

Case No: ZW20C90017

**IN THE FAMILY COURT AT WEST LONDON**

West London Family Court,  
Gloucester House,  
4 Dukes Green Avenue  
Feltham,  
TW14 0LR

Date: 28/03/2021

**Before :**

**HIS HONOUR JUDGE WILLANS**

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**Between :**

**THE LONDON BOROUGH OF HILLINGDON**

**Applicant**

**- and -**

- (1) JM**
- (2) MW**
- (3) FC**
- (4) EW**

**(through their Children's Guardian)**

**Respondents**

**-and-**

**TM**

**Intervenor**

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**Ms Nylah Abbasi (instructed by London Borough of Hillingdon) for the Applicant**

**Mr Patrick Wainwright (instructed by Duncan Lewis Solicitors) for the First Respondent**

**Mr Nathan Alleyne-Brown (instructed by Wainwright Cummins Solicitors) for the Second Respondent**

**Ms Joanne Day (Lovell Chohan Solicitors) for the Third and Fourth Respondents**

**Ms Ann May (instructed by Oliver Fisher Solicitors) for the Intervenor**

Hearing dates: 22-26 March 2021  
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**FACT FINDING JUDGMENT**

**His Honour Judge Willans:****Introduction**

1. This written judgment is provided to the parties following a 5-day fact finding hearing. Allegations are made against both the First Respondent and the Intervenor.
2. Within this judgment I intend to use the following abbreviations to identify the relevant participants:

|     |   |
|-----|---|
| FC  | Child   |
| EW  | Child   |
| JM  | Mother  |
| MW  | Father of EW  |
| TM  | Intervenor  |
| NR  | MW's partner  |
| AH  | Maternal Grandmother  |
| CW  | Paternal Grandmother  |
| SW  | Previously allocated social worker                              |
| KM  | Guardian  |
| RCD | Rebecca Clark-Dowd: Clinical Psychologist                       |
| EM  | Dr Elhassan Magid: Consultant Paediatrician                     |
| MB  | Dr Malcolm Bourne: Consultant Child and Adolescent Psychiatrist |
| H   | TM and JM's new child   |
| F   | NR and MW's new child   |

3. In the course of the final hearing I heard live evidence from each of the individuals above save for AH and RCD. The hearing was held on a remote basis using the Teams video platform. Provision had been made for both JM and TM to personally attend Court to give evidence, however, at their request I agreed for their evidence to be given remotely. In addition to the live evidence I have considered the documents contained within the hearing bundle; the parties opening position documents and final submissions made by each representative. It is neither practical nor necessary to detail or deal with all aspects of the evidence within this judgment. Rather I will focus on those parts of the evidence which I consider necessary to fairly dispose of the disputed issues. I will though bear in mind all the evidence put before me.
4. This fact-finding judgment precedes a welfare hearing concerning the children to be held between 29 March – 1 April 2021.

**Allegations under consideration**

5. These can be found in the amended schedule dated 16 March 2021 [A119-123]:
  1. *On or before 23/4/20 TM has hit/slapped the children above that which is reasonable chastisement:*
    - a. *TM has hit both children with a 'slider' and has slapped them*
    - b. *Both children have alleged that they used a hand towel after using the toilet due to no toilet roll being available in the home. TM in response hit both children demanding to know who had used the hand towel. Once he was made aware that*

*FC had used the hand towel, both children were again hit. This caused both children emotional and physical harm.*

- c. *The children were stripped down from their trousers and pants and TM has smacked them on their bottom.*
- d. .... *[finding not sought]*
2. *JM has witnessed the physical abuse the children have suffered by TM however, had failed to protect them and blamed them for not listening*
3. *On 24/4/20 the Child Protection Medical Assessment reported: EW has many linear marks on her body one of which is non-accidental'*
4. *On or before 23/4/20 TM exposed his penis to FC and EW and encouraged them to touch his penis.*
6. For ease of understanding a 'slider' is a sandal type shoe conventionally worn at swimming pools/on the beach. In contrast to a flip flop it simply has a band across the front portion of the foot into which the foot slides. It has no separate grip to any toe of the foot.
7. I am conscious allegation 1(b) is phrased in such a way as to contravene well understood legal principles. Proof of an allegation being made is not itself proof of the underlying allegation. In this case I have in fact been asked to find the event in question took place. I am conscious allegation 1(b) fails to allege significant harm and that proof of anything less than this does not meet the threshold test. The case has been led on the basis that the conduct caused significant harm. I am conscious allegation 3 is not phrased in a permissible fashion. The case has been led on the basis that the alleged 'non-accidental' injury was in fact inflicted on the child. It is troubling that these drafting errors continue into the final schedule notwithstanding discussion of the same at the PTR which preceded the hearing. Nonetheless I am in no doubt each of JM and TM understand the allegations that have been made against them and the challenge they are asked to meet. The poor drafting has caused no prejudice.
8. It can be seen the allegations are of improper physical abuse by TM and of inappropriate exposure (implicitly an allegation of sexual impropriety). It can be seen JM is alleged to have failed to protect the children from the same conduct.

### **Legal Principles**

9. I have been referred to the following case law:

*Re P (Sexual Abuse – Finding of Fact Hearing) [2019] EWFC 27 per McDonald J. [this decision provides a broad ranging analysis of legal authority in respect of fact finding]*

*Re L-W (Children) [2019] EWCA Civ 2019 [on the question of failure to protect]*

I have also been referred to the following:

*Achieving Best Evidence in Criminal Proceedings: Guidance on vulnerable and intimidated witnesses (Home Office 2011)*

*The London Safeguarding Children Partnership (LSGP) Child Protection Procedures (October 2020)*

10. Time constraints mean I do not consider it helpful to provide an expanded summary of the law within this judgment. But in addition to the references above (which I have read) I note the basic propositions:
- a) At the heart of this case lies the submission that the legal threshold found in section 31 Children Act 1989 has been crossed and that the children have significant harm. In the contact of this case the significant harm may be physical or emotional and is said to derive from the care given to them being not that which the Court would expect from a reasonable care giver.
  - b) The proof of this threshold being met is through the allegations identified above.
  - c) It is for the Applicant to prove the allegations. It will do so if it establishes each allegation as being more likely than not. If this standard is met, then the allegation will then be treated as a fact. If this standard is not reached, then it will thereafter be ignored.
  - d) There is no different standard depending on the seriousness of an allegation.
  - e) There is no duty on a respondent to disprove an allegation. The burden of proof does not shift.
  - f) All evidence is of relevance but the evidence of the key participants (parents and intervenor) will require special consideration.
  - g) Witnesses may be found to have lied but such a finding should not cause the Court to reject that witness's evidence. The Lucas direction gives a sophisticated basis upon which lies should be assessed before considering whether the lie has any probative value when considering the allegations.
  - h) Experts give evidence but it is for the Court to make findings and this is the case even with respect to areas in which the experts have reported. However, a Court should take care when seeking to reject unchallenged expert evidence and, in any event, should give reasons when departing from expert conclusions. Still it is a matter for the Judge to make the ultimate decision.
  - i) The Court must approach allegations with care. There must be a causative link between the alleged act and significant harm. The Court should be wary of entering into social engineering. The Court must be willing to accept a range of parenting styles to include the barely adequate.

- j) I bear in mind the additional caution that should be taken when considering the evidence of children. This is not a basis for over willingness to reject such evidence but rather the need to be conscious of the risks of accepting such evidence without careful analysis.

