Neutral Citation No: [2022] NICA 7 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **KEE11746** *ICOS No:* **15/104855/A02** *Delivered:* **09/02/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (FAMILY DIVISION)

IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995

Between:

Mr IJ

Appellant

and

A HEALTH AND SOCIAL CARE TRUST

and

Ms GH

Respondents

(In the matter of a Child M born in 2008)

Mr O'Donoghue QC with Mr Ritchie (instructed by RP Crawford & Co Solicitors) for the Appellant
Ms Simpson QC with Ms Lindsay (instructed by DLS Solicitors) for the Respondent Trust
Ms McGrenera QC with Ms Walkingshaw (instructed by Bannon Crawford Solicitors) for the Respondent Mother
Mr MacCreanor QC with Ms Dargan (instructed by Fisher & Fisher Solicitors for the Guardian ad Litem) on behalf of the child

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Before: Keegan LCJ, Maguire LJ, McAlinden J

KEEGAN LCJ (delivering the judgment of the court)

Introduction and anonymity

All of the parties in this judgment have been anonymised to protect the identity of the children to whom the proceedings relate. Nothing must be disclosed or published which would identify the children, the adults or the family in any way.

[1] This is an appeal of a decision made by Mr Justice O'Hara ("the learned trial judge") on 29 July 2021 in which he made a care order in respect of M and approved a plan for him to live in foster care and not to return to his father. The child is now 13 years of age.

[2] The grounds of appeal were refined upon direction of the court and distil into two, namely:

(i) That the court erred in law in arriving at a decision in relation to M without an independent assessment being conducted as to whether he was competent.

(ii) That the court erred in law in approving a care plan for M that lacked sufficient contingency planning and from which the return of the child to the father was excluded in all the circumstances.

[3] In opening the appeal counsel for the appellant acknowledged that the above appeal points engage with the exercise of the judge's discretion and as such the court will be slow to interfere. That concession was correctly and properly made.

[4] This appeal proceeded in the presence of Mr IJ who we were told is currently in a north African country but intending to return to this jurisdiction to face criminal charges which relate to an assault on his wife. Given this situation the court took some time during the case management to ensure that the case was ready. We also stressed that the obligation to protect public funds meant that this case should be conducted in a proportionate way. Ms GH observed remotely from her Solicitor's office. Lead counsel, junior counsel for the Trust and the GAL, the solicitor for the GAL and the GAL attended in person and we heard oral submissions on behalf of the appellant and the Guardian ad Litem ("the Guardian") and considered the written submissions of the other parties all of which opposed the appeal.

Factual Background

[5] This appeal arises in the context of a long running family dispute which has been before the courts in Northern Ireland now for some time. There are three children of the family, M and his elder brother L who is now 15 and a younger sister N who is now nine. This appeal relates to the making of a final care order and approval of a care plan. It is not the first appeal brought by IJ in relation to this case. It is preceded by an appeal against factual findings made by the learned trial judge

at an earlier stage of proceedings which are contained in a judgment of 31 July 2019. At that stage when considering threshold criteria the learned trial judge made substantial findings in relation to both parents but principally in relation to the father who he determined had seriously abused GH and the children. In particular we note two horrific incidents which the judge found proven on the balance of probabilities. The first was an incident in January 2007 when IJ raped and attacked GH with the result that she miscarried. The second was on 10 December 2011 when GH was pregnant and attacked as a result of which injuries were sustained including a left orbital blowout fracture. We understand that this is the incident for which IJ is being prosecuted.

[6] This judgment was appealed by IJ to the Court of Appeal and by decision of the Court of Appeal reported at [2020] NICA 3 the appeal was dismissed. In dismissing the appeal the Court of Appeal commented that:

> "This is a horrific case and the awfulness of the harm caused to all three children is readily apparent to this court even though it is one step removed from the consideration of the primary evidence in this case. The degree of inhumanity displayed by IJ in relation to GH is beyond comprehension. The court considers that this appeal has served to give rise to further harm being inflicted upon the three children one of whom is suffering from a serious illness."

