Re E and H (Care Proceedings – Alleged FII – Costs) [2023] EWFC 69 (14 April 2023)

The unusual facts of the case were that the mother of two children, aged 8 and 6, worked as a healthcare assistant in a general practitioner's surgery. The children were registered at the same surgery. Dr R was a General Practitioner at the surgery, and therefore the mother's employer, as well as her GP. Dr R was also the safeguarding lead for the surgery, and a named general practitioner for safeguarding in the county. The mother had told colleagues that she had cancer, when in fact she did not. She had also accessed hers and the children's medical records to change the surname in the medical records to her married name as she had been told there would be difficulties in travelling abroad if the name on her travel documents did not match the name on her covid vaccination certificate. This was in breach of the terms of her employment.

Dr R took it upon herself to investigate the mother. She checked the children's medical records, and the mother's medical records, even going so far as to personally contact a surgeon who had operated on the mother 20 years earlier. As a result of these investigations, she became concerned that the mother was fabricating or inducing illness on the part of the children. Dr R then made a safeguarding referral to the Local Authority.

The Local Authority, following two strategy meetings, sought and obtained an ex parte EPO with a plan of removing the children to foster care. During the EPO hearing Dr R gave oral evidence in which she asserted that the mother could kill the children by administering a fatal dose of antiepileptic medication. HHJ Vincent later found that the evidence base for this proposition had not been established.

The children and the parents were woken in the middle of the night by police banging on the door. The children were taken from their beds and placed into foster care. This family had never had any involvement with social services or the Family Court, and had no advance warning of what was happening. The father's offer of keeping the children with him while the mother went to stay somewhere else was rejected.

Following the issue of care proceedings, a consultant paediatrician, Dr Rahman, was instructed to carry out a report. He concluded that this was not FII, but probably exaggeration or attention seeking behaviour on Mother's part.

The Local Authority rejected this formulation and doubled down on their position, drawing up a schedule of findings that relied on the evidence of Dr R in preference to the single joint expert. The schedule went further than this, seeking findings against the single joint expert. The Local Authority maintained its position for the next 3 months, despite being invited by both the court and the parents' representatives to review its position. Very shortly before a hearing on 3 February 2023, the Local Authority notified the other parties that it was not seeking a fact-finding hearing and would not be seeking public law orders.

The court found at that hearing that threshold could not be established. It found that:
• The mother had admitted the significant fact that she had lied about having diagnosis of cancer;
• In respect of the allegations that the mother had fabricated or exaggerated other health conditions in the past, the local authority had not set out in its pleading why, if proved, this had caused the children significant harm, or put them at risk of significant harm;
• There was no evidence that the mother was suffering from a psychiatric illness;
• There was no expert evidence to support the assertion that the mother had fabricated or induced illness in her own children. There were no concerns about the children's health;

• There were no concerns at all about the care given by the children to the father and no properly particularised allegations made in the schedule of findings of failure to protect.

Following this hearing the Local Authority filed a further statement in which it maintained its assertion that the Mother posed a continuing risk to the children. The Local Authority made various false accusations against the family, including that the parents had prevented the Local Authority from putting questions to the single joint expert. This was not true – the Local Authority had never even drafted questions for the expert.

The parents' representatives sought an order for costs against the Local Authority.

The court found that the Local Authority had acted unreasonably, and its conduct could be described as reprehensible. In particular:

- *The local authority approached the case as if there was an immediate serious risk to the children, despite the absence of evidence of, 'frank deception, interfering with specimens, unexplained results of investigations suggesting contamination or poisoning or actual illness induction, or concerns that an open discussion with the parent might lead them to harm the child' as required by the RCPCH guidance.*
- *The local authority failed to keep an open mind, allowing its decision making to be driven by the opinions and fears of Dr R.*
- *Dr R was not the appropriate person to drive the decision-making because she had a conflict of interest. She was too personally involved as the mother's employer and general practitioner*
- *A referral should have been made to a consultant paediatrician, who should have taken the lead, but this was not done.*
- *The Local Authority failed to hold child protection medicals to inform its decision-making.*
- *The local authority failed to draw to the court's attention at the EPO hearing that other medical professionals had urged caution, noting that there was no evidence of Mother having harmed the children, and that the situation was "manageable".*
- *The advocate for the local authority did not draw the case of Re X to the court's attention (although the judge should have been aware of this case).*
- *The local authority did not draw the RCPCH or Working Together guidance on FII to the court's attention.*
- *The local authority did not consider any less interventionist approach, incorrectly proceedings on the basis that the options were, "a cushion or a hammer and nothing in between".*
- *Having obtained the order, the local authority failed to consider lesser alternatives to removal to foster care (such as excluding Mother from the family home).*
- *The Local Authority, rather than seek clarification from Dr Rahman, or apply to the Court for a further expert opinion, or choose to accept his opinion, instead sought findings against the court appointed expert paediatrician and placed continued reliance on Dr R's opinion evidence, where Dr R was a witness of fact, not an expert.*
- *Even when the inappropriateness of this was pointed out by the other parties and the court on 3 November, the local authority took no action, but reproduced the 'findings' sought in a 'Composite Schedule of Findings' .*
- *Notwithstanding that it did not apply to put questions to Dr Rahman, or seek alternative expert opinion, the local authority continued to indicate in correspondence and to the Court that it intended to pursue the findings on its schedule of allegations against both the parents and Dr Rahman, for a further four months. The change of position came on 2 February 2023 (just one day before the further case management hearing).*
- *At the hearing on 3 February there was a lack of clarity from the local authority about its position. Even at the final hearing, it continued to assert that the mother presented a risk to*

her children from which they required to be safeguarded by a 'safety plan', notwithstanding by this stage the Court had found that the local authority could not establish that the threshold for making public orders was crossed;

- *The local authority has been consistently poor in responding to requests for information about its decision-making processes, later made orders of the Court, and continued to disregard those orders, neither providing reasons, nor applying to the Court for extensions. Arguably, this did not just prevent the parties from understanding what had happened, and caused additional work for other parties' representatives, but contributed to the overall lack of reflection from the local authority on its own position as the case proceeded;*
- *All the FII guidance points clearly towards striving for a collaborative approach. However, the local authority appeared to be focused only on driving the case towards a fact-finding exercise, notwithstanding at no point did it have expert evidence to substantiate its own pleaded case.*

The court concluded that this merited an award of costs of 50% of the parents' costs up to and including 2 November 2022, and 100% of their costs thereafter.

Costs, if not agreed, were to be assessed on the indemnity basis having regard in particular to:

i) the local authority's failings were not just careless or sloppy unjustified errors as a result of lack of resource, pressure of workload or any particular challenges in this case. They appear to have been the product of deliberate disregard for orders of the court, the relevant guidance and the legitimate concerns of the mother and father.

ii) The Local Authority's failure to provide information about its decision-making processes, and its failure to put questions to Dr Rahman, meant that the parents' legal representatives had to painstakingly analyse medical records and respond to the pleadings, pointing out flaws in the local authority's case. Even after its case on threshold had been dismissed, the local authority continued to make unwarranted criticisms of the parents.

Alex Forbes
Barrister