IN THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

NATALIE O'TOOLE

Appellant

v.

SAM DALE

Respondent

BUNDLE ON BEHALF OF THE RESPONDENT

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Rosamund Smith Mooting Competition 2022, Semi-Final 1
Moot problem

IN THE COURT OF APPEAL
CIVIL DIVISION

B E T W E E N:

NATALIE O'TOOLE

Appellant

and

SAM DALE

Respondent

1. Natalie O'Toole is 40. She qualified as a social worker but has not worked for more than 15 years. Sam Dale is also 40. He works in finance in the City. He earns a significant salary and has worked long hours throughout the marriage.

2. The parties met through mutual friends in Chelsea. They married in 2010. They had two children in quick succession: Louis Dale who was born on 6 July 2012 and is 9; and Jenny Dale who was born on 4 June 2013 and is 9 this year. The family enjoyed a good quality of life with foreign holidays to exclusive resorts, frequent meals in local restaurants and a family membership of the Chelsea Harbour Club where they went most weekend. The children played tennis with their father every Sunday. The family employed a full-time nanny who assisted with bringing the children to and from school and activities and who cared for the children in the evenings and, occasionally, on weekends when their parents were out or travelling.

3. Friends believed that the family lived an idyllic life. However, there were occasions when, whilst visiting the Chelsea Harbour Club, Natalie was observed crying and informed people that she was fine but had just had an argument with Sam. Their friends thought that perhaps Natalie was an attention seeker at times. On one occasion, Natalie was seen to be intoxicated and crying in the bar at the club in the middle of the day.

4. Sam always appeared to be polite and charming as well as being very caring towards, and protective of, Natalie and the children. Although there were occasions when Sam was observed shouting at the children on the tennis courts and smashing a racquet close to where the children were playing, no one at the Harbour Club ever felt the need to intervene. His behaviour never seemed to cause particular upset to the children who tended to play a little better after their father had shouted at them.

5. There were a number of occasions during lockdown when the police were called to the family home. On two occasions, neighbours reported that they heard shouting from the home; on two occasions Natalie called the police; on one occasion, Sam called the police. On each of the five occasions when the police attended, the children were present but seemed calm and were seen by police officers in their bedrooms. All appeared well.

6. Although on each of the five occasions, the police decided not to take any further action, a number of minor allegations were made as follows:
    a. on the second call out, Jenny (then 6) told a female officer that she had heard her mother shouting at her father but couldn't be sure whether her father had shouted back;
    b. on the fourth call out, Natalie was seen with a red patch on her cheek but, on questioning, she surmised that it must have been caused by an allergic reaction to the fish they had eaten for dinner – a thesis with which Sam agreed.
    c. on the fifth occasion, when Sam called the police, he alleged that he was concerned for his safety because Natalie had been screaming at him and he feared that she was going to assault him.

7. As a result of the second call out, the police had referred the matter to the local authority's social services department. They had carried out a Child and Family Assessment and found that the children were well cared for by each of their parents. The children were interviewed and appeared well. Neither of them made any allegations. The parents were interviewed together and seemed very happy. They said that Jenny must have heard the television and mistaken a voice on the television for her mother's. Both denied that Jenny had been shouting on the night that Jenny had alleged it. The case was closed with the local authority concluding that there was no further role for them in the family.

8. On 3 June 2020, the police received a 999 call from Louis who reported that he was frightened that his parents were fighting. On arrival, Natalie was alone in the house and all seemed calm. Natalie alleged that she had Sam had an argument in the living room about what she planned to wear to a party that evening and that Sam had become very angry and frightening. She said that this was not the first time that it had happened and that she didn't think she could continue any longer in the marriage. She reported that Sam had left. There was no sign of injury to Natalie, no sign of disturbance in the living room and the children seemed calm and well. Louis confirmed that he had made the call using his father's mobile telephone which he had with him in his bedroom when the police were present. Whilst the police were present, Sam returned to the home. He appeared calm and charming and assisted the police with their enquiries. He agreed that there had been a verbal argument between Natalie and himself but said that the argument was because he had told her that he wanted a divorce but that he wanted to share the care of the children. Natalie had lost her temper with him and thrown an ashtray at him. He had left in a hurry so that the children would not hear them arguing – something that he was keen to avoid as it had happened so many times in the past.

9. The parents subsequently separated and divorce proceedings were issued by Natalie in December 2020. Natalie alleged soon after the separation that she had been the victim of coercive control and limited physical violence by Sam throughout the marriage. The financial arrangements were

settled between them by consent with Sam agreeing to pay generous maintenance as well as agreeing that Natalie could keep their house in Chelsea and that he would start again because he had by far the greater earning capacity.

10. Initially, there was regular contact between the children and Sam following the parents' separation. However, that regularity reduced from about April 2021 and continued to reduce and be unreliable until Sam eventually felt compelled to issue an application for a child arrangements order in June 2021.

11. Also, in June 2021, Sam received a call from Louis who informed him that he and Jenny had the day before been to their mother's wedding and that she had married her friend Amos. On enquiry, Sam discovered this to be true and that Natalie was now to be known as Natalie O'Toole, having taken Amos's surname. On 30 June 2021, Natalie informed Sam that she and Amos would soon be parents. On 2 November 2021, Natalie gave birth to twins.

12. Jenny and Louis have informed their respective school teachers that they love their twin baby brothers and that they are looking forward to them coming to the same school and sharing their names.

13. On 31 July 2021, Sam issued a further application for a prohibited steps order forbidding Natalie from having the children be known by any name other than Dale.

14. On 30 August 2022, Natalie issued an application for a specific issue order to change the children's surnames to Dale O'Toole and for a Child Arrangements Order allowing Sam to have only professionally supervised contact on the basis that he was otherwise a risk to the children. She also alleged that the children no longer wished to see Sam.

Final hearing

15. Sam's case at the final hearing was that Natalie wanted to cancel him from the children's lives and that the above facts supported his case. He believed that the children had been deliberately alienated from him by Natalie. He asked the court to grant a shared "lives with" child arrangements order. He called a fellow member from the Harbour Club who confirmed that he was a great father and that the children loved and missed him. He denied that he had ever been abusive to Natalie or to the children. He asked for an order for contact which would start as visiting contact for three weeks and then increase to staying contact once a week, increasing to full weekends and a mid week overnight stay within two months.

16. Natalie's case at the final hearing was that she had been willing to support contact at the start because she hadn't realised the extent of the emotional abuse she had suffered throughout her relationship with Sam. She had only realised this following counselling that started in January 2021 and following her relationship with Amos. Although the children had initially seemed happy to spend time with their father, they had begun to complain about his shouting at them and Jenny had complained that she was never allowed to go to the toilet when she was with her father. Natalie was clear that the children did not want to see their father, but she would agree to

supervised contact. If that went well, she would agree to more contact. She said that the children do not want to see their father as they always had a limited relationship with him due to his working and his treatment of her and of the children when he was at home. She said that she would support them seeing him in the future, if they changed their minds and it was a matter for the court whether to order any contact at this stage given the children's wishes and feelings, as expressed to her. In relation to the name change, Natalie insisted that the older children are enthralled with their little brothers and that they will all go to the same school and need to have the same name.

17. All of the facts set out at paragraphs 1 to 14 above were repeated either in the written evidence or in the parents' oral evidence.

