Neutral Citation Number:[2022] EWHC 2098 (Fam)

Case No: FD22P00346

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5/8/22

Before:

MRS JUSTICE THEIS

- -

Between:

Barts Health NHS Trust	**Applicant**
- and -	
Holly Dance	**1st Respondent**
- and -	
Paul Battersbee	**2nd Respondent**
- and -	
Archie Battersbee	**3rd Respondent**
(by his Children's Guardian)	

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- -

Ms Fiona Paterson (instructed by Kennedy's**)** for the **Applicant NHS Trust**
Mr James Bogle and Mr Bruno Quintavalle (instructed by Andrew Storch Solicitors**)** for the **First and Second Respondent Parents**
Ms Maria Stanley (instructed by Cafcass Legal) for the child by his **Children's Guardian**

Hearing date: 4 August 2022
Judgment: 5 August 2022

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Approved Judgment

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MRS JUSTICE THEIS

Mrs Justice Theis DBE:

Introduction

1. This judgment is given following a hearing that started yesterday afternoon and concluded last night. It was to deal with an application made yesterday morning by the parents of Archie Battersbee, now age 12 years. Archie has been the subject of proceeding issued by the NHS Trust following Archie's admission to hospital following a global hypoxic brain injury. He has been in deep coma since, cared for in the Paediatric Intensive Care Unit ('PICU') at the Royal London Hospital since early April 2022. I am very grateful to all counsel who attended court and provided documents and information at very short notice. The parents attended remotely from the hospital and Ms C, Archie's brother's girlfriend was in court. The hearing was conducted in private at the request of the parents. The media were permitted to attend.

2. It is agreed between the parties the court is considering the following matters:

   (i) The parents application to vary paragraph 5 of the order dated 15 July 2022 so that Archie can be moved to a hospice prior to treatment being withdrawn. The 15 July 2022 order directed Archie's best interests were met by that taking place in the hospital.

   (ii) Within (i) the parents made an application for expert evidence just prior to the hearing starting, they circulated a CV of Dr R, Consultant in Paediatric Respiratory Medicine. There was no formal application. The court permitted it to be made orally and accepted additional information that was provided during the hearing. At the suggestion of the NHS Trust, Dr R joined the hearing to hear the oral evidence of Dr F and provided an email to the court and the parties afterwards.

   (iii) Whether Archie should receive palliative oxygen.

   (iv) Whether there has been any change in Archie's clinical condition as described by the mother.

   (v) Whether any further steps should be taken regarding the possibility of treatment abroad.

3. The NHS Trust and Children's Guardian do not support any of the matters outlined above, although the Children's Guardian supported the principle of a hospice if the risks of transfer were manageable and there was only very limited delay.

4. The court heard oral evidence from Dr F Consultant Paediatric Intensivist who gave evidence at the hearing on 15 July 2022, Ms C (Archie's brothers fiancé) and the Children's Guardian.

5. Archie's welfare needs are at the front and centre of all decisions made by the court, they are the courts paramount consideration in accordance with s1 CA 1989.

6. The court has enormous sympathy with the circumstances Archie's devoted parents find themselves in, facing what is every parent's nightmare, the loss of a much loved child and the very difficult decisions that arise in the circumstances of this case.

Archie

7. The difficult medical position Archie is in was set out by Hayden J in his judgment on 15 July 2022 between paragraphs 16 – 23, including the following:

16. Dr Steven Playfor, Consultant Paediatric Intensivist, was instructed as an independent expert in the proceedings. He examined Archie and spoke at length to his mother and to his older brother's girlfriend. In his report for the Court, dated 10th May 2022, he made the following assessment of Archie's condition and prognosis:

"AB has suffered a catastrophic hypoxic-ischaemic brain injury as the result of suspension by the neck and a prolonged out-ofhospital cardiac arrest. It is very likely, in my opinion, that if formally tested, AB would meet the criteria necessary to determine death according to neurological criteria. Even if some residual brain stem function were demonstrated, I cannot envisage any scenario where AB could demonstrate any meaningful neurological recovery."

17. Sadly, but entirely consistently with the wider canvas of the medical evidence, Dr Playfor considered that Archie had "no prospect of making any meaningful recovery". On his examination, he found Archie to be "entirely unresponsive with absent pupillary, cough, gag, corneal and ocular-vestibular reflexes". He also found that "there was no respiratory effort during a 2-minute informal apnoea test".

