Neutral citation: [2024] EWFC 12 (B)

CASE NUMBER: TBA

IN THE FAMILY COURT IN CARLISLE

IN THE MATTER OF SECTION 8 OF THE CHILDREN ACT 1989

AND IN THE MATTER OF EMP (A CHILD)

BETWEEN:

DG

Applicant

And

KB

First Respondent

and

EMP

(by his Children's Guardian "CG2")

Second Respondent

Before: His Honour Judge C Baker

HEARING DATES:

14th and 15th December 2023

Judgment: 30th January 2024

1. *This published judgment has been anonymised. As is common practice, random initials have been chosen for all the relevant participants.*

2. This is my judgment in the final hearing of this matter. This judgment must be read in conjunction with my judgment given at the conclusion of a fact-finding hearing and published as *DG v KB & Anor (Re EMP (A Child)) (Rev1) [2023] EWFC 180 (21 September 2023)*.

3. EMP's mother is KB and his father is DG. EMP has not yet reached his teenage years.

4. On 30th April 2019 DG made an application for a section 8 order in relation to EMP. He wanted to spend time with his son.

5. DG has represented himself throughout all hearings that have taken place before me. KB has been represented by Dr Charlotte Proudman, Counsel, instructed on a direct access basis (i.e. without a solicitor) for the substantive hearings before me. EMP has a Children's Guardian - "CG2". His Solicitor is Ms Sarah de Maine and Mr Patrick Gilmore, Counsel, has represented EMP's interests at all relevant times throughout the hearings before me. The mother had the benefit of 'Special Measures' throughout the hearings undertaken. This final hearing was conducted remotely by video link at the behest or agreement of all the parties.

6. Following a fact-finding hearing I made a number of findings which are set out in the above judgment. I summarised those findings at paragraph 266 of that judgment as follows:

> *[266] Bringing all of the matters set out above together I have reached the following factual conclusions, which in summary form I have limited to those matters which are central to the current and future issues in determining EMP's welfare. They are not however intended to be divisible from the judgment as a whole.*
>
> *a. The father's relationship to date with EMP:*
>
> *i. The father has a view of parenting that is markedly different to that of the child's primary carer. He has engaged in behaviours with the child that he has considered to be rough play or humorous activities. For example:*
>
> *1. As a baby/infant, flicking the child's penis and remarking 'What's the Golden Rule, always cover your tool' which was the context of the activity. Such action was not sexual or physically harmful to the child but a manifestation of the father's approach to parenting. The father was unempathetic and dismissive of the mother's (his primary carer) view that such activity was inappropriate and potentially degrading;*
>
> *2. The father's approach to the child coming to minor harm (falling over, being ill, hurting himself) was to consider such events on occasions amusing and character building. The mother viewed such an approach as antithetical to her more nurturing style of parenting;*
>
> *3. The father would engage in behaviour that would cause EMP physical pain, being of the view that the same was rough and boisterous play*

appropriate for a young boy whom the father considered would benefit from behaviour intended to inculcate resilience and fortitude in his son. The father's behaviour was at times excessive and inappropriately ignored a number of factors that would have resulted in a more attuned and skilful parent mollifying his behaviour, namely (i) that the child's primary carer did not engage in or approve of such activities and therefore the father's behaviour was likely to set up in the child's mind an unfavourable dichotomy viz-a-viz his parents (ii) that the father's behaviour would distress and alarm the child's mother;

4. *Some of the father's activities towards EMP – e.g. spontaneously pulling his leg hairs, pushing him over - were simply inappropriate with respect to any child and can objectively be considered abusive, albeit at the lower end of the spectrum;*

ii. *EMP's currently extant generally negative view of his father is the consequence of two factors:*

1. *The effect of the matters set out above at (a)(1)(i) – (iv); and*
2. *The mother's own view of and reactions to the father being, to some degree, understood by and influential upon EMP.*

b. *The father has withheld and minimised his financial contribution to EMP's upkeep (both directly in the form of maintenance and indirectly in the form of satisfying or attempting to satisfy the costs order previously made). A major factor in doing so has been as a means of exerting pressure on the mother to agree to the nature and level of contact with EMP that he wished to have.*

c. *The parents' relationship (2012 to 2014):*

i. *There were times during the parents' relationship when the father acted in crass and thoughtless ways, ignorant of and unempathetic with regard to the effect of his behaviour on the mother. This included:*

1. *Inappropriately interfering with the mother's social media account;*
2. *Engaging in activities that he considered to be pranks or 'jokes' without proper consideration of the effect on the mother; and*
3. *On occasions using insulting and derogatory terms and intending them to be hurtful and demeaning.*

ii. *On balance, the court does not make adverse findings against the father with respect to the mother's complaints about physical activity by the father towards the mother beyond the fact that the mother found them disconcerting at the time and has come to view them as abusive because of her subsequent experience with the father.*

d. *The parents' relationship (2015 to March 2017):*

i. *The parents' relationship was marked by entirely different aims and approaches to each other and their relationship.*

ii. *The mother wanted a loving relationship in which the parents built a family together. She had ambivalent feelings towards the father ranging from loving him to being significantly affected by his unwillingness to engage with or take account of her emotional needs.*

iii. *The parents' relationship continued to involve sexual intercourse on occasions up to March 2017. The mother viewed the same as having at its foundation her continued emotional connection to the father. The father enjoyed having sex with the mother.*

iv. *The father was persistent in his pursuit of sexual activity with the mother. In doing so he ignored her clearly stated wish for them to stop sleeping with each other and her concerns about the effect it was having on her own wellbeing.*

v. *The overall effect of the father's pursuit of sex was coercive in that it was exploitative of the mother's vulnerabilities and pursued with the aim of gratifying his sexual needs despite the mother's clearly expressed concerns about the effect on her welfare.*

e. *In March 2017 the father had sexual intercourse with the mother without her consent and against her express wishes. This was rape.*

f. *In the context of the finding at (e) above the father's communications with the mother since that event and posts on social media have further compounded and built upon the trauma the mother has suffered.*

7. The matter was adjourned for a final hearing to determine the welfare issues concerning EMP. In my earlier judgment I define the primary issues that remained to be determined as follows:

> *[268] Having reached my factual conclusions it will be necessary for the court to determine the remaining issues:*
>
> *a. What Child Arrangements Order should be made pursuant to the father's application; and*
> *b. The mother's application to change the child's surname (a specific issue order application).*
>
> *[269] In doing so I will inevitably ask the Guardian provide a report examining the remaining issues. As both parents are now litigants in person it may be of assistance to set out what I consider to be the parameters and legal framework to that assessment.*
>
> *[270] Any decision as to a Child Arrangements Order or Specific Issue Order has as its paramount consideration the welfare of the child pursuant to section 1 of The Children Act 1989. Section 1(3) sets out the factors (often referred to at the 'Welfare Checklist') which the court must take into account.*
>
> *[271] In considering the welfare of the child, the court must (according to sections 1(2A) and 1(2B)) "presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare" where 'involvement' is defined as "involvement of some kind, either direct or indirect, but not any particular division of a child's time."*
>
> *[272] Clearly, in light of my findings consideration of whether "the contrary is shown" engages directly with the provisions of Practice Direction 12J and in particular paragraph 30 to 39.*

[273] In light of paragraph 37A of Practice Direction 12J I put all parties on notice that an additional issue to be considered at any concluding hearing of this matter is whether the court should make an order under section 91(14) of the Children Act 1989 and if so, of what duration.

8. In addition to the above matters by the time of the final hearing further applications fell to be considered. They are:

   a. The mother's application to either (i) limit the exercise of the father's Parental responsibility by the imposition of Prohibited Steps Order preventing him from, for example, obtaining information about the child from third party organisations such as the child's school or General Practitioner or (and this is the mother's preferred option) discharging the father's Parental Responsibility for the child; and

   b. The mother's application for an order allowing the child to be known by the mother's surname rather than the father's surname.

9. Further, beyond the matters that relate directly to the welfare of the child listed above, the issue of costs was raised by KB and accordingly this judgment also addresses:

   a. The mother's application for costs against the father; and

   b. The mother's application relating to costs against Cafcass.

10. At this final hearing the parents have each submitted statements and Position Statements, the Children's Guardian ('CG2') has filed a final analysis dated 10th November 2023. In addition to the lengthy written evidence, I heard oral testimony from GC2 and DG. KB chose not to give further oral evidence during this final hearing and in light of the issues I did not consider it necessary for her to be compelled so to do. The parties made submissions at the conclusion of the evidence.

11. In light of the fact that (a) the evidence and submissions in this matter ran until the end of the court time allotted for the final hearing and (b) the issues to be determined, I reserved judgment.

Welfare Issues – The Parents' Positions and Written Evidence

12. By way of a statement dated 13th October 2023 the father responded to the judgment. The statement disputes all of the findings and asserts that the mother has, in essence, fabricated the allegations as a 'litigation tactic'. He asserts that the mother has 'alienated' EMP from him. In respect of the relationship and the generality of his conduct he asserts:

"The court also found that I lacked empathy towards [KB]. Our previous relationship was never considered and, indeed, I had nothing to offer the court as evidence. [KB] developed a ferocious temper shortly after EMP' birth and I quickly learned that the best way to deal with that was simply not to engage if she was angry or upset, lest I inflame the situation. I concede that this would look cold and unfeeling to the outside observer."

13. That initial written response to my judgment contains no acknowledgment, beyond the final sentence set out above, with respect to any of the issues set out in my judgment. It amounts to, in effect, a repudiation of the court's findings.

14. The father filed a statement dated 24th November 2023 entitled "Response to section 7 report". In that statement the father asserts:

"4. I maintain my position that there was never an occasion where we had non-consensual sex, let alone an encounter where she was forced or begged me to stop (J218) as she insisted on many occasions.
5. I am dismayed that "compelling testimony" trumps the evidence from someone who has openly lied and exaggerated their other accusations. I maintain my position that [KB] made the rape accusation out of desperation to "win" and has convinced herself in the meantime that it happened.
6. The fact that the guardian, in her submission, couldn't reach a conclusion on the subject is an example of how ambiguous the accusation was in the first place.
7. I also deny having tried to control [KB] in any way. She has always had full control and she regards it as an absolute; that EMP is "her ball" and I'm not allowed to play. The police didn't identify any controlling aspects during her various calls to them.
8. [KB] has failed to consider or is ignorant of the damage she has caused to EMP' emotional wellbeing and his relationship with his father."

15. He goes on to observe:

"[KB]'s stress at court proceedings is the result of her own actions and has refused to take any accountability for that."

16. In conclusion he asks the court to "*consider ordering some form of family therapy to help re-establish the father/son relationship with sanctions in place should his mother further attempt to alienate EMP… It may, in fact, be better for [EMP] to live with me in [DG's place of residence]. This would obviously cause him upset in the short term; however he would not be subject to alienating behaviours and would be guaranteed a relationship with both parents, his siblings and his wider family. I am realistic about the prospect of this but feel that it should still be mentioned*."

17. In respect of the mother's application regarding the child's surname DG says "*Changing [EMP]s' surname [to that of the mother] is no more than attempt to remove me and his wider paternal family from his life and family history… Ordering a change of name would further alienate EMP from his father.*"

18. In respect of the consideration of section 91(14) order DG observes that "… *by the time a barring order expires and the opportunity to establish a relationship with his father will have long past*."

19. KB filed a statement dated 5th December 2023.

20. With respect to the fact-finding judgment she observes:

> *"I am disappointed that no firm findings of gaslighting nor coercive control were noted, despite being littered throughout the judgement. However, I accept the findings made and do not seek to challenge them. I also understand that findings are made when there is evidence available to support them, clearly my evidence didn't meet the balance of probabilities for all of the allegations.*
>
> *I believe the Judgement reflects most of my lived reality in relation to the ongoing abuse both [EMP] and I have endured by [DG].*
> *…*
> *Overall, I am in agreement with the findings of the Judgement."*

21. The mother recounts the experience of the fact-finding exercise and the proceedings more generally. In summary she says:

> *"The Fact Finding Hearing I found to be extremely traumatic… I found the watching of the police evidence videos to be a trigger… Giving evidence was exhausting in the truest meaning of the word… I am still traumatised by this court process. I have not slept a night the whole way through, since the hearing in December 2021. This has not changed waiting to hear the findings of the FFH and whilst awaiting the final hearing and subsequent order. Following the FFH I had approximately three months off work due to the stress caused by the court process."*

22. In relation to the father's application to spend time with EMP the mother asserts:

> *"My position regarding contact now, aligns with that of the Childrens Guardian and the current status quo, in that [EMP] should have no contact, neither direct nor indirect, with [DG]. This has been the position since April 2023 and there is a noticeable difference in [EMP]. He is more relaxed and happy within himself. He has expressed strongly that he feels unsafe with [DG] and that he does not want contact in any form. [EMP] confirmed that he does not wish contact in any form, including no indirect contact."*

23. In respect of a section 91(14) order:

> *"A barring order would be gratefully appreciated and I have made the application for such for five years. The constant threat of or actual litigation has been exhausting for many years. I have spent a phenomenal amount of time researching case law, reading practice directions, searching for examples that support my case and that is time that I cannot recover to spend with [EMP].*
> *…*
> *The constant fear of what court papers may arrive in the post, not to mention the actual threats and relentless public humiliation on social media by [DG] has compounded the stress and anxiety I have felt for the past four years.*

I believe the barring order will provide [EMP] and I with some peace of mind, knowing at least for the ordered years, that we can live our lives as we wish, without these fears being realised."