18. The judge made the following findings:

a. Although there was some limited evidence of domestic abuse against Natalie by Sam during the marriage, he was not persuaded that it was relevant to the issue of the children's contact. He had considered Practice Direction 12J and considered that the order he was making would properly protect the children and Natalie, even if her allegations were true.

b. Although he didn't consider it necessary to make findings on the allegations made by Natalie of abuse, he concluded that there was probably a bit of shouting between the parents and that the children might have heard that. Although Sam might have been louder, Natalie was also very capable of shouting and had shouted at Sam. He accepted Natalie's evidence that there had been an isolated incident five years into the marriage where Sam had locked Natalie into a bedroom with him so that they could speak privately and that Natalie had found this frightening.

c. He did not find that the father shouting at the children during tennis and breaking a racquet was supportive of Natalie's case of coercive behaviour by Sam.

d. He did not consider that the admitted fact by Sam that he did not think that Natalie needed either a debit or credit card was supportive of her case that Sam was coercively controlling. He considered that Sam acted reasonably in providing Natalie with cash whenever she asked for it as he almost always gave her what she asked for.

e. He found that there had been occasional losses of temper by Sam during the marriage but that there had also been losses of temper by Natalie. The children had not been adversely affected by shouting by either parent.

f. On the balance of probability, he accepted Sam's version of what happened the night the couple separated and that Natalie had thrown an object at Sam causing him to leave.

g. It was material to the judge's assessment of the parties that Sam had quickly agreed a very generous financial settlement in the divorce.

h. It was material to the judge's assessment of the parties that Natalie had not informed Sam of her impending marriage to Amos and that he had learned about this through his son. He considered it poor and not child-focused for Natalie to have behaved in this way.

i. He considered that Natalie's motivation for wanting to change the children's surname to match those of their half siblings was inconsiderate and not in the children's interests.

j. He found that Sam shouting at the children in the past or shouting at their mother could not have had an effect on the children in the way described by Natalie so that they no longer wished to see their father when they had initially been keen to do so.

k. He did not accept Natalie's evidence that the children did not want to see their father. Natalie was not being truthful when she told the court that she would support the children in seeing their father, if and when they decided that they wished to do so. She had alienated the children from their father. The children were bound to want to see their father and should do so soon. They would otherwise suffer if they do not see him.

l. He did not accept that there was any reason for the time the children spent with their father to be supervised.

m. He accepted that Sam was sincere when he told the court that he was sorry that the children had heard him shouting at their mother and would like to be able to see the children without having to see Natalie.

19. The judge ordered that:
    a. the children should live with both of their parents.
    b. the school holidays should be shared equally between the parents.
    c. the children should spend time with their father for three Saturdays in a row during the day, move to overnight on the 4th weekend and thereafter spend three nights on alternate weekends with their father as well as increasing to an overnight stay each week after 3 months.
    c. he refused Natalie's application for a change in the children's surname;
    d. he made an order forbidding Natalie from allowing the children to be known by any name other than "Dale".

The appeal

20. Natalie applied for permission to appeal the decisions of the court, which was granted by the Court of Appeal. Her grounds of appeal are as follows:

Ground 1: Abuse and alienation

The court erred in finding that the domestic abuse that she had suffered was either a. too mild to count; or b. irrelevant to i. her current attitude towards contact and ii. the children's expressed wishes and feelings about seeing their father. If the court was going to reach the conclusions it did on these issues, it should have adjourned the case to obtain proper expert evidence as to the possible effect on the children of having repeatedly witnessed shouting at their mother by their father and/or being shouted at themselves. They were not findings open to the court.

The mother had not alienated the children and was not responsible for their current attitude towards seeing their father.

In any event, the contact ordered by the court was wrong and not in the children's interests.

Ground 2: Child arrangements

The court should either have accepted the mother's evidence that the children did not want to see their father or should have adjourned the case to independently canvass the children's wishes before deciding that they should see their father. The children were entitled to have their voices heard when the outcome of the case would have such a fundamental effect on their lives. They were not findings open to the court to make.

Moot problem set by:
Ruth Kirby QC
4pb

26 May 22

IN THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

NATALIE O'TOOLE

Appellant

v.

SAM DALE

Respondent

SKELETON ARGUMENT ON BEHALF OF THE RESPONDENT

Grounds of Appeal

1. In relation to abuse and alienation:

    a. The court erred in finding that the domestic abuse that the Appellant ("**M**") suffered was either too mild to count or irrelevant to i. her current attitude towards contact and ii. the children's expressed wishes and feelings about seeing their father. If the court was going to reach the conclusion that it did on these issues, it should have adjourned the case to obtain expert evidence as to the possible effect on the children of having repeatedly witnessed shouting at M by the Respondent ("**F**") and/or being shouted at themselves. They were not findings open to the court.

    b. M had not alienated the children and was not responsible for their current attitude towards seeing F.

    c. In any event, the contact ordered by the court was wrong and not in the children's interests.

2. The court should either have accepted M's evidence that the children did not want to see F or should have adjourned the case to independently canvass the children's wishes before deciding that they should see their father. The children were entitled to have their voices heard when the outcome of the case would have such a fundamental effect on their lives. They were not findings open to the court to make.

Submissions on the First Ground of Appeal

M's alienation of the children

3. For the court to overturn the judge's findings in relation to parental alienation, they must be findings which exceed the generous ambit in which reasonable disagreement is possible and be "plainly wrong", per Lord Hoffman in *Piglowska v Piglowski* [1999] 2 FLR 763 as cited in *Re H-N and others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448 ("***Re H-N***") at [§75].

    a. Although the judge does not give a full explanation for his findings, the court must bear in mind that his judgment is an incomplete statement of the impression which was made upon him by the primary evidence, including oral evidence which this court is unable to consider per *Re H-N* at [§75].

4. Within the ambit of reasonable disagreement, it is submitted that there is ample evidence from which the judge was entitled to find that M had alienated the children against F:

    a. There was regular contact between F and the children from December 2020 to April 2021;

    b. Louis called F of his own volition to inform him that M was getting married in June 2021, after contact had already begun to break down in April 2021;

c. M made an application to change the children's name to O'Toole after their non-biological father, who had only been involved in their life for less than two years, even though both children expressed affection towards their current surnames to their teachers at school;

d. M alleged that the children did not want to see their father as they had a limited relationship, however their level of contact with F during the marriage was similar to M as the children were brought up with the assistance of a full-time nanny.

The findings of domestic abuse and the terms of the Child Arrangements order

5. Whilst paragraph 21 of *Family Proceedings Rule 2010: Practice Direction 12J- Child Arrangements and Contact Orders: Domestic Abuse and Harm* ("**PD12J**") does specify that a court should consider directing a report on matters relating to a child's welfare where a risk of harm resulting from domestic abuse is raised as an issue, this is not needed if the court is satisfied that it is not necessary to do so in order to safeguard the child's interests.

6. As is made clear in *Re H-N* at [§37], when confronted with allegations of domestic abuse, the court must consider the nature of the allegations and the extent to which they are likely to be relevant which deciding the terms of a Child Arrangements Order ("**CAO**").

   a. Interpreting the judgment in *Re H-N*, the Court of Appeal emphasised in *Re K* [2022] EWCA Civ 468 at [§10] that all allegations of domestic abuse raised must be considered in the context of what "fundamentally affect[s] the question of contact", namely whether the parent accused of domestic abuse demonstrates coercive and controlling behaviour which affects the children's welfare.

7. Not all findings of assertive or directive behaviour will constitute abuse, as noted by Peter Jackson LJ noted in *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 212 and cited with approval in *Re H-N* at [§32].

a. If the behaviour is not demonstrative of a pattern used to harm, punish, or frighten the victim, nor designed to make a person subordinate, then it is not in the interest of the child for the court to "allow itself to become another battleground for adult conflict" by unnecessarily adjourning and extending proceedings.

