*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.

1. 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.
2. 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.

1. 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.

1. 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.
2. 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.

1. 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.
2. 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.
3. 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.
4. 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.

1. 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

1. 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.
2. 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.
3. 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.
4. 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.

1. 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**

1. 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