## Background

11. I have regard to the chronology filed for the hearing as directed by the Court. In addition I note the chronology found in the initial statement of SW [C10]. I also note the historical accounts found in the various assessments and the parties personal statement evidence. I bear all of this in mind and highlight the following:

- a) JM was a mother of two children by the age of 18, she is now aged 25. The identity of FC's father was believed to be MM but DNA testing showed he was not the father. He has been informed as to the proceedings [E392] but has not indicated a wish to be involved. The evidence suggests he has played only a very limited role in FC's life. JM and MW started a relationship in 2013 when JM was aged 17 and MW aged 22. JM fell pregnant shortly afterwards and EW was born the next year. The parents remained in a relationship until (May/June) 2018. MW took on a role as father to FC and is regarded as such by FC who is unaware of her biological paternity
- b) JM suggests there were abusive qualities to the relationship with MW although she does not allege any physical abuse. I appreciate this is not accepted by MW and I am not asked to make findings. I proceed on the basis that these are untested allegations. JM also alleges the sexual relationship between the parents continued following their separation, through to I think February 2020 at least. Again this is disputed by MW. This is a point I will have to consider given its potential to impact on matters under consideration.
- c) Following their separation both parents have formed new relationships. MW is now in what appears a settled relationship with NR. They live together and have a child together (F, aged approximately 1 year of age). They mutually describe their relationship as positive and loving. NR has a relationship with both children under consideration and has done so since about the commencement of her relationship with MW in June 2018. It appears they started to live together from early 2019. MW would appear to have a closely knitted family and it would appear NR has formed a good relationship with the family.
- d) JM told RCD that her next serious relationship after MW was with TM. There were other relationships between MW and TM, a point I only raise because one of these was with an 'Andrew', an individual who will be referred to later in this judgment. It appears she 'bumped' into TM when moving into a new house local to where he lived. This is the property at which all material events in this judgment took place. It seems TM lives

with his mother and siblings relatively close to this property. It appears JM is friendly with TM's mother. The relationship started in May 2019 and RCD was told it continued for 5 months [E166].

- e) The evidence suggests that NR was accepted by JM as having a relationship with the children and likewise TM was accepted as being part of JM's life. The couples in fact holidayed together in the summer (July) of 2019 at a caravan park in England for a few days. The evidence indicates that the children had continued to maintain a relationship with MW (and his family) following the parents separation and were seeing him at weekends and on one occasion in the week. They were spending time with his mother (CW) on a Friday. The family were helping with school collections. I appreciate there is a degree of dispute as to the exact sharing of time but would simply note that the relationships continued post-separation without the need for Court involvement and that it appears JM was receiving support from the paternal family. I do not disregard her own mother (AH) who remained part of the picture and was involved with the children.
- f) In September 2019 there was an abusive incident between TM and JM. More correctly TM physically assaulted JM and the police were called, although JM did not press charges. TM accepts he assaulted JM and it is not a matter for this fact finding. There is a degree of disagreement between TM/JM as to the full detail of the incident, but it is agreed JM was hit and there were threats to kill. JM's account is at [C44] (but also see the police note at [H8]) and I note she stands by this. It includes allegations of being punched to the head repeatedly; strangled, and; being hit with a dog chain. TM is said to have picked up a knife before she fled. The cause of the incident is difficult to clearly ascertain with both participants suggesting there was little warning. It seems it arose out of a disagreement relating to their relationship. JM speculates (although to RCD is clear) that TM was under the influence of drink and/or drugs. The girls were not present. When giving her evidence JM expressed strong emotional upset when recalling the incident. TM did not seek to downplay the seriousness of the assault, albeit he disagreed with certain details. MW became aware something had taken place when JM called him and told him to get his mother out of bed because she would be arriving at her home. Although she did not explain why he came to understand the details of the assault.
- g) At this point the relationship between JM and TM is said to have ended. However it resumed. The timing of the resumption is unclear. JM's evidence was that this was in December 2019 and it was certainly the case by FC's birthday (.....). However in the evidence [C80] there is text messaging between JM and NR in which JM reports TM being at the home on 5 November 2019 for firework's night. The quality of the relationship thereafter is a matter for consideration below but it is sufficient to say that TM and JM continued to 'see each other', had sexual relations and he attended family related events including FC's birthday; a medical appointment on 17 December 2019 (along with MW

and NR, although neither NR or TM are said to have been in the consultation room), and; a meal on New Year's Eve. It is accepted he came into contact with the children and spent time at the home. The resumption of the relationship arose in circumstances in which JM:

*'bumped into TM at the corner shop and he stopped me to speak to him. I was alone at the time. He reassured me that I should not be scared of him. He admitted that he was wrong and what he did was out of order and should not have happened. He appeared extremely apologetic and sorry for what he did. I genuinely felt, that, at that time, that he meant what he said and that he felt guilty for treating me the way he did'. [C45].*

- h) MW and his wider family were aware TM was 'back on the scene'. MW told me there were reservations given the previous incident, but TM was being given a second chance.
- i) On I understand 3 January 2020 there was some form of incident at the home between TM and JM. In her evidence JM says TM came to the property at night when the children were present. She did not want him to come in, but he would not leave. The police were called by AH and TM left. There is not said to have been any threats or obvious misconduct beyond refusing to leave. As a result of this incident JM moved into a refuge. She explains this was due to not feeling comfortable that TM might turn up at any time; his unpredictable behaviour and the events of September 2019. MW suggests that a sense of the state of JM's mind at that time can be seen in text messaging between JM and NR in which she speaks of a concern that TM *'will lose his shit'* when he finds the relationship is over; that the police have an *"apb"* (which I assume means an 'All Points Bulletin') but *'by the time she needs the police she may not be in a position to call them'*; that she has been trying to break up with TM for 2 months, and a concern that it will take one of them to be dead or TM in prison to resolve matters [C102+].
- j) Over this period the children spent time with the paternal family before JM and the children moved to a refuge in South London. I understand MW suggested the children could live with him rather than move into the refuge. JM did not agree and in evidence suggested they would be at risk from TM if at their father's as TM would assume she was there too and would attend. In any event JM and the children moved to the refuge and stayed there until 11 March 2020 when they returned to the Hillingdon area.
- k) The period of January to March 2020 is a subject of significant dispute as to detail. It is sufficient to note at this point that the children continued to have contact with the paternal family and that JM on occasions returned to the home and indeed met with and engaged in sexual activity with TM. Whether the children saw TM and the extent and nature of the relationship between TM and JM is in dispute. Both MW and NR report JM indicating she intended to return and resume her relationship with TM and that they witnessed events which supported this intended plan. The formal position in conversation with the social worker was that the relationship was over and that on return to Hillingdon, JM and the children would live with AH and she would be seeking a house move.

- l) During the period in the refuge JM fell pregnant. She accepts sexual relations with TM and alleges sexual relations with MW. Subsequently JM has given birth (to 'H') and paternity has been confirmed as TM. MW has always denied sexual relations with JM.
- m) It is evident the paternal family were by now less content with a continuing role for TM in the children's lives. By March 2020 MW (and I think other family members) were expressing concerns that TM was living in the home with the children. A Child and Family Assessment did not support this conclusion. It seems to some extent the paternal family carried out a level of checking to evidence this was in fact the case. As a result of a social services referral (based on this concern) there was a breakdown in relationship between the parents and for a period (between 11 March and around 11 April 2020) there was no contact between the children and the paternal family. It appears at some point MW took legal advice on these issues and a letter was written. However, I have little more detail than that.
- n) On 16 April 2020 MW was advised that children services had closed their file and did not intend to intervene further. MW reports being '*disappointed and shocked*' [C72].
- o) On 21 April 2020 the children had contact with CW. During this contact CW reports the children making allegations of being hit by TM [H104]. They are alleged to have told her that when JM was told she said, 'they deserved it'. The children's complaints extended beyond the ambit of this fact finding. CW confirms she told MW what had been said.
- p) On 22 April 2020 the children were with MW. In the course of this contact the allegations were substantially repeated to NR [H106]. The police were contacted and saw the children on 23 April 2020.
- q) The children were taken to a Child Protection Medical on 24 April 2020 [E1 (EW) and E25 (FC)]. No injuries of note arose in the case of FC. EW was noted to have various marks and bruises. Of these [E17] only one was said to have relevance. This mark described as a 10cm linear mark to the right upper thigh is the subject of allegation 3 (above). A medical image of the same can be found at [J5 & J6]. The social worker was not at the medical.
- r) On 25 April 2020 FC is said to have made the allegation concerning TM exposing his penis. This was reported to the police.
- s) On 30 April 2020 both children were subject to Police ABE interview. I have a note of the interview; a transcript of the same and I have viewed the ABE interviews.
- t) Following the interview it seems FC spoke to CW and reported not having told the police about matters concerning suggested sexual exposure. This information was passed on and a further ABE interview



was held with FC on 6 May 2020. I have read the transcript of and viewed the video ABE.