24. KB asserts that her application for EMP's surname to reflect hers accords with EMP's wishes.

The Children's Guardian – Written Evidence

25. The Children's Guardian analyses the outstanding welfare issues through the prism of the welfare checklist.

26. With respect to EMP's wishes and feelings the Guardian met with EMP at a Family Centre on 31st October 2023. She reports:

"[EMP] clearly expressed to me the following; (i) That his father "hurts me and makes me feel unsafe" (ii) That "I do not want to be around him because he makes me feel unsafe" (iii) That "I do not feel comfortable being alone with him---I just don't like it." (iv) That [EMP] thinks the last time he spent time with his father "was at the start of Year Six and since I haven't seen him I feel more happier" because "I feel safer." I noticed to EMP that the words he was using most were around him feeling unsafe and asked if he could tell me why he felt like this. [EMP] started to become upset and responded; "because he hurts me." [EMP] and I then attempted to explore the alternative ways in which he could re-establish/maintain a paternal relationship which did not involve him either being alone with his father or having face to face contact. Having listened very carefully, [EMP] clearly stated "I do not want to see him. I don't want any contact." When specifically asked whether he would wish to agree to any about indirect contact option, [EMP] again clearly and somewhat wearily responded "I don't want any contact."

27. The Guardian goes on to refer to my conclusions in the fact-finding judgment (at paras 70 to 76) and observes "[EMP]'s current position regarding contact with his father is a result of a multitude of factors including; (i) the poor parental relationship which prevented [EMP]'s fears from being properly addressed (ii) [DG]'s inability/unwillingness to demonstrate sensitive care giving and alter his behaviours in accordance with [EMP]'s expressed wishes and adopt an approach more aligned with [KB]'s care giving (iii) [EMP]'s direct and sometimes harmful experience of being parented by [DG] (iv) EMP being highly attuned to [KB]'s responses towards [DG]."

28. With respect to EMP's needs, the Guardian acknowledges that these are well met by KB "to an excellent standard" and speaks very positively of EMP:

"[EMP] is a fine young person. What is particularly impressive is his innate kindness, his awareness of others feelings and his wish to be polite, considered and respectful. Such positive qualities also mean that [EMP] has a heightened emotional awareness and sensitivity to what is happening around him and to the needs of others, which in turn is also likely to have impacted his thoughts and feelings around his paternal relationship."

29. In respect of the contact EMP has had with his father the Guardian relates:

> *"Whilst paternal contact offered EMP opportunity to spend quality time with his father, take part in shared outdoor activities and helped satisfy his identity needs including enabling his better understanding of paternal heritage, it has not met EMP's emotional needs and indeed on occasions has been emotionally harmful given; (i) the stop start nature of EMP's paternal relationship, (ii) the frequent incidents of parental conflict sometimes played out with EMP's knowledge (iii) the continued presence of a third party (iv) his father's parenting style (as determined by Judge Baker) being so at odds with the way he was effectively parented by his main care giver (v) EMP' increasing sense of his mother's feelings towards DG."*

30. When contemplating the consideration of the effect on EMP of any change in his circumstances, which in this instance in effect means some form of relationship with his father, the Guardian evaluates the issue as follows:

> *"…any change in EMP circumstances for the purposes of paternal contact would be at odds with [EMP]'s strongly expressed wishes and feelings and any form of contact arrangement could not be directly or indirectly supported by [KB] and both of these factors are likely to further exacerbate the negative effect of change."*

31. In terms of parental capability, the Guardian reports, perhaps unsurprisingly, that KB feels unwilling and unable to positively support a relationship with DG at present.

32. In respect of the suggested name change, the Guardian relates that EMP associates the father's surname negatively, saying 'I don't want to be associated with my dad'.

33. The Guardian concludes that a 91(14) order is necessary for the following reasons:

> *"These proceedings have come at significant personal cost to EMP, KB and DG and have concluded with EMP having reached a very firm and established position. Both parents and EMP need time to reflect and recover from all that has gone before. EMP' established level of paternal fear is of some concern and if he is unable to make sense of this over the passage of time, he may require further support around this to manage these complex and potentially emotionally unhealthy feelings and make better sense of his life story. Whilst recognising the impact on DG if the Court decides that paternal contact is not in EMP's interests and what would be a natural wish for him to [issue] a further application to the Court within a short timeframe will be of no benefit to EMP as is most likely to cause him further distress and entrenchment of his position. That said, these highlighted issues need to be balanced against DG's further right to apply to make an application to the Court should he wish to do so."*

34. Ultimately the Guardian concludes:

i. There should be a 'live with' order in favour of the mother;
ii. A 'no contact' order with respect to the father;
iii. An order permitting the change of name to KB's surname;

iv. A 91(14) order; and
v. The Guardian recommends that if EMP wishes, KB should explore the possibility of sibling contact with the sibling's mothers.

Oral Evidence

35. By agreement the Guardian gave evidence first.

36. As well as repeating that which she set out in her report, the Guardian emphasised her view that EMP was an intelligent child who has not felt listened to. He was clear that he did not want to see his father and the Guardian did not consider that KB could be expected to promote that relationship in the context of the findings as the impact on her would be too adverse. She said that the proceedings had been 'all consuming' for KB and to some extent EMP. In respect of the suggestion made by DG for family therapy, the Guardian considered the suggestion to be unworkable as it would require willing participation by those involved.

37. The mother's application to restrict or revoke the father's Parental Responsibility ('PR') was made after the Guardian's analysis had been filed. However, she said she had given it some considerable thought. She said that notwithstanding the serious nature of the proposal she had come to the view that DG was not able to play any active part in EMP's life. Further, she considered that DG having PR for EMP was a situation that KB found difficult to cope with emotionally and it reduced her capacity to be 'an emotionally present parent'. Mr Gilmore asked the Guardian to contemplate the situation whereby DG did not in fact have PR at present but was applying for it. The Guardian opined that she could not recommend that it would be granted in those circumstances.

38. The Guardian agreed that DG had not accepted any of the findings. She opined that the child would be placed in an impossible position in circumstances where his primary carer had a wholly different view of the events surrounding a significant period of the child's life.

39. In respect of the 91(14) application, it was suggested to the Guardian by mother's counsel that a period of 2 years was too short. The Guardian agreed that it was a matter for the court and observed that EMP was about to enter the key years of his adolescent life. He did present to her as having a considerable degree of emotional and intellectual maturity. She said that she considered the key point was that a 91(14) order would provide a degree of freedom for EMP and his primary carer in light of the likely very disruptive and emotionally difficult effect of any further applications.

40. The father pointed out to the Guardian that in his view he had not had any quality time with EMP since 2020 and therefore he had been under the sole influence of his mother. The Guardian pointed out that EMP had initially indicated that he did want to see his father but at least in part, his experience of contact with DG had not been positive (see fact-finding judgment). During the Guardian's evidence DG indicated

to the Guardian that he understood the logic of the section 91(14) order and did not object to an order of 2 years in length.

41. The father made clear in his evidence that his statements (related above) remained reflective of his position at the hearing. He told me that he considered that EMP's views were a reflection of his mother's influence.

42. He told me that in essence he regarded the package of suggested orders (no contact, restrict or revoke PR, change of name) represented the culmination of the mother's desire to exclude him from EMP's life. He objected to EMP being known by the mother's surname because this represented a denial of his paternity. He continued to be of the view that, in effect, all of the mother's substantive allegations were 'retrospective exaggeration' (a term I used in the fact-finding judgment).

43. Dr Proudman raised with the father the fact that he had still not paid the costs order that had been made pursuant to the Appeal despite the court's observations in the fact-finding judgment (see paras 96 to 101 and in particular para 100). DG explained that it was his intention to take legal proceedings against the barrister who represented *KB* at the December 2021 because that barrister had failed to highlight to the then judge the appropriate law and therefore has cost DG money by setting up a situation that could be appealed. Leaving aside argument about whether there is any real possibility that someone could claim compensation from an opposing parties' legal representative for failing to mention something in court, the comments made by me at paragraph 100 of the fact-finding judgment pertain to this suggestion – it is a highly speculative suggestion that in no way justifies a refusal to pay or attempt to pay the costs order.

44. Some evidence was given with respect to a recent phone call the father made to the EMP's school. There was some dispute as to the contents of the discussion that took place during that phone call. I am unable, in the absence of primary evidence, to resolve that dispute and in any event it was a satellite issue which was in my view of minor importance and I pay no regard to it.

45. I will also add at this stage that since the close of evidence in this matter I have received emails directly from or on behalf of the parents about allegations (primarily to do with the father's conduct on social media). I have had no regard to that information coming as it does after the evidence-giving stage of the hearing was concluded.

Child Arrangements Order – the Law

46. I do not consider that the circumstances of this case requires a lengthy recitation of the law. Beyond that which I have set out at the end of the fact-finding judgment and repeated at the beginning of this judgment I will add that I have also considered *Re C (A Child) (Suspension of Contact) [2011] EWCA Civ 521, [2011] 2 FLR 912*, Munby LJ (as he then was) held that ECtHR case-law had established that [para 47]:

i. contact between parent and child was a fundamental element of family life and was almost always in the interest of the child;
ii. contact between parent and child was to be terminated only in exceptional circumstances where there were cogent reasons for doing so, and only if it would be detrimental to the child's welfare;
iii. there was a positive obligation on the state, and therefore upon the judge, to take measures to maintain or to restore contact;
iv. the court had to take a medium-term and long-term view;
v. the key question, requiring strict scrutiny, was whether the judge had taken all necessary steps to facilitate contact as could reasonably be demanded in the circumstances of the particular case;
vi. all that said, at the end of the day, the child's welfare was paramount.

47. The importance of a careful and proportionate consideration of no direct contact was set out very clearly in *Re A [2013] EWCA Civ 1104* in which the Court of Appeal affirmed that Human Rights violations might also arise from a refusal of direct contact. The court's duty to afford paramount consideration to the child's welfare involved an exercise of judgment. The traditional appellate approach to the exercise of judgment was to intervene only when a decision was "plainly wrong". When making care orders, a judge's duty was "more than to exercise a discretion"; that same level of duty applied to orders depriving a parent of direct contact. In care and contact cases, judges had an additional obligation under the Human Rights Act 1998 s.6(1) not to determine the application incompatibly with the European Convention on Human Rights 1950 art.8, *G v G (Minors: Custody Appeal) [1985] 1 W.L.R. 647, B (A Child) (Care Proceedings: Appeal), Re [2013] UKSC 33, [2013] 1 W.L.R. 1911 and G (A Child) (Care Proceedings: Welfare Evaluation), Re [2013] EWCA Civ 965, [2013] Fam. Law 1246* applied (paras 36-46). An appellate court had a duty to intervene where decisions in lower courts demonstrated a process which was not compatible with a party's right under Article 6 or Article 8 of the Convention.