8. The judge was therefore entitled to conclude that a separate finding of fact hearing was not required and that the findings that he did make did not fundamentally affect the question of contact as they did not represent a pattern of controlling or coercive behaviour. The judge clearly had regard to the factors that a court must consider in paragraph 37 of PD12J:

    a. The effect of the abuse on the children and on the arrangements for where the children are living and their relationship with the parents (PD12J, paragraphs 37(a) and 37(b)).
        i. The only evidence of F shouting directly at the children were isolated incidents on the tennis court and it is submitted that this does not constitute a pattern of controlling or coercive behaviour. Conversely, the court at first instance heard evidence that F was a good father to the children.
        ii. In relation to the shouting between M and F, this has ceased since the separation and in any event is not sufficient to constitute a pattern of coercive or controlling behaviour capable of affecting the children's welfare.
        iii. F has made significant efforts to put in place a clean financial break between the parties such that he exerts no influence over M who is now wholly financially independent.

    b. Whether F is motivated by a desire to promote the bests interest of the child or is using the process to continue a process of violence, abuse, intimidation or harassment or controlling or coercive behaviour against the other parent (PD12J, paragraph 37(c)).
        i. There is no evidence of this. F only applied for a CAO after M unilaterally reduced contact between him and the children in April 2021. Until that point, the children were in the care of both parents.

c. The likely behaviour during contact of F and its effects on the children (PD12J, paragraph 37(d)).
    i. There is no evidence that F would behave in a way that would place the children at risk during contact.

d. The capacity of the parents to appreciate the effect of past abuse and the potential for future abuse (PD12J, paragraph 37(e)).
    i. F has repeatedly shown awareness of the negative effects that the shouting between him and M may have had on the children.

9. In light of the limited findings of abuse and by explicit reference to PD12J, the judge was entitled to conclude that those findings did not amount to controlling or coercive behaviour and therefore to make the order that he did. To adjourn proceedings in such a case would be procedurally disproportionate to the welfare issues involved and be an inappropriate use of the court's resources, having regard to the 'overriding objective' of the Family Court, per *Re H-N* [§36].

Submissions on the Second Ground of Appeal

1. The court's finding in relation to the credibility of the mother's evidence that the children did not want to see their father should only be appealed in exceptional circumstances.

    a. In *F v M (Appeal: Finding of Fact)* [2019] EWHC 3177 (Fam) [§19], Cobb J emphasised the difficulty in appealing findings of fact and that an appellate court could only determine a judge had erred if the answer was 'demonstrably contrary to the weight of the evidence' or the decision-making process was 'plainly defective so that it can be said that the findings in question are unsafe'. Neither of these are true in the instant case.

b. In *Re A (Children)* [2015] EWCA Civ 1254 [§38], Lewison LJ further emphasised the power and advantages that a trial judge has over an appellate court in that they get to see and hear all of the evidence directly from the witness-box.

c. On this basis, after considering both written and oral evidence, the trial judge was entitled to conclude what he did and not accept Natalie's evidence or credibility as a witness.

2. The trial judge was entitled to make the decision that he did in the instant case.

   a. As outlined in s.1(2) of the Children Act 1989 ("**CA 1989**"), delay is detrimental to the welfare of the child.

      i. The independent canvassing of the children's wishes would have taken even more time. Given the judge's finding that the mother had alienated the children from their father, it is reasonable that the trial judge came to the conclusion that such measures were unnecessary.

   b. The ascertainable wishes and feelings of the child, per s.1(3)(a) CA 1989, is just one of a number of factors that the court must take into account when assessing the terms of a CAO. Ultimately it is a decision for the court and not the child to determine what is best for the child's welfare.

      i. As outlined by Macdonald J in *L v L (Anticipatory Child Arrangements Order)* [2017] EWHC 1212 (Fam) [§42-43], even the wishes of a mature child do not carry any presumption of precedence over any of the other factors in the welfare checklist under s.1(3) CA 1989.

   c. The weight to be placed on the child's wishes and feelings is to be evaluated by the reference to the child's 'age and understanding' per s.1(3)(a) CA 1989.

i. The judge was entitled, on the facts of the case, to determine that the children were ‘bound to want to see their father’ and that it would be the best for their welfare to do so, taking into account their respective ages.

Conclusion

For the above reasons, it is thus respectfully submitted that this appeal should be dismissed.

Charles Richardson and Samuel Mitchinson

Date	Event	Ref
2010	M and F were married.	§2
6 July 2012	Louis Dale was born (now aged 9).	§2
4 June 2013	Jenny Dale was born (now aged 9).	§2
2020	Neighbours called the police after hearing shouting from the family home.	§5
2020	Neighbours called the police again after hearing shouting from the family home. Jenny told an officer that she heard M shouting at F.	§6
2020	M and F are referred to the local authority by police. Child and Family Assessment was carried out and found that the children were well cared for by each of their parents.	§7
2020	M called the police to the family home.	§5
2020	M called the police to the family home once again. She was observed with a red patch on her check, which she explained as having been caused by an allergic reaction to fish she had eaten.	§6
2020	F called the police to the family home, alleging that he feared for his safety after M was screaming at him.	§6
3 June 2020	Louis called 999 reporting that he was frightened his parents were fighting. M was alone at the house when the police arrived. M alleged that F had an argument with her about what she planned to wear to a party and became angry. F alleged that the argument was caused by him seeking a divorce and shared care of the children, leading M to throw an ashtray at him and that he left the home so the children would not hear the arguing.	§8
December 2020	Divorce proceedings were issued by M and she alleged that she was a victim of coercive control and limited physical violence by F throughout the marriage.	§9
April 2021	Regular contact between F and the children began to break down.	§10

June 2021	Contact between F and the children continued to worsen and F issued application for a CAO. F received a call from Louis informing him that M has married Amos O'Toole.	§10 §11
30 June 2021	M informed F that she and Amos would be having children.	§11
31 July 2021	F issued application for prohibited steps order forbidding M from changing the children's surnames to anything other than Dale.	§13
30 August 2022	M issued application for specific issue order to change the children's surnames to O'Toole and a child arrangements order allowing F to have only professionally supervised contact. M also alleged that the children no longer want to see F.	§14
2 November 2021	M gave birth to twins.	§11
Late 2021 / early 2022	Final hearing in relation to all applications issued.	§17
13 June 2022	Court of Appeal: appeal hearing.	§20

IN THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

NATALIE O'TOOLE

Appellant

v.

SAM DALE

Respondent

AUTHORITIES TO BE RELIED UPON BY THE RESPONDENT

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1. *Re H-N and others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448

2. *Re K* [2022] EWCA Civ 468

3. *Family Proceedings Rule 2010: Practice Direction 12J - Child Arrangements and Contact Orders: Domestic Abuse and Harm*

4. *F v M (Appeal: Finding of Fact)* [2019] EWHC 3177 (Fam)

5. *Re A (Children)* [2015] EWCA Civ 1254

6. Children Act 1989

7. *L v L (Anticipatory Child Arrangements Order)* [2017] EWHC 1212 (Fam)

Re H-N and others (children) (domestic abuse: finding of fact hearings)

[2021] EWCA Civ 448

Court of Appeal, Civil Division

Sir Andrew McFarlane P, King and Holroyde LJJ

30 March 2021

Judgment

In the H-N Appeal

Mr Christopher Hames QC, Ms Camini Kumar and **Ms Charlotte Baker** (instructed by **Goodman Ray Solicitors**) for the **Appellant Mother**

Ms Janet Bazley QC, Ms Jessica Lee and **Ms Costanza Bertoni** (instructed by **Bindmans LLP**) for the **Respondent Father**

In the H Appeal

Ms Amanda Weston QC and **Dr Charlotte Proudman** (instructed by **Duncan Lewis Solicitors**) for the **Appellant Mother**

Ms Denise Gilling QC, Mrs Arlene Small and **Ms Melissa Elsworth** (instructed by **Mills & Reeve LLP**) for the **Respondent Father**

In the B-B Appeal

Ms Amanda Weston QC and **Dr Charlotte Proudman** (instructed by **Beck Fitzgerald**) for the **Appellant Mother**