[7] The background history is contained in the judgment of 2019. It is not necessary to recite it in any length in this appeal however we note the following. The parents met in 2004. Mr IJ is or was a surgeon and is described as a highly educated person. In 2004 Ms GH lived in a north African country and was said to be a psychologist. The parties came to Northern Ireland in 2004. From 2012 until 2015 Ms GH and the children resided in the north African country and Mr IJ lived in Northern Ireland. Mr IJ removed M and L from the north African country to Northern Ireland on 23 October 2015 and Ms GH then moved to Northern Ireland with N later in October 2015. All three children were born in the United Kingdom. In 2015 the family came to the attention of social services. Court proceedings started in 2015 as a result of parental disputes and escalated into public law proceedings which involved serious allegations of parental abuse against each other and the children. The learned trial judge's assessment of this at paragraphs [59]-[63] is framed in the following stark terms:

> "[59] The three children of this marriage have been damaged to a severe degree, more than in most cases, by the separation of their parents and by the subsequent conduct of the parties. I hold Mr IJ significantly more to blame for this than Mrs GH. As indicated earlier in this judgment, he brutalised Mrs GH in 2007 in London and in

> the presence of the boys in the family home in December 2011. He also controlled, denigrated and lied about her in the most appalling way before their separation and in particular since October 2015 when he returned to Belfast with the boys."

[8] Helpfully, in paragraph [2] of the judgment which is the subject of this appeal the learned trial judge describes the current living arrangements of the children as follows:

> "As before N still lives with her mother. She has not seen her father since March 2018.
>
> L now also lives with his mother and has done so since February 2021. He had lived with his father (and M) until January 2019. At that point he went into foster care. He had mixed experiences there until he went to his mother in February 2021. L has not seen his father since 4 October 2019. The last straw for him was that on that date he had a hospital appointment about treatment for cancer. His father attended but instead of focusing on his son and supporting his son he focused on his opposition to the Trust and then left abruptly. L was very distressed and mystified, asking why his father would do that. This led him to reappraise his life, to distance himself from his father and to rebuild a relationship with his mother and sister with whom he wants to remain.
>
> M has been continuously in foster care since August 2019. Until late June 2021, after a variety of placements, he had been in a residential home with a few other children. M refuses to see his mother or either of his siblings. He sees his father and asserts that he wants to return to live with him. As the hearing before me started on 17 June 2021 he had moved to a foster care placement. That change led me to proceed to hear all relevant evidence about L and N on 17 and 18 June but to adjourn M's part of the case until late July in order to see if the foster placement was working or starting to work."

[9] We note that the elder child in this case L who was 15 at the date of hearing was deemed competent after provision of an expert report from Dr Juliet Butler a consultant child psychiatrist. The father began a quest to have M similarly examined by C2 application dated 12 March 2020. Following on from this the learned trial judge asked the Guardian's solicitor Ms Colette Fitzpatrick to formally report on M's competence. She did so by virtue of a meeting on 26 February 2020 the outcome of

which is recorded in a note dated 3 July 2020. At this stage M was 12 years and 1 month old. The solicitor reported to the court that he was not competent and so the Guardian continued to represent him.

[10] Thereafter the father through his representatives contested the issue and on 18 September 2020 the judge decided that he was satisfied with the solicitor's assessment and refused the father's application for an expert assessment. The issue remained on the agenda during protracted proceedings. The application was formally renewed on 19 January 2021 and on 27 May 2021 the court again dismissed the father's application at a directions hearing acknowledging that although M was "a very clever boy" he was not going to grant the application for his competency to be assessed by an expert.

[11] The final hearing therefore proceeded with the Guardian representing M. By this stage M had disengaged from professionals including the Guardian and was becoming increasingly difficult to manage. This difficult behaviour is illustrated by his time in residential care and numerous instances of absconding to his father. Prior to this hearing the Guardian and instructing solicitor met M on two occasions on 1 July 2021 and 15 July 2021 which are recorded and which we have read. During the meetings M was uncooperative, he used expletive laden language and he confirmed that he would not meet the judge who he described in derogatory terms. We will not recite any further content of these notes here save to record that the content is very troubling and to our mind this highlights how damaged M actually is.