48. Given that, in part at least, an element of this matter concerns the views of the parents I have also reminded myself of *Re W (Direct Contact) [2012] EWCA Civ 999* where McFarlane LJ (as he then was) stressed the potential for harm to a child from prolonged adult dispute as described by Black LJ in *T v T [2010] EWCA Civ 1366* and went on to describe the responsibility, hard though it may be, for a parent to meet their child's needs with respect to contact, just as with any other aspect of their lives. He said:

> *"Where parental responsibility is shared by a child's parents, the statute (CA 1989, s 3) is plain that each of those parents, and both of them, share "duties" and "responsibilities" in relation to the child, as well "rights ... powers ... and authority". Where all are agreed, as in the present case, the courts are entitled to look to each parent to use their best endeavours to deliver what their child needs, hard and burdensome or downright tough that may be. The statute places the primary responsibility for delivering a good outcome for a child upon each of his or her parents rather than upon the courts or some other agency.*

Where there are significant difficulties in the way of establishing safe and beneficial contact, the parents share the primary responsibility of addressing those difficulties so that, in time, and maybe with outside help, the child can benefit from being in a full relationship with each parent … Parents, both those who have primary care and those who seek to spend time with their child, have a responsibility to do their best to meet their child's needs in relation to the provision of contact, just as they do in every other regard. It is not, at face value, acceptable for a parent to shirk that responsibility and simply to say "no" to reasonable strategies designed to improve the situation in this regard." [paras 72-80]

49. I have recited the above case law because it sets out the 'high water mark' of expectations placed upon parents to take primary responsibility for their children and indeed the very serious nature of the consideration required when determining an application that amounts to a 'no contact' order with respect to one parent. Likewise, as well as being a statement of the approach of responsible *primary carers*, it is also a statement of the responsibility of parents who seek to spend time with their children. In this matter, the father's previous behaviour has been far from delivering what the child needs, either directly or indirectly and therefore represents a failure of parenting.

50. That case law is, to my mind, an embodiment and expression of the fundamental truth of parenthood. A child usually has two parents. A child does not choose his or her parents. The *child's right* to know and have a relationship with both parents is a powerful imperative that should only be displaced in exceptional circumstances and where the child's welfare will be sufficiently compromised by that imperative being given concrete form to justify substantial interference. A child has, in my view, a right to *know* from whom they came and it is generally a long term right and welfare benefit for a child to have the building blocks to, in time, reach their own decisions about their parents. Children cannot and in my view should not be shielded from *all* mistakes, flaws, poor parenting or indeed *harm* and the risk of harm that a relationship with a parent may bring. The human experience, of necessity, involves learning that no one is perfect and life's most important lessons come from observing and understanding not only one's own mistakes but those of others.

Discussion

51. On the issue of contact between EMP and DG I accept the evidence and analysis set out by the Children's Guardian and in particular her analysis of the 'welfare checklist' factors. However, it behoves me to set out my analysis of my decision.

52. I have considered carefully what benefits would accrue to EMP were I to make provision for some form of contact (in the form of spending time with DG or having some indirect form of contact with DG).

53. It is trite to observe that EMP is DG's son and EMP has no other father. However, it is no less significant for being so. EMP's father (and the paternal family) are biologically linked to EMP and whilst my fact-finding judgment is critical of some

aspects of DG's parenting style I have no doubt that EMP shares some of his father's characteristics and that DG could bring to EMP's life an extra dimension of interests, influences and learning that could, in the right circumstances, be beneficial to EMP.

54. Depriving EMP of a relationship with his father also brings disadvantages to EMP. As EMP enters and progresses through adolescence he will have a growing understanding that he is the product of two people. They are his genetic make-up and although he may or may not have scientific understanding of that reality, the intangible quality of inherited characteristics and a sense of origin generally becomes an increasing consideration as children grasp the concepts. Given EMP's obvious intelligence, it seems to me very likely that for EMP an understanding of these concepts is inevitable.

55. For reasons that are obvious, and to which I will refer later, EMP is unlikely to receive a positive impression of his father from KB. That runs the risk of EMP internalising negative thoughts about himself. Putting it in more direct language, there is a risk that only having negative information and impressions of his father may result in him thinking that aspects of his make-up and character are like his father, about whom no one in his immediate circle has anything good to say. If EMP has no relationship with his father, there is unlikely to be a counterbalance to that negativity.

56. However, there are considerable direct and indirect risks inherent in the proposition that at present EMP could have any form of a relationship with his father.

57. My findings represent a severe and extreme failure of parenting. DG has treated *EMP's mother* in ways that go far beyond any margin of allowance that *might* be granted for the individual circumstances of their relationship. That behaviour represents both a direct and indirect threat of harm to EMP. The direct threat originates (but does not end) in the possibility of a repetition of such behaviour which EMP may witness or become aware of. That possibility could of course be ameliorated by the circumstances of any contact (e.g. supervision or indirect-contact only) but the potential harm does not end with such measures.

58. First, DG has made it abundantly clear that he does not accept or acknowledge any of the findings, including those that relate to his parenting style and conduct viz a viz EMP. Whilst, taken in isolation, those findings that relate solely to DG's contact in contact with EMP would not of themselves necessarily be incapable of being addressed or ameliorated, the lack of acceptance indicates the likelihood that such an approach will continue.

59. Second, that repudiation of the findings sets up a conflict of narrative that puts EMP in an impossible position. DG has no understanding of or insight into his contribution to EMP's negative view of him. Whilst I have found that *some* aspect of that negativity had been as a consequence of KB's influence on EMP, I also

found for reasons I explained at length that it has also been contributed to by DG's own direct behaviour towards EMP. Whilst KB's view of DG is unlikely to change, an acceptance by DG of some responsibility would allow at least one aspect of EMP's negativity towards his father to be addressed with the prospect of an improvement in the quality of contact and thereby EMP's own view of his father. In the absence of such improvement, the court would be, in effect, forcing an intelligent and sensitive child to maintain a relationship with someone with whom he has no wish so to do.

60. Third, the conflict of narrative extends to more medium- and long-term considerations. Children inevitably ask about their parents' relationship and indeed their parents themselves. DG considers this entire situation to be orchestrated by KB and denies, in effect, all of the findings that form the foundation for EMP and KB's past life with regard to the father. The conflict with the narrative of his primary carer is incapable of being compromised.

61. That conflict of narrative also builds into EMP's life a psychological time bomb. Assuming (as I do) that KB is not intending to tell EMP her truth (which aligns with the court's findings) of the relationship and EMP's father now but also assuming that gradually that narrative will form part of KB's explanation to KB as he increases in age and maturity, the potential future harm can be demonstrated by imagining EMP asking one question: "*why did the court involve someone who treated my mother that way in my life*?" It is a question which I can answer with theoretical manifestations of the concepts expressed above but I find it difficult to contemplate answers that would be truly satisfactory. There may come a time when EMP wishes, notwithstanding what has happened in the past, to know his father, for all of the reasons alluded to above when discussing genetic make-up. That will be his decision to take but not one that in my evaluation should be imposed upon him at this stage.

62. All of the above observations relate directly to EMP. My evaluation does not of course stop there.

63. DG raped KB. He treated her in the ways described in my fact-finding judgment. I am entirely satisfied that the father's treatment of the mother during their 'relationship' has caused the mother significant, substantial and long-lasting psychological harm. I do not need a psychological assessment to point out the obvious. The findings alone would, it seems to me, give rise to the *presumption* of such harm and I have now had the opportunity of observing the mother over several hearings and an extended period of time. The father asserts that her manifestations of distress are an act. I do not agree.

64. I of course found that *some* of EMP's negative views of his father were as a consequence of him being aware of his mother's feelings towards his father. That was a *factual* finding but I was careful in my previous judgment not to voice criticism of the mother for that fact.

65. Given my findings, how could the mother be reasonably expected to be able to shield EMP from all her reactions to the father? Her fears for EMP (and indeed herself) have at their foundation substantive experiences that would render even the most robust parent almost inevitably incapable of a neutral or positive portrayal. The duty spoken of in *Re W* (cited above) may extend to 'playing down' their own or a child's adverse experiences in relation to more minor incidents (to cite examples from the fact-finding judgment in this matter, the incident whereby the father called the police [paras 152-156] or the funeral post card [paras 240-246]) in pursuit of the longer-term aims given expression above. It cannot, in my opinion, be a reasonable expectation upon any parent to be asked to act as if a parent who has behaved as this father has is, in fact, an ideal or even benign parent.

66. I have little doubt that to force a situation whereby DG remains involved in KB's life would continue to expose KB to significant harm. That would, in my view, be enough to rule out any suggestion of an order mandating involvement with EMP because I am entirely satisfied that it would simply not be possible to ensure that KB's emotional safety could be secured (see PD12J para 36). Additionally, I am entirely satisfied that to so order would harm EMP by reason of the effect upon his mother. In fact, to do so would in my view be likely to *increase* the chances that EMP would be exposed to continued negativity about his father as, for entirely understandable and rational reasons, each incident of contact (direct or indirect) would only serve to cause further trauma to the mother which EMP would be bound to perceive.

67. My view is further compounded by DG's response to the findings. I make every allowance for the fact that there are as yet unresolved criminal proceedings. However, DG has made it clear that he accepts *no* responsibility for the current situation and places the 'blame' squarely on the mother's shoulders.

68. The overall picture, which now includes the father's reflections upon the matters dealt with at the fact-finding hearing is one that leads me to conclude that the father's continued involvement in the child's life would be, for the foreseeable future, continued court-sanctioned abuse of the mother.

69. I have also considered whether there are any steps the court could take to 'rectify' or ameliorate that conclusion. For example, the father suggests some form of family therapy. I do not consider this a realistic or indeed a genuine suggestion. The fundamental premise of therapy is an agreed or shared narrative, at least to an extent that allows for progress in addressing that which needs to change. The father's repudiation of my findings (and therefore the mother and child's 'truth') leaves no room for any form of therapeutic work known to this court, be that at an individual level (e.g. a Domestic Violence Perpetrators Course) or as a 'family'. The latter suggestion being divorced from the reality of the situation in the context the harm the mother has suffered and the former being a non-starter in circumstances where the father denies the existence of any form of abusive behaviour.

70. Accordingly, I make a 'live with' child arrangements order with respect to EMP in favour of KB.

71. I order that the father shall have no contact with the child.

Section 91(14) Order

72. I bear in mind the text of section 91(14) and the amendments thereto as set out in section 91(14)A. I have reminded myself of PD12Q and PD12J para 37A.1.

73. The father accepted during his evidence that a section 91(14) order made sense to him from the perspective of giving EMP a period without court proceedings would be beneficial to EMP. He agreed with the suggestion of 2 years. He considered that 5 years was excessive. The chronology set out in the fact-finding judgment shows how lengthy these proceedings have been.

74. The Children's Guardian initially suggested 2 years in her analysis but shifted towards a longer period during her oral evidence.

75. The effect of further court proceedings on the mother and the child can easily be divined from the conclusions I have reached above. Whilst I give some weight to the fact that a section 91(14) order represents an interference in the father's right to come to court the recent amendments, Practice Directions and case law make it clear that such orders must have at their foundation welfare considerations taken in the context of the court's evaluation of the situation as a whole. The Practice Direction states "*Section 91(14) orders are a protective filter – not a bar on applications – and there is considerable scope for their use in appropriate cases. Proceedings under the 1989 Act should not be used as a means of harassment or coercive control, or further abuse against a victim of domestic abuse or other person, and the court should therefore give due consideration to whether a future application would have such an impact*." [PD12Q para 2.7]

76. In light of that which I have set out above and in particular the strident and maintained non-acceptance of *any* substantive responsibility together with the likely negative effect on both the mother and child of further court proceedings, I am unhesitatingly of the view that the Guardian's analysis of the principle of such an order is correct.

77. With respect to the issue of the length of such an order PD12Q provides assistance as follows:

> "4.1 Sections 91(14) and 91A are silent on the duration of a section 91(14) order. The court therefore has a discretion as to the appropriate duration of the order. Any time limit imposed should be proportionate to the harm it is seeking to avoid. If the court decides to make a section 91(14) order, the court should explain its reasons for the duration ordered."

78. In reaching a conclusion as to the duration of such an order I have taken into account the following matters:

i. My factual conclusions and the father's responses;
ii. My decision and reasons with respect to the Child Arrangements Order set out above; and
iii. My conclusions as to the harm that would be caused to the mother and child in the event that the father were to have further involvement in the child's life.

79. The circumstances of this case are such that I struggle to annunciate any substantive advantage or benefit to further court proceedings before EMP attains the age of 16. I have reached this conclusion acknowledging that my orders in this matter represent a 'package' which when taken as a whole will result in a regime that does not currently contemplate the father being involved in his son's life for the foreseeable future. My evaluation is that for the reasons set out above that is the appropriate welfare conclusion in light of my findings and the father's response to them.

