Neutral Citation Number: [2024] EWHC 1981 (Fam)

Case No: FA-2023-000299

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
APPEAL FROM THE CENTRAL LONDON FAMILY COURT
HHJ TALBOTT
Case No. WT20P00115

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2024

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

A	**Appellant**
- and -	
K	**Respondent**

- -

A v K (Appeal: Fact-Finding: PD12J)

- -

Elisabeth Traugott (instructed on a **Direct Access** basis) for the **Appellant (Ms A)**
Ajmal Azam (instructed on a **Direct Access** basis) for the **Respondent (Mr K)**

Hearing date: 12 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court. A reporting restriction order is in place.

The Honourable Mr Justice Cobb :

Introduction

1. By this appeal, the appellant, Ms A ("the mother"), challenges the decision of a Family Court Judge not to hold a fact-finding hearing within private law proceedings under Part II of the Children Act 1989 ('CA 1989') where cross-allegations of domestic abuse had been raised.

2. By his preliminary ruling on the first day of the three-day hearing on 6 September 2023, which was confirmed and more fully explained in a substantive reserved judgment handed down on 18 October 2023, HHJ Talbott sitting at the Central London Family Court (the 'CFC') declined to conduct a fact-finding hearing in relation to the alleged domestic abuse, and/or make any adjudication upon a number of allegations, when determining the welfare issues arising within the private law proceedings which had been brought by Mr K, the Respondent to this appeal ("the father").

3. The subject of the substantive application, and therefore of this appeal, is a girl who I shall refer to as M; she is 8 years old and the only child born within the relationship of the mother and the father.

4. For the purposes of the appeal, I have read a number of documents which had been filed in the first-instance proceedings in the CFC; I have read the Judge's reserved judgment. I have been provided with transcripts of the evidence of the parties and the Family Court Adviser. I have received the able written and oral submissions of counsel instructed by both parties.

5. At the appeal hearing, the mother sought permission to file a further statement of evidence; I read it on a provisional basis, to assess whether it satisfied the general tests for admissibility of fresh evidence (rule 30.12(2)(b) Family Procedure Rules 2010: 'FPR 2010'). It did not, and I therefore did not admit it. However, what did become clear at the outset of the appeal hearing is that one of the mother's complaints about the Judge's decision, by which he refused to allow a change of school for M, could not be pursued as there was no longer a place in the school which the mother wished M to attend. Ground 5 of the Notice of Appeal, to which this issue referred, was therefore withdrawn.

Background facts

6. These parties met in 2013. The father is currently 42 years of age, and the mother is 38 years of age; both are working professionals. They began cohabiting in 2014 and

were married in an Islamic ceremony in the same year. They did not participate in any civil ceremony of marriage. M was born in 2016. The parties separated for a period in 2018; they reconciled at the start of 2020 but finally separated in September 2020 following the arrest of the mother on a charge of assault upon the father. M was then 4 years of age.

7. It appears that the relationship had been conflictual more or less from the start. The parties' cross-allegations of domestic abuse refer to events which extend throughout the duration of the relationship up to 2021; the allegations were set out in a composite schedule dated 25 November 2021. Neither party sought to update the schedule prior to the hearing before the Judge, suggesting that there had been no more recent incidents of note.

8. The father's allegations in summary were:

i) In October 2019, the mother kicked the father;

ii) In April 2020, the mother spat in the father's face; the mother pushed him on to a bed, and punched him;

iii) The mother was emotionally abusive to the father, and accused him of being aggressive, whereas he says that he was the passive party; she accused him of not being psychologically well; she denigrated him, belittled him, and taunted him; she threatened to report him to his professional body;

iv) In July 2020, the mother chased the father out of the family home and grabbed his arm;

v) In September 2020, the mother threatened the father and his livelihood; she assaulted the father by pinching him, and pushed him backwards down onto a bed.

The mother denies the allegations raised by the father.

9. The mother's allegations in summary were:

i) On the night of their Islamic marriage in 2014, the father sexually assaulted her;

ii) The father was "coercively controlling" towards the mother, illustrated (in part) by him denying the mother a civil marriage in order to limit her marital financial rights;

iii) The father was financially abusive towards the mother; on one occasion he is said to have cleared the parties' joint bank account and refused the mother access to child benefit for M;

iv) In 2018, the father was physically and verbally abusive to the mother during an argument; the father called her a 'stupid bitch' and various other unpleasant names; he pushed her backwards so that she fell against furniture and the floor;

v) In April 2020, the father verbally abused the mother who was forced to apologise to the father;

vi) In September 2020, the father allegedly threw a mug at the mother; it missed and hit the wall;

vii) The father made false allegations to the police about the mother in September 2020 and then barred her from the family home.

The father denies the allegations raised by the mother.

10. The incidents referenced at §8(v) and at §9(vii) are one and the same. As to this, it is notable that although the mother continues to deny this incident, she was convicted in the magistrates court of the assault as alleged by the father (§8(v)), and her conviction was upheld on appeal at the Crown Court. The mother was also convicted in the magistrates court in relation to the incident at §8(iv) although her conviction in relation to this incident was subsequently overturned on appeal. At the hearing of the appeal in the Crown Court, which took the form of a re-hearing, the Judge found the father to be "plausible … credible and reliable", in contrast to the findings in relation to the mother. Although the mother had asserted before the Crown Court that she was "terrified" of the father, the Crown Court Judge concluded that her claim "appeared to be inconsistent with what we could see of her behaviour" (which included "provoking" the father) in the video recordings of events which had taken place in the family home.