- u) As a result of these allegations:
  - i) The children have remained in the care of MW and NR;
  - ii) A criminal investigation was opened and both JM (18 May 2020 [H221]) and TM (19 May 2020 [H235]) have been subject to police interview;
  - iii) On 26 May 2020 these proceedings were instituted. I do not intend to detail the history of the proceedings which can be found in section B of the hearing bundle.
  - iv) A Child Sexual Abuse medical at the Havens was conducted on 16 June 2020 [E108]. No evidence of sexual abuse was identified.
  - v) Completing the background history, on 14 June 2020 a further incident took place which has led to TM being convicted of two accounts of battery (to JM and AH) and one of criminal damage. At [C46] On JM's description of the event there was an accidental meeting with TM early in the morning when she attended her property. The situation quickly escalated when he started to go through her phone. He became very angry and slapped her around the back of the head on a number of occasions. He then forced his way into the home and started to smash property with a baseball bat. He broke a TV, clock and punched a hole in the door. AH was summonsed but TM tried to drag JM away from her mother and car. He had her by her hair and the police were called. TM was arrested and remanded. On my reading of the events this would appear to have been an incident of similar seriousness to that reported in September 2019. I have noted the additional accounts of AH and other reports within the police disclosure. I appreciate the above account is not agreed. I appreciate there is alternative evidence of the baseball bat being brought to the scene by AH. I make no findings as to this detail but note the fact of the convictions and the relevance to the issue of risk and failure to protect.

## Discussion

12. In this section I will discuss the relevant evidence I have heard. In doing so I will necessarily comment on the impression I formed as to each witness. Rather than simply record the totality of the evidence I will instead focus on the key aspects of the evidence and the areas of material dispute. I consider it will be helpful to use headings to signpost separate sections. I do though continue to bear in mind that the evidential issues are inter-related, and a consideration of the full canvas is required before reaching final conclusions. I acknowledge the provisional assessment of one point may be dislodged by a later consideration

of a separate issue. The nature of a judgment is that the Court has to outline matters in some order – I appreciate others might reorder these issues below.

**The relationship between JM and MW post separation and the suggestion of an ongoing sexual relationship**

13. There is much to suggest the relationship was positive and supportive. I note the acknowledged fact of continued shared care (I do not use this phrase intending a legal definition) and apparent inter-family support (picking the children up from school for example). In addition I note the evidence of a ‘friendship’ between NR and JM during this period. NR was clear she considered JM to be a friend and the messaging between the two indicates JM was certainly willing to confide in NR. I also note that this support extended to other members of the paternal family (JM turned to the father’s sister for support with rehousing and to CW as noted in the background above). Lastly, although not exhaustively, there is the family events such as the shared holiday which suggest at the least an amicable relationship.
14. This does not mean that concerns and disagreements did not arise. However this was not an openly antagonistic relationship or one which had required Court resolution. The simple fact is that as at 3 January 2020 when needing support JM turned to the paternal family, MW and NR.
15. Having heard the evidence it seems to me there is a real risk of the history being subject to revision in the light of the subsequent events. This is a natural part of human nature but a real danger to a court seeking to fairly understand the reality of contemporaneous events. Now JM sees the events through the prism of MW’s role in keeping the children from her. MW sees the history in the light of the subsequent allegations. NR views the perceived friendship in the light of what JM is claiming. JM views the same relationship in the light of the messaging which was retained and is now exhibited. I must guard myself against these obvious risks and consider the most sensible approach is to simply look at what was happening and what that would reasonably suggest to an observer. What I see is a good working relationship, which whilst not without any issues, was working for the benefit of the children. It would appear to have been the sort of relationship which Court’s attempt to foster between separated parents.
16. This does not answer the question as to whether MW had maintained an occasional sexual relationship with JM. I accept this issue is not wholly irrelevant. From JM’s position it suggests an ongoing complication in the relationship between MW and her and given the impact it would likely have on NR, if known, a possible basis for MW to act improperly against her. However, it must be acknowledged that if true it would likely supply JM with a significant leverage over MW in terms of the ability to unsettle his relationship with NR. It might reasonably be thought that MW would need to be careful not to upset JM for fear that she might reveal to JM details of the illicit relationship. In the alternative it may be the allegation has been raised simply to cause hurt and disruption to MW and his family in the light of the removal of the children.
17. It is right to say there is no independent evidence to confirm the allegation. The paternity test is clear TM is H’s father. I bear in mind that whilst the detail is

limited that which is available does not sit entirely comfortably with the allegation. I note the following:

- a) On the evidence I heard JM was in this period in a relationship (for material periods) with TM and gives evidence of some happiness with the relationship. It is not clear why she would at the same time need to entertain a relationship with MW.
- b) The circumstances and suggested opportunity for the sexual activity (whilst dropping the children off and with NR in the car outside) can justifiably be challenged as to inherent plausibility. Would this really have taken place in what must have been a short period and with the children just returned home? Whilst one cannot rule out the opportunity being sufficient it is a surprising point.
- c) There is evidence of MW being in a happy relationship at the same time with NR and at this time they were clearly engaged in sexual relations see the conception of F.
- d) There is no corroborative evidence.
- e) To the contrary the messaging between NR and JM sits uncomfortably with the allegation. If JM was in a relationship with MW, then her messaging to NR paints her in a very poor light. Further, on an objective reading of the messaging JM does appear to be suggesting a state of knowledge of TM as father [exhibit MW1 at C83]. Whilst the language is not explicit that is a reasonable impression to form. At [C87] whilst the dating is in dispute JM agrees she messaged that she '*wanted TM's baby*'. At [C88] the conversation gives the impression that TM was seeking a further test. JM suggests the individual being referred to was in fact her friend (Andrew). My sense of the conversation is that NR was understanding that the individual although not stated was in fact TM.
- f) It is unclear JM raised this allegation prior to the proceedings. This lends to the potential that it was retaliation for the steps taken by the paternal family. It is said TM was not told about the pregnancy until the June incident. I note the children in interview, prior to June, speak of their mother being pregnant and TM being the father. It strikes me as odd for the children to be aware and TM not, particularly if I find, as alleged, that TM was visiting the house.

### **The 'relationship' between TM and JM**

18. A significant part of the examination of both TM and JM focused on the quality of their relationship and the appropriate labels to be applied to that relationship. I variously heard that they were 'in contact', 'seeing each other' or 'in a relationship'. I formed the impression it was felt the conclusions I formed as to the appropriate label may assist in determining the allegations in dispute. Similarly, but separately was the debate as to whether TM was living with JM or not. Again I had the impression this determination was felt to be of material significance.

19. For my part I struggle to see why such conclusions should of themselves particularly assist. It seems to me that the important factor to determine is whether the circumstances of the relationship were such as to bring TM into contact with the children at such a level as to make the allegations capable of belief. Plainly, if TM did not visit the home then he could not have done that which is alleged. If he had visited when the children were not there, then equally the allegations would fall away. I also accept that a conclusion as to only limited contact might undermine the allegations on a plausibility / inherent probability basis (is it likely he would have both the opportunity and circumstance in which to hit them/be seen naked). But if one steps beyond this to a position in which he regularly saw the children and stayed over then it seems to me it matters not whether this was whilst he was ‘seeing the mother’ or ‘in a relationship with her’. The self-declared quality of the relationship has no bearing on the subject and is surrounded by subjective analysis that does not help me. I pause to note that for both JM and TM having a sexual relationship did not amount to being in a relationship. On the evidence they were not in a relationship after September 2019, but it appears, he likely attended the property for fireworks night; attended the birthday party wearing a T-Shirt declaring him to be ‘step dad’; accompanied the mother to the doctor’s appointment and other matters besides. Others might consider this was suggestive of a relationship. For my part I intend to act on the circumstances as I find them and not on the viewpoint of the parties.
20. On the question of time in the property I do not consider that the absence of clothing or other personal items at the property, whilst it might inform me as to where TM lived, tells me anything about whether he could have acted as alleged. Whilst the presence of possessions might point to more stability at the property – and thus opportunity – the absence of the same simply does not. It seems to me the allegations are in principle consistent with TM either living at the property or visiting it on a sufficiently regular basis to have acted as alleged. I do appreciate in ABE interview the children speak of TM ‘living at the property’ but I consider there is no forensic purpose in examining the use of this phrase when used by young children, and particularly so where the adults on occasion use labels which appear fluid (see above).
21. Rather, I have regard to the evidence. I acknowledge that both TM and JM made the following basic case:
- a) In general terms TM would visit the home and stay over when the children were at contact with the paternal family
  - b) In any event the times on which he slept over were limited given his home was close by
  - c) Following September 2019 the extent of these visits was less than prior to September 2019.
22. I also bear in mind that it is unclear as to the dating of the allegations. This is a point I have to return to below but in considering periods when TM might have been at the property, I must continue to bear in mind that these dates would need to be causally linked to the dating of the allegations. If I find the allegations relate to the period shortly before they were made, then it is no relevance that TM was spending time in the property only prior to September 2019.