80. Conversely, I can see considerable benefit to imposing an order until the child attains the age of 16. Those benefits are, in my assessment:

i. The mother and child will know that the traumatic and difficult issues that have been raised during these proceedings will not be revisited (if at all) without leave of the court until EMP has attained an age whereby his decisions with respect to his relationship with his father will in all likelihood be determinative (bearing in mind that a court will only make a CAO with respect to a child who is 16 years or over in exceptional circumstances);

ii. The mother and child will have a period of respite and recovery. The Guardian referred to these proceedings as being 'all consuming' especially from the parents' perspective and I have commented above on the effect of the father's continued involvement in the mother and child's life on each of them;

iii. At present, in particular in light of the father's stance, I can see no realistic prospect of the current situation altering substantively prior to that time. If the father's stance alters, such a change would undoubtedly be a factor in any future determination by the court as to the issue of leave;

iv. The factors I set out at paragraph 66 above with regard to ongoing contact are also relevant in my view to the likely effect of further court proceedings;

v. My findings represent the manifestation of extreme harm to the mother, the child's primary carer. That harm is such that the mother requires protection against further trauma. I have little doubt that further court proceedings would be genuinely traumatic for the mother;

vi. An order for a shorter period of time would neither reflect the reality of the situation nor be proportionate to the level of harm I have identified; and

vii. The os91(14) order should, in my evaluation, cover the child's early adolescences, a time when stability and security are important and when significant changes and pressures exist that are both internal (maturation) and externally (school, exams etc.).

81. Accordingly I order:

i. There shall be an order preventing the father from making further applications with respect to section 8 of the Children Act 1989 without the leave of the court pursuant to section 91(14) of the Children Act 1989 until the date of the child's 16th Birthday; and

ii. Service of any subsequent application for leave should be prohibited until the court has made an initial determination of the merits of such an application.

82. Given that the father has been a litigant in person throughout my involvement with this matter, I do not consider that it would be appropriate (pursuant to PD12Q para 3.6(d)) to direct the court should make an initial determination of the merits of the application without an oral hearing.

Change of Surname

83. EMP's birth certificate identifies DG as his father and identifies him with DG's surname. The order applied for will not alter that fact.

84. However, the mother has applied for permission for EMP to use and be known as his mother's surname and, as set out above, EMP has also explained his wish so to be known.

85. The law in respect of this issue has been helpfully distilled by MacDonald J in *D v E [2021] EWFC 37*:

> "30. Subsequent to the decision of the House of Lords in Dawson v Wearmouth, the Court of Appeal in Re W (A Child) (Illegitimate Child: Change of Surname), Re A (A Child), Re B (Children) [2001] Fam 1 , sub nom Re W, Re A, Re B (Change of Name) [1999] 2 FLR 930 at [9] held that the following factors will fall for consideration on an application seeking to change the surname of a child, stressing that such factors are only guidelines which do not purport to be exhaustive, with each falling to be decided

on its own facts with the welfare of the child the paramount consideration and all the relevant factors weighed in the balance by the court at the time of the hearing:

> i) On any application, the welfare of the child is paramount and the judge must have regard to the s 1(3) criteria.
> ii) Among the factors to which the court should have regard is the registered surname of the child and the reasons for the registration, for instance recognition of the biological link with the child's father. Registration is always a relevant and an important consideration but it is not in itself decisive. The weight to be given to it by the court will depend upon the other relevant factors or valid countervailing reasons which may tip the balance the other way.
> iii) The relevant considerations should include factors which may arise in the future as well as the present situation.
> iv) Reasons given for changing or seeking to change a child's name based on the fact that the child's name is or is not the same as the parent making the application do not generally carry much weight.
> v) The reasons for an earlier unilateral decision to change a child's name may be relevant.
> vi) Any changes of circumstances of the child since the original registration may be relevant.
> vii) In the case of a child whose parents were married to each other, the fact of the marriage is important and there have to be strong reasons to change the name from the father's surname if the child was so registered.
> viii) Where the child's parents are not married to each other, the mother has control over registration and, within this context, the degree of commitment of the father to the child, the quality of contact, if it occurs, between father and child, the existence or absence of parental responsibility are all relevant factors to take into account."

86. In advancing the mother's application Dr Proudman set out in her Position Statement the following reasons for the application:

a) Accords with EMP' wishes and feelings;

b) It reflects the position on the ground when giving EMP's name;

c) It includes KB's own identity and heritage which was ignored;

d) KB says she was coerced into naming him as per DG's wishes;

e) The impact of the child in using the name of a father who raped his mother is significant.

87. I would observe that I considered the assertion made at point (d) above in my fact-finding judgment in the context of the registration of the birth (see paras 111 to 116). I did not make such a finding and it is not a valid submission to make now. It would be inappropriate for me to consider this assertion as being relevant or factually correct at this stage.

88. Likewise, I do not consider that point (c) above has substantive weight. The child lives with and has been raised by his mother. His day-to-day life has for the

overwhelming majority of the time been spent with his mother. The child has no identity insecurity with respect to his mother or his maternal heritage.

89. In analysing this issue through the prism of the 'Welfare Checklist' and the factors summarised in *D v E* above it appears to me that the following factors are of primary relevance:

i. The child was registered with DG's surname;

ii. I note the child's wishes and feeling in this regard, as related to the Guardian.

iii. The fact that my decision with respect to contact, as set out above, will result in the father having no substantive involvement with EMP. To permit use of the mother's surname will further 'distance' the child from his connection to his father and also his paternal birth heritage.

iv. The evidence suggests that EMP has been using his mother's surname in his day-to-day life for some time;

v. The court's findings;

vi. The effect of a change of surname on the mother and the child; and

vii. The 'package' of decisions the court is making and the totality of their effect.

90. Ordinarily the courts are generally reluctant to change a child's surname from that of a father in circumstances where the child's name was so registered and where that child's relationship with his non-resident parent is tenuous or threatened. The logic applied often rests upon the fact that a surname represents a tangible and important link to an immutable fact i.e. parentage. The context of such applications is often parental dispute where the court is left with the strong impression (or indeed concludes) that the aim of one or other parent is to distance the child from the other parent without real justification but rather as part of the ongoing adult dispute.

91. In essence, that is the father's assertion with respect to this application. That assertion is based upon the premise that the mother's primary motivation is to alienate the child from him without justification. It is an assertion I reject for the reasons set out above.

92. Likewise, the argument enunciated at para 89(iii) above would ordinarily be a powerful factor *in favour* of retaining the father's surname.

93. However, in the circumstances of this family and in particular my previous findings I have reached the conclusion that it is in EMP's welfare interest to permit the change of name for the following reasons:

i. Whilst EMP's name was registered with the father's surname at birth there has been a significant change of circumstances since that registration, namely the events set out in the fact-finding judgment. Those events have undermined the mother's psychological security and are so serious as to represent a significant indirect failure of parenting viz-a-viz EMP;

ii. Whilst I do not consider that the reasons given by EMP to the Guardian for wishing to use his mother's surname have reached the level of cogency that enable me to consider them as being determinative, I am satisfied that *if and when* EMP becomes aware of the way in which his father has treated his mother it is overwhelmingly likely that that he would find it almost incomprehensible that it was considered in his welfare interests for him to retain use of the surname with which he was registered;

iii. Whilst I understand the father's concern that a change of surname would weaken EMP's links to his paternal family and heritage I would observe that the *real* cause of the child's lack of connection to his paternal family is the father's behaviour. Whilst the child's surname is of course an important factor in maintaining those links, in the circumstances of this case maintaining EMP's paternal surname will in reality provide no 'real world' or tangible connection to the paternal family;

iv. In any event, the name of the child's birth certificate will not change. In my assessment that is sufficient substantive connection in the context of these facts – there is no secret within this family as to whom EMP's father is, EMP clearly understand his paternity;

v. The surname maintains a connection to a father who caused significant harm to the mother. It would be a daily reminder to the mother and there is a real risk that in due course it would be a daily reminder to EMP;

vi. In the context of my findings I consider it reasonable for the mother to *ask* that she not have imposed upon her as primary carer for EMP a child who uses on a daily basis the name of someone who raped her. I consider it a rational and reasonable request. Each school report or medical document that arrives with the father's surname on is a reminder not only of what has happened to her but also the truth that she must come to terms with i.e. that her son is also DG's son. To the extent that allowing EMP to use her name relieves her of that burden it is also a welfare benefit to EMP.

The Father's Parental Responsibility

94. The father has Parental responsibility for EMP by reason of being named on his birth certificate.

95. The mother has applied for an order revoking the fathers PR or alternatively restricting its use.

96. MacDonald J has once again helpfully distilled the law with respect to such applications in *D v E (Termination of Parental Responsibility) [2021] EWFC 37 (30 April 2021)* at paragraphs 31 to 35:

> 31. Where, as in this case, the father has acquired parental responsibility pursuant to s.4(1)(a) of the Children Act 1989 by being registered as the subject child's father, his parental responsibility may only be removed by an order of the court pursuant to s.4(2A) of the 1989 Act. Having regard to the terms of s.1 of the Children Act 1989, when deciding whether to terminate a father's parental responsibility, the child's welfare is the court's paramount consideration (that question being a question with respect to the upbringing of a child pursuant to s.105(1) of the Act) but is not *required* to consider the factors set out in s.1(3) of the 1989 Act, as an order terminating the father's parental responsibility is not an order specified in s.1(4) of the 1989 Act. However, in *Re D (Withdrawal of Parental Responsibility)* [2015] 1 FLR 166 the Court of Appeal made clear at [12] that:
>
> > "[12] When a court is considering an application relating to the cessation of parental responsibility, the court is considering a question with respect to the upbringing of a child with the consequence that by s 1(1)(b) of the CA 1989 the child's welfare will be the court's paramount consideration. By s 1(4), there is no requirement upon the court to consider the factors set out in s 1(3) (the 'welfare checklist') but the court is not prevented from doing so and may find it helpful to use an analytical framework not least because welfare has to be considered and reasoned. Given that the cessation of parental responsibility is an order of the court, the court must also consider whether making such an order is better for the child than making no order at all (the 'no order' principle in s 1(5) of the CA 1989)."
>
> 32. With respect to the factors to be taken into account, in *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048, Singer J held as follows at p.1052:
>
> > "I start from the proposition that parental responsibility – both wanting to have it and its exercise – is a laudable desire which is to be encouraged rather than rebuffed. So that I think one can postulate as a first principle that parental responsibility once obtained should not be terminated in the case of a non-marital father on less than solid grounds, with a presumption for continuance rather than for termination.

> The ability of a mother to make such an application therefore should not be allowed to become a weapon in the hands of the dissatisfied mother of the non-marital child: it should be used by the court as an appropriate step in the regulation of the child's life where the circumstances really do warrant it and not otherwise.
>
> I have been referred in outline to four authorities as to the circumstances in which a court will make an order for parental responsibility on application to it under s 4, notwithstanding maternal opposition and, more particularly, as to the criteria and considerations which are relevant. The authorities in question are: *Re H (Minors) (Local Authority: Parental Rights) (No 3)* [1991] Fam 151, sub nom *Re H (Illegitimate Children: Father: Parental Rights) (No 2)* [1991] 1 FLR 214; *Re C (Minors) (Parental Rights)* [1992] 1 FLR 1, in the Court of Appeal, and *Re G (A Minor) (Parental Responsibility Order)* [1994] 1 FLR 504, also in the Court of Appeal; and, finally, a decision of Wilson J, *Re P (A Minor) (Parental Responsibility Order)* [1994] 1 FLR 578.
>
> Such applications for parental responsibility orders are governed by the considerations set out in s 1(1) of the Children Act, namely that the child's welfare is the court's paramount consideration. I can see no reason why that principle should be departed from in considering the termination of a parental responsibility order or agreement.
>
> Key concepts to the consideration of the making of an order are evidence of attachment and a degree of commitment, the presumption being that, other things being equal, a parental responsibility order should be made rather than withheld in an appropriate case."

33. Within this context, in *CW v SG (Parental Responsibility Consequential Orders)* [2013] EWHC 854 (Fam), [2013] 2 FLR 655 Baker J (as he then was) endorsed the approach taken by Singer J in *Re P (Terminating Parental Responsibility)*. In *CW v SG (Parental Responsibility Consequential Orders)*Baker J held as follows at [59]:

> "As in *Re P*, I find that, if the father did not have parental responsibility, it is inconceivable it would now be granted to him, and that this is a factor I should take into account when considering this application to terminate his parental responsibility. Furthermore, like Singer J in *Re P*, I find that in this case there is no element of the bundle of responsibilities that make up parental responsibility which this father could, in present or foreseeable circumstances, exercise in a way which would be beneficial for D."