11. By the time of the hearing in September 2023 in the CFC, M was living predominately with her mother at the home of the extended maternal family in south London; she was spending four nights per fortnight with her father, also in south London. She attended a school which was closer to the father's home. The relevant local authority had been involved with the family in 2020, and at that time had undertaken a 'child in need' assessment under section 17 CA 1989; the authority did not initiate any child protection procedures, in part it seems because M then moved to another local authority area in which her maternal family lived. There was a further local authority investigation in early 2022.

The issues before the court in September 2023

12. In December 2020, the father had issued an application for a range of child arrangements orders under Part II of the CA 1989. The specific welfare issues on which the Judge was required to reach a determination at the hearing in September 2023 were:

i) Should the number of overnight stays for M with her father in school term-time be increased? As I mentioned at §11 above, at the time of the hearing, and since January 2023, M had been spending four overnights in every fortnight at the home of the father. The mother indicated at the hearing that she was content for this arrangement to continue, but opposed any extension; the father requested an increase in the time;

ii) Under what order should any child arrangements be made? The mother invited the Judge to make a sole 'lives with' order in her favour in respect of M, with

a 'time spent with' order in favour of the father; the father wished the court to make a 'joint lives with' order;

iii) Which school should M attend? Specifically, should M move school, to be at a school nearer her mother's home? For the reasons set out at §5 above, this is no longer an issue.

Case management pre-September 2023

13. In its case management phase, the father's application for orders under the CA 1989 enjoyed neither judicial continuity, nor judicial consistency of approach:

i) At the First Hearing Dispute Resolution Appointment ('FHDRA') on 29th April 2021 Deputy District Judge Butler determined that a fact-finding hearing was necessary; however, in the order generated following this hearing there is no reference to PD12J FPR 2010, nor any explicit reason given for why the Judge had determined that a fact-finding hearing was necessary to resolve the disputed welfare issues in respect of the child at that point in time; this order did not in the circumstances comply with PD12J paragraph [14], which requires this information to be recorded on its face;

ii) At the next hearing, on 15 July 2021, Recorder Glancy KC confirmed the decision to hold a fact-finding hearing; this was done again without any explicit reference to PD12J. Unsupervised contact was ordered for the first time at this hearing, by agreement; the fact-finding hearing was listed for 7 March 2022;

iii) On 7 March 2022, the fact-finding hearing could not proceed, as documents had not been filed as ordered, and certain evidence had not been served in an accessible format. DDJ Morris however resolved, on the information available, that the application did *not* after all warrant a fact-finding hearing, setting out on the face of the order that: "the court has considered the guidance of the Court of Appeal in *Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448 and PD12J and is satisfied that in the particular circumstances of this case, a fact finding hearing is neither necessary nor proportionate". The Judge expressly relied on the following matters:

a) The judgement of the Crown Court, wherein the court allowed the mother's appeal against the conviction relating to the incident on 20 July 2020 (assault by beating) but dismissed the mother's appeal (and upheld the conviction) relating to the incident on 27 September 2020 (assault by beating);

b) The determination of the Crown Court that the child was present during the assault by the mother against the father on 27 September 2020; the Judge therefore considered that the child is thereby a victim of domestic abuse within the meaning of Section 3 of the Domestic Abuse Act 2021;

c) The section 17 CA 1989 assessments dated 30 November 2020 and 13 January 2022;

d) The agreement reached between the parties that contact between the child and the father can safely progress to overnight contact.

The final hearing was listed for 3 November 2022.

iv) The section 7 CA 1989 report from Cafcass was filed on 13 May 2022.

v) On 23 May 2022, at the Dispute Resolution Appointment, some minor adjustments were made to the contact arrangements, but no variation was made to the direction about the nature of the final listing which had been made by DDJ Morris;

vi) On 3 November 2022, the final hearing was listed before DJ Cassidy again. This hearing again had to be abandoned due to the unexpected unavailability of counsel through illness. In the case management directions made on that day, DJ Cassidy ruled that "this matter ought to be resolved by way of a combined fact-finding and final hearing with a time estimate of 3 days", "the court considering that it is in the best interests of the child and in light of the recommendations within the addendum section 7 [CA 1989] [report] that the re-listed final hearing shall incorporate a determination of the findings sought by both the mother and father per the schedule of allegations contained within the bundle for the fact-finding hearing on 7th March 2022" (emphasis by underlining added). It was importantly said that: "The judge will determine as a primary issue which allegations it is necessary for the court to determine". No mention was made of PD12J, nor was there any indication given for why DJ Cassidy considered the allegations of domestic abuse to be "relevant" to the determination of the welfare issues which remained between these parties, nor (in short) why there had been an apparent reversal of the previous direction given by DDJ Morris;

vii) At a further hearing on 5 January 2023, DJ Cassidy confirmed that the final hearing would be listed as a 'combined' fact-finding and welfare hearing; at this hearing he extended the interim overnight contact for M with her father by agreement. Again, he appears not to have considered whether a fact-finding was actually "necessary";

viii) An addendum Cafcass report was filed on 23 March 2023: the Family Court Adviser reported that M wished to continue to spend overnights with her father, and would like more time with him at weekends;

ix) On the 28th August 2023, the mother applied to adjourn the final hearing listed in September, and sought a separate fact-finding hearing; the application was premised on the basis that her allegations of abuse against the father had apparently been referred to the Crown Prosecution Service ('CPS'). This application was refused; the Judge later commented:

> "[51] … what view the Crown Prosecution Service may take in the future as to whether there is a realistic prospect

> of conviction in respect of specific criminal offences on the basis of a different evidence base to that available to me is irrelevant to the decision I must make in respect of the necessity of conducting a fact-finding hearing".

