4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

In the matter of H-T (Children) : In the matter of T-H (Children) (2012)

[2012] EWCA Civ 1215

11/09/2012

Barristers
Rebecca Foulkes

Court
Court of Appeal (Civil Division)

Practice Areas
Public Children Law

Summary
A judge responsible for considering interim parental contact had wrongly pre-determined issues relating to a baby's non-accidental injuries when those issues should properly have been left to be decided at a full fact-finding hearing. In those circumstances it was appropriate to discharge a direction that he had made under the Children Act 1989 s.34(4) authorising the local authority to withhold parental contact.

Facts
The appellant mother and father (M and F) appealed against a judge's decision to continue a direction made under the Children Act 1989 s.34(4) which permitted the respondent local authority to withhold contact to their four children.

M and F's relationship was characterised by a history of domestic violence. M and F's one-year-old daughter (K) had been admitted to hospital due to bleeding in her genital area. A consultant paediatrician had found various injuries to K's genital area, including a laceration to her hymen and perianal tears, which she indicated were consistent of penetrative vaginal and anal injury. K and her two siblings were removed from M and F's care and care proceedings were initiated. M and F attended two supervised contact sessions, and notes of those sessions indicated that they had gone positively. M later gave birth to a fourth child (X). In June 2012 a judge made an order under s.34(4) giving the local authority permission to refuse M and F contact to their four children until a hearing two weeks' later. He also ordered the instruction of a psychologist to help in assessing the issue of future contact. At that later hearing in July 2012 the same judge extended the s.34(4) direction in relation to all four children; he said that K had suffered trauma at the hands of one or both of her parents, that it was difficult to see how contact could be in her interests and that similar considerations applied in relation to the children's domestic circumstances. The judge had considered X separately to the other three children, but had still decided that a s.34(4) direction was appropriate. A fact-finding hearing in respect of K's injuries was due to take place in November 2012.

M and F submitted that the judge had acted prematurely in determining the case as he did and that he had effectively determined the issue of contact for all four children solely on the basis of K's injuries. They argued that he had been wrong to look to the outcome of the proceedings and predict the facts that would be found at the final hearing, and was wrong to have ruled out the prospect of reunification. They also contended that the judge was wrong to have extended the s.34(4) direction in a blanket, open-ended fashion in a way that envisaged it continuing until the fact-finding hearing without review.

Held

(1) Whilst the s.34(4) direction had no formal limit, the psychologist was instructed in order to furnish the court with information on the issue of contact. The judge had expressly entertained the prospect of reviewing the s.34(4) direction in his judgment, and therefore he had not intended for it to be open-ended. (2) When the judge said that K had suffered trauma at the hands of one or both of her parents and that it was difficult to see how contact could be in her interests, he was basing his view on contact on his own concluded view of the facts. At the fact-finding hearing there would be further investigation into K's injuries and more was likely to be known about the circumstances surrounding her injuries. The judge had not analysed matters for and against some form of interim contact; he had simply decided that there should be no contact without considering the various ways in which contact could be arranged. He had not considered the possible benefit of contact for the children, whether any risk to them could have been contained by supervised or less regular contact, or the positive accounts from the contact sessions. Further, when he said that similar considerations applied in respect of the children's domestic circumstances, the judge had wrongly equated K's injuries with the family's history of domestic violence. The judge was correct to say that the children needed to be protected, but he should have analysed whether that protection could have been provided through contact, which he had not done. Accordingly, the judge had erroneously determined the issue of contact on the basis of K's apparent abuse and had conflated the seriousness of her injuries with the history of domestic violence. Whilst the judge was correct to approach the question of X's contact on a different basis, considering her very young age and the fact that there was no risk of retraumatisation to her since she had not been born when K suffered the injuries, he had similarly determined the outcome of the contact issue on the basis of K's injuries. The judge's view on contact had been coloured by K's serious injuries with the effect that he had fallen into the trap of pre-determining issues which should have been left for the final fact-finding hearing; he should merely have decided whether there should be some form of interim contact, A v M and Walsall MBC [1993] 2 F.L.R. 244 considered. It was appropriate to discharge the s.34(4) direction and to remit the case to the county court for further consideration by the same judge.

Permission