Mr Teertha Gupta QC, Mr Matthew Persson and **Ms Clarissa Wigoder** (instructed by **Messrs Pennington's Manches**) for the **Respondent Father**

In the T Appeal

Professor Jo Delahunty QC, Mr Chris Barnes and **Ms Adele Cameron-Douglas** (instructed by **Beck Fitzgerald**) for the **Appellant Mother**

Mr Charles Hale QC, Ms Rebecca Foulkes and **Ms Miriam Best** (instructed by **Meadows Ryan Solicitors**) for the **Respondent Father**

Mr Mark Jarman and **Mr Michael Gration** (instructed by **Cafcass Legal**) for **Cafcass** the **First Intervener**

Ms Barbara Mills QC, Ms Joy Brereton and **Ms Emma Spruce** (instructed by **Scott Moncrieff & Associates Ltd**) for **Women's Aid, Women's Aid Wales, Rape Crisis and Rights of Wome**n the **Second Intervener**

Ms Sarah Morgan QC, Mr Tom Wilson and **Ms Lucy Maxwell** (instructed by **Irwin Mitchell**) for **Families Need Fathers** the **Third Intervener**

Ms Deirdre Fottrell QC and Ms Lorraine Cavanagh QC (instructed by **ITN Solicitors**) for the **Association of Lawyers for Children**) the **Third Intervener**

Hearing dates: 19 to 21 January 2021

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Approved Judgment

This judgment is subject to a Reporting Restriction Order.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:00am on 30 March 2021.

The President of the Family Division, Lady Justice King and Lord Justice Holroyde:

1. The court is concerned with four appeals each of which involves an allegation of domestic abuse by one parent against the other. Later in this judgment at paragraph 78 onwards, we address the individual appeals, but we also take the opportunity to give more general guidance about matters which commonly arise in the Family Court and are of great importance. In particular we address the issue of whether, where domestic abuse is alleged in proceedings affecting the welfare of children, the focus should in some cases be on a pattern of behaviour as opposed to specific incidents. We also address the issue of the extent to which it is appropriate for a Family Court to have regard to concepts which are applicable in criminal proceedings. We consider the consequence of these issues for the way such cases are conducted in applications made for private law children orders ('private law orders') made under the Children Act 1989 ('CA 1989').

2. We must make clear at the outset that there is a limit to the extent to which we can give general guidance. In part, this is because there are various initiatives already in train, to which we refer in paragraphs (19-20) below. But it is also because there is plainly and properly a limit to what a constitution of the Court of Appeal, determining four individual appeals, can, and as a matter of law should, say about issues which do not strictly arise in any of those appeals.

Domestic Abuse and The Family Court

3. The four appeals to which this judgment relates each involve proceedings before the Family Court under CA 1989 concerning the welfare of children in which at least one parent has made allegations of domestic abuse against the other parent. Such cases are far from rare. In the year 2019/2020 the Family Court received 55,253 'private law' applications by parents for *Coercive and/or controlling behaviour*

29. As can be seen at paragraph 27 above, central to the modern definitions of domestic abuse is the concept of coercive and/or controlling behaviour. Shortly before the hearing of these appeals, Mr Justice Hayden handed down judgment in *F v M* [2021] EWFC 4. The judgment followed a two-week fact-finding hearing of domestic abuse allegations centred on coercive and/or controlling behaviour. The arrival of Hayden J's judgment was timely. All parties commended it to the court for its comprehensive and lucid analysis, and for the plea contained within it urging greater prominence to be given to coercive and controlling behaviour in Family Court proceedings. The parties' endorsement of the judgment in *F v M* is, in our view, fully justified. It is helpful to set out one of the central paragraphs from Hayden J's judgment here:

"4. In November 2017, M [the mother] applied for and was granted a non-molestation order against F [the father]. That order has been renewed and remains effective. The nature of the allegations included in support of the application can succinctly and accurately be summarised as involving complaints of 'coercive and controlling behaviour' on F's part. In the Family Court, that expression is given no legal definition. In my judgement, it requires none. The term is unambiguous and needs no embellishment. Understanding the scope and ambit of the behaviour however, requires a recognition that 'coercion' will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. 'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation. There has been very little reported case law in the Family Court considering coercive and controlling behaviour. I have taken the opportunity below, to highlight the insidious reach of this facet of domestic abuse. My strong impression, having heard the disturbing evidence in this case, is that it requires greater awareness and, I strongly suspect, more focused training for the relevant professionals."

30. Whilst the facts found in *F v M* may be towards the higher end of the spectrum of coercive or controlling behaviour, their essential character is not, and will be all too familiar to those who have been the victim of this form of domestic abuse, albeit to a lesser degree or for a shorter time. The judgment of Hayden J in *F v M* (which should be essential reading for the Family judiciary) is of value both because of the illustration that its facts provide of what is meant by coercive and controlling behaviour, but also because of the valuable exercise that the judge has undertaken in highlighting at paragraph 60 the statutory guidance published by the Home Office pursuant to Section 77 (1) of the Serious Crime Act 2015 which identified paradigm behaviours of controlling and coercive behaviour. That guidance is relevant to the evaluation of evidence in the Family Court.

31. The circumstances encompassed by the definition of 'domestic abuse' in PD12J fully recognise that coercive and/or controlling behaviour by one party may cause serious emotional and psychological harm to the other members of the family unit, whether or not there has been any actual episode of violence or sexual abuse. In short, a pattern of coercive and/or controlling behaviour can be as abusive as or more abusive than any particular factual incident that might be written down and included in a schedule in court proceedings (see 'Scott Schedules' at paragraph 42 -50). It follows that the harm to a child in an abusive household is not limited to cases of actual violence to the child or to the parent. A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:

i) Is directed against, or witnessed by, the child;

ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;

iii) Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;

iv) Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men.

32. It is equally important to be clear that not all directive, assertive, stubborn or selfish behaviour, will be 'abuse' in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour. We would endorse the approach taken by Peter Jackson LJ in *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121 (paragraph 61):

“Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is defined as behaviour that is *'used to harm, punish, or frighten the victim…'* and 'controlling behaviour' as behaviour *'designed to make a person subordinate…'* In cases where the alleged behaviour does not have this character it is likely to

be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict."

Patterns of behaviour

33. Having considered what is controlling and coercive behaviour and emphasised the damage which it can cause to children living in a household in which it is a feature of the adult dynamics, it is necessary to move on to consider the approach of the court where the question of whether there has been a 'pattern' of 'coercive' and/or 'controlling' behaviour by one or more of the adults in a family is raised. Although the principal focus in this judgment has been on controlling and coercive behaviour, it should be noted that the definition of domestic abuse makes reference to patterns of behaviour not only in respect of domestic abuse refers to a 'pattern of incidents' not only in relation to coercive and/or controlling behaviour but to all forms of abuse including physical and sexual violence. Our observations therefore apply equally to all forms of abuse.

34. In our judgment there are a number of important issues which arise out of the submissions made by the parties to these appeals in relation to the proper approach of the court to such cases namely:

i) Whether there should be a finding of fact hearing;

ii) The challenges presented by Scott Schedules as a means of pleading a case;

iii) If a fact-finding hearing is necessary and proportionate, how should an allegation of domestic abuse be approached?

iv) The relevance of criminal law concepts.

The approach of the court:

(i) The need for and the scope of any fact-finding hearing

(d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;

(e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact-finding hearing;

(f) the nature of the evidence required to resolve disputed allegations;

(g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and

(h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.'

36. It is important for the court to have regard to the need for procedural proportionality at all times, both before and during any fact-finding process. A key word in PD12J paragraphs 16 and 17 is 'necessary'. It is a word which also sits at the core of the President's Guidance '*The Road Ahead*' (June 2020), ('RA II') in particular:

'43.If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear.'