14. On the afternoon before the hearing, the Judge sent an e-mail to the parties' legal representatives in these terms:

> "I shall specifically require submissions as to the necessity and proportionality of determining any of the allegations within the schedule of allegations in the context of an application of PD12J and the principles clearly set out within *K v K* [2022] EWCA Civ 468".

15. Pausing here, it may be helpful to point out that in his reserved judgment (at [59]), the Judge reviewed the case management history in this case which I have set out above. He comments as follows:

> "… the inconsistency of the judicial approach in this case has been unhelpful for the parties and is likely to have contributed to the delay in a final decision being made in respect of [M]'s welfare. The chronology of this case emphasises how important it is that judges in the Family Court adopt a consistent approach to determining the necessity or otherwise of conducting a fact-finding hearing. PD 12J is the framework which, if applied carefully, provides that consistency".

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16. It was the father's position at the hearing before the Judge (adopting the language of PD12J paras [5], [14], [16], [17], and [19]) that it was not 'necessary' for the court to investigate the allegations of domestic abuse, as they were not 'relevant' to the issues before the court; he repeatedly told the court in his oral evidence that "we've moved on". The mother sought to have her allegations against the father investigated, claiming that they were 'relevant' and that it was 'necessary' to adjudicate upon them.

17. Having heard argument, the Judge indicated that he did not intend to investigate the allegations of domestic abuse. He returned to this in his detailed reasoned reserved judgment at [27], wherein he said this:

> "As a preliminary issue I determined that a fact-finding hearing was not necessary to determine the welfare issues in dispute. I explained why that was the case in light of having undertaken an analysis within the context of PD12J and *K v K* [2022] EWCA Civ 468. …".

The Judge had offered some latitude to counsel for both parties in allowing them to test the oral evidence relevant to the parental relationship in more recent times (provided that this could satisfy the tests of relevance and necessity), and added:

> "… I made clear to counsel that I would continue to review the necessity of embarking on a fact-finding exercise throughout proceedings as was incumbent on a court dealing with a case in which PD12J is engaged".

18. The Judge's detailed reserved judgment opened with the survey of the procedural history, describing the lack of judicial continuity and consistency to which I have drawn attention above. He referenced the cross-allegations of domestic abuse (including physical and emotional abuse, controlling and coercive behaviour). He alluded to the mother's conviction for assault against the father. He reproduced the definitions of domestic abuse contained in PD12J and in the Domestic Abuse Act 2021, and cited important paragraphs from the former. He then went on to explain why he had resolved not to conduct a fact-finding hearing, importantly emphasising that "[a]s a starting point, it is necessary to determine what the disputed welfare issues are in this case". The Judge correctly identified the three welfare issues for his determination as I have outlined them above at §12. He continued:

> "[34] … as of 7 March 2022, the mother's case was that she agreed to overnight contact taking place regardless of the allegations made. Indeed, by 23rd May 2022, the mother's position was that a change to her working pattern meant that [M]'s welfare best interest would be best served by there being an additional night of overnight contact in the place of one daytime contact sessions. This stance emphasises the position that the mother was adopting – that regardless of the seriousness of the allegations which were made there was no reason why overnight contact should not take place. It was the mother's case on 23rd May 2022 that there should be more overnight contact than she had agreed to on 7th March 2022".

19. The Judge recorded ([38]) that in anticipation of the final hearing, and at a time when she was legally represented by counsel and solicitors, the mother had signed and filed a witness statement in which she had confirmed her agreement to a continuation of the arrangements for M to stay overnight with her father on four nights out of fourteen, while opposing any increase in these arrangements; the Judge recorded that the mother had confirmed this position in her oral evidence. He continued ([42]):

> "An analysis of both *K v K* and PD12J provides a number of key propositions in respect of the decision as to whether to conduct a fact-finding hearing in any particular case, including:
>
> i) A judge considering whether to hold a fact-finding hearing must first identify the child welfare issue to which the resolution of the dispute will be relevant,
>
> ii) The court must have in mind the purpose of a fact-finding hearing, which is to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child.

> iii) Domestic abuse is pernicious in nature, but a fact-finding is only needed if the alleged abuse is likely to be relevant to what the court is being asked to decide relating to the child's welfare.

20. The Judge referenced the President's Guidance "Fact-finding hearing and domestic abuse in Private Law children proceedings" (5th May 2022); he quoted the following extracts in their entirety in his judgment, which, given their relevance to the issues before me, it is appropriate that I too should reproduce:

> "[3] There is a time and a place to determine allegations of domestic abuse, but it may not be in your court. Unless it will be relevant to, and necessary for, your decision regarding the welfare of the child, do not allow the court to be used to litigate such allegations.
>
> [5] Identify the real issues in the case. Is one parent denying contact *per se* or seeking to add conditions for or in relation to contact arrangements? What are the questions pertaining to the child's welfare?
>
> [13] The fundamentals are relevance, purpose, and proportionality. Consider FPR PD12J [14] and [17].
>
> [16] If your conclusion is that the allegations, if proved and however serious, would not be relevant to the decision, then no fact-finding hearing is required.
>
> [27] The court must, at all stages in the proceedings, consider whether domestic abuse is raised as an issue: FPR PD12J [5]. However, guard against attempts to re-argue the question once a decision has been made. What is said to have changed to undermine the original analysis? Proceedings should have judicial continuity, wherever possible, and a consistent approach."