18. Dr F, the Consultant Paediatric Intensivist, provides the most recent update on Archie's condition. She gave evidence before the Court. Her view as to Archie's condition and prognosis accords exactly with that of Dr Playfor. Her evidence, however, casts some light on the reality of Archie's day to day experience. She has told me that with brain injury as devastating as that sustained by Archie, the loss of brain function, inevitably, causes adverse cardiovascular, respiratory, endocrine, metabolic and haematological change. This in turn creates instability in organ function and in the heart. In her statement, Dr F lists the treatments that seek to manage or mitigate this instability. They require to be set out here because they reveal the reality that every aspect of Archie's bodily function is maintained artificially through ventilatory support, chemical assistance and the physical care provided by the nurses. This is a remarkable medical achievement but the moral and ethical challenges it creates are obvious. Archie's care requires the following:

- *Standard treatment and care practiced in a neuro-intensive care with round the clock care provided by 1:1 and at times 2:1 nursing (heavily dependent)*

- *Continuous and invasive monitoring to allow target of haemodynamic parameters (monitoring of blood pressure, heart rate and urine output and treatment targeted to keep them within a standard range known to be safe)*

- *Oxygenation and carbon dioxide clearance by the ventilator (breathing machine) as he is unable to breathe for himself • Routine neuro-critical care respiratory management (standard patient positioning, turning, clearance of secretions by suctioning and physiotherapy of the chest)*

- *Regular turning and care to prevent pressure areas developing and bed sores • Regular cleaning and changes to prevent skin breakdown*

- *Support of the blood pressure with medications as needed*

- *Treatment for chest, blood or other infection with antibiotics as required*

- *Continuous Vasopressin administration to control water balance and salt balance within the body based on hourly urine output*

- *Fluid boluses due to large uncontrolled urine output despite treatment as needed*

- *Feeding via a tube into the stomach to give nutrition as tolerated*

- *Loperamide treatment to slow down the passage of food through his gastrointestinal tract due to diarrhoea secondary to gut failure associated with brain failure*

- *Administration of glucose to prevent low blood sugars as needed*

- *Electrolyte disturbance corrections, particularly potassium, (body salts kept within a safe range by regular replacement)*

- *Active warming to prevent the body getting too cold as needed*

- *Steroid replacement and thyroid hormone replacement (hormone replacement needed due to brain damage)*

- *Prophylactic treatment to prevent deep vein thrombosis (clots forming in blood vessels)*

8. The list set out above, provides a window into some of the complexities of what is required to care for Archie on a day to day basis.

9. In the Court of Appeal judgment at [2022] EWCA Civ 1055 Sir Andrew McFarlane, President of the Family Division, summarised the position at paragraph 71 as follows:

'Whilst it is, most sadly, correct that it was the medical evidence that ultimately determined the outcome of the judge's best interest determination, he had clearly taken full account of the countervailing factors. Those factors, and in particular Archie's individual feelings and religious beliefs, were insufficient to avoid a finding that the continuation of life-sustaining treatment was no longer in the best interests of this moribund child, who is weeks away from a death which will otherwise occur from a gradual further deterioration and then failure of his organs followed by the failure of his heart. Consent can only be given to medical treatment where it is in the patient's

best interests and the consequence of the judge's assessment is that continued life-sustaining treatment for Archie will not be lawful, even for a period of days or weeks.'

10. In the Court of Appeal judgment dated 1 August 2022 [2022] EWCA Civ 1105 the President stated at [42]

'In terms of Archie's best interests, every day that he continues to be given life sustaining treatment is contrary to his best interests. A stay, even for a short time, is against his best interests and not in accordance with his welfare, and that is the decision that has been taken by the court in England and Wales'.

11. The following day, 2 August 2022, the Supreme Court set out in its reasons for refusing permission to appeal that

'Even if life-sustaining treatment were to be maintained, Archie would die in the course of the next few weeks through organ failure and then heart failure. The maintenance of the medical regime, as Hayden J in his very sympathetic judgment, serves only to protract his death". That conclusions was one the judge reached only "with the most profound regret".

12. These observations are a reminder that the decision made on 15 July 2022 that Archie's best interests are met by the withdrawal of life sustaining treatment remains in effect, subject to a number of agreed or court directed short term stays made since. Each day that passes is another day that this court has determined does not meet Archie's welfare needs, which is the lodestar that guides the court in the very difficult decisions about whether life-sustaining treatment should be continued.

