Neutral Citation Number: [2023] EWFC 232 (B)
Judge: Recorder O'Hagan

Re A and B (fact finding hearing – sexual abuse: no QLR available)
Fact Find Hearing taking place on 23rd – 27th October 2023 at Stoke-on-Trent Combined Court

1) I am dealing with proceedings in respect of two children. The children are:

   (i) Child A, aged 7; and
   (ii) Child B, aged 4.

2) In the course of proceedings, the mother, made allegations of domestic abuse against the father. The allegations were sufficiently serious, and sufficient relevant to the decisions that have to be made about the welfare of the children, that the need for a fact-finding hearing was recognised by the Court. So it is that the case has come before me for a factual determination of the alleged abuse.

Background

3) The mother and the father entered into a relationship in 2015. They separated for the first time in April 2021, but they resumed their relationship in December 2021. It ended for the second time in January 2022. There has been no subsequent resumption of the relationship. The children were born during the course of the relationship.

4) These proceedings began on 16th August 2022 when the father applied for a child arrangements order to spend time with the children. There was a hearing, known as a FHDRA, before Deputy District Judge Connolly on 14th March 2023 when the matter was listed for further consideration of the need for a fact-finding hearing. Various case management directions were made, and also an order for disclosure by the police.

5) The case was considered by Her Honour Judge Davies on 22nd May 2023. At that hearing, the children were joined as parties to the proceedings, and Cafcass was ordered to allocate a Guardian. The matter was listed for a further case management hearing, and also for a fact-finding hearing which was scheduled to begin on 21st August 2023. The case management hearing took place on 7th July 2023 before Recorder Trussler. Of particular importance was that the learned Judge identified the need for the father to notify the Court if he was to be unrepresented, and directed that consideration would need to be given to the appointment of a Qualified Legal Representative if he was unrepresented.

6) The fact-finding hearing scheduled to commence on 21st August 2023 was ineffective. The late receipt of material disclosed by the police created a situation in which Her Honour Judge Davies could not fairly hear the case. The learned Judge was compelled to adjourn it with various case

management directions being made, including provision for the appointment of a Qualified Legal Representative for the father.

7) There were two further hearings in mid-October 2023, the first before Her Honour Judge Davies and the second before Recorder Messling. At those hearings, it became apparent that no Qualified Legal Representative would be available to asked questions on the father's behalf. He applied for his McKenzie Friend, Mr Ison, to be granted rights of audience. Quite understandably Judge Davies and Recorder Messling both took the view that the issue of rights of audience was one that should be decided by me as a preliminary issue at the fact-finding hearing.

The fact-finding hearing

8) When the matter came before me for the fact-finding hearing from 23rd to 27th October 2023, the mother was represented by Mr Hughes of counsel. The children were represented by Ms Bell-Paris of counsel. The father was unrepresented, but was accompanied by his McKenzie Friend, Mr John Ison, for whom he sought rights of audience. For the reasons I will give below, I decided that it was appropriate to grant that application, and so Mr Ison represented him throughout the hearing.

9) I make no comment about the appropriateness of granting rights of audience to McKenzie Friends more generally, but it is right that I should record that Mr Ison acquitted himself commendably throughout the hearing. His cross-examination of the mother was robust, but entirely professional, and the questions he put were appropriate and focused on the issues in the case. His manner in the course of his cross-examination was calm and courteous throughout. Similarly, his submissions were calm and considered, and they focused on the legal and evidential issues before the Court. I am indebted to him for his assistance which I am satisfied enabled the father to have a fair hearing. I struggle to see how his case could have been better or more effectively put. I am similarly grateful to Mr Hughes and to Ms Bell-Paris, both of whom put their cases ably and were models of professionalism.

10) During the hearing, I ensured that all parties were treated with dignity and respect. I was mindful that these were vulnerable parties. I accommodated the mother's wish to use screens when she was in Court. In doing so, I was not indicating any view as to the allegations, but seeking to ensure that all parties could participate in the hearing. I was conscious of the guidance set out in the Equal Treatment Benchbook throughout.

11) I have heard evidence from the parties, and also from the father's brother. I have heard submissions from Mr Hughes, Mr Ison and Ms Bell-Paris.

The McKenzie Friend

12) As set out above, I had to consider whether to grant Mr Ison rights of audience as a preliminary matter. The father invited me to do so. Mr Hughes opposed the application. Ms Bell-Paris took a neutral stance, but very fairly

recognised that granting rights of audience might be appropriate in this case. In considering the issue, I had the advantage of written arguments from Mr Ison and Ms Bell-Paris, and oral submissions from them both, and also from Mr Hughes.

13) One element of Mr Ison's written arguments did cause me some concern. This was that he seemed to be contending that the Courts generally ought to be taking a more liberal approach to the issue of granting rights of audience to McKenzie Friends. I indicated at the outset that it did not seem to me appropriate that I should comment on the issue of whether such rights should be granted more often, or on a more liberal basis, than has been the case. The general approach to be taken is a matter for others. I have confined myself to the issue of whether such rights should be granted in this particular case, and I have not strayed beyond that. All advocates respected that view. I wish to make it clear that the decision I made was intensely tied to the particular circumstances of this case. There is nothing of more general application in my decision.