23. It is fair to record that TM's evidence gave the impression of only the most limited contact with the children. A reasonable observer listening to his evidence would in my assessment have doubted he would have had the opportunity to act as alleged. I consider JM's evidence was somewhat more expansive as to visits etc but even so it pointed to a limited extent. In contrast the paternal family evidence was of TM being regularly at the house and present when they visited. Their sense was that he lived at the property. Their evidence was that JM indicated she was returning home to resume a relationship with TM (although this says nothing as to how often he would visit the property). It was this inherent level of disagreement which led to the anonymous referral to the local authority. I bear in mind the referral was closed without action and the local authority were satisfied nothing was amiss.
24. I bear in mind all of the evidence. In support of the limited time in the property I note the following points:
- a) The evidence of TM and JM
  - b) The fact that TM did have an alternative property to stay at in close proximity with his own room and privacy.
  - c) The inherent sense that JM might wish to use her time when the children were at contact to enjoy personal time with TM.
  - d) The outcome of the CFA which did not substantiate the concerns of the paternal family as to JM living with TM.
  - e) My understanding that AH confirmed the children were living at her property following their return from the refuge.
  - f) TM's evidence that he had to be at home to assist with household and child duties due to his own mother's disability. Hence, he would return home to be available first thing in the morning.

There may be other points, but these are the ones which appear relevant.

25. In contrast there are points which suggest the contrary (if not living at the property then substantial presence to include when the children were present):
- a) Messaging sent by JM which suggested TM was present at the property (at times when it is now said he was not present). At [C152] JM messages TM (on 1 February 2020 – a date when it is said TM was not at the property) '*Get MW to bring EW to the door and go again? I've got TM here and MW needs to not say anything about it? Xxx*'. At [C149 – 19 February 2020] there is a further message which implies TM is present ('*...he came in didn't eat anything and he's already gone back out? Been all sneaky on his phone...like why am I bothering....He's back now I'll talk tomorrow xxx*'). At [C122 – 8 March 2020 at 0957hrs] '*Hello I'm awake just giving tee a nudge to get up then leaving xxx*'.
  - b) Evidence from various paternal family members of sighting MW at the family home on occasions when passing by or dropping/collecting the children. It is important to note that MW's case is not that he was

suspicious that TM was at the property prior to the cessation of contact. Rather his case is that he knew he was there. It is only after the cessation that knowledge translated into suspicion because he was no longer picking and dropping the children.

- c) That JM accepts having gone to the refuge that she regularly left there to meet with TM and in this period had sexual relations with him. This being the case it is not clear to me why JM suggests there was a material change in circumstance once she officially returned home. If she travelled back to see TM from the refuge, then why did she stop seeing him when she was back home? For his part [C161] TM accepts regularly meeting JM after her return home including on occasion when the children were there. He confirmed this in oral evidence.
- d) The trajectory of the relationship. This perhaps fits with the point above. JM clearly describes the events of September 2019 as deeply harrowing yet within weeks had resumed a relationship (whatever form) with TM (see fireworks night). By December 2019 TM was involved in family life to some extent. The impression was of him having returned to the family fold. JM had heard his account and apology and it appears accepted it. Whilst there was an event on 3 January 2020 JM does not give an account of this having any comparison with the earlier incident and it is clear that notwithstanding the move to the refuge she continued some form of physical relationship with TM and indeed on occasion gave him the key to her house to deal with administrative matters. On the evidence it is difficult to identify the forensic point that might suggest his removal from the scene on full return from the refuge. The evidence of the paternal family is that he did return to involvement in family life. I have to ask myself whether taken in its totality this suggest a likelihood that the position in 2020 had similarity to the situation prior to September 2019?
- e) The evidence of the children aged 5 and 7 (at the date of ABE) that TM was living at their home. I repeat the label is not the point, but I am entitled to weigh up whether this indicates the contemporaneous reality for the children. I am asked to consider why the children would make this up? Should I conclude children of this age might make up this point to buttress their allegations or is this to ascribe too much sophistication to these children? I bear in mind (see below) the concern as to adult contamination but I have to ask whether these observations simply reflect their sense of their lived experience.
- f) The cessation of contact in March 2020. I am asked to consider whether this reflected genuine upset on the part of JM given false allegations about TM living with her. But it might also be said to have operated to distance the paternal family at a time when TM was on the scene and would be discovered as such were contact to continue. I bear in mind that the paternal and maternal family are not geographically proximate and might not be expected to be local to JM but for children related purposes.

### **A family campaign against JM**

26. I am asked to consider the suggestion of there being a form of campaign mounted against JM by the paternal family. This has relevance as to whether the paternal family have been motivated to fabricate or encourage false reporting by the children or alternatively whether due to their views they have inadvertently encouraged the children to make reports which are not true in fact.
27. There are some undisputed facts which are relied upon in support of this contention. It is quite clear the paternal family were concerned as to what was taking place in the children's home and made referrals to the local authority. It is also clear that on occasions members of the family found themselves passing by JM's home and there is a strong inference that they were checking on the mother. I am also asked to reflect on a 'log' of events produced by the paternal family [H262] in which events between September 2019 and April 2020 are detailed. It is agreed this was constructed as a 'joint effort' by members of the paternal family and it is said this indicates some negativity towards JM.
28. I also bear in mind JM suggests MW had wanted to have the children live with him and he used these circumstances as an opportunity to take them into his care. Finally I bear in mind (see below) that there is within the reporting process arguable room for criticism of the paternal family as to the manner in which accounts developed.
29. Against this though must be set my general observations as to the role previously played by the family in supporting JM and the children and the extent to which they assisted when difficulties arose. This does not sit comfortably with the notion of bad intentions.
30. An alternative approach to the campaign allegation is that the paternal family were justifiably concerned as to the resumed role of TM in the lives of the children. They knew what JM had alleged in September 2019 and it would not be surprising if they had concerns for the children. It would be entirely reasonable for them to be on their guard in such circumstances. When one then considers JM fled to a refuge before first resuming contact with TM and then returning to meet with him, it does not take a great deal of further reflection to sympathise with circumstances in which a referral was made to social services. This would likely be exacerbated by, what they claim, was a mismatch between what was happening and what JM was accepting to social services. Finally the suspension of contact would have left them cut off from the children with the likely implication that their concerns would be heightened.
31. Whilst I do not at this point determine the issue it strikes me that one might as reasonably view the paternal family as acting justifiably out of concern for the children rather than mounting a campaign against JM.
32. I am aware it is said that the paternal family permitted TM back into the fold after September 2019. The evidence of MW and NR was of accepting his presence and agreeing they saw no evidence of misconduct. However, I consider it somewhat disingenuous to place over reliance on this point. Ultimately, JM was in the driving seat so far as the relationship was concerned and the most the paternal family could do was challenge her decision making. That they accepted

her decision does not raise them to the same level when considering whether TM was given a second chance. I note a dispute as to who invited TM to FC's party fits into this debate. The paternal family told me that JM turned up with TM without warning. JM says he was invited by the paternal family. I do not need to resolve this dispute.

33. An incidental feature which I consider is linked to this point (but could be considered elsewhere) is the report of CW being told of there being some issue with TM and the children's duvet. This is not an allegation before me, but I heard how before Christmas 2019 [H102] EW had reported an incident with TM. CW raised this with JM who told her EW was lying. Subsequently when she next saw EW, CW asked her whether '*it had been sorted out*'. It was suggested that to ask the child in this way was improper and perhaps supported the allegation under consideration in this section of the judgment. I struggle with that notion. It seems to be both natural and human for the grandmother to ask whether an issue had been sorted out when she next saw her granddaughter.