[12] At the hearing the Guardian filed a final report in which she faithfully recounted M's wishes to return to his father. Mr IJ did not give evidence. When probed, counsel on behalf of the father told us that he had no further evidence upon which to base a challenge to the Guardian's assessment of competency and so specific questions were not asked of her about it. However, counsel challenged the care plan and maintained that it was self-evident that competency should have been assessed by an expert.

[13] The learned trial judge did consider M's competence and provide reasons in his final judgement from paragraphs [11]-[14] of his judgment as follows:

> "[11] M is a very intelligent boy. In many, if not most, cases such a boy of his age would be competent to instruct his own representatives. I was not however persuaded of that in M's case. On this issue I had the advantage of a report from Ms Collette Fitzpatrick who is a solicitor with considerable experience in children's cases. The issue is not how clever M is, which is not in doubt, rather the issue is that he is controlled and dictated to by his father and has been for years even in the time after he was removed from his father's care. This is

> illustrated by much more than the language that he uses. It is evident in his absolute refusal to see his mother, his sister or even L.
>
> [12] I am satisfied, unhappily so, that M has no independent thinking when it comes to considering information he receives and forming an opinion. It is not that his opinion is one which others may disagree with. It is that his opinion is effectively predetermined by his father. His father has direct access to him, to influence and manipulate him, through a mobile phone which he gave M. At last week's hearing it was represented that the father has blocked M's number to prevent M contacting him. Even if that is so, which I don't necessarily trust the father about, it is access the father is in charge of and which he uses as he wishes, not responsibly.
>
> [13] It is also necessary to make the point that the Guardian, who also represents M, has consistently represented M's views about wanting to return to his father and rejecting all contact with the rest of his family.
>
> [14] Finally, on this issue it was emphasised to me on a number of occasions, especially in June and July 2021, that M was very anxious to meet me to tell me directly what his wishes and feelings are. I agreed to meet him and offered the dates of either 22 or 23 July 2021. When that was relayed to M, he announced that he no longer wanted to meet me, that the decision was already made. I understand that to mean that in his eyes I had already made my decision. That may possibly be M's independent view but I believe it is far more likely that this was his father's view and that that is the real reason why M did not meet me."

[14] From paragraphs [21]-[32] of the judgment the learned trial judge explains why he decided to approve the care plan and make a care order for M in the following way:

> "[26] In M's case the father's attack on the care plan was different. Since mid-June M has been in a foster placement. He absconded twice in the first week or so but since then has shown some signs of beginning to adapt to this new home. On any view however it is early days. Given that he is 13 with a very troubled past and an

obstructive and hostile father alternative foster placements may not be easily found for M. It is to the Trust's credit that it found this one.

[27] M's care plan states the following under the heading "Contingency Plan if the placement breaks down:

> 'If the placement broke down an alternative foster placement would be sought.'

[28] Counsel for the father challenged this, contending that it was simply too vague and did not reflect the reality that a long-term foster placement might not be achievable. In that event, the question asked was whether the plan should indicate that M would return to his father.

[30] … The Trust modified its contingency plan on 22 July to read as follows:

> "1. In the first instance the Trust (would) seek an alternative long-term foster placement for M.
>
> 2. If a long-term placement was not achieved a short-term placement would be sought.
>
> 3. If a short-term placement was not achieved the Trust would place M in residential care. During this time an assessment would be undertaken to see if a more appropriate specialist setting is required if his needs cannot be met within a … Trust facility."

…This is still somewhat vague but only because alternatives to foster care are so limited. We have very few options within Northern Ireland for damaged teenagers for whom a foster placement is not possible. I do not criticise the Trust for the limitations of this amended plan, a plan which I approve. What is critical to it is that excluded from the contingency plan is consideration of a return of M to his father. That will not happen. It is so contrary to M's interest that it cannot be allowed."

[15] It is apparent from the above that the learned trial judge was satisfied that M was not competent and that his views were adequately represented by the Guardian. He also approved the care plan for M which was a care plan of placement in foster care. The contingency plan did not provide for any return of M to his father. Therefore, the learned trial judge made a final care order in relation to M. It is only the approval of the care plan which is at issue in this appeal along with, the assessment of M's competence.