21. The Judge alluded to the Court of Appeal's statement in *Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448 ('*Re H-N*') concerning the importance of the modern judiciary having a proper understanding of the nature of domestic abuse and in particular of controlling and coercive behaviour and of its impact on both the victims and the children caught up in the atmosphere engendered in such a household ([224] of *Re H-N*). At [45] of his judgment he continued:

> "There is no doubt as to the devastating impact on the welfare of a child that exposure to patterns of controlling and coercive behaviour are likely to have. As a proposition, that is undeniable. However, <u>in any particular case it is incumbent upon the court to decide whether it is necessary to hold a fact-finding hearing in light of the particular allegations made in a particular case in light of the potential</u>

> impact of the welfare decisions needed to be taken in respect of a particular child" (Emphasis by underlining added).

22. The Judge then addressed the parties' respective cases:

> [48] "The father's case is that his allegations do not need to be determined as he does not say that his allegations, even if proved, would have an impact on the welfare decision the court needs to make. Indeed, whilst acknowledging the fact that he is a victim of domestic abuse, that father's position is that the mother voluntarily undertaking a victim awareness course after her criminal conviction is a positive sign. In light of the nature of the father's allegations and the evidence available to the court in respect of the mother's conviction and subsequent victim empathy work, it is clear that there is no necessity to determine any of the allegations of behaviour demonstrating a pattern of controlling or coercive behaviour made within his narrative statements or schedule of allegations.
>
> [49] In respect of the mother's allegations, it is important not to artificially focus on individual allegations in assessing their relevance to the welfare issues which fall to be determined for [M]. Incidents of alleged sexual abuse may well be relevant to welfare decisions and necessitate specific determination when it is evident that they form part of a pattern of controlling or coercive behaviour which impinges upon the decisions the court must make for a child. Slavish adherence to schedules of allegations is not useful when considering the complex issue of domestic abuse. However, in the present case, the specific allegation of sexual assault which the mother seeks to be determined by the court dates to 2014, before [M]'s birth. Even when viewed in the context of the other allegations made by the mother, this is not an allegation which can properly be said to have an impact on the welfare issues in this case. The mother's further allegations include that she was the victim of a physical assault by the father on 27th September 2020 and that he then proceeded to have her, wrongly, arrested for assaulting him. However, the mother was convicted of assaulting the father on this occasion, and that conviction upheld on appeal, and so there is sufficient material available within the case papers already to ensure that determination of this allegation is unnecessary".

23. The Judge turned to the mother's further allegations including her assertion that the father had denied her a civil marriage in order to control her, and his alleged 'financial abuse' of her; he referenced the two specific alleged incidents of physical and verbal domestic abuse which were said to have occurred on 9th January 2018 (alleged verbal

abuse and pushing) and 15th September 2020 (father said to have thrown a mug at her).

24. The Judge then went on to consider the evidence of the Family Court Adviser, and said this:

> "It is abundantly clear that the views of Ms [T] are that the current arrangement of [M] spending one night with her father one week and three nights the next, in place since District Judge Cassidy's order of 5th January 2023, pose no risk to [M]'s welfare. Indeed, Ms [T] accepted that a progression of contact at [M]'s pace, beginning perhaps with an extra night on the longer period of contact, would be "reasonable." It was clear from Ms [T]'s evidence that she did not feel that the undetermined allegations of domestic abuse made by either of the parents were sufficient to prevent these regular periods of significant unsupervised overnight contact." (Emphasis by underlining added).

26. The Judge commented on the agreement of the mother to M having regular unsupervised staying contact with her father; he appropriately accepted that "victims of domestic abuse sometimes do agree to contact arrangements as a result of the continuing effect of the control and coercion of their abuser on them" ([54]) but added (ibid.) that:

> "I am entirely satisfied that the mother's agreement to unsupervised overnight contact which has been in place since March 2022 is both informed and is a position she adopts having had the benefit of advice and representation throughout, even at points when the father himself was unrepresented".

27. The crux of the decision is at [56]:

> "Of course, if the behaviours alleged by the mother occurred then it would have been frightening for the mother and she would have suffered harm as a result. However, when the mother's allegations taken at their highest are considered in conjunction with her consistent agreed position that there should be overnight contact between [M] and her father, and the supporting views of Cafcass in this regard, it is clear to me that they are not allegations which are necessary to determine in order to make the welfare decisions for [M] that I must." (Emphasis by underlining added: see Ground 2 of the Grounds of Appeal).

He added at [57], in some respects echoing, for emphasis, the comments which he had earlier made at [45] (see §21 above):

> "Nothing I have said within this analysis should be understood as in any way minimising the impact of

> domestic abuse either generally or specifically on children who are exposed to it or to adults who are victims themselves. In each case it is incumbent upon a judge within the Family Court to consider the impact of the specific allegations made in a specific case in the context of the impact on the welfare decisions required in respect of a specific child. It is that task which I have undertaken, and this judgment is not in any way a comment on domestic abuse, controlling behaviour or coercive behaviour more generally." (Emphasis by underlining added).

28. The Judge went on to consider the welfare issues. Specifically, in this regard, he commented:

> "[68] The mother set out her case clearly – she feels that [M]'s welfare best interests would be met by the current arrangements continuing and her changing schools to cut down the time spent travelling to and from school. Despite this being the clear thrust of her evidence, the mother was also keen at points to mention her "concerns" about the father's behaviour in a way in which I am entirely satisfied was designed to undermine his ability to meet [M]'s needs without committing to whether she genuinely felt that there was a real risk to [M]'s safety in the father's care."