**The genesis and development of the hitting allegation: A consistent narrative?**

34. As noted above it is clear the allegation of hitting first arose in conversation with CW on 21 April 2020. It is said to have been repeated on 22 April 2020 and was subsequently in some form or other to the police in interview; to the social worker and to MB.
35. In considering this point I bear in mind the children's ages. I bear in mind I am yet to determine the truth of the allegations or indeed whether they were in fact made as alleged. I do note the following:
- a) The allegations followed a period when the children had not seen their paternal family. As noted above it is unclear what their lived experience was during this period. Prior to this report and aside from the duvet point the children had raised no material complaint against TM.
  - b) On CW's account on 21 April 2020 the children spoke of being hit prior to being asked questions. They spoke of being hit by TM when they had taken toys out of a black bag in which they had been put. He had smacked both of them with a toy. CW was upset and asked whether they had been hit before. FC spoke of them being hit '*loads of time*' and with a '*slider*'. EW is said to have told FC to be quiet as they had been told by JM they would not be allowed to visit. However FC had gone onto describe hitting when they had gone downstairs when JM was in bed to get food and on an occasion when they had been hit when they had used a towel (not toilet paper) to clean their bottoms after going to the toilet. FC said it hurts and stings. They had told their mother who said they deserve it. Other complaints were made which are not subject to this fact finding, have not been investigated through this hearing and which do not justify fact finding. CW said this was a free-flowing account which was not interrupted by other distractions.
  - c) On 22 April 2020 they spoke to NR (MW was present for part of this). Prior to this CW had informed MW/NR as to what the children had said. Again the children made generalised complaints not meriting of



investigation. The sense of this conversation was of a more random dialogue. However FC reported being '*smacked*' and asked about this. Mention was made of the toy being taken out of the bag and being hit with a slider. FC spoke of being hit on the back of the thighs and wearing leggings and a long top as '*it hurts less when you have clothes on*'. JM was said to have '*kissed the bruises*' and said, '*they deserved it*'. Later that day NR noticed marks on the girl's legs and each of the children associated the marks with having been hit. One of the marks would appear to be the 10cm linear mark.

- d) On 25 April 2020 in addition to the exposure allegation FC spoke of having her underwear pulled down and being smacked by TM. FC said this had caused marks and then commented that both TM and JM had '*smacked her to see who would leave the biggest mark*'.
- e) In ABE interview EW spoke of being hit by TM with a slider and that it hurt. She had been hit on the leg, arm and hand. She appears to associate the 10cm mark with being hit with the slider. She said she cried when hit and it left a mark. She made mention of being slapped because of eating a brioche and because of taking toys from a bag. FC in ABE spoke of being slapped by TM. She said, '*things happen that mummy doesn't know*'. She spoke of being hit with the slider. She described being hit on various parts of the body and that it hurt and made her cry. She speaks of seeing EW also hit but is unclear as to how many times this had happened. She spoke of being marked and this sometimes lasting for a week. She spoke of toys being bagged and that she would probably get a slap if TM knew she had taken the toys out. Later in the interview she spoke of TM pulling '*everything down*' and slapping them. FC associated the last time she was hit with Covid 19.
- f) I will discuss the ABE in more detail later in this judgment.
- g) The sense of the reporting would appear broadly consistent with allegations of being hit in such a way that hurt and led to the children crying. There is the consistent repetition of the use of hands and a slider and reference to being hit linked to taking toys from a bag; the use of a hand towel and eating a brioche. Certain points arise but are not consistent and there is contradictory information as to the extent to which JM is aware or not as to the hitting. The reports are quite unclear as to how often the hitting is said to have occurred, but the sense is of more than a few occasions. The sense of the force used is found in the reference to the hitting hurting and causing the children to cry. There is mention of marks being caused which subsist after the hitting. There is very little evidence as to dating of the events other than a mention of the last incident being shortly before the report was made. It is fair to say the ABE interview process includes broad ranging issues and the accounts are at times confused and difficult to follow with potentially relevant and wholly irrelevant matters being mixed up.
- h) When speaking to MB, FC spoke of being hit by TM with both a slider and with his hands. EW gave a similar account of being hit by TM. She

expressed the view that her mother should have done something to keep her safe.

36. It is quite clear the children have reported being hit by TM. Incidentally they have reported being hit by both their parents and by NR (albeit with less detail particularly in the case of MW/NR). On the evidence before me I consider I am being asked to have regard to the following:
- a) Can I rely on the reports that came out of the maternal family network? Should I have regard to the possibility of fabrication or some other form of action which has consciously or subconsciously led to the shaping of the children's allegations notwithstanding the same events never taking place?
  - b) If I accept the fundamental truth of allegations having been made then to what extent can I reasonably rely upon the same in the light of the manner in which the reports have arisen (out of the paternal family home); having regard to the perceived antagonism of the paternal family, and; in the light of the suggested inadequacies in the professional investigation?
  - c) If I accept the essential truth of the allegations being made and the essential truth of their content then to what extent can I properly form a view as to the nature of the events so as to reach a conclusion of improper conduct on the part of TM? To what extent can I properly reach a conclusion as to the ambit of the behaviour; the force and mechanism used and the context and timing of the same?
  - d) In the light of all the above to what extent can I safely conclude JM was sufficiently appraised of facts or knowledge which places her in a position where she can be said to have failed to protect the children.
37. These questions cannot be answered without reference to the investigation process. But I am also asked to have regard to additional matters including:
- a) FC's autistic spectrum disorder and the potential for her to confabulate (tell untruths without intention)
  - b) The argument that there are instances of the children saying things which appear to be inherently implausible.
  - c) The timing of the allegations. Only arising during a period in the care of the paternal family and following a breakdown in trust between the respective families.
  - d) The points made with respect to the sexual exposure allegation to which I now turn.
38. The Court has to be alive to the potential for story creep where an account is repeated to multiple individuals. In real terms the account of the allegations given to the police is fundamentally in terms with the account given to the family members.

### The sexual exposure allegation

39. This allegation derives from the conversation with NR on 25 April 2020 [H108]. In the course of this conversation FC is said to have reported having seen TM's 'tail'. It is suggested FC using this word to refer to the male penis. The report continued:

*she said, "it looks like this" and she grabbed the meerkat teddy. [TM] is mixed race and so she said "its the same colour as this, she lifted the brown sleeve up of the teddy's arm and she said "inside it is a different colour". [FC] then said "he sometimes walks around without pants, sometimes it can look different like big or small and sometimes he calls my name"*

40. NR gives an account of making a note of the conversation and it is suggested the account reflects this note taking. At some point in the conversation MW was present or listening and he reports hearing this discussion. He agrees he did not speak separately to FC before calling the police and making this report [H294]:

*'She has seen...his...penis. Sometimes it is floppy and small and other times it is big and standing up. She states he has pulled back his foreskin to her and the end is a different colour. Sometimes he is walking around with his pants and sometimes he calls [her] and asks [her] to come and just shows [her]'*

41. It is of note that EW at no points references such exposure although it is suggested by the end of the account that she has also been present whilst TM showed his penis whilst in the bathroom.

42. In ABE interview FC was asked about this issue [H198+]. She described having seen TM naked and having seen his 'tail'. When asked she described it as to colour and talked about it being 'tucked in' (I formed the sense that she was talking about a flaccid penis). She said sometimes he touched it but then talked in the contact of cleaning it after going to the toilet and scratching himself. She talked about how a penis starts small but gets bigger. It is not clear at this point whether she is making a general reference or a specific reference to TM or what this means. She does though link the size change to 'growing up'.

43. After the interview FC spoke to CW [H104]. She said there were things she had not told the police as she 'did not want to make them uncomfortable'. EW was asked if she had seen TM's tail and denied the same. FC said when EW was asleep TM would show his 'tail' to FC in her bedroom and call her into the bathroom to show his 'tail' to her. CW told MW, the police were called, and FC was reinterviewed.

44. Note is made of the fact that FC turned up at the second interview wearing an outfit which appears to have cheetah ears and a tail. The point is made that this was an unfortunate potential prop in the light of the allegation and the use of the word 'tail'. NR explained that at this time FC was very interested in animals and wanted to wear this outfit. She explained that FC can have a meltdown if she is told to change clothes and NR didn't want to endanger the interview. I note JM gives a similar rationale as to why TM wore a 'stepdad' T Shirt at the birthday party.