…

'46.Parties will not be allowed to litigate every issue and present extensive oral evidence or oral submissions; an oral hearing will encompass only that which is necessary to determine the application before the court.

47.It is important at this time to keep the 'overriding objective' as set out in Family Procedure Rules 2010, r 1.1 in mind:

"The overriding objective

1.1

(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(c) ensuring that the parties are on an equal footing;

(d) saving expense; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

: In these times, each of these elements is important, but particular emphasis should be afforded to identifying the 'welfare issues involved', dealing with a case proportionately in terms of 'allotting to it an appropriate share of the court's resources' and ensuring an 'equal footing' between parties.' (emphasis added)

37. The court will carefully consider the totality of PD12J, but to summarise, the proper approach to deciding if a fact-finding hearing is necessary is, we suggest, as follows:

i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).

ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.

iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.

iv) Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in '*The Road Ahead*'.

38. In its submissions, Cafcass offered additional support to the court when deciding whether to hold a fact-finding hearing:

'It would benefit the court and the parties for there to be Cafcass involvement prior to determination of whether or not a fact-finding hearing is necessary. At present, the 'safeguarding' system and the preparation of a Cafcass 'Letter to the Court' allows a Cafcass Officer to report on allegations that have been made, but nothing more. In some cases, the allegations may be such as to make it obvious that a fact-finding hearing is required before any further assessment can take place. In others, early social work assessment could lead to a conclusion that a fact-finding hearing is not necessary, but that some other intervention would be more helpful. At present, it is rare for there to be any substantive Cafcass involvement prior to fact-finding.'

39. In putting forward this submission, Cafcass contended that the present system was 'sub-optimal' and that, rather than a gatekeeping judge simply allocating a case for a fact-finding hearing without any social work input other than the Cafcass 'safeguarding' letter, the judge should direct that Cafcass undertake an enhanced form of safeguarding assessment (including where appropriate meeting the child) prior to the case being listed for a second gatekeeping appointment, with any resulting listing decision being made on a more informed and child-centred basis.

40. As is the case with some other submissions and suggestions that were made to the court, this offer by Cafcass (which was expressly supported by the Association of Lawyers for Children) seems to us to justify close consideration by those who are charged with reviewing PD12J.

58. As part of that process, we offer the following pointers:

a) PD12J (as its title demonstrates) is focussed upon 'domestic violence and harm' in the context of 'child arrangements and contact orders'; it does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court;

b) PD12J, paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is 'necessary' in order to:

i) Provide a factual basis for any welfare report or other assessment;

ii) Provide a basis for an accurate assessment of risk;

iii) Consider any final welfare-based order(s) in relation to child arrangements; or

iv) Consider the need for a domestic abuse-related activity.

c) Where a fact-finding hearing is 'necessary', only those allegations which are 'necessary' to support the above processes should be listed for determination;

d) In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other.

59. Where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary in the context of PD12J, paragraph 16, that assertion should be the primary issue for determination at the fact-finding hearing. Any other, more specific, factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise, unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape).

(iv) The relevance of criminal law concepts

60. The primary purpose of criminal law is the prosecution of criminal behaviour and the punishment of offenders by the state. The purpose of family law, in the present context, is to resolve private disputes between parents and other family members, which may include the need to protect the vulnerable and victims of abuse and, where the upbringing of a child is in question, the need to afford paramount consideration to that child's welfare.

The approach to appeals against fact-finding

75. Although the House of Lords decision in *Piglowska v Piglowski* [1999] 2 FLR 763 concerned an appeal against the courts exercise of discretion in matrimonial finance proceedings, much of Lord Hoffmann's description of the general approach to appeals is expressly applicable to fact-finding cases:

"In G v G (minors: custody appeal) [1985] 1 WLR 647, 651–652, this House, in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343, 345, which concerned an order for maintenance for a divorced wife:

'It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'

This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc v Medeva Ltd [1997] RPC 1:

'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'

The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account."

76. In hearing and determining the present appeals we have endeavoured to apply the well-established understanding and approach described in *Piglowska,* and elsewhere. Full allowance is to be afforded to the trial judge who has heard the evidence and been exposed to the parties and the detail of each case over an extended period.

Re K

[2022] EWCA Civ 468

Court of Appeal, Civil Division

Sir Geoffrey Vos MR, Sir Andrew McFarlane P and King LJ

8 April 2022

Judgment

The appellant father appeared in person

Jessica Lee and Lucy Maxwell appeared for the respondent mother

Hearing date: 2 March 2022

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APPROVED JUDGMENT

Sir Geoffrey Vos, Master of the Rolls, giving the judgment of the court:

Introduction and summary of conclusions

1. This judgment is intended to provide general guidance on the proper approach to fact-finding hearings in private family proceedings following this court's decision in *Re H-N* [2021] EWCA Civ 448 (*Re H-N*). We should say at once, however, that we endorse *Re H-N*, and note that the District Judge in this case reached his decision before *Re H-N* was handed down. Nothing we say in this judgment on that subject can, therefore, be regarded as a criticism of him.

2. The issues in this case relate solely to whether the findings of fact made by District Judge Capon (the judge) should be over-turned. On the first appeal, Her Honour Judge Mellanby upheld those findings, but we have given permission for all the father's grounds of appeal to be re-argued. In the broadest outline, the father submits that the judge ought to have considered his case that the mother had alienated his children, and that the factual findings that the judge reached as to rape, coercive and controlling behaviour, and physical abuse of the children are unsound and failed to take into account the bigger picture. The

7. Secondly, the FHDRA is, as its name suggests, primarily an opportunity for judicially led dispute resolution. Had the mother confirmed her C1A at the hearing to the effect that she did not object to contact, the logistics might have been sorted out by agreement. This was a possibility that should have been explored.

8. Thirdly, it is important that a judge considering ordering a fact-finding hearing identifies "at an early stage the real issue in the case in particular with regard to the welfare of the child" (see [8] and [139] in *Re H-N*). As [14] of FPR PD12J provides, "[t]he court must ascertain at the earliest opportunity … whether domestic abuse is raised as an issue which is likely to be relevant to any decision of the court relating to the welfare of the child". [17(g)] of FPR PD12J is to the same effect. Fact-finding is only needed if the alleged abuse is likely to be relevant to what the court is being asked to decide relating to the children's welfare.

9. Fourthly, the finding that the father raped the mother during the marriage is unsafe because the judge failed to look at the matter in the round. He focused too heavily on the question of whether the mother had had a conversation complaining about the father's conduct, rather than considering all the available evidence including the mother's untrue assertion in her Scott Schedule that she had reported a version of the incident to the family doctor.

10. Fifthly, the judge ought to have considered all the allegations in the context of the contention that most fundamentally affected the question of future contact, namely whether the father was demonstrating coercive and controlling behaviour affecting the children's welfare after the separation.

11. Sixthly, whilst the allegations of bullying in the June 2019 WhatsApp, of chastising B on one or two occasions by ear flicking, and of upsetting A by pressing inappropriate questions, were made out, the generalised allegation of coercive and controlling behaviour was not. The judge had found no evidence of financial control, yet went on to find controlling behaviour after the separation based mainly on the WhatsApp messages on a single day. The judge had correctly found that the ear flicking did not amount to child abuse, yet allowed his order to suggest that he had found physical abuse of all three children to have been proven (when he had not).

12. Seventhly, the appeal must therefore be allowed and the case sent back to a Circuit Judge for a decision to be made as to whether a fresh fact-finding hearing is required on the basis of the principles set out in *Re H-N* and this judgment. The court urged the parties at the conclusion of the appeal hearing to consider, whether, even at this late stage, there was room for some compromise in the best interests of their children. Successful mediation or other consensual resolution would be very much for the benefit of the children.

13. Once we have set out some further necessary factual context, we will deal with the issues we have mentioned in the order indicated by our conclusions.