Legal Context

[16] The governing legislation is the Children (Northern Ireland) Order 1995 ("the Order"). By virtue of Article 50 of the Order a child may be made subject to a care order placing him in the care of an authority if certain criteria are met. The first is the threshold criteria otherwise known as "harm criteria." These are not in dispute in this case. Then a court must apply the welfare tests in Article 3 of the Order and decide what is in the child's best interests and whether an order is required. This is the welfare stage which involves consideration of the care plan. The taking of a child into public care is also an interference with the Article 8 rights of parents under the European Convention on Human Rights and so any proposed course must be necessary for a legitimate aim and proportionate to that aim. The focus in this case has not been on these provisions but rather the supplementary provisions and rules which we set out as follows.

[17] Article 60 of the Order sets out the relevant provisions governing representation of a child and of his interests in certain proceedings. Article 60(1) states as follows:

> "60.—(1) For the purpose of any specified proceedings, the court shall appoint a Guardian ad Litem for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.
>
> …
>
> (3) Where—
>
> (a) the child concerned is not represented by a solicitor; and
>
> (b) any of the conditions mentioned in paragraph (4) is satisfied,
>
> the court may appoint a solicitor to represent him.
>
> (4) The conditions are that—

(a) no guardian ad litem has been appointed for the child;

(b) the child has sufficient understanding to instruct a solicitor and wishes to do so;

(c) it appears to the court that it would be in the child's best interests for him to be represented by a solicitor.

…

(6) In this Article "specified proceedings" means any proceedings—

(a) on an application for a care or a supervision order"

[18] In addition, the Family Proceedings Rules (Northern Ireland) 1996 ("the Rules") deal with the powers and duties of the Guardian ad Litem in specified proceedings such as these:

"4.12.—(1) In carrying out his duty under Article 60(2), the guardian ad litem shall have regard to the principle set out in Article 3(2) and the matters set out in Article 3(3)(a) to (f) as if for the word "court" in that section there were substituted the words "guardian ad litem."

…

(4) Where it appears to the guardian ad litem that the child—

(a) is instructing his solicitor direct, or

(b) intends to, and is capable of, conducting the proceedings on his own behalf,

he shall so inform the court and thereafter—

(i) shall perform all of his duties set out in this rule, other than duties under paragraph (2)(a) and such other duties as the court may direct,

(ii) shall take such part in the proceedings as the court may direct, and

(iii) may, with leave of the court, have legal representation in his conduct of those duties."

[19] Rule 4.12(5) states that:

> "(5) The guardian ad litem shall, unless excused by the court, attend all directions appointments in and hearings of the proceedings and shall advise the court on the following matters—
>
> (a) whether the child is of sufficient understanding for any purpose including the child's refusal to submit to a medical or psychiatric examination or other assessment that the court has power to require, direct or order;
>
> (b) the wishes of the child in respect of any matter relevant to the proceedings … "

[20] Rule 4.12(10(c) requires the guardian to act as follows:

> "(10) The guardian ad litem shall make such investigations as may be necessary for him to carry out his duties and shall, in particular—
> …
>
> (c) obtain such professional assistance as is available to him which he thinks appropriate or which the court directs him to obtain."

[21] Rules 4.13 calibrates the role of the guardian solicitor:

> "4.13.—(1) A solicitor appointed under Article 60(3) or in accordance with rule 4.12(2)(a) shall represent the child—
>
> (a) in accordance with instructions received from the guardian ad litem (unless the solicitor considers, having taken into account the views of the guardian ad litem and any direction of the court under rule 4.12(4), that the child wishes to give instructions which conflict with those of the guardian ad litem and that he is able, having regard to his understanding, to give such instructions on his own behalf in which case he shall conduct the proceedings in accordance with instructions received from the child)."