14) In considering the issue of granting leave, I reminded myself of the principles. These are so well set out at paragraphs 10 – 22 of the position statement provided by Ms Bell-Paris on behalf of the children that I can do no better than to set out those paragraphs below, and I adopt their contents. They were as follows:

> 10. Sections 27 & 28 of the Courts and Legal Services Act 1990 govern exhaustively rights of audience and the right to conduct litigation. They provide the court with a discretionary power to grant lay individuals such rights.
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> 11. A court may grant an unqualified person a right of audience in exceptional circumstances only and only after careful consideration. The court must have regard for the fact this is a contested hearing, which involves serious allegations made of a sensitive nature which will need to be explored in cross-examination with the mother. **D v S (Rights of Audience) [1997] 1 F.L.R. 724 (CA)**.
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> 12. McFarlane LJ (as he then was) in **Re: J (children) (contact orders; procedure) [2018] EWCA Civ 1152** considered the question of a McKenzie friend being given rights of audience to cross-examine:
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> > "73. In between the option of direct questioning from the alleged abuser and the alternative of questioning by the judge sits the possibility of affording rights of audience to an alleged abuser's McKenzie Friend so that he or she may conduct the necessary cross examination. The possibility of a McKenzie Friend acting as an advocate is not referred to in PD12J and, as has already been noted, the guidance on McKenzie Friends advises that, generally, courts should be slow to afford rights of audience. For my part, in terms of the spectrum of tasks that may be

> undertaken by an advocate, cross examination of a witness in the circumstances upon which this judgment is focussed must be at the top end in terms of sensitivity and importance; it is a forensic process which requires both skill and experience of a high order. Whilst it will be a matter for individual judges in particular cases to determine an application by a McKenzie Friend for rights of audience in order to cross examine in these circumstances, I anticipate that it will be extremely rare for such an application to be granted."

13. The court must have regard to the applicant's qualifications and experience in general and more specifically to the jurisdiction in which they are requesting a right of audience. Mr Ison's CV has been submitted to the court by the father.

14. The Children's Guardian takes a neutral position in respect of this application. However, the Guardian acknowledges that (in absence of a QLR) if (and only if) the court is satisfied that that Mr Ison is a person capable of managing the sensitive issues in this case appropriately, there may be a significant advantage to him being granted rights of audience, to be able to cross-examine the mother on the father's behalf, in furtherance of a fair trial. On behalf of the children, it is of the upmost importance that the evidence is fully explored and tested on both sides.

15. If no QLR is appointed, and Mr Ison is not granted rights of audience, the court will need to consider the most appropriate way for the father's questions to be put to the mother.

16. The President of the Family Division envisages this precise situation in his View from the President's Chambers July 2023:

> 17. Changes to the operation of the QLR scheme are a matter for the MoJ, but the current unwelcome situation requires courts to determine how to proceed where the circumstances are such that, by s 31W(6), 'the court must appoint a qualified legal representative (chosen by the court)', yet none can be found. Where that situation is reached it will be a matter for the individual judge or magistrates to decide how to proceed in each case, but I would suggest that if no QLR is found within 28 days, the court should list the case for directions and direct that some summary information is provided by HMCTS about the difficulties that have been encountered. Although there is no provision in MFPA 1984, Part 4B for the termination of a QLR appointment, PD3AB, para 8.1(b) permits termination 'when the court so orders'. No guidance is given in PD3AB as to the test to be applied. When a QLR is appointed by the court the focus is on whether it is 'in the interests of justice' to do so. A similar focus may therefore be appropriate when considering discharge. In addition, courts should apply the over-riding objective in FPR

2010, r 1.1 of ‘dealing with a case justly, having regard to the welfare issues involved’. The need to do so ‘expeditiously and fairly’ and to ensure ‘parties are on an equal footing’ will be of particular importance.

18. Consideration of terminating the appointment of a QLR provides a further opportunity to canvas with the parties any other options, for example directly instructing an advocate. If a QLR is discharged, short reasons for doing so should be recorded in the court order.

19. Although courts will be mindful that PD3AB, para 5.3 provides that ‘a satisfactory alternative means to cross-examination in person does not include the court itself conducting the cross-examination on behalf of a party, that guidance does not trump the over-riding objective and, where there is no alternative, courts may have to revert to asking the questions where that is the only way to deal with the case justly, expeditiously and fairly in the absence of a QLR.

20. The appropriate resolution therefore is for the judge to ask the mother the father’s questions. This is specifically prescribed in PD12J para 28 [which says]: “While ensuring that the allegations are properly put and responded to, the fact-finding hearing or other hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved. At the fact-finding hearing or other hearing: each party can be asked to identify what questions they wish to ask of the other party, and to set out or confirm in sworn evidence their version of the disputed key facts; and the judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focussing on the key issues in the case.”

21. It was suggested by the court at the pre-trial review that one option would be for the Guardian’s counsel to put these questions to the father, in accordance with PS v BP [2018] EWHC 1987 - it must however be noted that this authority pre-dates the implementation of the Domestic Abuse Act 2021.