Further factual context

63. We will deal with the 5th and 6th conclusions together. In *Re H-N*, the court explained the importance of focusing on whether or not there has been coercive and controlling behaviour, as opposed to specific factual allegations of abuse. This case was decided before *Re H-N*, but nonetheless provides a clear example of the need identified in that case for the court (a) to focus on the overarching issue of coercive and controlling behaviour when it is raised, and (b) to do so in this context only to the extent that is relevant and necessary to determine issues as to a child's future welfare.

64. The judge in this case did not at any stage, either in the FHDRA or fact-finding, identify the issues that arose as to the future arrangements for these three children. The judge concluded that a fact-finding hearing was required before the mother had identified the allegations she wished to pursue, and before disclosure of relevant material had been obtained.

65. A fact-finding hearing is not free-standing litigation. It always takes place within proceedings to protect a child from abuse or regarding the child's future welfare. It is not to be allowed to become an opportunity for the parties to air their grievances. Nor is it a chance for parents to seek the court's validation of their perception of what went wrong in their relationship. If fact-finding is to be justified in the first place or continued thereafter, the court must be able to identify how any alleged abusive behaviour is, or may be, relevant to the determination of the issues between the parties as to the future arrangements for the children.

66. At the risk of repeating what has been said at [37] in *Re H-N* and at [41] above, the main things that the court should consider in deciding whether to order a fact-finding hearing are: (a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of the child arrangements order, (b) that the purpose of fact-finding is to allow assessment of the risk to the child and the impact of any abuse on the child, (c) whether fact-finding is necessary or whether other evidence suffices, and (d) whether fact-finding is proportionate.

67. It seems that a misunderstanding of the court's role has developed. There is a perception that the Court of Appeal has somehow made it a requirement that in every case, in which allegations of domestic abuse are made, it is incumbent upon the court to undertake fact-finding, involving a detailed analysis of each specific allegation made. That is not the case. As *Re H-N* explained and we reiterate here, the duty on the court is limited to determining **only** those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, in what terms.

68. In *Re H-N* at [50]-[59], the court explained the correct approach where an allegation of coercive or controlling behaviour is made. The message in those paragraphs was plain. Where coercive or controlling behaviour is alleged in this context, it is likely to be the primary matter requiring determination, provided that it is likely to be relevant to a live issue relating to a child's welfare. *Re H-N* at [56] made clear that the focus on coercive or controlling behaviour as the primary issue should make it generally unnecessary to determine other subsidiary date-specific factual allegations.

69. Re H-N at [53] included the following sentence which may inadvertently have been misunderstood. It read:

Where however an issue properly arises as to whether there has been a pattern of coercive and/or controlling abusive behaviour within a family, and the determination of that issue is likely to be relevant to the assessment of the risk of future harm, a judge who fails expressly to consider the issue may be held on appeal to have fallen into error.

70. That sentence is a requirement to consider an overarching issue of coercive or controlling behaviour, where to do so is necessary for the determination of a dispute relating to a child's welfare. It is not a requirement for the court to determine every single subsidiary factual allegation that may also be raised. The court only decides individual factual allegations where it is strictly necessary to do so in addition to determining the wider issue of coercive or controlling behaviour when that itself is necessary.

71. We can deal briefly with the allegations in this case. There was here a specific allegation that the father had controlled the mother during the marriage by making her feel that she could only cope if he was with her. The court was not, however, invited to consider any more general assertion of coercive and controlling behaviour.

72. In relation to the specific allegation, the judge found that the net effect was that the father effectively took control over what was happening within the marriage – whether that was intentional or not. He found that the father persuaded the mother that he, but not she, was able to deal with those things, and that she was unable to cope on her own. There was, the judge found, controlling behaviour which effectively undermined the mother's self-esteem and her ability to function on her own. It is to be noted that all that related to what happened during the marriage, which had ended some years ago and there was no evidence that similar behaviour had been repeated following the end of the marriage.

73. The judge also found, notwithstanding that numerous other WhatsApp conversations must have been available, that the mother's allegation of verbally abusive and bullying behaviour was proved based upon the June 2019 WhatsApp, which related to just one day. Unfortunately, however, the judge's order of 25 August 2020 (the order) is inaccurate in more than one respect. The order records that verbal abuse and bullying was established and that the June 2019 WhatsApp was 'an example' of the bullying. That is inaccurate because the allegation in the mother's Scott Schedule was limited to the June 2019 WhatsApp and that was how the judge dealt with it. No other evidence of bullying was adduced. The judge made no finding that the bullying behaviour in the June 2019 WhatsApp was an example.

74. Specific allegations were made that (a) during a visit on 23 January 2018, the father had pressured A to say that she had heard her grandfather and mother speaking about him, and (b) A had telephoned the mother begging to be collected from contact sounding hysterical and in fear. The judge found these allegations proved. The judge was satisfied that A was distraught as a result,

PRACTICE DIRECTION 12J – CHILD ARRANGEMENTS & CONTACT ORDER: DOMESTIC VIOLENCE AND HARM

Summary

This Practice Direction supplements FPR Part 12, and incorporates and supersedes the President's Guidance in Relation to Split Hearings (May 2010) as it applies to proceedings for child arrangements orders.

1 This Practice Direction applies to any family proceedings in the Family Court under the relevant parts of the Children Act 1989 or the relevant parts of the Adoption and Children Act 2002 ('the 2002 Act') in which an application is made for a child arrangements order, or in which any question arises about where a child should live, or about contact between a child and a parent or other family member, where the court considers that an order should be made.

2 The purpose of this Practice Direction is to set out what the Family Court should do in any case in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic violence or abuse perpetrated by another party or that there is a risk of such violence or abuse.

3 For the purpose of this Practice Direction–

'Domestic violence' includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse.

'Controlling behaviour' means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

'Coercive behaviour' means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim.

General principles

4 The Family Court presumes that the involvement of a parent in a child's life will further the child's welfare, so long as the parent can be involved in a way that does not put the child or other parent at risk of suffering harm.

5 Domestic violence and abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to violence or abuse, or witness one of their parents being violent or abusive to the other parent, or live in a home in which violence or abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with violence or abuse, and may also suffer harm indirectly where the violence or abuse impairs the parenting capacity of either or both of their parents.

6 The court must, at all stages of the proceedings, and specifically at the First Hearing Dispute Resolution Appointment ('FHDRA'), consider whether domestic violence is raised as an issue, either by the parties or by Cafcass or CAFCASS Cymru or otherwise, and if so must–

- identify at the earliest opportunity (usually at the FHDRA) the factual and welfare issues involved;
- consider the nature of any allegation, admission or evidence of domestic violence or abuse, and the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order and, if so, in what terms;
- give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly;
- ensure that where violence or abuse is admitted or proven, that any child arrangements order in place protects the safety and wellbeing of the child and the parent with whom the child is living, and does not expose them to the risk of further harm. In particular, the court must be satisfied that any contact ordered with a parent who has perpetrated violence or abuse is safe and in the best interests of the child; and
- ensure that any interim child arrangements order (i.e. considered by the court before determination of the facts, and in the absence of admission) is only made having followed the guidance in paragraphs 25-27 below.

(a) in order to provide a factual basis for any welfare report or for assessment of the factors set out in paragraphs 36 and 37 (below);

(b) in order to provide a basis for an accurate assessment of risk; or

(c) before it can consider any final welfare-based order(s) in relation to child arrangements; or

(d) before it considers the need for a domestic violence-related Activity (such as a Domestic Violence Perpetrator Programme (DVPP)).

17 In determining whether it is necessary to conduct a fact-finding hearing, the court should consider–

(a) the views of the parties and of Cafcass or CAFCASS Cymru;

(b) whether there are admissions by a party which provide a sufficient factual basis on which to proceed;

(c) if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;

(d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;

(e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact-finding hearing;

(f) the nature of the evidence required to resolve disputed allegations;

(g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and

(h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.