Applications

13. The application by the NHS Trust to withdraw treatment was initially heard by Arbuthnot J, orders made on 13 June 2022 that included a conclusion that Archie's best interests would be met if life-sustaining treatment was withdrawn. The order was successfully appealed and the application was remitted for hearing before Hayden J on 11 July 2022, with judgment on 15 July 2022. Hayden J made a declaration that it was in Archie's best interests for life-sustaining treatment to be withdrawn. At paragraph 5 of that order he directed that should take place at the hospital where Archie currently is.

14. Hayden J refused permission to appeal. It was renewed in the Court of Appeal and on 25 July 2022 the application was refused, a stay was granted until 27 July 2022. An application was made to extend the stay to enable an application to be made to the European Court of Human Rights (ECHR) for interim measures or to the UN Committee on the Rights of Person with Disabilities (UNCRPD).

15. The Court of Appeal extended the stay until 2pm 28 July 2022. The Supreme Court refused permission to appeal on 28 July 2022

16. On 29 July 2022 the UNCRPD sent a request for a State party to refrain from withdrawing life preserving medical treatment whilst the case was being considered by them.

17. On 31 July 2022 the Court of Appeal stayed Hayden J's order dated 15 July 2022 until 1pm 1 August 2022 and listed the matter for hearing on 1 August 2022. The Court of Appeal dismissed the parents application for a stay and refused permission to appeal on 1 August 2022. They granted a stay until 12 noon on 2 August 2022.

18. On 2 August 2020 the Supreme Court dismissed the application for permission to appeal. Shortly afterwards the parents applied to the ECHR for urgent relief. That was refused on 3 August 2022.

19. The email from the parents solicitors to the NHS Trust on 2 August 2022

    (i) Confirmed they were preparing the application to the ECHR.

    (ii) Stated the parents preference was for withdrawal of treatment to take place at a hospice and invited the Trust to agree and they can then discuss an application to vary paragraph 5 of the order dated 15 July 2022.

    (iii) Invited all parties to consider whether there is any updating evidence as to Archie's medical condition and prognosis which may amount to a change in circumstances and would need to be placed before the court.

    The email continued that the parents disagree with the decision to withdraw treatment and *'wish to pursue all legal avenues reasonably open to them to challenge the decision [to withdraw treatment. Having gone through that process, depending on the outcome, our clients wish to cooperate with the Hospital either in future for Archie's treatment, or in the arrangements for a withdrawal of that treatment'*

20. The response from the NHS Trust on 2 August 2022 confirmed the Consultant Paediatric Intensivist and Director of Children's Nursing have approached the parents to discuss the withdrawal of treatment and that offer remains open. It set out that the order dated 15 July 2022 confirmed that it was in Archie's best interests for his treatment to be withdrawn at the hospital and the Trust intended to withdraw that treatment at 11am on 3 August 2022. The letter continued that if the parents were pursuing the hospice option they needed to make an application on 4 August 2022. The letter continued:

    'The Trust considers that a transfer to a Hospice would not be in Archie's best interests even if is your clients' wish. To be clear, the Trust has to put Archie's welfare and best interests at the forefront of its decision making about his care. It believes that Archie's condition is unstable and that transferring him even a short distance involves significant risk. Even in an ambulance with full intensive care monitoring and equipment with intensive care medical and nursing staff caring for him, there is a risk

he could arrest and die during the journey. There may also be a delay of up to two days while the necessary arrangements are made regarding the transfer and the withdrawal of treatment. The Trust does not consider this is in his best interests.'

21. In their letter dated 3 August 2022 the NHS Trust said they would withdraw treatment at 11 am on 4 August 2022 unless an application was made to vary Hayden J's order by 9am 4 August 2022.

22. The parents Part 18 application was circulated at 9am 4 August 2022 seeking a variation of paragraph 5 of the 15 July 2022 order on the grounds that *'the hospice option was not available at the time Hayden J's order was made and is available now'.* A letter dated 31 July 2022 was submitted with the application from the Hospice which stated:

'This letter confirms that [delete] hospice would be prepared to offer AB a compassionate extubation of his mechanical ventilation at the hospice, to be carried out by an intensive care team such as those working with [ambulance retrieval team], if the court considers it is in AB's best interests to vary the terms of the current Order as to the location for extubation. In writing this letter, [delete] Hospice does not seek to become a party to the current proceedings, nor does the hospice seek to pursue a particular outcome. The hospice has written this letter to confirm the availability of a transfer to the hospice, should this be regarded as being in AB's best interests.