22. The Children’s Guardian is strongly opposed to the suggestion. Sir James Munby, P (as he then was) reviewed this proposition in Q v Q; Re B; Re C [2015] 3 All ER 759, agreeing with the view of HHJ Wildblood in Re B in the first instance, who concluded: “The guardian's statutory role is to promote the welfare of the child. It is no part of the roles of the guardian or of the children's solicitor to adopt the case of one party in cross examination or argument. After the fact finding case is resolved it is essential that both parties retain confidence in the guardian and in the institution of CAFCASS. I therefore cannot see that

the guardian or the child's solicitor could be expected to conduct cross examination on behalf of this father."

15) The factors which led me to conclude that Mr Ison should be granted rights of audience in the circumstances of this case were as follows:

(i) Mr Ison has a law degree, and he has passed the professional exams required of aspirant solicitors. Whilst he is neither a barrister nor solicitor, he does possess a level of knowledge and understanding that goes beyond that of the untaught or self-taught. In addition, his CV records that he has wide experience of family proceedings, albeit not directly in dealing with the issues raised by this case. Moreover, having explored the matter with him, I was satisfied that he understood his responsibilities to the father, and to the Court.

(ii) A Qualified Legal Representative was not available to ask questions on behalf of the father. He could not ask the questions himself, and indeed he fell within the scope of the statutory provisions which forbid someone in his position from so doing. That left the unattractive option of the questions being asked by Counsel for the children or by me. I appreciated the concerns raised by Counsel for the children about her undertaking the role, and I shared her view that this was to be avoided if at all possible. Although permissible for me to ask the questions, that too was an unattractive option since it would inevitably place me in an invidious position with a real risk that, by the time I had finished, either or both parents would be anxious that I had favoured one or other of them. I would not, of course, have undertaken the task in anything other than an even handed way, but I could readily see the risk that there might be a perception of bias. Sometimes, of course, the circumstances are such that the Court cannot avoid being placed in such a position, but it is never desirable, and it is best avoided where possible. There was also the possibility of adjourning the case to see whether a Qualified Legal Representative could be found. That was not a satisfactory option because of the delay it would have caused to the detriment of all, most importantly the children, and because of the uncertainty that it would achieve the desired result since an appropriate person might still not be available.

(iii) I was mindful that the mother's allegations fell towards the top end of the spectrum of seriousness, and of the implications for the father if they were found to be substantially made out. It seemed to me that fairness required that he should be given the opportunity to challenge those allegations through cross-examination, and, if possible, for that to be done by an advocate in whom he had confidence. I was conscious that, whatever findings I made, one party or the other or both, would be unhappy with them. That cannot be avoided, but I did want to ensure that the parties were confident in the process through which the findings were made. Mr Ison was the father's chosen person, and his confidence in him was a factor that carried weight.

16) Pulling these threads together, it seemed to me that this was one of those rare cases in which the unusual step of granting rights of audience to a McKenzie Friend was justified. As set out above, Mr Ison fully repaid the confidence I showed in him, and his conduct throughout the hearing was of the highest standard.

Fact-finding – the burden and standard of proof

17) In considering the issues before me, I have reminded myself of the basic principles. The burden of proof in respect of each of the allegations lies with the person making it. The standard of proof is the balance of probabilities. I follow the guidance in **Re B (Children) [2008] UKHL 35** in saying that (i) neither the seriousness of the allegations nor the consequences arising from the findings made alters the standard of proof, and (ii) if I am satisfied that an alleged fact is more likely than not to have occurred, then it is made out and shall be treated as a fact, but if an alleged fact is not more likely than not to have occurred, then it is not a fact, and it shall not be treated as such.

18) I have further reminded myself that decisions must be based firmly on the evidence, and that speculation and suspicion have no place. I have also reminded myself of the principles set out in **R v Lucas**. The fact that someone has lied about some things does not mean that person has lied about everything. People tell lies for many and varied reasons, including fear, shame and embarrassment. I have been careful to consider each piece of evidence in the context of the evidence as a whole seen in the round. I have been mindful of the guidance in **Re A, B and C (Children) [2021] EWCA Civ 451**, and I gratefully adopt the formulation of McCur LJ at paragraphs 57 and 58 about the correct approach to issues of alleged dishonesty. In brief, where I find that a party has lied, I must consider the significance of the lie, and the reasons for it.

19) In assessing the credibility of witnesses, I have reminded myself of the need to be cautious about drawing conclusions from demeanour. People respond differently in the stressful setting of a Court hearing. The witness who laughs inappropriately may be disrespectful and contemptuous, but may equally be highly nervous, and doing so out of fright. The witness who appears over-confident and emphatic may be lying, but may be telling the truth whilst being anxious that the truth will not be believed. For the most part, I have not needed to consider demeanour much in this case. To the extent that I have, I have been careful to consider it in the context of the wider tapestry of evidence.

Fact-finding – The correct approach

20) The understanding of domestic abuse has developed in recent years. In broad terms, there has been a shift from seeing the issue as one in which the emphasis is on determining whether individual incidents of alleged abuse did or did not occur. Instead, the Courts now focus on whether there has been a

pattern of abusive behaviour. This is reflected in the decision in **Re H-N and others [2021] EWCA Civ 448**, and also in PD12J.

