RELEVANT LAW

1. The law relevant to fact finding hearings of this nature can be summarised as follows.

2. I should have in the forefront of my mind the provisions of Articles 6 and 8 of the ECHR. In particular it is important that I ensure that any person who might be affected adversely by my judgment, for example by being in the pool of possible perpetrators, has had the opportunity to be represented within the proceedings and been able to put their case.

3. The fact finding decisions need to be made in the context of the provisions of Section 31(2) Children Act 1989, the "threshold criteria". This section reads:-

   *"**A court may only make a care order or supervision order if it is satisfied – that the child concerned is suffering**, or is likely to suffer, **significant harm**; **and that the harm, or likelihood of harm, is attributable to ...the care given to the child,** or likely to be given to him if the order were not made, **not being what it would be reasonable to expect a parent to give to him.***

4. "*Harm*" is defined in Section 31(9) as meaning "*ill-treatment or the impairment of health or development"*.

5. The relevant date for assessing whether the child "is suffering" harm is the date of the care order application or, if temporary protective arrangements have been continuously in place from an earlier date, the date when the arrangements were initiated. In cases where the "is suffering" limb of the test is engaged (as in the present case) it is not enough that the court suspects that a child may have suffered significant harm or that there was a real possibility that he did, the court must be satisfied that the child was actually harmed: *Re M (A Minor) (Care Order: Threshold Conditions)* [1994] 2 FLR 577.

6. The burden of proof lies on the party who makes the allegation, in this case the local authority.

7. The standard of proof is the balance of probabilities: see *Re B (Care Proceedings: Standard of proof)* [2008] UKHL 35. In the words of Baroness Hale at paragraph 70: "*I...would announce loud and clear that that the standard of proof in finding the facts necessary to establish the threshold at s31 (2) or the welfare considerations at s1 of the 1989 Act is the simple balance of probabilities, neither more not less. Neither the seriousness of the allegations nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The*

inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies".

8. If a fact is to be proved the law operates a binary system. It is open to the Court to find on the balance of probabilities either that an allegation is true or that an allegation is false. As Lord Hoffman observed in *Re B* (supra) : "*if a legal rule requires the facts to be proved a judge must decide whether or not it happened. There is no room for a finding that it might have happened; the law operates a binary system in which the only values are nought and one*".

9. Findings of fact must be based on evidence not speculation. As Munby LJ (as he then was) observed in *Re A (Fact Finding: Disputed findings)* [2011] 1 FLR 1817 "*it is an elementary position that findings of fact must be based on evidence, including inferences that can be properly drawn from evidence and not suspicion or speculation*". The court's task is to make findings based on an overall assessment of all the available evidence. In the words of Butler-Sloss P in *Re T* [2004] 2 FLR 838: "*Evidence cannot be evaluated and assessed separately in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof*".

10. One part of the assessment is an analysis of the credibility and reliability of the witnesses and potential perpetrators. I need to remind myself, though, of the important warning to be derived from *R v Lucas* [1981] QB 720 that "*if a court concludes that a witness has lied about a matter, it does not follow that he has lied about everything. A witness may lie for many reasons, for example out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure*".

11. Where, as here, an important part of the evidence is provided by expert witnesses I need to remind myself of two propositions in weighing the importance of that evidence. First, whilst it may be appropriate to attach great weight to clear and persuasive expert evidence it is important to remember that the roles of the court and expert are distinct and that it is ultimately the court that is in the position to weigh the expert evidence against the other evidence: see, for example, Baker J in *Re J-S (A Minor)* [2012] EWHC 1370. Secondly, the court should always remember that today's medical certainty may be disregarded by the next generation of experts and that scientific research may one day throw light into corners that are at present dark. There may be cases where criticism of even a clear expert opinion is more than fanciful. The case of *LB of Islington v Al Alas and Wray* [2012] EWHC 865 (Fam) is a useful cautionary tale in this respect. As Hedley J observed in *Re R (Care Proceedings Causation)* [2011] EWHC 1715 "*there has to be factored into every case…a consideration as to whether the cause is unknown*".

12. In structuring my analysis in this fact finding hearing I remind myself of the Supreme Court decision in *Re S-B (children) (non-accidental injury) [2009] UKSC 17.* This decision informs the structure of the analysis, broadly encouraging the route set out below.

13. If I am satisfied that the child sustained injuries I must first consider whether they were caused non-accidentally. In this context I remind myself of the comments of Ryder LJ about the expression "non-accidental injury" in *S (A Child)* [2014] EWCA Civ 25:-

    "I make no criticism of its use but it is a 'catch-all' for everything that is not an accident. It is also a tautology: the true distinction is between an accident which is unexpected and unintentional and an injury which involves an element of wrong. That element of wrong may involve a lack of care and/or an intent of a greater or lesser degree that may amount to negligence, recklessness or deliberate infliction. While an analysis of that kind may be helpful to distinguish deliberate infliction from say negligence, it is unnecessary in any consideration of whether the threshold criteria are satisfied because what the statute requires is something different namely, findings of fact that at least satisfy the significant harm, attributability and objective standard of care elements of section 31(2)."

14. Secondly, I must next consider whether I can identify the perpetrator of the injuries. A Court should not strain to identify the perpetrator, but to do so should promote clarity in identifying future risks to the child and the strategies necessary to protect the child from them and there should be long-term benefits for the child in knowing the truth if it can be ascertained. Plainly, the threshold criteria can be established by findings that a child has suffered harm whilst in the care of his parents, or other carers, without the need to establish precisely who caused the injuries. Nevertheless, where possible, and for the consideration of a child's welfare, it is desirable to identify who has and who has not caused the injuries.

15. Thirdly, if I cannot identify a perpetrator or perpetrators, I should attempt to identify the pool of possible perpetrators. In this context I remind myself of the decisions in *Lancashire CC v B* [2000] 2 AC 147 and *North Yorkshire CC v SA* [2003] 2 FLR 849. The identification of a pool of possible perpetrators is sometimes necessary in order to fulfil the 'attributability' criterion – for example if the harm has been caused by someone outside the home or family, for example at school or in hospital or by a stranger, then it is not attributable to the parental care unless it would have been reasonable to expect a parent to have prevented it. It is also generally desirable to identify a pool of perpetrators because it will help to identify the real risks to the child and the steps needed to protect him, it will help the professionals in working with the family and it will be of value to the child in the long run. In considering

whether a particular individual should be within the pool of possible perpetrators the test is not whether that individual can be excluded as a perpetrator, but whether there is a real possibility that he or she was involved. An individual should not be expected to prove his or her innocence beyond reasonable doubt.

16. Fourthly, if I identify a pool of possible perpetrators which, *ex hypothesi,* will include more than one person, I should be cautious about expressing a view as to the percentage likelihood of each or any of those persons being the actual perpetrator. In the words of Thorpe LJ: “Better to leave it thus”.