45. During this interview when questioned FC spoke of both her and EW being called into the bathroom by TM and they are allowed to look at the 'thing I was

*talking about (tail)*'. When this happens TM is said to be washing himself in the bath and 'then he calls them in for some reason'. This is said to have happened about six times. The bath has no curtain and so you can see someone using the shower attachment. The shower is said to be on when this occurs and he says, 'look at me'. On other occasion TM is said to be laying in the bath. She commented that the 'tail' was 'really big' but was tucked in. TM is said to be 'wagging it around'. But she does not see anything else because the 'tail' is tucked in 'like your belly button'. He 'normally' says look at it but 'sometimes' says 'touch it' but they don't. FC went on to report that JM was in her bedroom next to the bathroom but 'she can't hear'.

46. In contrast to the assault allegations it can be seen the exposure allegation develops over the course of questioning. Arguably the first report amounts simply to seeing TM naked (a point NR fairly conceded in her statement) although the mention of a different colour inside suggested the possibility of seeing the skin under the foreskin (certainly that is the suggestion). The first report of 'calling her name' does not make immediate sense in the context of the report. It is perhaps therefore concerning that MW's report develops the account to talk in terms of the penis being erect ('standing up') and of him pulling the foreskin back. These suggestions are simply not part of the initial account – a point which MW accepts. Furthermore MW reports TM calling FC and shows her his penis. This also was not stated by the child. The last point is of particular concern given the developing account during the second interview with the allegation of being called and shown his penis. I cannot help but note that MW made this report prior to FC and yet FC came to make a similar report.
47. TM denies these allegations. He told me that whilst he visited the house and was naked when in the bedroom with JM, he did not walk around the house naked. Further the children would not be at the house. After sex he would visit the bathroom, but he would be wearing pants. He did not use the bathing facilities at the property as he likes his privacy and had the option of returning to his mother's home to shower. The bathroom door had some form of locking mechanism and he would use this when using the toilet. It was suggested to TM that this seemed an improbable account as to privacy given, he had holidayed with the children and adults sharing a static caravan and must have used the facilities during that holiday. Further he was questioned as to his account of not bathing/showering. He was challenged as to whether his account was consistent with wearing the tracksuit, he had arrived at the property in throughout the night. It was put that it would be more consistent with his general case for him to visit the bathroom unclothed to clean himself.
48. I bear in mind these suggestions go to the truth of his account of the children not having a chance to see him naked. They do not establish inappropriate sexual exposure. I bear in mind that being seen naked is not of itself evidence of conduct which draws the Court's opprobrium. Nakedness of itself is not a sexual act but a state of attire. I note FC's account prior to interview makes no mention of sexual language; arousal on the part of TM or other sexually related conduct. I am doubtful whether the account given to NR could of itself support a finding of misconduct.

### **The physical injury**

49. I am asked to conclude the 10cm mark on EW's right rear thigh was inflicted by TM. The key evidence in this regard comes from EW in interview and elsewhere (where she associates the mark with being hit with the slider) and from EM. In his expert opinion the mark was likely to be non-accidental having regard to its site (in a protected area inside the thigh which would be difficult to injure by accident); by the lack of any witness to an innocent explanation, and; by an absence of a reported event when EW presented as upset following suffering the injury. EM considered the injury would have been painful and the child would have exhibited crying as a result.
50. EM felt the cause of the injury would have been a memorable event. A difficulty with his logic is that the account given by the child (and thus one would assume reflective of her memory) is ruled out by the expert as being unlikely to cause the linear mark which travels in a curve around the thigh. He simply could not see how a blow with a slider could cause this injury. EW gives no alternative account.
51. Whilst other possibilities have been raised and rejected it is right to say from an early stage JM raised the possibility of the injury being caused whilst EW was on a trampoline. The detail of the account was not provided prior to hearing and the expert was not minded to accept this possibility. However in live evidence an account of a broken trampoline was put to the expert. It was said one of the supporting posts was broken leaving an edge around the mat surrounding the trampoline net. It was suggested that EW had been sitting on the edge of the mat and as she dismounted passed over the sharp edge causing the mark on her thigh. The expert considered this was a plausible explanation if the Court accepted the account.
52. No other injuries are reported and relied upon as suggesting misconduct. The children have been seen to exhibit bruises, but these are unsurprisingly felt to be part and parcel of an energetic lifestyle.

### **The investigative process (including ABE)**

53. Counsel for TM has provided a detailed critique of the ABE interview. I have had full regard to this document as I have to the Guidelines that underline this criticism. The other parties to the litigation acknowledge the force of the criticism. It would be tempting to provide a detailed analysis of this critique point by point however given my overarching conclusion I consider it is neither necessary nor proportionate to do so.
54. What I intend to do is summarise my broad assessment of the process and to outline the implications of the same for this fact-finding process.
55. I share the concerns expressed. I do not think I can go as far as counsel for TM in suggesting that this is worst example of an ABE interview which I have seen but it is a very poor example. Counsel has categorised a range of concerns and I note (and accept the following):

- a) The lack of proper engagement with the social work team. This is both inexplicable and unacceptable. Good practice necessitates joint agency working and, in the case, the social worker expressed her concern at being simply kept out of the process. One consequence was that the children were interviewed by a male interviewer without any other accompaniment. This is plainly not a helpful basis for obtaining good and reliable evidence from vulnerable children.
  - b) The use of a civilian investigator (CI) to carry out the interview process. I am not able to fully comment as to whether this is good practice within the Police Service but on the evidence of this interview it is respite with problems. What makes this choice more bewildering is that the recording officer (operating the camera) was a Detective Constable. I simply do not know why this reversal of normal roles was considered appropriate.
  - c) This concern is exacerbated by what appears to be a lack of real interview planning. The questioning was clumsy and failed good practice in a host of regards. A good example was the use of leading questions. I note the only allegation surrounding the suggestion of asking the children to touch TM's penis came from a leading question to such effect. At other points the interviewer interrupted the children in the course of free-flowing evidence with the impact that it is now impossible to know what the children would have said. As I have noted counsel summarises a range of questioning errors which I accept.
56. The purpose of ABE interviewing is to obtain evidence which can be reliably accepted within a criminal process. The Guidelines operate to ensure mistakes are avoided and to ensure evidence is admissible or given weight. Failures in interviewing technique run the risk of robbing the Court of valuable evidence. In many cases this evidence will be all the evidence the Court can rely upon. In any event it is intended this evidence should stand as the child's evidence in chief. The Court appreciates that interviewing is not a science and that the process can be challenging having regard to the needs of the child. However, on this occasion the process was surrounded by so many failures as to call into question what benefit could be taken from the interview at all.
57. On the evidence I have considered I judge it risky to place any significant weight on the evidence adduced through the ABE process. It is concerning that this decision is neutral as to the truth of the allegations. As such this disadvantage may undermine the merits of an otherwise truthful allegation. Equally though it may undermine the opportunity for TM to properly defend his case.
58. But this does not mean the allegations cannot proceed. The allegations are supported by evidence outside of the ABE process. Whilst I consider the poor ABE interview impacts on the investigatory process it does not wreck it entirely from my perspective. I intend to weigh the allegations having regard to the balance of the evidence. I do not intend to entirely ignore the ABE interview, but I am minded not to rely upon its contents unless elsewhere corroborated and even then, to weigh the ABE interview information in the balance as supporting evidence alone.

59. Criticism is also made of the Child Protection Medical process however I consider this criticism is far less clear cut than that levelled against the ABE. It is noted the social worker was not present for the medical. Whilst this is a matter of concern it does not undermine the process. It is said if the social worker had attended then this enquiry may never have occurred due to the limited nature of supporting evidence arising out of the medical. I note this argument but do not consider it has real impact on the fact-finding process now placed before me. I agree the social worker appears to have misinterpreted the medical assessment as to physical injury causation but ultimately this is now a matter for me, and I am well placed to assess the allegations.
60. I lastly note the Haven assessment. For the avoidance of doubt this process has provided no supporting evidence in respect of any allegation placed before me. Indeed on review of the allegations it can be seen a sexual abuse medical could not support the account given (which involved no touching). I appreciate other matters were being discussed contemporaneously but for my part I struggle to understand the logic behind this decision making. It was an invasive and likely distressing process which has served no obvious purpose.