21) PD12J includes the following definitions, each of which refer to a pattern of acts or incidents:

> "…domestic abuse' 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. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment…"
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> "…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…"
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> "…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."

22) As part of this shift in understanding, there has been an increased awareness that Scott Schedules can be of limited utility, and even actively harmful to a proper understanding of the case. The essential difficulty is that they require the parties to present their case in terms of a number of alleged incidents which the Court is invited to find either did or did not occur. The problem is that, in focusing on the specifics of the alleged incidents, the Court may risk losing sight of the broader patterns of behaviour that underpin them. What is lost is the understanding that abusive, coercive and controlling behaviour is likely to have a cumulative impact upon its victims which would not be identified simply by separate and isolated consideration of individual incidents. Moreover, there is the risk that the Court may proceed as if the individual incidents under consideration represent the sum of what was concerning in the relationship.

23) Unfortunately, this case was case managed in its early stages without an appreciation of the difficulties Scott Schedules can present. This issue was discussed during the hearing, and I made it clear that I would not be confining myself to the specific allegations, and that I would be looking more broadly at patterns of behaviour.

24) One feature of the case was that the allegations included allegations of incidents when the father forced the mother to engage in sexual activity. The word "rape" was used in connection with this. As I pointed out to the parties,

words and concepts from the criminal jurisdiction should be avoided in cases of this kind.

25) I reminded myself of the guidance of Hickingbottom LJ in **Re R (Children) (Care Proceedings: Fact-finding Hearing) [2018] EWCA Civ 198**. He observed that "what matters in a fact-finding hearing are the findings of fact". [paragraph 67]. The Family court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not, come within the strict definition of 'rape', 'murder', 'manslaughter' or other serious crimes. Behaviour which falls short of establishing 'rape', for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to 'not guilty' in the family context. For example, in the context of the Family Court considering whether there has been a pattern of abusive behaviour, the border line as between 'consent' and 'submission' may be less significant than it would be in the criminal trial of an allegation of rape or sexual assault.

The evidence

26) In reaching my decision, I have had regard to all the written evidence, to the recordings that were provided, and to what I heard over the course of the hearing. It is neither necessary nor helpful for me to refer to every piece of evidence in this judgment, but I have considered it all, and I have had regard to all the evidence in reaching my decisions.

27) There were times in the course of the evidence that I was referred to evidence that was not before the Court. I was somewhat surprised that the parties did so since they had both been given every opportunity to provide the evidence on which they wished to rely. With my permission, the mother adduced some additional evidence in the course of the hearing: screen shots of a short exchange of text messages, and a hospital discharge letter. To ensure fairness, I gave Mr Ison the opportunity to consider those, to discuss their contents with the father, and to cross-examine the mother about them.

28) In considering the oral evidence, I was conscious that both parties had raised concerns about their mental health and psychological functioning. In the father's case, it was said that he ADHD. On exploration, it emerged that he has not been diagnosed. He believes that he displays signs and symptoms consistent with his having ADHD. He has asked for a formal diagnosis, and the matter is being investigated. The outcome of those investigations is not yet known. As a matter of fairness, I have decided to evaluate his evidence on the basis that potentially he may have ADHD. I should say that nothing in his evidence suggested to me, as a lay person in medical terms, disordered or irrational thinking.

29) With the mother, the position was more complex. She has experienced significant mental health problems over the years subsequent to a history of childhood abuse, and also alleged abuse from her former partner. She spoke of a diagnosis of emotionally unstable personality disorder. That was not a

diagnosis supported by the letter from her GP dated 29th March 2023 (pages D6 – D8). He refers to a diagnosis of complex post-traumatic stress disorder (PTSD). From the hospital discharge letter provided by the mother in the course of the hearing, I noted that the diagnosis of emotionally unstable personality disorder had been considered. Although the medical professionals ultimately preferred the diagnosis of complex PTSD, it was clear that the diagnosis of emotionally unstable personality disorder had been considered. Whilst I was mindful of the diagnoses, the same observation that I have made about the father applies to the mother: nothing in her evidence suggested to me, as a lay person in medical terms, disordered or irrational thinking.

30) As set out above, I was conscious of these vulnerabilities when the parties gave evidence. I afforded them the opportunity to have breaks when needed, and made it clear to them both that I would accommodate them in every way that I could to ensure that the process of giving evidence was made as comfortable as possible.

The witnesses

31) I will set out below my general assessment of the witnesses from whom I heard, and the views that I formed about the reliability of their evidence. For convenience, I will deal with the witnesses in turn in the order that I heard from them. I have not, of course, considered each of the witnesses in isolation from each of the other witnesses. Rather, in evaluating each, I have considered their evidence in the context of the evidence as a whole, including the written and oral evidence of the other witnesses.

Mother

32) In general terms, I found the mother to be a reliable witness whose evidence on the core matters I believed. She gave a clear, credible and consistent account of her experiences during her relationship with the father. There was consistency both with accounts she had given to others over a sustained period of time, and an emotional consistency between her account of what had happened, and how she felt about it. Many of the details she gave were consistent with things that the father admitted had happened, albeit that she placed matters higher on the spectrum of seriousness whilst he placed them lower.