Consideration of the grounds of appeal

Ground 1: Competence

[22] In relation to this first ground of appeal all parties save the father maintain that the judge was correct not to afford separate representation to M in the particular circumstances of this case. A core point permeating all of the submissions in support of the learned trial judge's decision is that he had dealt with this case for some time and was therefore uniquely equipped to reach the decision he did on the facts of the case. In answer to this collective case the appellant maintained that the judge had wrongly refused an independent assessment of M's competence and had failed to give adequate reasons for the decision he reached. The appellant substantially relied upon the fact that due to the longevity of the proceedings and the parallel advancement of M in age by the time this case was heard in July 2021 it should have been obvious to the judge that he needed an expert assessment of competency to decide whether M should have separate representation.

[23] At the outset we simply note a procedural issue which derives from the Rules. By virtue of the Rules, consideration of a child's competency in specified proceedings is specifically the terrain of the Guardian and clearly an application by the Guardian is the most natural route to court. Here the father has initiated the application however given the nature of children's proceedings that should not in our view be a procedural bar. The learned trial judge rightly proceeded on the basis that the issue needed to be tackled having been raised.

[24] We recognise that in the family law realm it is essential that the voice of the child is heard and that attitudes to direct participation of children have evolved in recent times. In *Re W (Representation of Children)* [2017] 2 FLR 199 Black LJ observed at paragraph 27:

> "The question of whether a child is able, having regard to his or her understanding, to instruct a solicitor must be approached having in mind this acknowledgment of the autonomy of children and of the fact that it can at times be in their interests to play some direct part in the litigation about them. What is sufficient understanding in any given case will depend upon all the facts. In this particular case, in my judgment, the criticisms made by Ms Giz of Judge Williams' approach, taken together, fatally undermine the decision that she took. The careful submissions on behalf of the local authority and the guardian in support of her determination failed to persuade me otherwise."

[25] Also in *Re W* at paragraph [36] Black LJ helpfully sets out some guidance on how to assess competence which has been applied in later cases as follows:

> "Sometimes there will be a clear answer to the question whether the child is able, having regard to his or her understanding, to give their own instructions to a solicitor. In cases of more difficulty, the court will have to take a down to earth approach to determining the issue, avoiding too sophisticated an examination of the position and recognising that it is unlikely to be desirable (or even possible) to attempt to assemble definitive evidence about the matter at this stage of the proceedings. All will depend upon the individual circumstances of the case and it is impossible to provide a route map to the solution. However, it is worth noting particularly that, given the public funding problems, the judge will have to be sure to take whatever steps are possible to ensure that the child's point of view in relation to separate representation is sufficiently before the court. The judge will expect to be guided by the guardian and by those solicitors who have formed a view as to whether they could accept instructions from the child. Then it will be for the judge to form his or her own view on the material available at that stage in the proceedings, sometimes (but certainly not always) including expert opinion on the question of understanding (see *Re H (A Minor) (Care Proceedings: Child's Wishes)* (supra) at page 450). Understanding can be affected by all sorts of things, including the age of the child, his or her intelligence, his or her emotional and/or psychological and/or psychiatric and/or physical state, language ability, influence etc. The child will obviously need to comprehend enough of what the case is about (without being expected to display too sophisticated an understanding) and must have the capacity to give his or her own coherent instructions, without being more than usually inconsistent. If the judge requires an expert report to assist in determining the question of understanding, the child should be under no illusions about the importance of keeping the appointment with the expert concerned. It is an opportunity for the child to demonstrate that he or she does have the necessary understanding and there is always a risk that a failure to attend will be taken to show a failure to understand."

[26] In specified proceedings such as these M has the benefit of specialist representation via the Guardian. However, in some circumstances, particularly with

older children, separate representation is provided. That will depend on the facts of each case applying the well-known principles that derive from *Gillick v West Norfolk* [1986] AC 112 namely whether a child has sufficient intelligence to understand, weigh up options and make a decision for him or herself.

[27] We were referred to a number of other authorities in this area, some of which are not directly applicable because they deal with private law proceedings and involve the different rules of procedure that apply in England and Wales. We mention *Re CS (A Child)* [2019] EWHC 634 although it is a private law case as some guidance was provided in that case in relation to how competency should be assessed in paragraph [38] which was utilised by the learned trial judge. This is a useful source which can be adapted to the needs of an individual case. In *Re CS* the judge also returned to the point that:

> "It seems clear to me that it is in the best interests of a child that the court remain the ultimate arbiter of whether the child has understanding or sufficient understanding to act without a Guardian."