29. The Judge made assessments of both parties, giving them some backhanded credit for behaving in a more mature manner than in the period under review. He recognised that the mother had given M "excellent care on a consistent basis" but was critical of the mother for making an "unreasonable and unjustifiable mental leap" in suggesting that the father had sexually abused M after two occasions when M had apparently wet the bed when staying at her father's home; in this regard, her evidence was found to be "inconsistent and implausible", the Judge finding that she deliberately implied to professionals that there were genuine concerns about sexual abuse so as to influence their recommendations as to contact with the father. Moreover, he found that the mother "misrepresented the truth" by implying to M's general practitioner that she alone had parental responsibility for M, and that the father did not. The Judge further criticised the mother for telling M that "the father "was not her (i.e., M's) friend because he sent mummy to jail". The Judge criticised the father too, finding his "explanation as to some of his past behaviour to be simply implausible"; he referred to the father as occasionally "immature and stubborn" at times of conflict and displaying "un-child-focused behaviour".

30. The Judge's welfare analysis took account of the matters set out in section 1(3) CA 1989. This assessment included:

i) M's currently expressed wishes and feelings, namely that she wishes to spend time with her father, perhaps slightly more than currently, but that she was uncertain about an equal split of time;

ii) His finding that the real risk of harm to M in this case "is the risk of emotional harm were either of her parents to be unable to put their feelings about each

other to one side and for this to continue to negatively affect her welfare";

31. He concluded:

> "[77] It is abundantly clear that whatever did or did not occur between the parents during the course of their relationship there is no suggestion from either parent that it prevents [M] spending significant unsupervised time with the other parent".

32. In relation to the form of order (the 'joint lives with' order):

> "[84] In respect of the nature of the order under which the above arrangements should be facilitated, it is clear to me that there is the need to mark very clearly that both parents have an equally important role to play in [M]'s life. Whilst it is clear to me that the parents are still unable to fully put aside their personal differences for the sake of promoting their daughter's welfare, the bringing to an end of these long-running proceedings will hopefully mean that they feel more able to do so. The lack of a current working co-parenting relationship, whilst relevant, is not a bar to the making of a joint "lives with" order. Indeed, in my judgment [M]'s emotional needs will be best met by the making of an order that makes clear that she lives with both parents (albeit with slightly more time spent living with her mother) and that both parents are equally as important to her. Without a joint "lives with" order being in place, I am satisfied that there would be a risk to [M]'s emotional and psychological welfare due to one parent allowing their feelings towards the other to once again influence their decision making to the detriment of [M]. [M] living with both her mother and father ensures that there can be no dispute in the future that both have equal rights to information regarding things like [M]'s schooling and medical records, an equal right to take [M] abroad and an equal responsibility to promote the importance of the other parent to her. Only the making of an order that [M] lives with both parents meets her welfare needs in my judgment". (Emphasis by underlining added).

He continued:

> "[84] … As is sadly often the case, there appears to have been a confusion between a joint "lives with" order and a shared care" arrangement. An order that a child lives with both parents is an order the Family Court can make under s8 of the Children Act 1989. A "shared care" arrangement, or "shared care order" as it is regularly erroneously referred to, is usually interpreted as an arrangement where a child spends an equal amount of time with both parents on a

> "week on, week off" basis. Having conducted the balancing exercise, it is clear to me that there are no negative impacts of a joint lives-with order being made in this case for [M], but that an order than she lives with her mother and spends time with her father runs the risk of the importance of both parents in her life being undermined. This would cause [M] emotional harm which could affect her throughout her childhood and beyond in respect of her relationship with both parents".

33. The order made by the Judge contained the following provisions:

i) There was to be a gradual progression towards M spending six nights in every fortnight with the father during term-time;

ii) M was to spend one-half of each school holidays with each parent;

iii) "[T]here is the need to mark very clearly that both parents have an equally important role to play in [M]'s life"; therefore a joint 'lives with' order was made;

iv) M was to remain at her present school (close to the father's home), though the Judge contemplated that the mother may re-apply to change school in due course "if considered appropriate".

Grounds of Appeal: Permission to Appeal

34. The mother launched her assault on the Judge's approach under five Grounds of Appeal. Henke J refused the mother permission to appeal on Ground 1, which had challenged as a point of 'procedural unfairness' the Judge's decision to reject the need for a fact-finding hearing at the outset of the hearing "despite the hearing having been listed for a 'rolled up' final hearing and fact-finding hearing for many months". Quite apart from the general case management obligations set out in rule 1 of the FPR 2010 (supported in this regard by PD12B para.[20]), para.[5] of PD12J quite emphatically requires a judge at "all stages of the proceedings" to consider whether domestic abuse is raised as an issue, and "consider the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order". The Judge did precisely that. For these reasons, this ground was destined to fail. Henke J granted permission to the mother to pursue Grounds 2-5, though Ground 5 fell away (see §5 above) given that the mother had no alternative school place for M.

35. Ground 2: reads as follows: "The judgment omits material and significant aspects of the evidence that would have supported findings of domestic abuse and coercive and controlling behaviour, including, but not limited to:

i) F's refusal to register the Islamic marriage in England because he did not like M's "behaviour";

ii) F's refusal to tell M in whose name the family home was registered;

iii) F's unilateral change to the locks on the house, ousting M from the property (in September 2020);

iv) F's use of the Nest home monitoring system to track M's whereabouts in the house (2020);

v) F's expectation that M maintain a certain level of cleanliness in the home (2020);

vi) F's admission to taking the child benefit without reasonable excuse; and

vii) F's refusal to permit M's brother or father to attend the home".