33) Mr Ison quite properly cross-examined the mother on some inconsistencies between the accounts that she gave to the police, social workers and her doctor of events that form the basis of her allegations, and her account within these proceedings. I will address specific matters when dealing with the allegations. In general terms, though, I should say that none of the discrepancies pointed to went to the core of her account, and nor did they lead me to conclude that she had lied about the matters in question. It is a reality that people do not remember things perfectly or sequentially, that recall can be confused and imprecise, and that is particularly so when the matters being recalled are, as here, difficult and traumatic experiences.

34) Mr Ison, again quite properly, also put the father's case that the mother's allegations were motivated by a selfish desire to exclude the father from the children's lives, possibly motivated by anger at his entering a new relationship. I have to say that the evidence did not support that view. Far from seeking to magnify his behaviour and its impact, the records made by professionals show the mother sought to minimise and normalise it. There were elements of that in her evidence to me. I struggled to reconcile this with the view of her advanced by the father.

Maternal uncle

35) The father's brother and maternal uncle to the children gave a short statement which addressed allegation 3. In many respects, it does not particularly matter what I make of his reliability as a witness in respect of that allegation. On his own account, he was not present for the entire time on the day of the alleged incident. The most he could say was that he did not personally see anything. Even if I were to accept that this was so, it would be of little probative value because it does not address the possibility that what was alleged to have happened did so when he was not there to see it. I note that there were in any event, some concerns about the reliability of his evidence since he sought to amend his written evidence in his evidence to me about the date when the events described in his statement happened. He said that he did so after conferring with his brother. He denied that they had conferred on any matters beyond the date. Maybe so, but I would have to be cautious in evaluating the evidence of a witness who accepted that he had conferred about that evidence with one of the parties. As I say, such caution is unnecessary because it does not particularly matter what view I take of his reliability in any event.

Father

36) I found the father an interesting witness. In his evidence, he made serious admissions without, I think, fully appreciating the significance of what he admitted. Even if I were to discard every element of the mother's account which goes beyond those matters he admitted, I would be entitled to make serious findings. For the avoidance of doubt, I do not discard what the mother had to say beyond his admissions.

37) That said, the father was not a particularly honest witness. He was forced to accept, when challenged, that he had lied to the police about matters that went to the core of the case when he denied the sending of a sexualised photograph of the mother to a work colleague without her consent, and the use of the phrase that he would rest it [his penis] in her [mother's vagina]. Unlike the inconsistencies in the mother's evidence, which did not go to the core of the issues and which could be explained in terms of imperfect recall and confusion, I found it difficult to find any explanation for this other than the obvious one: he lied to try to avoid responsibility for what he had done.

38) A further feature of the father's evidence was that he minimised and normalised behaviour which was, on any sensible analysis highly abusive. This was particularly so in respect of the sexual matters discussed below.

The allegations

39) In addressing the various allegations, I have been mindful of the need to consider the tapestry of the case as a whole. Nonetheless, for ease of reading and writing, I will break them down, and deal first with the mother's specific allegations, and then with the other matters that emerged over the course of the hearing. In some cases, dealing with the allegations made leads naturally to a consideration of wider issues, and I shall deal with those there.

Allegation 1

40) The allegation is that the mother would wake up with the father having his fingers in her vagina and his penis inside her. She would have to tell him to leave her alone, and to get off her. He would ignore her pleas and carry on without her consent.

41) The evidence from the father about this allegation was striking. He accepted that he would wake up at night, often around 3 am, wanting to have sex. He further accepted that he would then wake up the mother, and seek to engage her in sexual activity, to fulfil his need. Pausing there, if that was all there was to it, I would be bound to conclude that this was intensely selfish behaviour. It was, on any analysis a matter of him disrupting the mother's sleep whenever he chose to do so to meet his needs, and with no regard to hers.

42) I was struck by the father's response when Mr Hughes put it to him that the mother would be tired given that she was meeting the demands of caring for the children, running the home, and working part-time. He partly acknowledged that this was so whilst at the same time seeking to minimise it. He commented that she worked only part-time, and that he sometimes helped with domestic chores. The thought did not, it seems, occur to him that, even if he could manage the demands on his time and energy, and then still be awake in the middle of the night wanting sex, it did not follow that the same was true of her. The view I formed was that, to him, all that mattered was need and desire, and that the mother was wholly irrelevant as a person at these times, being seen by him as no more than a physical receptacle for his sexual fulfilment.

43) I considered whether it went further than that. The evidence the father gave when questioned by the police was that all sex within the relationship was consensual, and that the mother never told him to stop. This was all what he said in his written evidence. His initial evidence to me was that he would ask whether he could engage in sex, and that she would say yes. When cross-examined by Ms Bell-Paris, however, he said something different. He said that there would be times when the mother would say, "No," and ask him to stop. He said that this was a form of game in which he would continue, and

the experience would be more intense and pleasurable. There had been no mention of such sexual games, in which both would gain sexual pleasure from a pretence of coercion, previously.