[28] We have gained particular assistance from the case of *Re Z* [2021] 2 FLR 830 which we note was not drawn to the attention of the learned trial judge. It is recognised by all counsel that the factual matrix was different however the judgment provided by Baker LJ is instructive and so we will discuss it in a little detail. First some reference to the facts is needed. In Z in September 2020 during the course of private law proceedings a solicitor assessed the child, then aged 15 years and suffering from autism, as lacking capacity. This assessment was based principally, though not exclusively, on a meeting to assess competence that took place some six months before on 18 July 2020. Thereafter, public law proceedings ensued and the judge hearing the application on 12 November 2020 relied upon the earlier assessment of competence.

[29] The Court of Appeal disagreed with this assessment and made the point that this case arose in the context of a removal under an interim care order of a 15 year old child with autism from a family home. In those stark circumstances the court allowed the appeal because of a procedural irregularity in relation to the evidence put before the court. There were a number of aspects to this, namely the issue of competency of the child and potential separate representation but also that the father, from whose home the child was being removed, did have evidence put before the court. At paragraph [46] of the judgment the court concluded that not only was four months too long a delay between the date of assessment and the hearing but that the assessment had to be directed to the issues arising in those proceedings.

[30] This is the core authority relied upon by the appellant in this case. However, the factual circumstances are key in any determination of this nature. Clearly the facts of Z are very different particularly as it involved interim removal of a child with disability where his primary carer's evidence was not before the court. These

features are not present in M's case which is shaped by its own facts particularly the fact that he was out of his father's care for some time, presenting in an erratic manner and clearly parroting his father's wishes. The submissions made on GH's behalf must be viewed in that context. Turning to the core of the argument we paraphrase it to mean that the decision to deny the father's application for release of papers, or to proceed with the hearing without assessing the child's competence, or at the very least requiring a very full update as to the child's competence amounted to a significant procedural irregularity.

[31] In examining this argument we have been taken to the various occasions at which competence was referred to by the learned trial judge during court proceedings. What is clear to us is that this issue was fully canvassed and adjudicated on. The document from Ms Fitzpatrick that we have referred to above is a critical document and we have read it. It is her account of the meeting with the child after which she sets out the view that the child is not competent. The problem is, obviously, that it is dated by the time the court came to hear the case. However, in the intervening period the child clearly did not engage with the Guardian.

[32] We also note from the Guardians final report that the father prevented the child from engaging with Voice of Young People in Care ("VOYPIC"). We have examined the two notes of the recent meetings of the child prior to the determination where the Guardian explained what was happening in court and, frankly, they highlight a very concerning picture on the part of the child who was belligerent, used bad language and was clearly not willing to engage with any professionals, not least the judge, who he described in extremely pejorative terms. Therefore, the Guardian whilst not expressly referring to competence in the final report did draw the court and the parties' attention to the child's presentation and, in our view, it was quite proper of the judge to make an assessment on the basis of the evidence that he had before him.

[33] The learned trial judge heard evidence from the Guardian. He also heard evidence at the care planning hearing from social work professionals and an expert Professor Wilcox, consultant clinical and forensic psychologist. In argument the Guardian has relied on Professor Wilcox's evidence as he described the vulnerability of the child and the influence projected onto the child by his father. This evidence is clear and compelling particularly the extracts highlighted to us where the expert said *inter alia* that the "child's ability to weigh up issues is very damaged" and where he said that if in the care of his father M would be exposed to long term developmental trauma that would simply persist as he grows older." Professor Wilcox also said that the opportunity for M to develop his own views is critical here… and he won't do that if he is with his father."

[34] The authorities make it clear that competence is context specific. It is not solely determined by age although the older the child the stronger the argument. The countervailing factors are where the child's views are clearly influenced by

others or where the child has a particular vulnerability. Competency is also fluid and can change particularly as a child matures.

[35] This is a case where the judge had already made findings which were adverse to the father including a finding of abuse against M. The learned trial judge was well placed to determine that the father was influencing the child and that the child's behaviour demonstrated this fact. Therefore, a perfectly reasonable assessment to make was that the child's views were not truly his own.