18 Where the court determines that a finding of fact hearing is not necessary, the order shall record the reasons for that decision.

19 Where the court considers that a fact-finding hearing is necessary, it must give directions as to how the proceedings are to be conducted to ensure that the matters in issue are determined as soon as possible, fairly and proportionately, and within the capabilities of the parties. In particular it should consider–

(a) what are the key facts in dispute;

Reports under Section 7

21 In any case where a risk of harm to a child resulting from domestic violence or abuse is raised as an issue, the court should consider directing that a report on the question of contact, or any other matters relating to the welfare of the child, be prepared under section 7 of the Children Act 1989 by an Officer of Cafcass or a Welsh family proceedings officer (or local authority officer if appropriate), unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests.

22 If the court directs that there shall be a fact-finding hearing on the issue of domestic violence or abuse, the court will not usually request a section 7 report until after that hearing. In that event, the court should direct that any judgment is provided to Cafcass/CAFCASS Cymru; if there is no transcribed judgment, an agreed list of findings should be provided.

23 Any request for a section 7 report should set out clearly the matters the court considers need to be addressed.

Representation of the child

24 Subject to the seriousness of the allegations made and the difficulty of the case, the court shall consider whether it is appropriate for the child who is the subject of the application to be made a party to the proceedings and be separately represented. If the court considers that the child should be so represented, it shall review the allocation decision so that it is satisfied that the case proceeds before the correct level of judge in the Family Court.

Interim orders before determination of relevant facts

25 Where the court gives directions for a fact-finding hearing, the court should consider whether an interim child arrangements order is in the interests of the child; and in particular whether the safety of the child and (bearing in mind the impact which domestic violence against a parent can have on the emotional well-being of the child) the parent who has made the allegation and is at any time caring for the child can be secured before, during and after any contact.

26 In deciding any interim child arrangements question pending a full hearing the court should–

32 Following any determination of the nature and extent of domestic violence or abuse, whether or not following a fact-finding hearing, the court should consider whether any party should seek advice, treatment or other intervention as a precondition to any child arrangements order being made or as a means of assisting the court in ascertaining the likely risk of harm to the child and to the parent with whom the child is living from that person, and may (with the consent of that party) give directions for such attendance and the filing of any consequent report.

33 Further or as an alternative to the advice, treatment or other intervention referred to in paragraph 33 above, the court may make an Activity Direction under section 11A and 11B Children Act 1989. Any intervention directed pursuant to this provision should be one commissioned and approved by Cafcass. It is acknowledged that acceptance on a DVPP is subject to a suitability assessment by the service provider, and that completion of a DVPP will take time in order to achieve the aim of risk-reduction for the long-term benefit of the child and the parent with whom the child is living.

Factors to be taken into account when determining whether to make child arrangements orders in all cases where domestic violence or abuse has occurred

35 When deciding the issue of child arrangements the court should ensure that any order for contact will be safe and in the best interests of the child.

36 In the light of any findings of fact the court should apply the individual matters in the welfare checklist with reference to those findings; in particular, where relevant findings of domestic violence or abuse have been made, the court should in every case consider any harm which the child and the parent with whom the child is living has suffered as a consequence of that violence or abuse, and any harm which the child and the parent with whom the child is living, is at risk of suffering if a child arrangements order is made. The court should only make an order for contact if it can be satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before during and after contact, and that the parent with whom the child is living will not be subjected to further controlling or coercive behaviour by the other parent.

37 In every case where a finding of domestic violence or abuse is made, the court should consider the conduct of both parents towards each other and towards the child; in particular, the court should consider–

(a) the effect of the domestic violence or abuse on the child and on the arrangements for where the child is living;

(b) the effect of the domestic violence or abuse on the child and its effect on the child's relationship with the parents;

(c) whether the applicant parent is motivated by a desire to promote the best interests of the child or is using the process to continue a process of violence, abuse, intimidation or harassment or controlling or coercive behaviour against the other parent;

(d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and

(e) the capacity of the parents to appreciate the effect of past violence or abuse and the potential for future violence or abuse.

Directions as to how contact is to proceed

38 Where the court has made findings of domestic violence or abuse but, having applied the welfare checklist, nonetheless considers that direct contact is safe and beneficial for the child, the court should consider what, if any, directions

or conditions are required to enable the order to be carried into effect and in particular should consider–

(a) whether or not contact should be supervised, and if so, where and by whom;

(b) whether to impose any conditions to be complied with by the party in whose favour the order for contact has been made and if so, the nature of those conditions, for example by way of seeking intervention (subject to any necessary consent);

(c) whether such contact should be for a specified period or should contain provisions which are to have effect for a specified period; and

(d) whether it will be necessary, in the child's best interests, to review the operation of the order; if so the court should set a date for the review consistent with the timetable for the child, and shall give directions to ensure

Neutral Citation Number: [2019] EWHC 3177 (Fam) Case No: NE18P01829

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Newcastle Combined Court Centre The Quayside Newcastle-Upon-Tyne

Date: 21/11/2019

Before:

THE HONOURABLE MR JUSTICE COBB

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Between:

	F	**Appellant**
	- and -	
	M	**Respondent**

\- -

F v M (Appeal: Finding of Fact)

\- -

The Appellant (F) in person
Miss Claire Brissenden (instructed by **Paul Dodds Law**) for M, the Respondent

Hearing dates: 21 November 2019 -

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public.

"By virtue of the *Sexual Offences Act 2013* (sic.) by which [the Judge] based her judgment on (sic.), ejaculation could never translate to a rape."

16. Ms Brissenden contends that the finding is unassailable. She contends that the Judge has considered all relevant matters and that she was entitled on the evidence to reach the finding that F had "raped" M. Ms Brissenden argues that the Judge's clear finding that M had told F to "stop" part-way through sexual intercourse materially converted the consensual activity into non-consensual activity; she relied on the fact that rape is defined as the intentional penetration of the vagina without consent (and where the person does not reasonably believe that the other consents) and that, importantly, "penetration is a continuing act from entry to withdrawal" (*section 79(2) Sexual Offences Act 2003*). She submits that the evidence concerning F's ejaculation was not in fact relevant to the finding of rape, and that in granting permission to appeal, Cohen J must have misread or misinterpreted the Judge's judgment in this regard; she points out that Cohen J had apparently read the judgment as indicating that at the point of ejaculation the sexual activity was otherwise 'consensual' whereas the Judge's conclusion was that at that time, the sexual activity had "ceased to be consensual" (see [2] above).

Discussion

18. Without, I believe, diminishing the scope or force of the F's arguments, I distil F's grounds of appeal into two essential complaints:

i) That the Judge was wrong to find as a fact on the evidence that the sexual intercourse was other than consensual; her finding was contrary to the weight of the evidence and fails to reflect the inconsistencies in M's accounts;

ii) That the Judge was wrong to describe the act as 'rape' because F had only accidentally, not intentionally, ejaculated inside M's vagina.

I address these points discretely below.

Appeal against the finding of fact

19. Appeals against findings of fact are notoriously difficult. As an appellate court I would only be able to say that the Judge who has conducted a fact-finding exercise had erred materially if the answer was "demonstrably contrary to the weight of the evidence" or the "decision-making process can be identified as being plainly defective so that it can be said that the findings in question are unsafe" (see Mostyn J at *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211).

20. Moreover, the fact-finding Judge here has had a considerable advantage over me in seeing and hearing these parties give their evidence: see *Piglowska v Piglowski* [1999] UKHL 27, [1999] 3 All ER 632, [1999] 1 WLR 1630, and *Biogen Inc v Medeva plc* [1997] RPC 1, discussed further in *Re A (Children)* [2015] EWCA Civ 1254 (see in particular Lewison LJ at [37-40]). It is apparent from the judgment that the Judge plainly formed mixed views of the reliability and truthfulness of *both* parties, which she properly set out in her judgment and apparently weighed in reaching her final conclusion.