### **Conclusions Allegation 3: The 10cm mark**

61. I do not find this allegation proven. The local authority has not persuaded me on balance of probabilities that TM (or JM) inflicted this injury on EW. Whilst neither TM nor JM are required to disprove the allegation, I consider the trampoline account a plausible explanation for the injury.
62. I do not intend to spend significant time on this allegation but reach this conclusion having regard to the following:
- a) I note there is no plausible account establishing a NAI. EW's account of the mark being caused by a slider was rejected by the expert and I accept that evidence. On a common-sense basis this account appears unlikely given the nature of the mark and its location and shape.
  - b) As such there is in fact no alternative account and one is in the realm of speculation. I am wary about concluding an injury is non-accidental just because no account has been given (in fact an account has been given and rejected) and the injury has not been witnessed. Children suffer many minor injuries (and this was undoubtedly one) without the same being witnessed. Furthermore, one cannot assume that when an injury is suffered whilst playing there will be an immediate and lasting response that will come to the notice of adults. Anyone around young children is familiar with unexplained marks arising out of play.
  - c) I do though acknowledge the siting of the injury as a relevant supporting point. This injury was in an unusual location (in the high inner thigh area) which would not in the normal course of events be likely susceptible to injury. This was I agree a concerning feature.
  - d) However, the trampoline account is in my view eminently plausible. There was much debate about the notion of the 'sharpness' of the broken edge and the likelihood this would have caused broken skin. This is of

course a fair assumption to make if the edge was ‘sharp’. However, what does the word ‘sharp’ mean in this context. As with other words in this case it is in the mouth of the user. ‘Sharp’ might simply convey the notion of a raised edge. I can well see that a child passing over such an edge whilst dismounting might suffer this form of raised welt or marking.

- e) For my part (although rejected by the expert) I considered the alternative possibility of dismounting from a frame using a fireman’s pole technique might also cause such a mark (were there to be a raised part to the frame). The expert could not understand how this would cause a mark which circles around the thigh. However, in the classic fireman’s pole dismount the individual does not slide down the pole through the vertical axis only, but rather circles the pole at the same time. I do not say this was the cause and indeed no-one suggests witnessing such an act. However, it simply reinforces the range of possible causes of this injury within the accidental sphere.

#### **Allegation 4: Sexual Exposure**

63. I do not find this allegation proven. I give the following reasons:

- a) I consider the evidence on which I can place safe reliance is that provided by NR. I make it clear I accept her account is a truthful reflection of what she was told by FC. However on careful consideration I am simply not persuaded it evidences sexually inappropriate behaviour. I consider it evidences FC seeing TM naked and no more. I make it clear I do not consider this makes out the allegation which requires in my assessment a sexual motivation to permit the allegation to cross the threshold. Absent a sexual motive the allegation does not come close to the threshold.
- b) At PTR I considered this point with the parties and I remain of the view that simple nakedness without more is not a matter for the Court but for personal morality. It is not for me to sit in judgment on such decision making. To do so would fail to have regard to the guidance as to social engineering [For the avoidance of doubt I make it clear there is no obvious reason why the State would want to socially engineer society so that children could not see naked adults within the domestic environment. Many children grow up with misconceptions as to what an adult naked body should look like leading to dysfunctional attitudes. There are obvious merits in children developing with an ‘abuse free’ understanding of what normal people look like].
- c) On my assessment FC’s original account was no more than descriptive of seeing TM’s penis. One has to read into the account (as MW wrongly accepted, he did) a notion of the penis being aroused or erect when no such account was given. The account of the different colouring to the penis in my assessment does not establish reliable evidence beyond sighting the penis. It could of course suggest seeing a retracted foreskin, but this again does not of itself establish a sexual context to the sighting.



- d) I note in ABE the evidence of FC as to seeing the penis and TM scratching or touching it after the toilet. This supports an innocent and perhaps inadvertent sighting.
- e) I am concerned as to that aspect of the evidence which develops the allegation. I have regard to the following:
  - i) I cannot ignore the development of the account as understood by MW. On my assessment MW jumped to a conclusion as to what was being reported and passed on his interpretation rather than what had been said. Having considered all the evidence with care I do not consider this was a malicious reworking of the account. Rather I consider in the context of the reporting he jumped to a conclusion and subconsciously reworked the account.
  - ii) The difficulty with this is as to the impact this may have had on FC's subsequent reporting and particularly in the light of the need to interview her twice. I consider there is a real possibility that MW's understanding became the family understanding, and this has ultimately impacted on both the police's approach to interviewing and the account given by FC. This culminated in the interviewing officer obtaining a positive answer as to whether FC had been asked to touch TM's penis notwithstanding this was not part of the original complaint.
  - iii) Given my concerns as to the ABE I am not willing to rely upon the information contained within the second interview given it is otherwise uncorroborated.
  - iv) It may be thought that I have overlooked the blank denial by TM as to any opportunity for FC to sight his penis. I have not. In my assessment I think it more likely than not that FC has at some point seen TM's penis in a wholly natural setting (for instance when he was passing to the toilet having left her mother's bedroom). I have considered TM's evidence and found it inconsistent, implausible and inherently inconsistent in this regard. His account of why he would not use the shower I found unlikely particularly in the light of his evidence as to wearing his day clothes to bed.
  - v) My judgment is that TM has sought to distance himself from any opportunity for the children to see him naked by presenting an untruthful account of his actions whilst in the home. I consider he has underplayed the times he has slept in the home when the children were present.
  - vi) In my assessment he has done this because whilst he is confident that he has not sexually exposed himself as alleged he is worried he will not be believed. I consider it is likely he has made the choice to deny any chance rather than to be open as to his actions. I have carefully reflected on the *Lucas* direction in this regard

and I am satisfied there is a reason for the lie which has nothing to do with TM hiding his misconduct.

- vii) It should be noted that this conclusion does not go to the heart of whether FC/EW are credible in their accounts. This point is relevant to FC alone and I have fundamentally accepted her account of seeing TM's 'tail'. What I have not accepted is the developed account ('story creep') which suggests a sexual motive. I should though bear in mind when considering the other allegations that FC has shown herself to be open to developing her account in the light of third-party reports. This causes me to approach her evidence as to the assaults with caution as to the same risk.

64. It can be seen I have addressed these points head on without broader assessment of the surrounding evidence. I consider the same was not necessary. It is though now necessary to turn to the broader evidence prior to reaching conclusions on the other allegations.

### **Allegation 1: The physical assaults**

65. I am not persuaded as to the suggestion of an improper family campaign against JM by the paternal family. This is not to say I dispute they took many if not all of the steps complained of by JM. Rather, I am not satisfied this was motivated with the aim of removing the children from her care. On the evidence it is abundantly clear to me that the paternal family were deeply concerned for the children (and I sense to some extent JM). There is no doubt they had established and loving relationships with the children. The events of September 2019; the refuge and JM's return would have naturally left them concerned as to what might happen next. The fact that something did happen next (June 2020) simply confirmed their concerns. I find there was a clear mismatch between what JM was accepting to outside agencies and what they saw or perceived to be the situation on the ground. This lack of transparency was exacerbated by the cessation of contact. It was these circumstances which led to the referrals; monitoring and the 'log'. This was not indicative of an animus towards the mother but a concern for the children. I consider JM has a lack of insight in this regard. I would ask her even now to reflect on this. At many points in her evidence she told me (when questioned about the alleged assaults) that '*no mother would want to believe this happened to their children*'. Yet the paternal family were spectators to a situation which was deteriorating and placed the children at apparent risk. Given the information they had I question what she expected them to do?
66. In reaching this conclusion I reflect on the view I have reached as to the evidence of the paternal family members. I found CW to be an open and honest witness. Notwithstanding the facts of the case she was balanced and fair. My sense was of a concerned grandmother and no more. I formed an equally positive view of both NR and MW. This is not to say criticisms cannot be made, e.g. in the case of MW restructuring the allegation of sexual exposure. But my sense is that these errors were not intentional but a consequence of the worry and concern in their minds. In assessing them I reflect on the reality of their role prior to March

2020. They were plainly supportive of JM (practically and emotionally) and it is disingenuous to now suggest otherwise. I found their evidence consistent and honest. MW was willing to accept his errors and NR equally displayed an open mind. I do not consider it a weighty criticism to suggest that they jumped to conclusions on the information they received. This is human nature and to be expected and signifies no more than their concerns for what was taking place.