34. The decision of Baker J (as he then was) was upheld by the Court of Appeal in *Re D (Withdrawal of Parental Responsibility)* [2015] 1 FLR 166, in which Ryder LJ (as he then was) held as follows at [13] and [14] with respect to the factors to be taken into account on an application to terminate parental responsibility pursuant to s.4(2A) of the Children Act 1989:

> "[13] The paramountcy test is overarching and no one factor that the court might consider in a welfare analysis has any hypothetical priority.

> Accordingly, factors that may be said to have significance by analogy or on the facts of a particular case, for example, the factors that the court considers within the overarching question of welfare upon an application for a parental responsibility order (the degree of commitment which the father has shown to the child, the degree of attachment which exists between the father and the child and the reasons of the father for applying for the order) may be relevant on the facts of a particular case but are not to be taken to be a substitute test to be applied (see *Re M (Parental Responsibility Order)* [2013] EWCA Civ 969, [2014] 1 FLR 339, at paras [15] and [16]).
>
> [14] An unmarried father does not benefit from a 'presumption' as to the existence or continuance of parental responsibility. He obtains it in accordance with the statutory scheme and may lose it in the same way. In both circumstances it is the welfare of the child that creates the presumption, not the parenthood of the unmarried father. The concept of rival presumptions is not helpful, although I entirely accept that the fact of parenthood raises the welfare question, hence the right of a parent (with or without parental responsibility) to make an application under s 8 of the CA 1989 without permission (see s 10(4)(a) of the CA 1989). There is also ample case-law describing the imperative in favour of a continuing relationship between both parents and a child so that ordinarily a child's upbringing should be provided by both of his parents and where that is not in the child's interests by one of them with the child having the benefit of a meaningful relationship with both. A judge would not be criticised for identifying that, as a very weighty, relevant factor, the significance of the parenthood of an unmarried father should not be under estimated."

35. Within the foregoing context, it is also important when considering an application to terminate the parental responsibility of an unmarried father to have regard to the shared nature of parental responsibility when the same is conferred upon both parents. In this context, in *Re W (Direct Contact)* [2013] 1 FLR 494 at [80] McFarlane LJ (as he then was) observed as follows:

> "Whether or not a parent has parental responsibility is not simply a matter that achieves the ticking of a box on a form. It is a significant matter of status as between parent and child and, just as important, as between each of the parents. By stressing the "responsibility" which is so clearly given prominence in the Children Act 1989, section 3 and the likely circumstance that that responsibility is shared with the other parent, it is hoped that some parents may be encouraged more readily to engage with the difficulties that undoubtedly arise when contemplating post separation contact than may hitherto been the case."

Discussion

97. I remind myself once again of the ‘welfare checklist’ contained in section 1(3).

98. The concept of PR is unlikely to be uppermost in EMP’s mind. However, in light of his view with respect to his father’s involvement in his life, it is clear that he is unlikely to think of his father as having responsibility for him. Indeed, the father’s actions (as set out in the fact-finding judgment) reveal the father taking insufficient responsibility for EMP, including financially. However, the key issues must relate

to what EMP is likely to want his father to be able to do with respect to his PR? Would EMP want his father having the ability to exercise the rights that attend having PR?

99. In answering that question, whilst it is not a case law or legal definition, it is instructive to look at the Government website (the place a lay person might first go to enquire as to what their PR means) at https://www.gov.uk/parental-rights-responsibilities:

> **What is parental responsibility?**
> All mothers and most fathers have legal rights and responsibilities as a parent - known as 'parental responsibility'.
>
> If you have parental responsibility, your most important roles are to:
>
> - provide a home for the child
> - protect and maintain the child
>
> You're also responsible for:
>
> - disciplining the child
> - choosing and providing for the child's education
> - agreeing to the child's medical treatment
> - naming the child and agreeing to any change of name
> - looking after the child's property

100. The above definition does not seem to me to be significantly different to more formal 'legal' definitions and has the advantage of practicality.

101. Returning then to EMP's wishes, what are the reasonable conclusions I can draw about EMP's view of his father exercising the sort of tasks, rights and responsibilities given as examples? Again, applying the logic set out above in respect of other issues, it seems to me unlikely that EMP would understand how someone who has acted in the way the father has could make a positive contribution to his life in regards to the exercise of PR. Further, as time goes on, it is likely he will wonder how his father was not considered to have forfeited his PR by reason of the way he acted.

102. EMP's wider needs are of course met by his mother. In normal circumstances he would have a 'need' to have a relationship with his father. However, need are child specific and for the reason set out above when considering the making of a Child Arrangements Order I have spelt out why I consider that the welfare costs of providing that 'need' do not outweigh the benefits.

103. Further, in these circumstances I consider (as does the Guardian) that EMP needs a number of very specific things:

a. He needs not to be embroiled in court proceedings any more;

b. He needs his mother to be able to provide him with the best care she can and for distractions, traumatic triggers and emotionally exhausting issues not to divert her from those responsibilities (as much as is reasonably possible);

c. He needs to have a degree of certainty and stability about his father's involvement (or lack of it) in his life.

104. The change being considered for EMP at present is the possibility of revoking the father's PR for EMP. In one sense that will have little direct practical day to day impact on EMP, given my other decisions set out above. However, the indirect change for EMP (and indeed the mother) would be the knowledge that the father, as of right, cannot exercise the more peripheral elements of PR e.g. obtaining school reports, medical records etc.

105. I have both in the fact-finding judgment and this judgment said much about EMP's characteristics that do not require repeating here.

106. The mother has proved herself entirely capable of meeting EMP's needs. The father has not.

107. Finally, in terms of 'checklist' issues, the question of 'the powers available to the court' is a consideration. With respect to the issue of PR the court has a number of options:

a. Leave PR as it is, unfettered;
b. Leave PR but make specific issue or prohibited steps order to regulate specific rights that can be exercised with PR;
c. Revoke PR.

108. I will engage with these options when discussing the issue of proportionality below.

109. I also remind myself of section 1(5) of the Children Act 1989. The court should not make an order unless it considers that doing to would be better for the child than making no order. Again, I consider that this consideration is best discussed in the context of proportionality.

110. The case law suggests a simple question as part of the evaluation exercise – if the father applied now would the court grant him PR? The father has shown commitment to EMP in a number of regards (as set out in the chronology in the fact-finding judgment):

a. He had a relationship with EMP;
b. He has made court applications with respect to EMP;
c. He has participated and fully engaged in those court proceedings for a number of years; and
d. He has paid some child maintenance (see fact-finding judgment)

111. All of the above must be contrasted against the findings made. Whilst they do not go directly (save for the payments of maintenance) to the issue of commitment, they do speak to the father's actions as a parent and to some extent the way he has exercised his PR to date.

112. In light of my conclusions about the Child Arrangements Order it is relevant to ask what elements of PR remain to be exercised by the father? In terms of responsibilities flowing from the father to the child, there is really only one – paying maintenance. The obligation to pay child maintenance of course remains extant whatever the PR status of a biological father.

113. In terms of 'rights' flowing *to* the father as a parent, the existence of unfettered PR gives him the ability to access medical and school records and to be consulted in relation to important decisions.

114. All of the above considerations coalesce around the issue of proportionality and the court's powers. I approach this discussion on the basis that (a) any interference with extant PR requires positive justification with respect to the welfare interests of the child and (b) any interference should only be to the extent necessary to achieve the welfare interests identified.

115. Is it proportionate to remove PR where a father:

i. Has no contact with the subject child;
ii. Has caused significant harm to the subject child's mother (as set out in the fact-finding judgment);
iii. Makes no substantive acknowledgment of any of the findings;
iv. Where the practical exercise of PR relates solely to 'rights' flowing to the father;
v. Where the father's continued involvement in the child's life, even at the periphery, adversely affects the mother and therefore indirectly the child; and
vi. Where there is a positive welfare benefit to the child (as set out above) in revoking PR?

116. I am entirely satisfied that 'yes' is an entirely proportionate answer to the above question.

117. Will something less do? It would be possible to formulate prohibited steps or specific issue orders that 'ring fenced' elements of the exercise of PR. In my view

there are two reasons why that is not the welfare solution that best meets EMP's needs at present. First, on consideration of the day-to-day elements of PR that remain to be exercised it is difficult to identify what should be left or what may raise itself as an issue in the future. Secondly, and more importantly, in this case the 'representative' value of having PR is in my view significant. PR is important not just for the practical 'rights and responsibilities' it manifests but also because of its intangible quality as a statement of those rights and responsibilities. From the mother's (and I am sure in due course the child's) perspective it is difficult to ignore the fact that however 'ring fenced' or restricted, the father retaining PR represents an individual who has raped her retaining a legally recognised statement of his ability to involve himself and be consulted regarding the child. I fail to see how in the circumstances of this case that is a proportionate outcome.

118. Accordingly, I revoke the father's Parental Responsibility for the child.

<u>The Mother's Costs Application Against the Father</u>

The Law

119. Whilst reported cases from Recorders and indeed Circuit Judges such as myself provide no precedent value and are certainly not binding on other judges, sometimes such a judge will have considered the law in relation to an issue comprehensively and included that consideration in a judgment. *A Mother v A Father [2023] EWFC 105 (14 April 2023)* is one such case. In that case Recorder Dias KC undertakes a thorough and in my view accurate review of the case law in relation to the issues of costs in Children Act proceedings. With all due respect to him, I have reproduced it below:

> [36] There is a generally circulating misconception that there is a common approach to costs in the Family Court, and that it is that generally costs orders are not made. In fact, the position is more complex and nuanced than that. There are a number of dominant themes that broadly shape but do not determine the various substreams of work that together constitute the work of the Family Court. Proceedings under the Children Act 1989 is one such stream; this work can be further subdivided into public law and private law work.
>
> [37] In respect of private law cases determining child arrangements orders, there is indeed a policy that informs the question of costs awards. It was set out amongst other places by Wilson J, as he then was, in *London Borough of Sutton v Davis (Costs) (No 2)* [1994] 1 WLR 1317. In that case, the judge sought to explain the reason behind the general proposition that it was unusual to make an order for costs in children cases. He stated at 1317:
>
> > "Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their cooperation around the

> future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them… But the proposition is not applied where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable".

[38] Thus, where litigation conduct has been blameworthy, in the sense of being reprehensible or unreasonable, costs are potentially payable. In *Re S (A Child)* [2015] UKSC 20, at [19], Lady Hale deemed this exposition by Wilson LJ to be the "classic" encapsulation of why in Family Court proceedings involving child welfare the courts have generally adopted a "no costs" approach.

[39] Of the seminal cases in this field is *R v R (Costs: Child case)* [1995] 2 FLR 95. In that case, the Court of Appeal explained why the practice of not awarding costs in child cases had developed. At pages 96-97, Hale J, as she then was, said:

> "The reasons why this practice has developed perhaps fall into three categories. The first is general to all family proceedings and was pointed out by Butler Sloss LJ in G*ojkovic v Gojkovic (No 2)* [1991] 2 FLR at page 237, that orders for costs between the parties will diminish the funds available to meet the needs of the family…
>
> The second reason which is given for there being no costs orders in general in children cases, is that the court's concern is to discover what will be best for the child. People who have a reasonable case to put forward as to what will be in the best interests of the child should not be deterred from doing so by the threat of a costs order against them if they are unsuccessful…
>
> The third reason is suggested by Wilson J in the case of *London Borough of Sutton v Davis (Costs) (No 2)* at page 570 to 571, when he points to the possibility that in effect a costs order will add insult to the injury of having lost in the debate as to what is to happen to the child in the future; it is likely therefore to exacerbate rather than to calm down the existing tensions; and this will not be in the best interests of the child".

[40] At page 97, Hale J goes on to say:

> "Nevertheless, there clearly are, as Neil LJ pointed out, cases in which it is appropriate to make costs orders in proceedings relating to children. He pointed to one of those sorts of situation: cases where one of the parties has been guilty of unreasonable conduct".

[41] However, that is not the end of it. The policy to encourage, or at least not deter, active participation by those who have a reasonable interest in the welfare of the child is encapsulated in Part 28 of the Family Procedure Rules 2010 ("FPR"). Generally, in family proceedings, the court starts with a plain sheet in respect of costs, as part 44 of the Civil Procedure Rules (CPR) makes clear: the starting point is rule 44.2. This provides insofar as it is material:

> "(1) The court has discretion as to -
>
> a) Whether costs are payable by one party to another;
>
> b) The amount of those costs; and

c) When they are to be paid".