It is notable that the allegations set out in (iii), (iv) and (v) were not in the Schedule of Allegations on which the mother relied to establish controlling or coercive behaviour.

36. Ground 3: reads as follows: "It was legal error for the court to determine that M's case as to domestic abuse, "taken at its highest", would have no effect on the welfare decision because the father was already having overnight contact".

37. Ground 4: reads as follows: "In determining child arrangements, the court did not place enough weight on the child's sex in light of the father's comment that it "would depend on the circumstances" if she came to him to say that her future husband would not register her marriage or expected a certain level of cleanliness in the home. The father's prejudicial views are harmful for the child".

The arguments

38. Ms Traugott focused her appeal on the Judge's failure to consider the specific factual matters raised in Ground 2 which thus led to an "unsafe contact order"; she described the Judge's failure to address the issues as a "legal error", given that they were "significant enough to require that they be taken into consideration". She argued (reference Ground 3) that the father had been responsible for "some of the most serious coercive and controlling behaviour that can be inflicted".

39. It was suggested on behalf of the mother that she was put under pressure to agree the overnight contacts for M with her father even though she was represented by solicitors and counsel at the hearings at which this was agreed. The mother further argued that it was incumbent on the judge when considering M's welfare to consider her "age, sex, background and any characteristics" which the court considers relevant, adding "[M] is Muslim. Her father, according to his evidence, holds strict views about women in Islamic marriages". She added:

> "It is the mother's case that the father's views about women are harmful and that on this basis, the child's contact with the father should not have been granted [under] a joint lives-with order nor should his contact have been increased".

40. Ms Traugott drew attention to the fact that the CPS had not yet made any charging decision in relation to the father in respect of her allegations of abuse against him; she argued that a risk assessment for future contact was indicated because of the father's "misogynistic and controlling views about women, the effect on the mother of having to attempt to co-parent with an abusive ex-partner who has caused her harm, and the father's lack of insight and empathy".

41. In response, Mr Azam, counsel for the father, argued that the Judge had directed himself admirably, clearly, and concisely. He challenged the proposition that the refusal to marry a woman who has been convicted of an assault against him is an example of his controlling and coercive behaviour towards her. He accused the mother of being so selective in her extracts of the evidence on appeal that the all important context is lost; he argued that "[t]he bare assertion, out of all context, of the various alleged admissions (to the extent they can be regarded as admissions at all) do not and cannot amount to evidence of controlling and coercive behaviour". He drew attention to the adverse findings against the mother in the Crown Court of her lack of credibility, the finding that the mother was deliberately interfering with the father's relationship with M in relation to his access to her medical records, and the scurrilous and unfounded suggestion of sexual abuse; he relied on *K v K* [2022] EWCA Civ 468 ('*K v K*') and the fact that the duty is on the court only to determine "those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, in what terms" ([67]).

42. The father expressed his surprise that the mother had asserted that she was placed under pressure to agree the unsupervised and overnight contacts, having never advanced a case in writing, or during the course of her oral evidence to that effect. On the contrary, it was observed, the mother specifically sought to increase the number of M's overnight stays with her father when it suited her own arrangements.

43. The father refuted the assertion that he held strict views about women in Islamic marriages; this was "wholly unsupported by any factual determination". He had, he pointed out, given oral evidence at the hearing as to the value and prominence of highly educated women in his family, a contention which was supported by his written evidence. He argued:

> "… there was no basis to at all suggesting that the existing contact arrangements or indeed any increase in the time the child spent with her father posed any form of risk of harm to the child – that is of direct and crucial significance to the court's determination of the proceedings".

The law

44. The law in this area is now well known, and I am satisfied that the Judge traversed it appropriately in the course of his judgment. He cited relevant extracts from PD12J FPR 2010; he referenced appropriately sections 1-4 of the Domestic Abuse Act 2021. While not specifically citing section 76 of the Serious Crime Act 2015 (which makes controlling and coercive behaviour a criminal offence) the Judge did not minimise the impact of this kind of behaviour on a family (see [45], [48], [49]: see §§21-22 above). He drew on the President's Guidance "Fact-finding hearing and domestic abuse in Private Law children proceedings" (5th May 2022) (see §20 above). He referenced the significant body of caselaw which has now built up around these provisions in recent years including *Re H-N*, *Re B-B* [2022] EWHC 108 (Fam) ('*Re B-B*'), and *K v K*. During the hearing, and at my instigation, counsel and I further considered *Oxfordshire County Council v DP, RS and BS* [2005] EWHC 1593 (Fam); *Re H-D-H* [2021] EWCA Civ 1192 (*Re H-D-H*'); and the recent judgment in *AZ v BX* [2024] EWHC 1528 (Fam) ('*AZ v BX*').

45. As I said in *Re B-B* at [13]:

> "Fact-finding in cases concerning alleged domestic abuse are almost always time-consuming and challenging for judges and magistrates; the responsibility placed on the lay and/or professional judiciary to conduct a fair, thorough and above all a considerate and respectful hearing is indeed "weighty" (*Re H-N* at [6]), particularly where the factual issues are often complex, emotions are invariably raw, and the stakes are so high."