21. In this regard, it is notable that the Judge broadly accepted, as F contends in this appeal, that in some respects M had been an unsatisfactory witness; the Judge explicitly records "I am unable to agree that she has been entirely honest and frank with the court or indeed with the police". The Judge rejected M's evidence about when she first knew what rape was (i.e. more

Neutral Citation Number: [2015] EWCA Civ 1254

Case No: B4/2014/3195

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LEEDS
HIS HONOUR JUDGE HEATON QC
LS12C05106

Royal Courts of Justice Strand, London, WC2A 2LL

Date: Tuesday 8th December 2015

Before :

LADY JUSTICE BLACK
LORD JUSTICE LEWISON and
LORD JUSTICE KITCHIN

Re: A (CHILDREN)

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Shorthand Writers to the Court)

Mr A Ollennu (instructed by **Blackwhite Solicitors**) for the **Appellants**
Mr Alex Taylor (instructed by **Leeds Legal & Democratic Services**) for the **1st Respondent**
Miss Sara Anning (instructed by **Zermansky & Partners)** for the **Children's Guardian**

Hearing date: 29th September 2015

Judgment
As Approved by the Court

Lewison LJ :

30. I agree, and add some short observations of my own. In deciding whether to make a placement order, the paramount consideration is the welfare of the child throughout his life: Adoption and Children Act 2002 s 1(2). The decision requires the court to form a view about the future which nobody, of course, can predict. Inevitably, therefore, there is no obviously or objectively right answer to the statutory question. As Lord Nicholls explained in *In re B (A Minor) (Adoption: Natural Parent)* [2001] UKHL 70, [2002] 1 WLR 258 at [16]:

> "In all save the most straightforward cases, there are competing factors, some pointing one way and some another. There is no means of demonstrating that one answer is clearly right and another clearly wrong. There are too many uncertainties involved in what, after all, is an attempt to peer into the future and assess the advantages and disadvantages which this or that course will or may have for the child."

31. An appeal court (such as this one) can only interfere with the decision of a lower court if it is wrong. It is not enough to show that different choices could have been made. Nor is it enough that the members of the appeal court would themselves have struck the balance differently. In a case such as this one the advantage that the trial judge has over the appeal court is enormous, as Lord Wilson explained in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 at [42]:

> "The function of the family judge in a child case transcends the need to decide issues of fact; and so his (or her) advantage over the appellate court transcends the conventional advantage of the fact-finder who has seen and heard the witnesses of fact. In a child case the judge develops a face-to-face, bench-towitness-box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask himself not just "is this true?" or "is this sincere?" but "what does this evidence tell me about any future parenting of the child by this witness?" and, in a public law case, when always hoping to be able to answer his question negatively, to ask "are the local authority's concerns about the future parenting of the child by this witness justified?" The function demands a high degree of wisdom on the part of the family judge; focussed training; and the allowance to him by the justice system of time to reflect and to choose the optimum expression of the reasons for his decision. But the corollary is the difficulty of mounting a successful appeal against a judge's decision about the future arrangements for a child."

32. It seems to me that these considerations are all the more powerful in a borderline case. It is in precisely such a case that the legislature has entrusted the decision making to the first instance judge and this court should be very slow to interfere.

33. Mr Ollennu quite rightly did not suggest that Judge Heaton had overlooked anything of significance about the case. He was well aware of the disparity between the cultural background of the children and their potential adopters; and he was well aware of the loss that their elder brother would feel. Thus Mr Ollennu was driven to submit that the judge had given insufficient

Children Act 1989

1989 CHAPTER 41

PART I INTRODUCTORY

1 Welfare of the child.

(1) When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

[F1(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

(2B) In subsection (2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.]

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that—

(a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or

(b) the court is considering whether to make, vary or discharge **[**[F2]a special guardianship order or**]** an order under Part IV.

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

[[F3](6) In subsection (2A) "parent" means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned—

(a) is within this paragraph if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm; and

(b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.

(7) The circumstances referred to are that the court is considering whether to make an order under section 4(1)(c) or (2A) or 4ZA(1)(c) or (5) (parental responsibility of parent other than mother).**]**

Neutral Citation Number: [2017] EWHC 1212 (Fam)

Case No: WD16P00931

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 19/05/2017

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- - - - - - - - - - - - - - - - - - - -

Between:

L	**Applicant**
- and –	
L	**First Respondent**
-and-	
N (Through her Children's Guardian)	**Second Respondent**

- -

- -

The Applicant appeared in person
Ms Hannah Markham QC (instructed by **Messrs Raydens**) for the **First Respondent**
Ms Jane Rayson (instructed by **CAFCASS**) for the **Second Respondent**

Hearing dates: 17 and 19 May 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

(a) parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.

(2) The circumstances referred to are that the court is considering whether to make an order under section 4(1)(c) or (2A) or 4ZA(1)(c) or (5) (parental responsibility of parent other than mother)."

2. This case requires in particular, careful consideration of the stipulation in s 1(5) of the 1989 Act that the court must ask itself whether to make an order is better for the child than making no order at all and the stipulation in s 1(3)(a) of the 1989 Act that the court must have regard to the wishes and feelings of the child having regard to their age and understanding.

3. With respect to the first stipulation, s 1(5) of the Children Act 1989 does not create a presumption one way or the other, but simply requires the court to ask itself the question, "will it be better for the child to make the order than making no order at all" (*Re G (Children)* [2006] 1 FLR 771). Within this context, an order may be justified in order that a child can feel a greater sense of security about the arrangements that exist (*B v B (A Minor)(Residence Order)* [1992] 2 FLR 327).

4. With respect to the second stipulation, the wishes and feelings of a mature child do not carry any presumption of precedence over any of other the other factors in the welfare checklist (*Re P-J* [2014] 2 FLR 27). The child's preference is only one factor in the case and the court is not bound to follow it. The weight to be attached to the child's wishes and feelings will depend on the particular circumstances of each case. In particular, having regard to the words of section 1(3)(a), it is important in every case that the question of the weight to be given to the child's wishes and feelings is evaluated by reference to the child's 'age and understanding'.

5. Within this context, on the face of it the older the child the more influential will be his or her views in the decision-making process. However, in the end the decision is that of the court and not of the child (*Re P (Minors)(Wardship: Care and Control)* [1992] 2 FCR 681). Where adherence to the wishes of an older child may seriously compromise their long-term welfare, the court may override those views (*Re A (Intractable Contact Dispute: Human Rights Violations)* [2014] 1 FLR 1185). Once again, it is important to recall in this context that N's best interests are the court's paramount consideration.

6. Finally, and of importance in this case, pursuant to s 11(7) of the Children Act 1989 a child arrangements order may contain directions about how it is to be carried into effect and may impose conditions which must be complied with by any person in whose favour the order is made, who is a parent of the child concerned, who is not a

parent but who has parental responsibility for the child or with whom the child is living, to whom the conditions are expressed to apply. The court is also able to make such incidental, supplemental or consequential provision as the court sees fit. It is important to note however that the court has no power to impose obligations on persons who are not listed in s 11(7) of the Act, for example CAFCASS or a local authority (*Leeds County Council v C* [1993] 1 FLR 269). Nor may the court use directions or conditions under s 11(7) to achieve a result which may not be achieved under the substantive s 8 order (*Re D (Residence: Imposition of Conditions)* [1996] 2 FLR 281).

7. Within this context, it is important to recall that one objective of the Children Act 1989 is to create a statutory framework which provides flexible, tailor-made orders for individual cases.