[36] There is no rule that the judge in a case like this needs an expert assessment to assess competence. In fact, the law that we have read suggests that that would be a rare course. In our view the judge had more than adequate information upon which to reach an assessment and we see absolutely no flaw in the reasoning that he provided.

[37] In addition, we do not accept the point that the failure to raise this issue at the final hearing in July was truly justifiable on the basis suggested by counsel. We do not encourage a practice of points being promoted on appeal that were not canvassed before a trial judge. We note that the father was represented at the hearing and he chose not to give evidence. It is apparent that no point was put to the Guardian through cross-examination that her assessment was out of date and should be revisited. This, in our view, rather exposes the true position that it was clear for all to see that M by the time of the care order hearing was a very upset child who had been influenced by his father. He clearly did not have "sufficient understanding" within the meaning of the Rules. He was properly represented by the Guardian who faithfully provided his views to the court and also made a best interests recommendation.

[38] We are not attracted to the subsidiary criticism that the judge failed to give reasons. We have found this to be an unrealistic submission divorced from the reality of family court practice. For a start we are not convinced that the learned judge was asked to give fuller reasons at any of the interlocutory stages. In any event the transcripts show that the judge considered this issue at various stages during lengthy and often fraught proceedings. The learned trial judge could not be expected to provide lengthy reasons in relation to applications made at directions hearings or reviews. He was perfectly correct to formulate his reasons after the final hearing when all of the evidence was before him and those reasons are clear and address the issues.

[39] It is also very obvious to us that M's wishes and feelings which were very much in favour of his father and against living in foster care were fully canvassed before the court. He also had the opportunity to meet with the judge which he did not utilise. This case presents us with a very unhappy and unhealthy picture. However, perhaps there is some light at the end of the tunnel in that we were told that M is now settled in his foster placement and we sincerely hope that that

continues and that his life may stabilise. Overall, we find no merit in Ground 1 of the appeal.

Ground 2 of the Appeal: Approval of the Care Plan

[40] We can deal with this ground of appeal in shorter compass. We begin by reference to the case of *Re S (Minors) Care Order: Implementation of Care Plan; Re W (Minors) Care Order: Adequacy of Care Plan* [2002] UKHL 10. In that decision Lord Nicholls explains the nature of the judge's role in approving a care plan. This was a case overturning a "starred care plan." That novel method for keeping proceedings live was rejected. The House of Lords reiterated that once a plan is choate responsibility should pass to the local authority. The court summarised the nature of a care plan as follows:

> "Despite all the inevitable uncertainties, when deciding whether to make a care order the court should normally have before it a care plan which is sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future."

[41] As counsel has pointed out, the approval of a care plan is a discretionary exercise. It will therefore be rare to see a successful challenge in this area unless something has clearly been overlooked or obviously needs corrected.

[42] We have considered the final care plan of 21 July 2021. In our view it is a choate plan. The objection taken is that the father is not included as a contingency in this plan. We find no merit whatsoever in this argument. This appeal highlights the fact that Mr IJ does not accept the effect his behaviour has had upon his wife and children including M. Clearly, for the reasons given by the judge at the fact finding affirmed by the Court of Appeal, it would have been entirely unrealistic and irrational of a judge to give any hope of this child returning to his father in the care plan.

[43] The rationale for the care plan being expressed as it was during the care order hearing was to allow M to settle and to validate the foster placement in which he was placed. Approval of a care plan is quintessentially within the discretion of a trial judge. In this case the learned trial judge had knowledge of the issues gleaned over years of proceedings. Applying that he was entitled on the evidence to approve the plan as he did. We do not consider that the learned trial judge has stepped beyond the wide margin of discretion that he has as the trial judge in approving this care plan. This ground of appeal is dismissed.

Overall Conclusion

[44] We dismiss the appeal. This case is very far from satisfying the appellate test set out by the Supreme Court in *RE B (A Child*) [2013] UKSC 33. The judge was entirely correct to take the course that he did. We hope that M will continue to have a settled life and that he will be given all of the necessary supports and services that he needs in order to reach the potential that he clearly has.