And as Peter Jackson LJ said in *Re H-D-H* at [23], the decisions taken day-in day-out whether to hold a fact-finding hearing: "… are not always easy decisions and the factors typically do not all point the same way: most decisions will have their downsides."

46. The Court of Appeal in *Re H-N* dedicated an important section of its judgment to the question of the necessity of holding fact-finding hearings and their scope (see 'The Approach of the Court': *Re H-N* at [35]-[40]). I am satisfied that the Judge in the instant case faithfully applied its terms (see what I say at §19 above). For convenience I repeat what the Court of Appeal said within this section at [37]:

> "i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).
>
> ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.
>
> iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.
>
> iv) Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in '*The Road Ahead*'."

To some extent this was reprised in *K v K* at [41]-[42].

47. Those are, in my judgment, the most important passages on this topic in our current caselaw. The seminal procedural rule which underpins those comments is rule 1.2 of the FPR 2010, which requires judges to deal with cases in a way which is

"proportionate to the nature, importance and complexity of the issues". The fundamental decision to hold (or not to hold) a fact-finding hearing is also located (albeit not explicitly) in rule 1.4(2)(c)(i) FPR 2010 which is itself a cornerstone of the FPR 2010, requiring judges to "[decide] promptly which issues need investigation and hearing and which do not". Thus, in this field as in all others in the Family Court, litigants should expect the issues to be tried to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to those which it is necessary for the court to hear (see again the 'Road Ahead': June 2020 quoted in *Re H-N* (see above) at [43] and see also [44] / [46] / [47]). As the caselaw has made clear:

i) Not every case requires a fact-finding hearing even where domestic abuse is alleged (*Re H-N* at [8]);

ii) It is important for judges to hold firm to the notion that "[e]very fact-finding hearing must produce something of importance for the welfare decision" (*Re H-D-H* at [21]);

iii) There is a "need for advocates to focus on those issues which it is necessary to determine to dispose of the case, and for oral evidence and/or oral submissions to be cut down only to that which is necessary for the court to hear" (*Re B-B* at [6](iv));

iv) "Decisions about the scope of fact-finding are core case management decisions with particular consequences for the length and cost of proceedings, the impact of the litigation on parties and others, and the allocation of court time" (*Re H-D-H* [2021] EWCA Civ 1192 at [3]);

v) The function of the family court judge in resolving issues of fact is different from that of the criminal court judge: see *Re R* [2018] EWCA Civ 198 at [62] and *Re H-N* at [66]-[74]. The Judge in this case was right not to be distracted by the submission on behalf of the mother that any decision about whether to hold a fact-finding hearing should await a charging decision from the CPS (see the Judge's comment which I have reproduced at §13(ix) above).

48. The judgment in the instant case was in my judgment faithful to these principles.

49. As to the appeal itself, rule 30.12(3) FPR 2010 provides that an appeal will be allowed where either the decision was wrong or it was unjust for serious procedural or other irregularity. The court may conclude a decision is wrong because of an error of law, or in limited circumstances where the Judge has reached a conclusion on the facts which is not sustainable on review: see generally on this second aspect the judgment of Lewison LJ in *Fage UK Ltd & Anor v Chobani UK ltd & Anor* [2014] EWCA Civ 5 at [114] to [115].

Conclusion

50. The two essential welfare issues which remain under challenge in this appeal are:

i) whether the Judge was wrong to rule that overnight stays for M with her father should be increased (as had been contended for at the hearing by the father);

ii) whether the Judge was wrong to make a 'joint lives with' order, or whether he should have made a 'sole lives with' order in favour of the mother.

51. It is convenient to take Grounds 2 and 3 of the Grounds of Appeal together. In combination, the mother seeks to show that the Judge was wrong not to make certain findings of fact about the father's conduct towards her, and that had he done so, those findings of fact (taken with others) would have impacted materially upon the welfare decision.

52. In my judgment, the Judge approached the issue of fact-finding in this case both responsibly and carefully; as I have already indicated (see §48 above) he directed himself impeccably in relation to the application of PD12J and to the overriding objective in rule 1.2 of the FPR 2010. He did not allow himself to be distracted by the largely unexplained decisions of some of the case-management judges who had sought to steer the case towards a fact-finding hearing; he rigorously examined whether the allegations raised by either parent would be relevant to the issues which he had to decide, and concluded that they were not. He was rightly focussed on the necessity (or otherwise) of the investigation on the facts of this case, and in my judgment he conscientiously applied the law which he had summarised at [42] of his judgment (see §19 above). He scrupulously considered the "relevance of the potential result of the investigation to the future care plans for the child" (*Oxfordshire*); as I have indicated at §25 above, he drew on the opinion of the Family Court Adviser which was to the effect that the undetermined allegations of domestic abuse made by both parents was not sufficient to prevent regular periods of significant unsupervised overnight contact. He was not distracted at the hearing by the renewed assertions of allegedly bad behaviour by one parent against the other save and as far as these points were relevant to his assessment of the 'balance of power' within the post-separation relationship.

53. The Judge rightly did not dismiss or diminish the significance of domestic abuse and its effect on its victims, but emphasised that he had to have regard to its relevance and impact on the particular facts of this case. It was the mother who pursued findings; thus he was entitled in this regard to take into account in his decision that:

i) It was the mother who had been convicted for assault on the father;

ii) It was the mother who had been found by the bench in the Crown Court appeal to lack credibility (in contrast to the father);

iii) It was the mother who had attracted further criticism in the instant case for her behaviour towards the father – her groundless suggestions of sexual abuse and her purported usurpation of the father's parental responsibility by 'misrepresenting the truth' of the family situation (see §29 above);

iv) Albeit that the father too had behaved badly in certain regards.