[42] This principle is echoed in the Family Procedure Rules 2010 at rule 28.1. That provides: "The court may at any time make such order as to costs as it thinks just". However, the rules then qualify this general principle in the next provision. Rule 28.2 provides insofar as it is material:

> "Subject to rule 28.3 (this is concerned with financial remedy proceedings) Parts 44 (except rules 44.2(2)…) of the CPR apply to costs in proceedings".

[43] That rule that was expressly excluded by Family Procedure Rules 28.2 is as follows:

> CPR 44.2:
>
> "(1) The court has discretion as to -
> a) Whether costs are payable by one party to another;
> b) The amount of those costs; and
> c) When they are to be paid.
> (2) If the court decides to make an order about costs -
> a) The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party".

[44] Although it is excluded by rule 28.2 of the FPR, nevertheless it is noteworthy that CPR 44.2 itself contains an exception at (2)(b), which states: "The court may make a different order". To take stock then, the court is left with a position that it can make any costs order it thinks just, but the rule that the costs follow the event, what is called the "general rule", deriving from CPR 44.2(2), is disapplied. Thus, to make an order following a fact-finding hearing would not be to disapply the disapplication; it would be, in my judgment, to make an order that the court thinks is just.

[45] Further assistance about the exercise of discretion in determining what is indeed "just" is provided by CPR part 44. Part 44.4 provides:

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
> a) The conduct of all the parties;
> b) Whether a party has succeeded on part of its case, even if that party has not been wholly successful".

[46] Thus, there is a wide discretion. That discretion is conferred by statute and statutory instrument. It must be exercised in accordance, therefore, with the overriding objective. The FPR outlines the overriding objective at rule 1.1. That rule provides to the extent that it is material as follows:

> "(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".

[47] Thus, the question becomes: when would it be just to order costs in Children Act 1989 proceedings, and why? The reason for this application of the general costs following the event rule principle is a species of promoting both the overriding objective ambition of dealing with the case justly and having regard to the paramount principle of section one of the same Act. At section 1(1), the Children Act 1989 provides that "the child's welfare shall be the court's paramount consideration".

[48] Do, then, fact-finding hearings engage questions of the child's welfare? By their definition, they do not: a fact-finding hearing is axiomatically about finding facts. It is those facts, once found, that then inform the welfare decisions of the court, but they are not in themselves about child welfare. One tests that proposition by asking whether one makes a factual determination taking into account what is in the best welfare interests of the child or simply by assessing the evidence and then making a determination of what is proved to the requisite standard, irrespective of the implications for the destination of the child's living and contact arrangements.

[49] It is essentially for this reason that in *Re J (Children)* [2009] EWCA Civ 1350, Wilson LJ found that a fact-finding hearing could be, as the judge put it, "ring-fenced" from the general welfare enquiry. That case was a case involving a fact-finding hearing. While the judgment of the Court of Appeal was delivered by Wilson LJ, as he then was, Ward LJ concurred with the judgment. Thus it is an authoritative court.

[50] What had happened was that there was a fact-finding hearing that was conducted by a district judge in 2008. This was an investigation into the allegation by the mother within an application for contact made by the father that in the marriage he had perpetrated acts of violence towards her, including in the presence of one or other of the two children of the marriage, and indeed had to a limited extent been violent towards the older child.

[51] At the end of the hearing the District Judge gave a judgment in which to a significant extent, but not completely, he found the mother's allegations proved. The mother then sought an order for costs for the fact-finding hearing against the father. The District Judge refused the application and made no order. It was against this refusal to make no order as to costs that the mother appealed to a Circuit Judge; she lost again there.

[52] The background was that the father had served in the British Army. In 2005, he began a tour of duty in Germany and the family moved there with him. There were difficulties and the marriage came to an end in February 2007, when the mother took the children with her and returned to England. A few months later, the father was transferred back to England by the Army, and the parents then lived in close proximity in west London.

[53] Once he returned to this country, the mother refused to permit him access to the children, other than supervised contact at a contact centre. He therefore applied to the court for an order for unsupervised contact including staying contact, and in his application he reiterated that the mother was fabricating the allegations of domestic violence against him. In light of the mother's allegations, the District Judge convened a fact-finding hearing. That was conducted on 18 and 19 March 2008 and both parties were represented by counsel.

[54] At that fact-finding hearing the mother made 20 allegations against the father. The judge ruled that five of them had not been established to his satisfaction. He did not

consider one of the allegations, but 14 allegations out of the original 20 were established. Those subdivided into three categories: one allegation which was established only to the extent of an admission by the father; four allegations which had been the subject of a partial admission by the father, but which were established to the more serious extent alleged by the mother; and also nine allegations which the father had denied completely, but were nevertheless established to the requisite civil standard.

[55] Wilson LJ said that the District Judge's findings were "entirely at odds with the tone of injured innocence struck by the father at the beginning of his written witness statement". In his witness statement, the father said: "I am not a violent aggressive individual and certainly not the man I am being accused of being through the evidence provided to the court by my wife and her 'supportive witness'".

[56] The mother founded her application for costs on the basis that notwithstanding that the hearing had been the context of the father's application for contact, and that it was rare for the court to make an order for costs in proceedings under the Children Act 1989, the hearing was a fact-finding enquiry into allegations that had been properly made by the mother. Furthermore, her claim had to a significant extent been denied by the father and had yet been subject of positive adverse findings against him.

[58] The judgment of the District Judge was brief. He said:

> "I am not going to make an order in this case. I think the parties had a right to come to court and in those circumstances I am not going to make an order for costs".

[58] When that was appealed to the Circuit Judge, the Circuit Judge properly reminded herself that it was indeed unusual to make an order for costs in proceedings under the Act. She properly referred to a decision of the Court of Appeal in *Re T (Order for Costs)* [2005] EWCA Civ 311. It was submitted that the stance taken by the father at the fact-finding hearing was not "irrational conduct which had prolonged unnecessary litigation".

[59] In the Court of Appeal, Wilson LJ cited his own judgment that I have already mentioned: *London Borough of Sutton v Davis (Costs) (No 2)*, and the passage at page 570H-571C. The judge continued that the reference to *Re T* "is an example of a case in which an order for costs was nevertheless made in proceedings under the Act". He then moved on to consider the nature of this case. He disagreed with the Circuit Judge's refusal to accept what she called a "compartmentalised approach":

> "The order for a bespoke fact-finding hearing was surely to consign the determination of the mother's allegations into a separate compartment of the court's determination of the father's application for an order for contact".

[60] He stated at [17]:

> "…the effect of the direction for a separate fact-finding hearing was that the costs incurred by the mother in relation to that hearing can confidently be seen to be wholly referable to her allegations against the father. There was, in that sense, a ring fence around that hearing and this around the costs referable to it. Those costs did not relate

> to the paradigm situation to which the general proposition in favour of no order as to costs applies".

[61] He continued at [18]:

> "…it would be wrong to consider that the discretion in relation to costs is so fettered that an order can be made only against a party whose conduct has been irrational".

[62] And then at [19]:

> "I am well aware that, in most disputed cases in relation to children, whether in private or in public law, parties justify their proposals for the future arrangements for the child by reference, at any rate in part, to past events, of which another party or other parties will often present a different version. Thus, to a greater or lesser extent, issues of historical fact arise in probably the majority of these proceedings. I would be concerned if our exercise of discretion in relation to the mother's costs in this case today were to be taken as an indication that it was appropriate in the vast run of these cases to make an order for costs in whole or in part by reference to the court's determination of issues of historical fact… the mother's costs of the hearing before the District Judge fell into a separate and unusual category. The hearing was devoted exclusively to the court's consideration of serious and relevant allegations against the father of what can only be described as misconduct on his part. Over two thirds of the mother's allegations were true… Of the true allegations, nine had been falsely denied by the father; and all but one of the remainder had been admitted by him only in part".

[63] Therefore, he concluded at [20]:

> "This case is in my judgment one in which a proper exercise of discretion on the part of the District Judge did call for an order for costs to be made against the father. In the light however of the allegations which the mother undertook to establish but failed to establish, and of the limited admissions made by the father prior to the hearing, my view is that he should have been ordered to pay only two thirds of the mother's costs of and incidental to the fact-finding hearing".

[64] Stepping back then, fact-finding hearings can lead to costs orders. Indeed, in *R v R* at paragraph 99, Staughton LJ stated: "For my part I am not sure that it would be wrong to discourage unreasonable parents from putting unreasonable views before the court".

[65] I must briefly deal with the case of *Re T (Care Proceedings) (Costs)* [2012] UKSC 36 in the Supreme Court. That was a case that considered Wilson LJ's decision in *Re J*. Lord Phillips, President of the Supreme Court, held at [44] that:

> "…we have concluded that the general practice of not awarding costs against a party, including a Local Authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that

> accords with the ends of justice and which should not be subject to an exception in the case of split hearings".

[66] One must be clear what was actually decided by the Supreme Court. These were care proceedings; there were allegations of sexual abuse of two children. The grandparents of the children were joined as intervenors as being people who allegedly colluded with the abuse.

[67] After a lengthy split fact-finding hearing lasting five-and-a-half weeks, the grandparents were exonerated completely. Because of their financial circumstances, they were disentitled to legal aid, therefore they borrowed £55,000 from a building society. They spent £52,000 on legal fees and they sought to recoup them having been vindicated in the contested proceedings.

[68] At the first instance, the trial judge dismissed their application for costs; his decision being reversed in the Court of Appeal. When the matter came to the Supreme Court, that court in turn overruled the Court of Appeal and restored the order of the judge at first instance, which was to dismiss the costs application.

[69] The issue of principle that was raised by the appeal must be clearly and carefully identified. It was this:

> "Whether in care proceedings a Local Authority should be liable to pay an intervenor's reasonable costs in relation to allegations of fact reasonably made by the Authority against the intervenor which had been held by the court to be unfounded".

[70] Therefore, I judge this decision to be fundamentally about public law proceedings and costs; it is distinguishable from private law proceedings. However, it is of course highly persuasive being the judgment of the Supreme Court, but I do not find myself bound by this decision. It did consider what Wilson LJ said in *Re J*, but it considered its application to split hearings in public law Part IV proceedings. Here, the issues in private law fact-finding hearings are subtly, but importantly, different.

[71] Nevertheless, putting all the authorities together, I conclude that some form of unreasonable conduct by the party subject to adverse findings is generally necessary. I have been influenced by what was said in the Supreme Court in the case of *Re T*. The Supreme Court emphasised that the unreasonable conduct need not be confined to the conduct of proceedings, but can include conduct prior to proceedings, which must include the question of whether to bring proceedings at all. The ability to consider conduct prior to proceedings was recognised by Keehan J in *Re A and B (Parental alienation: No 3)* [2021] EWHC 2602 (Fam) at [19], and while examining *Re T*. I turn to this more recent decision.

[72] This was a long-running and complex case involving allegations of parental alienation which necessitated both multiple hearings and judgments. At the final welfare hearing, the residence of the child was transferred from the mother to the father. In a third judgment about proceedings, the judge considered the father's application for costs. The judge carefully set out the legal framework and relevant decisions about it ([9]-[20]). He found that the mother's approach to proceedings, in which she had lied repeatedly, amounted to an "ill-judged litigation tactic" and was "so egregious" that it triggered the costs discretion. The judge painstakingly considered whether each of the heads of costs incurred were necessary to proceedings, finding that some could not be characterised as "unnecessary" ([38]-[39]), while finding that

applications to join the children as parties to be "inimical to the[ir] welfare best interests" ([43]) and the spurious attack on the professional integrity of a witness to be "wholly unreasonable" ([44]).

[73] What can be taken from this is that the court is obliged to assess in general terms the contribution that the unreasonable and reprehensible conduct has made to the cost of proceedings. Keehan J ultimately awarded costs against the mother on an indemnity basis. The approach of Keehan J was confirmed by Arbuthnot J in *C v S* [2022] EWHC 800 (Fam) (see [128]-[129]).