By way of further explanation of practical arrangements, we can advise that such a transfer could take place during the week commencing 01/08/22, with a 24 hour notice period to allow for arrangements to be put in place. The hospice team will require the support of a specialist team such as [ambulance retrieval team], providing an intensive care team to remove AB's mechanical ventilation upon admission, alongside a symptom management plan from [delete], with whom the hospice works for all our children with palliative care needs.

Evidence

23. For this hearing the court has considered the two statement from the mother, dated 25 July 2022 and 4 August 2022, the four statements from Dr F dated 5, 25 and 21 July 2022 and 3 August 2022 and the statement from Dr I dated 4 August 2022. There is a letter from the hospice referred to above and relevant correspondence.

24. In addition, the court has read the judgments of Hayden J 15 July 2022, the two judgments of the Court of Appeal dated 25 July 2022 and 1 August 2022 and the written decisions of the Supreme Court dated 28 July 2022 and 2 August 2022. The court has also seen the communications from UNCRPD dated 29 July 2022 and ECHR dated 3 August 2022.

25. The court heard oral evidence from Dr F, Ms C and the Children's Guardian.

26. Dr F has been involved in his care since April 2022 and had most recently cared for Archie last weekend and earlier this week. She described what she regarded as the *'not insignificant'* risks of moving Archie to a hospice as being first the physiological risks that are inherent with regard to Archie's condition, such as the risk of a drop in blood

pressure when he is turned and moved. This is a particular risk in the moves from bed to trolley and movement in and out of the ambulance. Second, human or accidental error that may dislodge tubes with medication that is there to support him in the context of a small transport team that would not be familiar with his care. Third, higher risk of equipment failure (battery run) and inherent risks of being in an ambulance on the road. Fourthly, the logistical risks regarding transfer of someone in Archie's condition, including delay and the need for the ambulance retrieval service to liaise with the palliative care team at X hospital, co-ordinate with the hospice as to bed availability, have conversation with the family to ensure understanding intensive care will not be continued and treatment would be withdrawn within a very short time after arrival, usually about an hour. There would also need to be an additional ambulance team involving specialist staff and an additional ambulance to be available. Only once that is in place would the hospital finally liaise with the hospice and confirm bed availability. Although accepting it was difficult to judge she was informed this is likely to take a minimum of 48 hours. This is subject to a number of variables such as availability of staff, ambulance, and other demands on the service.

27. It was accepted that Archie had been moved during his time in hospital, such as for scans, which had involved movement around the hospital and movement from his hospital bed. Dr F was clear that was different is a hospital setting with his treating team on hand to the proposed transfer by the ambulance retrieval service.

28. As regards the option of 'blue lighting' during any transfer Dr F said her understanding is in circumstances such as this that would not be an option if Archie deteriorated during the journey due to his clinical circumstances. There would also be clinical reasons not to do that due to the risks of making matters worse.

29. Dr F placed emphasis both in terms of assessing the risks of Archie moving and the benefits of remaining at the hospital. Archie has what she described as a bespoke care regime to meet his particular needs. Once he leaves the hospital Archie would be with people who would be unfamiliar with his particular care needs and would be caring for Archie in very different circumstances, in the confines of a vehicle and a reduced care team.

30. In her oral evidence she emphasised that in reaching their conclusion the treating team have to weigh in the balance the views of the family and their wishes in reaching a conclusion about what is in Archie's best interests. They also have to consider the impact of delay in the context of the conclusions that have been reached about Archie's condition.

31. Turning to the evidence of the mother about what she has observed as a possible change in Archie's clinical condition Dr F's evidence was clear that this was not related to Archie breathing, this had not been observed by any staff. Dr F described the sensitivity of the breathing equipment, how it responds to things like condensation or small movement, for example during physiotherapy movements that can result in a change of pressure onto abdomen or stomach that moves air into the chest. These incidents cause the ventilator to display this change, for example by a white line. She described the steps taken by the clinical team on 26 July 2022 having been told of the changes the mother reported, those actions did not support any evidence of independent breathing by Archie. The white lines alone do not represent Archie breathing, there is a need to look at the patient and see if there is any chest movement. That has not been observed

and when the steps are taken (such as to remove water condensation) the white line disappears. The PICU chart recordings have remained constant. When asked about the more recent changes noted by the mother Dr F was not aware of them or them having being brought to the attention of the treating team and considered they were more likely to have been caused by the factors she had outlined and the sensitivity of the machine. As regards the level of the alarm settings the mother refers to in her recent statement, Dr F said the important alarm setting is for apnoea in the context of the high level of nursing care the other alarm settings are not used.