54. In relation to the decision to extend the number of overnight stays for M with her father, the Judge was perfectly entitled to bring into account, and indeed rely upon, the fact that the mother had agreed to overnight contacts some eighteen months before the hearing against the backdrop of the allegations she had made. She had indeed later suggested an increase in the number of nights. The court had, in the interim,

extended the number of overnights yet further, and the Family Court Adviser (Cafcass) had advised that the frequency was about right albeit they could increase gradually. The Judge rightly acknowledged that domestic abuse can still play out in the court setting, and can directly affect the victims in the way in which they present their cases and potentially even agree to outcomes with which they are not instinctively content. The Judge, on these facts, satisfied himself that this was not such a case (see §26 above).

55. The Judge set out detailed reasons for concluding that a 'joint lives with' order was appropriate in this case; his reasoning is, indeed, entirely in line with the reasoning contained in the judgment of Poole J in the recent case of *AZ v BX* in which he said at [77] that:

i) "The choice of whether to make a shared lives with order or a lives with/spend time with order is not merely a question of labelling – it is likely to be relevant to the welfare of the subject children and must be made by applying the principles of CA 1989 s1. … In every case the appropriate choice of order depends on a full evaluation of all the circumstances with the child's welfare being the court's paramount consideration";

ii) "A shared lives with order may be suitable not only when there is to be an equal division of time with each parent but also when there is to be an unequal division of time";

iii) "It does not necessarily follow from the fact that the parents are antagonistic or unsupportive of each other that a shared lives with order will be unsuitable";

iv) "A shared lives with order would signal to each parent that each was of value in the lives of the child".

I support these views, and emphatically reject Ms Traugott's submission that the reasoning of Poole J and of the Judge in this case is 'problematic'; I dismiss her further argument that it is "unrealistic" and "rather facile" to suggest that a joint lives with order may enable or encourage parents to work together; in the right case, it can do just that.

56. I reject Ground 4 of the Grounds of Appeal; the evidential basis underpinning this ground is, at best, somewhat speculative. No exploration was sought of the father's comment "it would depend on the circumstances" (assuming he said this – I could not locate this in the transcript of the oral evidence, and I could find no challenge to it in the evidence). Even if he had made the comments alleged, the mother has failed in my judgment to demonstrate that they were 'relevant' to the judge's decision as to whether M should stay overnight on four, or more than four, nights per fortnight with her father at the present time or whether the order should be expressed as a 'joint lives with' order.

57. Cases involving disputed allegations of domestic abuse are some of the most difficult with which Family Court judges have to grapple. They are particularly difficult at the case management stage(s) because decisions with significant implications for the future conduct of the hearing, and of the family's life, are called for; these are acknowledged at the highest level not to be 'straightforward' decisions (*Re H-N* at

[7]). Judicial continuity is key in domestic abuse cases; judges should always consider retaining a case listed before them which contains allegations of domestic abuse; it is obvious that this case suffered from a lack of judicial continuity, which probably contributed to the lack of consistency of decision-making.

58. When presented with allegations of domestic abuse in private law CA 1989 proceedings, judges need to be astute to work out (ideally as early on in the process as possible) what is, and is not, *actually relevant* to the precise welfare issues which require adjudication. Peter Jackson LJ addressed this point in *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121 ([61]), which was cited with approval in *Re H-N* at [32] to the general effect that:

> "… not all directive, assertive, stubborn, or selfish behaviour, will be 'abuse' in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour."

This was echoed by the Court of Appeal in *K v K* at [89]:

> "All judges hearing children cases will know that there will almost inevitably be emotional fallout following the separation of adults who have been in a close relationship. Whilst the court will not hesitate to adjudicate upon parental behaviour where this impacts upon the protection or welfare of a child, it is not for the court to hear about, much less to resolve, issues between the parents relating to their time together, unless to do so is likely to be necessary for, and proportionate to, the resolution of a dispute relating to the protection or welfare of a child".

I associate myself entirely with these remarks. Private law proceedings should not be used for one or other party to air grievances, to seek some form of validation or vindication of what they say went wrong in the relationship, to settle old scores, or pick over the coals of the breakdown of the relationship.

59. Therefore, as appropriate, judges in the Family Court when presented with a private law case involving allegations of domestic abuse where the issue of fact-finding arises, should press the parties or their advocates, as both DDJ Morris and this Judge properly did, by asking them directly at a case management, or later: "why do I need to determine this issue / these issues in this particular case?"; "what difference would it make to the welfare decision/outcome in this case in respect of this child even if I were to find the allegation proved?". It is important to maintain focus on the individual circumstances of the particular case (*Re H-D-H* at [21]-[23]). In some cases, like this one, the decision not to hold a fact-finding hearing will leave unresolved some adult disputes between the parties, i.e., about their behaviour towards each other. So be it. If those issues are not relevant to the determination of the application, then court time should not be dedicated to their resolution.

Order

60. For the reasons set out above, I therefore dismiss the appeal.

61. When granting permission to appeal Henke J imposed a stay on paragraphs 4-7 of the order of 18 October 2023. By the dismissal of this appeal, I forthwith lift that stay, and those paragraphs are now effective, though will need to be adapted to incorporate new dates for implementation.

62. At the hearing on 12 July 2024, I imposed a Reporting Restriction Order which prohibits the reporting of the name of the parties to this appeal, or their child. That order continues.

63. That is my judgment.