44) The mother's account was that sex generally was something in which she engaged with a greater degree of enthusiasm prior to the birth of the children, but with a lowered libido afterwards. She described sometimes agreeing to sex when she did not really want sex because she would sometimes "get into it". From her written and oral evidence, three points emerged very forcefully. They were:

(i) The mother was highly anxious to sustain the relationship, and not to be part of a broken relationship, or for her children to experience that, and that this was a potent driver in her responses when the father sought to have sex with her.
(ii) The father would be forceful and persistent in his demands for sex, and he could be difficult if she sought to refuse.
(iii) The mother was highly ambivalent about what constituted abusive behaviour, and what did not, and that this arose against the background of her childhood experience of familial sexual abuse.

45) I considered whether the credibility of the mother's account was undermined by the contents of the WhatsApp messages which appear in the papers in which she engages in a sexually charged dialogue with the father. This was in December 2021, and so subsequent to her making allegations of sexual abuse to school staff, social workers and the police. In my view, it does not undermine the account. Rather, it was consistent with the general pattern of behaviour that emerges from the evidence in which the mother oscillated between recognising that her experiences were highly abusive, and seeking to minimise and excuse that behaviour, and of her pattern of wanting to end the relationship, but also wanting to sustain it. Similarly, her reluctance to pursue criminal charges forms part of the same pattern.

46) I find that there were a number of times when the father woke in the middle of the night, and wanted sex. He would then engage in sexual activity with the mother, sometimes waking her and sometimes not. On occasions, she would consent, on occasions passively acquiesce, and on occasions she would positively withhold consent. Critically, I find that it was a matter of indifference to the father whether the mother consented, acquiesced or positively withheld consent. His focus was entirely on his own needs and desires, and the mother's status was reduced to that of a physical body by which his needs would be met.

<u>Allegation 2</u>

47) The allegation is that the father wanted to have sex with the mother. She told him she did not want to have sex. Despite this he put his hands down her trousers and starting touching her vagina. She felt she had no choice. He then bent her over in the corner near to the cooker, which he called "the rape corner". He put his penis with force inside her which made her sore. This

happened on numerous occasions with the mother having very little choice and felt forced to engage.

48) I have already covered much of the ground in dealing with allegation 1. I do not need to repeat what I have said in respect of that. It is a fact agreed between the parties that there was a corner of the kitchen referred to as “the rape corner”. The father said that this term was a joke shared between the two of them. The mother’s evidence was that he devised the term, and that she acquiesced in its use. On that point, I found her evidence persuasive. He was unable to say how the phrase came into use, or who said it first despite being given numerous opportunities to do so. The mother, in contrast, was clear and consistent that the phrase was his. I find that more likely than not to have been the case.

49) Pausing there, without anything more, that phrase is highly illuminating. It is a statement of the obvious to say that “rape” is a highly charged word since to rape someone is a serious criminal offence, and to be known as a rapist is something which would attract a high level of social opprobrium. The horror of rape lies in the way in which it takes the sexual act which, at its best, is about enabling a profound physical and emotional intimacy, and changes it into an act of physical and emotional violation in which the person to whom it is done is treated as an object by the perpetrator. It is not difficult to see why most people would recoil from associating that word with a consensual sexual relationship with their partner. The fact that the father chose to describe a place in which he had sex with the mother as the “rape corner” says much of his attitude towards her, and towards their relationship.

50) The evidence that the father gave when asked about this was to admit, in contrast to what he said to the police, that he would ask the mother if he could rest his penis inside her vagina. It was, it is clear, something that he would ask with a view to having sex once she had agreed to let him put himself inside her. It was plainly never the case that he intended merely to let his penis “rest” insider her. I also remind myself of the evidence that he gave in the closing moments of the hearing that there would be times when the mother would say, “No,” and ask him to stop, and that he saw this as a form of game in which he would continue, and the experience would be more intense and pleasurable. This evidence did not appear anywhere else in the papers, or earlier in his oral evidence. I think, however, that it reflected the truth of how he saw the situation when the mother said, “No.” To him that was not a refusal of consent to be respected, but something to be overcome or ignored in pursuance of his own need for sexual gratification.

51) There is ample evidence to support the view that the father saw the mother as little more than an object whose sole purpose was to meet his needs. A particularly telling example of this was that, in August 2015 shortly after the relationship began, the mother took an overdose and was admitted to hospital. The father was asked about this in cross-examination. I found his evidence on the point astonishing. He told me that he had known that she was in hospital and that he visited her, but he did not know at the time why she had been admitted. He said, in terms, that he had not asked her, or seen the

need to do so. He said that he did not know until much later on what the reason for the admission was. I was so struck by that evidence that I intervened to invite him to confirm it which he did.

52) If true, then it showed a shocking indifference on the father's part to the well being of the person with whom he was in a relationship, and with whom he went on to have two children, that she was admitted to hospital, and that he did not trouble himself to ask why she had been admitted. That is not the only example, but it is the most shocking. Amongst other things, he was largely unaware of any matters relating to her health, and he knew little or nothing about her work life. The view I formed in respect of this, as in other areas, was that the father considered the mother to matter only insofar as she related to him and met his needs. He did not see her as a person to be loved and valued in her own right. That mindset is entirely consistent with his attitude towards having sex with her.