32. When asked about any other changes since 15 July 2022 Dr F described the difficulties Archie had including the need to increase reliance on vasopressin, concern regarding constipation and recent events involving a displaced line in his neck resulting in his blood pressure dropping very quickly and the need to relocate the line to his groin.

33. Dr F was asked about air travel if there was treatment available overseas which she described as having many risks, *'very risky',* including being cared for by different staff and the logistical risks similar to those relating to transfer to a hospice. On behalf of the parents Mr Bogle pressed her about circumstances where there was a prospect of Archie's condition significantly improving, she said that was not the situation as she understood it and, in any event, any decision involves the need to weigh the risks with the benefits.

34. Dr I, a Consultant Paediatric Neurologist, was not required to give evidence. Her statement provided such information as was available about the generalised option of treatment abroad, no details have been provided on behalf of the parents about what it would involve or the location. This issue had been raised by a recent letter on 3 August 2022 from the parent's MP to the hospital. Dr H's statement gives the information about the trials involving the potential use of stem cells, which can be reprogrammed into brain cells in the potential treatment of certain conditions, including brain injury. However Dr H states *'there is no proof these treatments are safe and effective'* and the *'chance of any improvement would depend on the pre-existing clinical and brain state and unfortunately there is very extensive brainstem and cortical damage, as is sadly the case for Archie, it is impossible to envisage that a cell-based therapy could produce any meaningful improvement'* continuing that she is *'not aware of any treatment which has provided evidence of any form of recovery in a patient who has been without circulation to the brain over such a lengthy period of time'.*

35. The two statements from the mother outline what she considered is evidence of a change in Archie's condition, in particular relating to his breathing as outlined above, and why she seeks an order that Archie is transferred to a hospice. She considers the surroundings and facilities there are more conducive for Archie, the parents and the wider family. The mother's third statement also contains some information about the proposed treatment abroad but gives little information as to what it actually involves or where it would take place.

36. Ms C gave evidence at the request of Mr Bogle on behalf of the parents. No objection was taken to this course and she had given evidence at a previous court hearing. She is engaged to Archie's oldest brother and described herself as the family advocate. In her clear and powerful evidence she described the visit with the family to the hospice last Friday and described what they could offer if Archie went there. She emphasised that the family understood the risks, Archie had been moved around the hospital and they

recognise that there is a risk Archie could die. She described how the circumstances at the hospital meant the family considered if treatment was withdrawn there Archie would not die with peace and dignity due the breakdown in trust and other circumstances at the hospital. By contrast, she said the hospice would be more peaceful due to its circumstances and setting, the facilities it can offer to accommodate the family and their willingness for Archie to stay there after his death for longer than at the hospital and they have on site bereavement counsellors.

37. The Children's Guardian gave evidence. having only just had the opportunity to read the email from Dr R. She said, as set out in the position statement filed on her behalf, if the risks were considered to be manageable she would support a move to the hospice, if not she considered Archie's best interests were that he remained in hospital. In her position statement Archie's parents were described as having '*fought for him and have fought for what they considered to be in his best interests. Their love and dedication to their son is clear.'* She considered she was unable to recommend a transfer to a hospice as being in his best interests due to the risk that the people who are most important to him, his family, may not be with him when he dies if he dies in transit to the hospice. She was concerned about the issue of delay and the impact of that on Archie. If it is going to take too long to establish if it is manageable, with no short term fixed timeframe, Archie's best interests are to remain in the hospital.

38. Prior to the judgment being circulated the parents solicitors sent on 5 August 2022 to the court and the parties an email from solicitors acting for the hospice who confirmed that the notice of 24 hours that the hospice requires could run concurrently with the time needs for the ambulance retrieval service to organise a transfer.

Legal framework

39. The relevant legal framework that guides the court as to Archie's best interests is not in issue. The relevant paragraphs in Hayden J's judgment at [34] – [41] were not challenged in the Court of Appeal. I rely on what is set out there and by the President in paragraphs [17] - [20] in the Court of Appeal in particular what Baroness Hale set out at [35] in *Aintree University Hospitals NHS Trust v James* [2013] UKSC 67.