[74] Having surveyed the law as it currently stands, I conclude that the proper approach of the court when questions of costs arise in private law fact-finding hearings is reducible to the following ten propositions:

> (1) For fact-finding hearings about child arrangements orders, the court has a wide general discretion as to costs;
> (2) The disapplication of the general rule that costs follow the event does not itself apply to fact-finding hearings;
> (3) However, it does not automatically follow that after a fact-finding hearing the party against whom allegations are proved must pay the legal costs, but an adverse finding or findings may trigger the discretion to make such an order;
> (4) Generally, what is required is some form of unreasonable conduct. In *Re N (A Child) v A and Others* [2010] 1 FLR 454, a decision of Munby J, as he then was, the judge observed at [47]:
>
> > "The fact that a parent has litigated in an unreasonable fashion may open the door to the making of an adverse costs order, but it does not of itself necessitate the making of such an order. There is at the end of the day a broad discretion to be exercised having regard to all the circumstances of the case."
>
> (5) The discretion must be exercised in accordance with the overriding objective (FPR 1.1 and 1.2);
> (6) The court must take into account the conduct and litigation conduct of parties as a whole, and this examination can include conduct prior to proceedings (*Re T (Care Proceedings) (Costs)* [2012] UKSC 36);
> (7) The court must have regard to the extent to which party has been successful;
> (8) As a first approximation, the court should look at the number of allegations proved and not proved;
> (9) As a second approximation, the court should determine the extent to which the determination of the adverse findings contributed to the cost of the hearing (*Re A and B (Parental alienation: No 3)* [2021] EWHC 2602 (Fam));
> (10) If the overall successful party has engaged in litigation conduct that was not reasonable, that also may affect discretion and/or the ultimate figure awarded and indeed the basis upon which costs are to be assessed.

120. Having read all of the 'source' case law referred to above (and others) I will observe that I agree with the ten propositions made at the conclusion of the extract.

121. At a much earlier hearing I determined that a fact-finding hearing was necessary. I summarised the issues to be determined in broad terms at the start of my judgment:

> "a. KB alleges that in various ways DG has been abusive to her and, to some extent, EMP. She makes a wide range of allegations against DG, which when taken cumulatively she asserts establish a pattern of coercive and controlling behaviour. Additionally, she alleges that DG raped her on an occasion in 2017;
> b. DG denies many of the allegations made by KB, asserting that in essence KB's allegations are exaggerated or fabricated. He denies the allegation of rape; and
> c. DG asserts that in fact KB has engaged in a series of behaviours that have soured and frustrated his relationship with his son, including fabricating allegations about him within these proceedings."

122. KB formulated a long list of allegations which exceeded 50 in number (see C200-215). I did not find all of them proved and there are nuances to my findings. In addition, I did not address each and every allegation, concentrating, as is appropriate, on those issues that engaged most directly with the issues that would be of most relevance to the welfare stage of the proceedings. Whilst it may have been possible for the mother's schedule to have been more focused the hearing was not lengthened by the number of allegations pleaded as it was managed by me so as to concentrate upon the most pertinent and significant issues.

123. My findings with respect to the father's allegations of 'alienation' were more nuanced than simply a positive or negative conclusion.

124. However, standing back and taking a broad overview of the 'result' of the finding of fact hearing it can be seen that the court reached conclusions that aligned with the mother's narrative more than with that of the father. In particular and importantly the court concluded that (i) the father's treatment of the mother included acts of abusive behaviour of a very serious nature and (b) that the mother's influence upon EMP (which informs *some* of his negative view of his father) was consequent upon a rational and understandable set of beliefs about the father which had, at their genesis, the father's behaviour.

125. The nature of the father's behaviour can be seen from the findings. Clearly aspects of the father's conduct viz-a-viz the mother during their relationship and acquaintance was unreasonable and in short, abusive. Further, denying the allegations in their entirety the fact-findings hearing necessitated the mother giving evidence and being cross-examined, a process I am entirely satisfied she found traumatic.

126. The father pursued a case that sought (and continues to seek) to place blame on the mother entirely.

127. An oft quoted reason for the general rule that costs are not awarded with respect to Children Act hearings is the fact that such awards can have a negative impact upon

the finances available for the child and therefore are not in the child's overall welfare interests (not as a paramount consideration but as a factor to be taken into account).

128. In the circumstances of this case that consideration does not apply in the same way. The reality of situation is that the party who has and will remain having primary and almost sole responsibility for the care and upkeep of the child is the mother. Whilst I have little doubt that an adverse costs award made against the father would impact him and tangentially may impact the child in the sense of his ability to pay maintenance, the litigation costs of the fact-finding hearing have most impact on the child when it is the mother who has to meet them.

129. It was not unreasonable for the mother to be represented during the finding of fact hearing and the issues to be determined were of fundamental importance to her and the child.

130. To my mind the overall result of the fact-finding hearing bears a striking resemblance to the observations of Wilson LJ (as he then was) cited above in *London Borough of Sutton v Davis (Costs) (No 2)*:

> "The hearing was devoted exclusively to the court's consideration of serious and relevant allegations against the father of what can only be described as misconduct on his part. Over two thirds of the mother's allegations were true… Of the true allegations, nine had been falsely denied by the father…"

131. On balance I have concluded that it is appropriate that the father makes a significant contribution to the mother's costs with respect to the fact-finding hearing. A fact-finding hearing was necessitated by the level of dispute between the parties about significant past events. The central allegations clearly had relevance to the welfare outcome for the child and the father made no substantive or meaningful concessions with respect to his behaviour. My findings mean that the father has lied about significant aspects of his behaviour although I acknowledge that not all the mother's allegations were proved.

132. I also remind myself that an adverse costs orders are not 'damages', reparations or indeed intended to be punitive but seeks to fairly apportion the *legal* costs incurred as between the parties. They remain 'unusual' orders in family Children Act proceedings that sit in the realm of a high degree of judicial discretion.

133. Looking at the overall justice of the situation, it is my view that it would not be a just outcome if the mother shoulders the full cost of the fact-finding hearing in the circumstances where the findings made against the father amount to significant misconduct on his part notwithstanding that not all of the allegations were established.

Summary Assessment

134. The mother has filed a costs schedule which is not particularised so as to identify which elements of the costs relate to the finding of fact hearing alone and the proceedings in general. The total amount claimed in the cost schedule is £84,187.60, including VAT.

135. The schedule includes matters that do not relate to the finding of fact hearing (for example "Additional leave purchased to attend court 2022" - £1,000; and Bundle Preparation - the bundle for the finding of fact hearing was prepared by the Children's solicitor). Indeed, the schedule is headed "Between 21st December 2021 until now." December 2021 is the date of the hearing before HHJ Dodd and presumably 'now' includes the welfare hearing, which as the case law above makes clear, falls within the 'usual' rule.

136. Neither is it clear from the costs schedule to whom some of the itemised matters have been or is to be paid to. KB has not had solicitors during the fact-finding hearings and Dr Proudman's fee is set out separately, in fact under the sub-heading "Fee for advice/conference/documents" with no amount being specified as the "Fee for hearing" although I assume the figure encapsulates the fee for all the work undertaken by Dr Proudman. There is one item itemised as "consultation with Family First Solicitors" at a fee of £120 although no indication of when this took place.

137. Approximately £15,000 of costs appear to relate to an itemisation of KB's time – the Excel breakdown appended to the costs schedule says "*Prep includes researching, searching Bailii, contacting academic institutes for info, reading related cases etc. and understanding court process*". In general terms costs incurred by lay parties for the time they have spent preparing for a case etc are not recoverable from the other party.

138. Part of the costs schedule identifies the hearing days attended as being 17 although it is not clear to what those 17 days relate. The finding of fact hearing was heard over 6 days (including handing down of judgment). Whilst I acknowledge other hearings in preparation for the finding of fact hearing may be referrable to the exercise of fact finding solely, only 3 hearings took place before me prior to the finding of fact hearing (8th November 2022, 13th February 2023, 6th April 2022).

139. Dr Proudman's fee is £55,860 plus VAT. It is not clear from the costs schedule whether that fee includes the welfare/final hearing as the fee is not particularised.

140. Given that it is my task to summarily assess the costs to be awarded for the fact-finding hearing and taking into account the factors I have elucidated above, together with the fact that the Costs Schedule submitted does not contain sufficient particularisation for me to be able to divine which costs are referrable to the fact-finding hearing and which are not, it seems to me I must look elsewhere to make a reasonable assessment of the costs to be awarded and then ask myself whether that figure represents the aim of being 'just'.

141. Had KB been represented by counsel funded by Legal Aid the fact-finding hearing would have resulted in payment under the Family Graduated Fee Scheme, a fee calculated as follows (see The Civil Legal Aid (Remuneration) Regulations 2013): approximately £600 per day plus a bundle fee of approximately £320.

142. For the 6 days of the fact-finding hearing that gives a total just short of £4,000. Adding fees for conferences, advice and the hearings preceding and preparatory for the fact-finding hearing a rounded-up figure for a junior counsel (i.e. counsel that is not King's Counsel) instructed to act for a legally aided client would be in the region of £6,000.

143. It is my understanding that the Bar Counsel does not consider that legal aid fees remain sufficient such that a barrister is compelled to accept instructions paid at legal aid rates pursuant to the usual 'cab rank' rule (the rule in the Barristers' Code of Conduct that says, in effect, that barristers cannot discriminate between clients, and that they must take on any case provided that it is within their competence and they are available and appropriately remunerated.). Further, the graduated fee rates have not increased since 2013. I make no observation on either point beyond referring to them to highlight that that there is regularly a *substantial* difference between the amounts paid to counsel when instructed privately and those who are paid through public funding. Of course, it is a matter for the individual instructing the barrister/barrister's clerk to agree fees with counsel and the other parties have no standing with respect to that negotiation. Neither, in particular in family cases, where there is a wide discretion (see above) with respect to costs can such negotiation take place with any assumption that those fees will ultimately be paid by the opposing party, even if they are largely 'successful' with respect to the relevant issues.

144. I take into account that counsel being instructed by direct access often involves counsel undertaking more 'background' work that might otherwise have been undertaken by a solicitor. If the mother had instructed solicitor and counsel, it is highly likely that the costs would have been higher.

145. Further, by the end of the fact-finding hearing the bundle contained in excess of 7000 pages, a figure in excess of that contemplated by the Family Graduated Fee scheme.

146. I am also aware that, by reason of an exception to the Family Graduated Fees scheme, counsel for the child is not paid on a graduated fee basis but in fact an hourly rate for work undertaken.

147. I also consider that the three hearings that preceded the fact-finding hearing were referrable to the fact-finding process all being, in essence, preparation for that hearing.

148. I am also of course aware of my own preparation and ongoing reading time with respect to the hearing, which amounted to very many hours.

149. I consider that a reasonable and just amount to order the father to pay as a contribution to the mother's costs in the context of all the forgoing factors is £30,000 plus VAT.

150. Whilst this is a significant amount (it is 6 times what counsel funded by legal aid would in all likelihood be paid for the fact-finding element of these proceedings) I do regard the amount of preparation necessary for the finding of fact hearing to be out with the normal range for such hearings, as demonstrated by the amount of written evidence; it is commensurate with my experience of fees for other privately paying individuals in such circumstances; and makes allowance for my inability to 'separate out' that which relates to the fact-finding exercise and that which relates to welfare. It takes into account all the factors I have weighed in the balance above in my assessment represents a just and reasonable outcome in light of my findings.

<u>The Mother's Costs Application against Cafcass</u>

151. In her statement dated 5th December 2023 KB states as follows:

> "CG1, the Guardian, was professionally negligent in her practice by failing to not only identify Domestic Abuse, but in failing to safeguard my child and I due to her practice being negligent and outdated in considering the rape to be historical and therefore irrelevant. Irrelevant to the point that she failed to make mention of it in her report.
>
> Furthermore, both CG1 and her solicitor were negligent in their court practice such that they failed to direct HHJ Dodd to consider PD12J and PD3A as is required by law where allegations of abuse are made. Neither CG1 or the Solicitor were able to identify ANY practice direction nor did they make reference to any case law.
>
> In addition, CG1 was negligent in her practice when acting as the Family Court Adviser before the Magistrates, she allowed cross examination of the perpetrator by the DA Survivor. These actions are unlawful. Both DG and I were LiPs and CG1 a Court adviser should have recognised this practice to be unlawful.
>
> As a result of the CAFCASS Guardian wrongly advising the Court in December 2021, I have incurred a considerable amount of costs, as per the attached N260 costs schedule. These costs are only since the December 2021 hearing, not prior to this date.
>
> I believe that both the CAFCASS Guardian and their representative are responsible for providing the judge with unlawful advice, and both have been professionally negligent in their respective positions. Had they applied the law and case law correctly, the outcome may have been considerably different and my child may not have been harmed."