53) There was also a willingness to embarrass and humiliate the mother which again reinforces the view that he was indifferent of, or oblivious to, her needs. He readily accepted in his evidence to me that he said to the neighbours that he and the mother have a "rape corner". He said it said in the course of a social event when there was discussion about their sex lives, and that he saw telling them this as a joke. The mother was clear that she did not see this as a joke. Maybe the father did see it in that way. It does not particularly matter whether he did or not. It was a matter of him saying something to the neighbours that any reasonable person would have appreciated would be likely to cause the mother to feel embarrassed and humiliated, and either intending to cause her to feel that, or being oblivious to how she was likely to feel. Either way, it displays the same lack of respect for her as a person. Again, that mindset is consistent with his attitude towards having sex with her.

54) That is not to say that the mother never consented to have sex in the "rape corner". She accepts that there were times when she did. I find that, as with the nocturnal sex dealt with above, there were times when the mother consented, when she acquiesced, and when she positively withheld consent, and that it was, at best, a matter of indifference to father which it was. At worst, her refusals simply added to his sexual pleasure.

Allegation 3

55) The allegation is that, in June or July 2020, the father, supported by his brother and a friend, were working in the garden during the lockdown period. Child A wanted to go outside and help him with the gardening. She went out into the garden with mother following her. Child A then got very close to the father who told her to go inside. Whilst he was holding a shovel, he took a step forward with the shovel towards Child A and raised the shovel at her to scare her, causing her to cry. He thought this was funny.

56) I heard evidence from both parties about this allegation. The mother maintained that it happened. The father denied it. I also heard evidence from the father's brother, although his evidence did not advance matters for the

reasons already given. I also saw screenshots of text messages between the the mother and a later partner of the father's in which the new partner said that the father had admitted that he raised the shovel, although he said that he did so as a joke, rather than with the intention of scaring Child A.

57) The screenshots were, of course, hearsay evidence. I did not have the advantage of hearing from the later partner, and her evidence could not be tested on cross-examination. Such evidence is admissible, but the weight to be attached to it is a matter for careful consideration. I was conscious of the need for caution because the later partner was clearly unhappy with the father at the time she was texting the mother, and may have been saying that he admitted it for reasons of her own, rather than because it was the truth of the matter.

58) That said, there were features of the exchange that led me to conclude that the texts were reliable. The most striking was that what was said about the father readily admitting he had engaged in behaviour of which others would look askance without any insight into why they would do so was, I find, highly characteristic of him as was the belief that unacceptable actions were no more than a joke. It was a pattern of behaviour that was clearly displayed when telling the neighbours about the rape corner, and in respect of allegation 5 below.

59) I accepted the mother's evidence in relation to this allegation, and found that the father did scare Child A by raising the shovel. I accept that he may have thought that this was a joke, rather than something done with the intention of scaring Child A, but it does not assist him. On any analysis, if done as a joke, it is simply another instance of his being oblivious to the feelings and needs of others.

Allegation 4

60) On 30th October 2020, the father, arranged for some friends to attend the home as it was his birthday. The mother was not happy about this as it was during lock down and in breach of the Covid rules. When everyone left, there was a dispute regarding the father's birthday cake. He grabbed the mother, and pushed her backwards causing her to hit her back on the side of the kitchen work top leaving her in pain. He told her that she had ruined his birthday weekend and he was going to make her feel, how she had made him feel and make her understand what it is like to be alone. He also told her that he would lock her in the house and take her car keys whilst he took the children to his parents.

61) To a large extent, the parties agree what happened that night. It was agreed that there was a social gathering. Cakes had been made. The mother says that they were intended for the father's birthday. He said that the gathering was for Halloween, and that he did not appreciate why the cakes were a matter of sensitivity to the mother. Mr Ison suggested that this was a simple miscommunication. I agree with that so far as the initial argument was concerned. Had that been all there was to the incident, I would see it as no

more than that. Indeed, I would be bound to point out that, on their own accounts, neither party behaved particularly well. The mother was clearly angry and intemperate when she snatched away the tray of cakes. The father was, on his own account, angry when he went to snatch them back.

62) Pausing briefly, it was not particularly commented on during the hearing, but I do question the father's decision to have a social gathering at all, given that this was during the pandemic at a time when social distancing measures were in place.

63) What to my mind elevates this from being a simple if unattractive tiff in which neither party behaved well was the use of violence by the father towards the mother. He denied that he did so. She gave a clear and, in my judgment, credible account that he did. Not only was the account internally consistent, but it was also consistent with what the father himself accepted of his own character, that he was prone to aggressive and unthinking behaviour in moments of anger. The element of the mother's account which was significantly challenged in evidence was the location of the incident with emphasis being placed on the seeming inconsistency between the reference to the kitchen and the conservatory door. That was satisfactorily explained by the mother in terms of the layout of the house.

64) I also note the account given by the mother of the cruel words spoken by the father in the aftermath. There was no direct evidence beyond the parties' own of what was said. There was, however, indirect supporting evidence that the father had a propensity to send cruel and unthinking messages when angry. The most striking example of this was a text message sent by the father to the mother which is screenshot at page G54. The message was sent in the aftermath of the breakup. In it, he denigrated her in highly abusive language, and blamed her for both the familial abuse she experienced as a child, and for the abusive behaviour of her former partner. The father accepted that he sent the message, and that he should not have done so. I was struck that, even when pressed, he struggled to empathise with the impact that it would have had on mother. In that context, I have to say that the behaviour alleged here seems notably similar. It adds verisimilitude to the mother's account which I accept.