40. In her position statement on behalf of the NHS Trust, Ms Paterson reminds the court of the approach the court should take in relation to applications to vary orders. She has referred the court to what Baroness Hale stated in *Re L (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at [38] reminding the court to have regard to the overriding objective in the FPR 2010 to deal with cases justly. In *Maughan v Wilmot (no 2)* [2018] 1 WLR 2356 Moylan LJ set out at paragraphs [88] – [90] the importance to the interests of justice in the finality of a court's order and that any application should be made promptly and be something out of the ordinary to lead to variation.

41. In her approach at this hearing Ms Paterson was not saying the court could not entertain the application, she took a pragmatic approach but in the context the court needed to focus on events since the 15 July 2022, when the court made the best interests determination at paragraph 5 of the order.

Submissions

42. In his focussed submissions, Mr Bogle submits the court should not determine the hospice transfer issue without the expert evidence sought by the parents. Dr R's email following hearing Dr F's evidence provides a rational basis for his view, having had the opportunity to listen to Dr F's evidence and gives a tight framework for a report to be prepared. This evidence is necessary to assist the court to resolve the proceedings as it suggest that the risks relied upon by Dr F are manageable. What Dr R sets out needs to be *'developed further',* which he submits would result in a better outcome for the family which is in Archie's best interests.

43. In any event he submits the evidence of Dr F overplays the risks of the transfer, they are not quantified and need to be looked at in the wider context of Archie'e best interests, which include the views of his family who have recognised the risks to him of a transfer. He emphasised what the mother set out about the benefits of Archie going to a hospice, which is designed to meet this sort of situation, and the risks relied upon by the hospital need to be looked at in the context of the occasions when Archie has been moved in the hospital and the inherent instability of his position in that he could die at any time.

44. As regards the provision of palliative oxygen he submitted there are unknowns in this type of situation and this facility should be available.

45. Turning to the changes noted by the mother he submits there is no challenge to her account and they provide a foundation of a change in Archie's clinical condition.

46. In relation to the suggestion of treatment abroad he submits there is very limited information to enable the court to make a determination.

47. In her submissions Ms Paterson does not support the expert instruction and focussed on the delay in response to the application for an expert. The expert had only been approached very recently, his email says yesterday afternoon, the timescales in Dr R's email are likely to be much longer due to the need to consider all Archie's notes as his position is so unusual. No criticism is made of Dr R but he does not have recent clinical practice in this area and any statistics he sets out should be treated with very great caution. For example, reliance on the emergency retrieval service statistics from 4 years ago is over simplistic due to the nature of the service to move critically ill children, which is different to Archie and the severity of his needs as described by Hayden J. In addition, no breakdown is given of the children's particular needs within the data.

48. More generally in relation to the proposed transfer to the hospice she submits Archie's best interest are best met by him remaining at the hospital. Whilst she recognised the strong wishes expressed by the family and the importance of that for Archie she submits those benefits are outweighed by the risks of transfer for Archie regarding a deterioration in his condition in transfer in circumstances where he would be without his family. Whilst recognising the benefits of the hospice garden as described by Ms C the context is likely to be that treatment will be withdrawn very soon after arrival, usually within the hour. Also, to be weighed in the balance is the loss of the Chaplain service at the hospital if there was a transfer to the hospice. Finally, to go in the balance are the facilities at the hospital, the evidence of the good relationship of the family with some of the nursing team and the offer from the hospital medical director to provide what support they can to the family.

49. As regards the palliative oxygen the evidence is it is very unlikely that Archie will breathe due to his injuries and what palliative care is given should be left to the relevant team, as Hayden J did.

50. As regards any change in Archie's clinical condition Ms Paterson submits that is answered by Dr F's evidence about the sensitivity of the ventilator machine and the fact that it has not been observed or recorded by any of the clinical team in circumstances where Archie is very closely monitored.

51. Any suggestion of treatment abroad, Ms Paterson submits, is unrealistic and unsustainable on the evidence.

52. On behalf of the Children's Guardian, Ms Stanley recognises that any further involvement is going to involve delay, it will, as she says, *'be inevitable'.* These issues were considered by Hayden J during the hearing on 11 July 2022 and he makes reference to his conclusions in paragraph 47, which led to paragraph 5 of the judgment, which all parties agreed and was not appealed. She submits the real question for the court is have the circumstances changed since then as, if not, there is no basis to change the order. Whilst the Children's Guardian's position is that if the risks are manageable she prefers the hospice option, that has to be balanced with the consequences of delay, the risks involved in the transfer and of Archie dying without his family being present.