152. The inclusion of the above observations in this judgment should not be taken as an indication that they are factually or legally correct. I did not hear evidence in the fact-finding hearing from CG1 (and was not asked to do so). My observations

concerning CG1 were limited to those set out at paragraphs 290 to 293 of the fact-finding judgment. The *merits* of such a costs application are not straightforward – for example and as counterbalance to that which the mother sets out above, KB was represented by counsel at the hearing in December 2021 (the subject of the successful appeal) and my understanding is that no mention of PD3A was made on KB's behalf. Further, as I observe in the fact-finding judgment and as is set out in the chronology within that judgment, identification of the precise point at which CG1 fell into error and the degree of that error is not a simple matter. An order of November 2020 records that "mother is not opposed to contact in principle but states that it is too soon for the child for unsupported contact". A different judge rejected the mother's application to change the Guardian in March 2021 and the allegations of rape was not made in a statement to the court until October 2021 (see fact-finding judgment). The allegation of rape was an important factor in my decision to hold a fact-finding hearing. Ultimately, the error identified by the appeal was judicial - Guardians advise, they do not decide.

153. However, I have recited the above paragraphs from KB's statement to demonstrate that *at the latest* the issue of a costs application by the mother against Cafcass was clearly identified in this statement, not only to the other parties but also, presumably, to Dr Proudman. I was not told why that application was not advanced in the Position Statement prepared on the mother's behalf.

154. On the morning of the first day of the final hearing Dr Proudman indicated first to Mr Gilmore and then to me that in fact, the mother was not pursuing an application for costs against Cafcass.

155. However, after the court had risen for the day, Dr Proudman sent the parties and the court an email indicating "I have had a brief conference with KB after the hearing and she has reflected on her position (the court will note how difficult it is to take remote instructions), and she does seek costs from Cafcass (and father). This is in no way a criticism of Mr Gilmore or CG2. I suspect we will need to address consequential directions for skeleton arguments on this narrow point."

156. The asserted difficulty in taking remote instructions was not expanded upon. No technical difficulty was alleged or apparent. In the context of the pandemic providing numerous experiences of dealing with large numbers of hearings remotely, sometimes of considerable length and complexity, I will simply observe that this is the first time I have had the experience of such circumstances giving rise to the assertion that a remote hearing substantively added to the difficulty in taking instructions, absent technical difficulties. Throughout all of the hearings in this matter (where in person or remote) and to the best of my memory I never denied an application by any party for time to take instructions, consider their position or otherwise have appropriate breaks to be able to participate in the hearings fully. I make that observation not as a negative or positive point with regard to the issue of the costs application but to explain why I have not taken the assertion into account

in reaching my decision, absent detail with respect to the contribution such asserted difficulty made in a way that was relevant to this specific issue.

157. Mr Gilmore responded to Dr Proudman's email with a Position Statement stating:

> "1. This position statement addresses the issue of costs. The Court were informed at the conclusion of the hearing on the 14th December that costs were not being sought against CAFCASS.
>
> 2. Placing that into context. Dr Proudman's position statement was received on the 11th December 2023 confirming that the costs application was being made against the father. The Court will note the absence of CAFCASS within that section of the position statement. In addition, clarification was sought prior to the hearing starting and confirmation was given by Dr Proudman that [KB] would not be seeking such costs.
>
> 3. The goal posts have moved when at 16:30 after evidence had concluded for the day, and with now only 3 hours of Court time remaining, [KB]'s position has altered and the parties were informed that she now seeks costs against CAFCASS and the father. That is procedurally irregular at such a late stage.
>
> 4. In light of such a clear position being set out within the position statement of behalf of KB instructions have not been sought from CAFCASS senior management, or indeed CAFCASS legal. Indeed, had that position been made clear within the position statement that would have been done.
>
> 5. If the court are minded to deal with costs, absent a substantive application from KB, which is it submitted it should not, and following the changing position. Costs would not be a matter which can be addressed within the course of this hearing. Separate skeleton arguments should be directed as to the issue of costs and the matter listed in the new year for a separate costs hearing. At which point instructions will have been taken from senior management in CAFCASS and CAFCASS legal."

158. During submissions the following day Dr Proudman agreed that the currently filed costs schedule did date from December 2021 (see above) and that those costs were not for the time period relevant to any application as the appeal decision had overturned that order and the costs incurred since that time were largely consequent upon the Court granting the application for a fact-fining hearing, which is what KB had sought at the hearing on 21st December 2021. There were three hearings before HHJ Dodds after 21st December 2021: 23rd March 2022 [B171]; 19th May 2022 [B175] and 7th July 2022 [B181]. At all of those hearings KB did not have legal representation and appeared in person and therefore those hearings are not relevant to any claim for legal costs.

159. What KB wanted (as expressed Dr Proudman on her behalf) was permission to file and serve a further costs schedule relating to the potentially relevant time period and a Skeleton Argument with respect to the merits of such a claim.

160. In response to the suggestion that the Final Hearing of this matter had been listed for three months (i.e. when judgment was handed down following the fact-finding hearing) Dr Proudman responded by pointing out that the mother was a vulnerable person pursuant to *PD3A (Vulnerable Persons: Participation in Proceedings and Giving Evidence)* and therefore the mother should be given more time to make a properly particularised application for costs with supporting schedule relating to the relevant time period.

161. In essence at the final hearing of this matter the court did not have any of the documents necessary to consider the merits or quantum of a costs application against Cafcass. Therefore the case management decision for me is whether I should allow these proceedings to continue in order to give the mother the opportunity to advance that application.

Practice Direction 3A

162. KB is clearly a victim of domestic abuse and therefore PD3A is clearly engaged and KB falls squarely within the provisions of PD3A.

163. Paragraph 3A.2A stipulates:

> "(1) Subject to paragraph (2), where it is stated that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, a relative of another party, or a witness in the proceedings, the court must assume that the following matters are diminished—
>
> (a) the quality of the party's or witness's evidence;
>
> (b) in relation to a party, their participation in the proceedings.
> …
> (3) Where the assumption set out in paragraph (1) applies, the court must consider whether it is necessary to make one or more participation directions."

164. Paragraph 3A.1 defines participation directions:

> ""participation direction" means—
>
> (a) a general case management direction made for the purpose of assisting a witness or party to give evidence or participate in proceedings; or
>
> (b) a direction that a witness or party should have the assistance of one or more of the measures in rule 3A.8; and
>
> references to "quality of evidence" are to its quality in terms of completeness, coherence and accuracy; and for this purpose "coherence" refers to a witness's or a party's ability in giving evidence to give answers which address the questions put to the witness or the party and which can be understood both individually and collectively.

165. In respect of the court's duty to consider how a party can participate in the proceedings, paragraphs 3A4 states:

> "(1) The court must consider whether a party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.
> (2) Before making such participation directions, the court must consider any views expressed by the party about participating in the proceedings."

166. In terms of *what* the Court may do, paragraph 3A.8 sets out:

> (1) The measures referred to in this Part are those which—
> (a) prevent a party or witness from seeing another party or witness;
> (b) allow a party or witness to participate in hearings and give evidence by live link;
> (c) provide for a party or witness to use a device to help communicate;
> (d) provide for a party or witness to participate in proceedings with the assistance of an intermediary;
> (e) provide for a party or witness to be questioned in court with the assistance of an intermediary; or
> (f) do anything else which is set out in Practice Direction 3AA.

167. Practice Direction 3AA at paragraph 4 provides:

> "4. Participation directions: participation other than by way of giving evidence
>
> 4.1 This section of the Practice Direction applies where the assumption at rule 3A.2A FPR applies to a party, or where a court has concluded that a party's participation in proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability, including cases where a party might be participating in proceedings by way of asking questions of a witness.
>
> 4.2 The court will consider whether it is necessary to make one or more participation directions, as required by rule 3A.4 and rule 3A.2A. The court may make such directions for the measures specified in rule 3A.8. In addition, the court may use its general case management powers as it considers appropriate to facilitate the party's participation. For example, the court may decide to make directions in relation to matters such as the structure and the timing of the hearing, the formality of language to be used in the court and whether (if facilities allow for it) the parties should be enabled to enter the court building through different routes and use different waiting areas.

168. All proceedings are subject to the overriding objective set out in the Family Procedure Rules 2010 (as amended) which is defined as follows

> 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 justl, 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.

Application by the court of the overriding objective

1.2

(1) The court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by these rules; or

(b) interprets any rule.

169. Paragraph 1.4 of the Family Procedure Rules sets out the Court's duty to manage cases effectively and particularises the steps that the court can take so to do.

Discussion

170. The issue at hand is not about KB giving oral evidence or asking questions.

171. It can be seen that the provisions of PD3A and PD3AA do not go directly to the timing of or allowance made for making and supporting applications before the court. None of the measures identified provide specifically for something akin to "allowing extra time to make applications or filing skeleton arguments/evidence". However, the term 'participating in proceedings' must include, it seems to me, not only what happens during a court hearing but also those matters that lead to a court hearing, including for example, the filing of statements and the making of applications.

172. Accordingly, and by way of example, an individual who has a vulnerability may seek a longer period of time for the filing of a statement or complying with FPR mandated procedural steps than is usual. That would be, in my view 'a general case management directions made for the purpose of assisting… a party to… participate in proceedings" (see para 3A.1(a) above).

173. By way of the order dated 9th September 2023:

a. The matter was listed for the Final Hearing on 14th and 15th December 2023;
b. CG2's report was directed to be filed by 10th November 2023;
c. The parents' final statements were directed to be filed by 24th November 2023.

174. The above timetable was confirmed at a hearing before me on 10th October 2023 and no application to vary these directions was made by any party at any point prior to the final hearing.

175. KB made an application dated 25th November 2023 which relates to her application for "a prohibited steps order for the restriction of parental responsibility" [see B332 to B341].

176. The final statement from KB was in fact dated 5th December 2023, although no party sought to raise that as a point in the hearing.

177. The detailed Position Statement in which Dr Proudman advances, amongst other things, arguments with respect to the cost application against the father is dated 11th December 2023 and was accompanied by a further application dated 12th December 2023 which was an application by KB to "to terminate [DG's] parental responsibility." No party took any point against the timing of this application.

178. Dr Proudman advances on the mother's behalf the following proposition:

a. The mother is vulnerable by way of being a victim of domestic abuse; and
b. Accordingly, it is (i) understandable that she may change her mind with respect to an application and (ii) appropriate to allow her extra time to make an application.

179. Whilst I accept that in certain circumstances the above propositions may justify a case management decision to allow further time for application to be made, in particular *prospectively*, in the context of the history of this matter, I do not agree that the circumstances justify retrospect allowance being made with respect to this application for the following reasons:

a. At the final hearing, apart from that contained within the mother's statement set out above, the court had none of the material necessary to determine the application either on the merits or as to quantum;

b. There was a significant amount of time preceding the final hearing for the appropriate costs schedule to be filed and served;

c. There was a significant amount of time for the other matters necessary for the court to consider the application;

d. There was evidently sufficient time for applications, statements and Position Statements to be filed and served in relation to a large number of issues (all of which have been dealt with in this judgment), including, arguments and evidence in support of the costs application against the father;

e. The explanation for both the mother's 'change of mind' and the absence of any of the material necessary to pursue such an application relies upon a general assertion about the mother's vulnerability without specific detail as to why, for example, no such difficulties were experienced with regard to any other the other issues to be determined at the final hearing;

f. The application to allow further time for the application to be made and substantiated came on the second day of a final hearing and during submissions. It was unsupported by evidence or indeed an explanation beyond the most general assertions related above;

g. The issue does not go to the court's core function with respect to the Children Act 1989 and whilst the child's welfare is not the paramount consideration in this decision, the factors I have identified above in relation to the welfare issues strongly point to the need for this litigation to come to an end; and

h. The allocation of additional court time to this issue, when considered in the context of the Overriding Objective is not, in my judgment, warranted.

180. Accordingly, I decline to give further directions with respect to this issue and make a final order in terms set out above.

Appeal

181. In accordance with the suggested best practice advised by The President of the Family Division I will remind the parties that in the event that any party wishes to appeal this judgment they should do so within 21 days of this judgment being handed down (i.e. from 30th January 2024). The procedure, time limits etc concerning appeals from this court are set out in the Family Procedure Rules 2010 rule 30 and the accompanying Practice Direction 30A.

HHJ C Baker

30th January 2024