<u>Allegation 5</u>

65) The allegation is that, in April 2021, the father came into the kitchen. The next thing the mother remembered was that she was in the corner next to the cooker, which the father referred to as "the rape corner". He began pulling the mother's hair to the point it hurt her neck whilst his penis was inside her. She told him to stop because he was hurting her. He did let go of her hair but carried on penetrating her until he had finished despite her pleas for him to stop. After he told her that he had taken photographs of her in the rape corner which he showed to her. She asked him why he had taken them. He told her that he wanted to prove that they had a rape corner at home. He then sent the photographs to a friend.

66) The father accepted significant elements of this allegation in his evidence to me. He accepted having taken a photograph of the mother in that corner of the kitchen without her knowledge or consent, and sending it to a friend. He also accepted that he was pulling her hair at the time. He denied that they were having sex. He said that he sent the photograph as a form of "showing off", although he was unable to say what he was showing off about. He explained that he had been talking to his friend, and he said that he told him that he was going home to have sex. Pausing again, I note with concern that he accepted that he told his friend that he was going home to have sex. That, in itself, says much about his view of sex and consent since implicit in that statement was the unspoken assumption that, if he wanted sex, sex would happen. It did not, it seems, even occur to him to consider whether the mother wanted to have sex at that time.

67) It seems to me that the only sensible interpretation I can come to given the matters that the father admitted happened in his evidence to me is as follows. He was bragging to his friend about the fact that he had a "rape corner", and that he could have sex whenever he wanted to have it. He made a concrete statement that he was going home to have sex. He then took one or more pictures to prove to his friend that he meant what he said, and he sent it for that purpose. He was indeed "showing off". I do not find that he did so to humiliate or embarrass the mother as Mr Hughes submitted. In my view, it was worse than that. He did not think about her at all. She was merely an object to him, a thing not a person, whom he used to boast to a friend about his own sexual machismo. Whether she consented, how she felt, what impact it would have on her, were all matters of complete indifference to him.

Allegation 6

68) The allegation is that, in July 2022, the father removed Child A from school and attempted to take Child B. Child A came running over to the mother. The father shouted loudly outside the school, that she should be back in hospital so everyone could hear. The police arrived and told him that the children would be going home with her. He continued to behave in an abusive and aggressive way towards the mother and shoved the children's bags and lunch boxes into her chest. Most of which was witnessed by the children. The police had to stop the father from entering the school.

69) I heard evidence from both parties about this. The mother's account was substantially as set out above. The father described a more low key incident in which nothing particularly happened, and in which the mother over reacted and embellished the little that did. I preferred the mother's account. It was clear, consistent and credible. Two factors supported it. The first is that the father accepted that the police threatened to arrest him for breach of the peace. The fact that the police were called, threatened him with arrest, and sent the children home with the mother makes little sense in the context of his account, but is entirely understandable in the context of the mother's. Secondly, the comment that she should be back in hospital fits in with the broader context that this was very shortly after she had been discharged from

hospital after a period being treated for her mental health. I find the allegation is made out.

Further findings

70) I have considered whether there are further findings that I need to make above and beyond those identified already in this judgment. On balance, I have decided that there are not. I am conscious that there are other matters on which I heard evidence, and about which findings could be made. That said, in my view, the findings that I have made go far enough. They address the allegations made, and they provide a firm basis to identify not just what happened on specific occasions, but also the broader patterns of behaviour. They are sufficient for the Guardian, or any other professional who becomes involved, to have a foundation on which they can rely in assessing risk, and the welfare needs of the children.

Reservation of the case to me

71) Having heard the case at the fact-finding hearing, it is critical that there should be continuity and consistency for future hearings. For that reason, I am reserving all future hearings to me. There will have to be careful exploration of how that should be done since I am based in Wolverhampton as a full-time District Judge, and I am sitting in this Court in my part-time role as a Recorder. It should be relatively easy to manage short case management hearings by hearing them remotely. For longer hearings, I will liaise with the appropriate judicial and administrative personnel in Wolverhampton and Stoke-on-Trent to try to ensure that I am booked to sit as a Recorder to hear the case when needed.

What happens next

72) Plainly, I have made significant findings in this judgment. The question is where we go from here. It is an established principle of case law that findings of this kind are not determinative of child arrangements, but the fact that they have been made is a significant issue to which careful regard must be had in deciding what the arrangements should be, and how they should be managed.

73) I will invite submissions from the advocates as to how best matters should be moved forward, and as to what they propose for the interim period between now and the next hearing. In order to assist the advocates in formulating submissions, I made them aware by email sent earlier today what the broad thrust of my judgment would be so that they could address their minds to the issues, and take instructions.

Closing comments

74) Before concluding, I should record my gratitude to a number of people. The first is the parties and supporting witnesses from whom I heard evidence. The advocates for their professional and constructive approach to the hearing,

which helped make it less difficult for both parents than it might otherwise have been. I am also grateful for their comprehensive submissions.