Discussion and decision

53. The first issue to determine is whether the application for an expert assessment should be granted. The application was made very late, by way of email about 20 minutes before the hearing was due to commence. Dr R is a Consultant in Paediatric Respiratory Medicine and worked in a PICU for 16 years until 2008. That was the last time he had clinical experience of that work.

54. At the suggestion of the Trust, and with the agreement of the other parties, Dr R joined the hearing yesterday to hear Dr F's evidence, having read her relevant statement and been referred to paragraph 18 of Hayden J's judgment. He described in an email sent after Dr F's evidence that he found her evidence clear and accurate. He recognised he had not reviewed the medical notes or met Archie. He did not take issue with the timescales outlined by Dr F and the logistical issues around such an arrangement. In referring to the risks outlined by Dr F for Archie he recognised *'Archie has also been quite unstable in the hospital – to a degree that I cannot verify – making the risks of transport greater. I do not disagree with any of the issues raised, and concur there is a significant risk that there may be an 'event' during any transfer requiring intervention'*, he accepts that risk is impossible to qualify and then seeks to do so recognising the limits in doing so without specific knowledge of Archie's clinical status. He considers interventions, short of a serious event, would be difficult but manageable and then seeks to give a further estimate of the risk of a serious event as being much lower, saying he can't be precise and relies upon his experience some years ago and the annual report from the retrieval team four years ago. No breakdown is given of the clinical circumstances of the individuals transported. In his email Dr R stated if *'he read a very limited number of notes'* he would *'hope to put something together tomorrow [5 August] evening'* adding '*Given the very specific nature of my comments, there may be little further I can add'.*

55. Both the Trust and Children's Guardian raised the issue of delay, in particular for filing any report. The Children's Guardian seeks a focussed timeframe to minimise delay. Ms Paterson submitted Dr R would need to see the full extent of Archie's medical notes to understand the complexity of Archie's condition which very likely pushes the timeframe for a report into the weekend, or beyond. Ms Paterson raises caution about the statistics to underpin the level of risk set out by Dr R, submitting they lack foundation in the oversimplistic analysis.

56. I have to determine whether this expert evidence is necessary in the way provided in rule 25.3 FPR 2010 and PD25B para 5.1. In reaching a conclusion the court has a discretion and in considering whether the evidence is necessary needs to consider matters such as what other evidence is available, the wider circumstances of the case and the question of delay.

57. I have reached the conclusion that the application for expert assessment should not be granted. I have reached that conclusion for the following reasons:

(i) Archie's treatment was described by Hayden J on 15 July at [47] as *'futile, it compromised Archie's dignity, deprives him of his autonomy, and becomes wholly inimical to his welfare. It serves only to protract his death, whilst being unable to prolong his life'.* That bleak picture remains the position 3 weeks after that conclusions was reached.

(ii) The court does have other evidence available on this issue, namely from Dr F who is the treating specialist who has detailed knowledge of Archie's current position.

(iii) Dr R takes little issue with what Dr F set out, other than the assessment of risks involved in transfer which he recognises he has no detailed information about Archie's clinical position or background.

(iv) There will inevitably be a delay if Dr R was instructed and in my judgment is likely to extend beyond the weekend before any report would be ready as he will need to review Archie's notes, rather than a *'very limited number'* that he refers to in his email. That is going to take some time. Any report produced will need to be considered, possibly with another hearing resulting in further delay that this court has determined is inimical to Archie's welfare, bearing in mind the conclusions that have been reached about his best interests regarding treatment.

(v) Dr R's clinical experience although helpful it is of note he has not had direct experience in this area for 14 years.

(vi) I recognise that this is an expert sought by the parents relating to an issue that is very important to them and the wider family. However they have had the opportunity to question Dr F when she gave evidence about these issues.

(vii) It also has an impact on Archie, but that can't be viewed in isolation of the other evidence available to the court, and Archie's position as described by Hayden J and updated by Dr F in this hearing.

58. Turning to the issues the court is considering as outlined in paragraph2 above.

59. Archie's best interests guide any decision made by the court, those interests are not limited to the medical issues. As Hayden J said [25] *'it is important that I place him, his personality, his wishes, at the centre of this process. Respect for Archie, as a person, involves a clear recognition that as a human being, he is more than a raft of medical complexity that I have set out above. He is not, in my judgment, simply who he is now, but he is also who he has been throughout his short life'.* The court needs to have regard to the wide canvas of what will meet Archie's best interests.

60. The court needs to consider the application regarding the transfer to the hospice in the context that the order dated 15 July 2022 provided that the withdrawal of treatment would take place at the hospital as being in Archie's best interests. That determination was not appealed. What, if anything, has changed since?

61. His wishes, as well as those of his parents and wider family would be very important to Archie. As Hayden J set out at [47] *'...Arrangements can be made, with which I need not burden this judgment, that afford Archie the opportunity, for him to die in peaceful circumstances and in the embrace of the family he loved'.* In this hearing the parents have made very clear they would wish that to take place at the hospice due to the facilities that are there, the support that is available both before and after Archie's death and their concerns expressed about this being undertaken in the hospital.

62. Archie's parents recognise that there are inherent risks in relation to the transfer to the hospice and have said they are prepared to take them in preference to remaining in the hospital, including the risk of him dying in transit.

63. Dr F's evidence was clear and detailed about the risks of transfer. She is someone who knows Archie very well and had a detailed understanding of his medical position. Her careful analysis, which I accept, in her most recent statement and her oral evidence of the risks and where they come from in the four areas she identified was careful and balanced, underpinned by clear reasoning based on her experience and a detailed understanding of Archie's medical condition. She distinguished this transfer from other movements in the hospital and had undertaken detailed enquiries of what a transfer to the hospice would involve to help inform her view, as described in paragraph 7 of her most recent statement. In her statement she describes the risks in transfer for Archie as

'major and unpredictable'. I agree. In addition, it is necessary to factor in the further delay that would be caused, although the helpful very recent clarification from the hospice that the times could run concurrently needs to be taken into account.

64. Her evidence needs to be viewed in the context of her update about Archie's medical position, which is becoming more fragile. For example, I accept her evidence about the increased reliance on the vasopressin infusion and the consequences for Archie and the recent incident with the disturbance of the line to his neck, the loss of blood pressure and the need to relocate that line. These are but two examples of Archie's difficult and increasingly compromised position.

65. Archie's best interests must remain at the core of any conclusions reached by this court. When considering the wishes of the family, why those wishes are held, the facilities at the hospice, what Archie is likely to have wanted as outlined by Hayden J in [47], the risks involved in a transfer as outlined by Dr F and the increasing fragility of his medical condition I am satisfied that when looking at the balancing exercise again his best interests remain as set out on 15 July 2022, that he should remain at the hospital when treatment is withdrawn. The circumstances outlined by Dr F of the physical arrangements at the hospital and the arrangements that can be made will ensure that Archie's best interest will remain the focus of the final arrangements to enable him peacefully and privately to die in the embrace of the family he loved. The parents in the email from their solicitors on 2 August 2022 confirmed, in principle, their willingness to co-operate in these arrangements.

66. Turning to the issue of palliative oxygen. I am satisfied that issue should be left to the clinical team on the ground. Sadly, the evidence points to it being unlikely he will breathe once treatment is withdrawn due his severely compromised medical position and the extent of his injuries.

67. As regards any change in his clinical position. The mother's evidence as outlined in her statements is that there have been changes noted on the display in the ventilator indicating a white line or other sign that she considers indicate an ability by Archie to breath independently. When the issue was raised with the clinical team in July the physiotherapy team undertook a procedure to see if that was demonstrated but no change was noted. Dr F's evidence was clear and I accept it that such changes in the display are invariably caused by other factors, such as moisture caused by saturation, when removed, the white lines goes. Also, movement of the body, such as the leg, can generate a similar sign. Dr F said what needs to be looked for is movement in the chest, which has not been observed. Dr F also provided a rational explanation for the non-reliance on the alarm that the mother considered was relevant. It is wholly understandable in the very difficult circumstances this mother is in to constantly be vigilant for anything that could signal a change. On the evidence I am satisfied that it not the case, if anything Archie's position is becoming more compromised.

68. Turning, finally, to the issue of treatment abroad. This has been raised in a letter from the parents MP asking the hospital to consider this. There is no detail as to what is being actually being sought and where. Whilst accepting it is a balancing exercise Dr F's evidence set out her concerns about the risks in any air travel for Archie The Trust have provided Dr I's helpful statement with an analysis of what is known and reached a clear conclusion on the information she has seen that such experimental treatment would be

inappropriate to consider without a full neurological assessment including brainstem testing. I agree.

69. I return to where I started, recognising the enormity of what lays ahead for Archie's parents and the family. Their unconditional love and dedication to Archie is a golden thread that runs through this case. I hope now Archie can be afforded the opportunity for him to die in peaceful circumstances, with the family who meant so much to him as he clearly does to them.