67. Although it is of questionable relevance, given the findings above, on balance I prefer MW's evidence as to sexual relations with JM, to that given by JM. I have summarised already the balancing features. In my assessment they strongly support the suggestion that JM has used this as a device to retaliate against MW and NR for their perceived role in separating her from the children.
68. As to the nature of the relationship between TM and JM I have reached the conclusion that TM presence in the home was at a much higher level than accepted by either TM or JM. I form no view as to whether he was living there or whether they considered themselves in a relationship as nothing turns on these labels. But I am of the view they have each underplayed the time spent at the property and the circumstances in which this took place for their own separate reasons. In the case of TM, and as with the sexual exposure allegation, by underplaying his time in the home/time around the children he has sought to limit the opportunity to have acted as alleged and thus has sought to undermine the allegations. In the case of JM she has equally underplayed the relationship because acceptance of the same would raise awkward questions concerning the allegation of failure to protect. But once again I remind myself that more is required to establish the allegation.
69. I consider the evidence more than demonstrates TM being at the property throughout the period in question and regularly at times when the children were present. Again I have highlighted points above which in my assessment balance in this direction, but I note the following:
- a) The messaging between JM and NR provides real insight into what was taking place. It is both contemporaneous and made without a view to the litigation. It is evidence on which the Court can rely. In a wholly natural way it regularly points to the presence of TM at the property and around the children. I found JM's evidence in this regard unreliable and inconsistent. Her explanation for messaging required increasingly elaborate explanations which lacked a sense of truth.
  - b) The nature of the relationship between TM and JM does not sit comfortably with their accounts. It is quite clear to me that JM and TM could not separate as a couple. It is not necessary for me to find why this was the case but the fact of the same is plain on the evidence. I accept there was a serious incident of violence in September 2019 and yet the relationship resumed. I struggled to understand the account of the circumstances in which it first resumed. I consider how likely it is that JM scarred by the events of September would bump into TM and in the course of this accidental meeting be reassured as to his future conduct. This is the man who she says repeatedly beat her with a dog chain and threatened to kill her when she last saw him. Having full regard to the

susceptibility of victims of domestic violence to the influence of emotional coercion this remains a problematic account. After all this was a short relationship and on the evidence one with only one incident (albeit serious). There is said to have been a two-month break. I struggle to understand from the evidence I have received where the strong emotional coercion may have come from and why she did not refuse to engage when approached.

- c) My strong sense is that JM was seeing MW move on with his life with NR and craved the same for herself and the children. I can empathise with this emotion. She was a young mother of two children and likely wanted the support of a partner. It is not part of this judgment to assess their wider relationship, but it may be there were positives to be found in their day to day life together. I consider there is good evidence to support this speculation. Her willingness to forgive TM supports this view as does her willingness to allow him to slip into the role of ‘stepdad’ for the children. The difficulty I have is that having reached this strong view accepting that TM was then kept distant from the home and children. This simply does not fit with the evidence. As noted, JM readily welcomed TM back into their life despite the September incident. She left for the refuge but quickly resumed a relationship with TM. It seems to me at every point she has demonstrated a lack of insight and a prioritisation of her relationship with TM over the wider safety issues. I do not accept having demonstrated this tendency that she at the same time managed a clear demarcation between time with TM and time with the children. Rather the two blurred and this was a natural blurring given the role she wanted for TM.

70. I have therefore reached the conclusion that TM had the ‘opportunity’ to act as alleged. I consider his place in the property extended to overnight stays both in 2019 and 2020 and whilst this would often be when the children were away it extended to periods when they were at the property. In reaching this conclusion I place weight on the following additional matters:

- a) The evidence of the paternal family as to their sighting of TM at the property in 2020. I accept this evidence.
- b) The evidence in the police of someone running from the property when they attended, and this person being described as being [‘X’]. I note TM’s birth name is [X]. On balance I consider it is likely this was TM.
- c) The accounts of the children (outside of the allegations) of TM living at the property.
- d) Minor points such as the suggested presence of TM’s pet [...] at the property when the paternal grandparents attended at Easter 2020.
- e) The willingness of JM to provide TM with a key to the property whilst she was at the refuge.

71. The above findings do not answer the question as to whether TM has hit the children. However, I have reached the conclusion on balance that he has

assaulted the children by both slapping and hitting them with a slider. I do so for the following reasons:

- a) I consider the first account given by the children (to CW and NR on 21/22 April 2020) is reliable evidence of physical assaults. I accept the evidence of CW that this account was spontaneous and free flowing and not extracted improperly from the children.
- b) I bear in mind the account of TM/JM that the children will not have seen the domestic abuse of JM by TM and the suggested evidence of TM having a positive relationship with the children. In this context there is no apparent reason why the children would have sought to make allegations against TM to first their grandmother and then NR unless something had taken place.
- c) I consider it significant that this followed a period when the children had not seen their paternal family. It might be suggested this point supports the notion of a false report in some way, but I reject the same. In my assessment if something had been occurring in the home then the children would have been contained there for an unusually long time without seeing the paternal family. In the normal course of events they would have been seeing their paternal family each week. However they had not seen them for at least 4-weeks, and I suspect the meeting acted as a pressure release allowing the children to speak when they otherwise may have not. It is also entirely possible that the extended period without paternal family support may have increased pressure within JM's household leading to misbehaviour and inappropriate discipline.
- d) The accounts are noteworthy for not being obviously exaggerated or incredible. Rather the children give a simple account of being hit and explain this in the context of certain behaviour (taking toys out when they are not meant to / soiling a towel / eating food without permission). This does not have the impression of a story which has been dreamt up. In the detail there is a ring of truth.
- e) On the evidence of JM and TM it is not clear why the children would make up these stories against TM. There is no suggestion of him acting improperly. Whilst I bear in mind the potential for the children to make stories up for some ulterior motive and to select TM (given his somewhat peripheral role) I consider it unlikely they would choose him as a candidate on the evidential account given by the JM/TM.
- f) I do have regard to the domestic violence evidence. I made clear in submissions that I would approach 'island hopping' with care. Indeed I accept the evidence of domestic violence is not without more evidence of the children being hit. But there are aspects to the domestic violence that has probative value to this assessment:
  - i) It is said the violence was unpredicted and arose without significant warning. This is evidence of anger control issues, a point which TM appears to concede in messaging when he accepts work is required on his part;

- ii) The violence was serious. Whilst it is difficult to talk in terms of the gradience of violence, this was not a case in which violence is said to have insidiously entered the relationship. Rather when it arose it occurred explosively.
- iii) The suggestion of the mother of drink/drugs as a supporting feature. Whilst this is not substantiated by direct evidence, I note JM in her police evidence is clearer as to this being a surrounding feature. There is the potential for uninhibited behaviour. I note JM has produced positive drug tests for the relevant period and I therefore cannot rule out a situation in which both adults were affected by drugs.
- iv) The later issues leading to the refuge and the June incident. In the former case I am deeply suspicious that I have not been given a full account of what took place. I find it most unlikely JM would have made the difficult decision to leave for the refuge on the basis of the evidence given to me. However, the detail is known only to TM and JM and I cannot pierce that which is shrouded.
- v) The June incident had a similar character of developing without warning; anger control issues and the use of violence as a controlling mechanism.
- vi) These events cannot but weigh in my assessment of TM's likely conduct. They suggest an individual with anger management issues who can quickly and without real warning lose self control. They suggest he is willing to use force when appropriate conduct will not deal with the situation confronting him. The June incident is concerning as he acts in the public arena and in the presence of third parties suggesting his actions are not regulated by the presence of others.
- vii) I also have regard to the evidence of MB. He formed the opinion that the children were giving truthful accounts as to their experience. He properly accepted it was not his role to determine the facts of the case, but I accept he is obliged to form an impression on this point if he is to properly report to the Court on related matters. His evidence speaking from a position of real experience was that the children did not appear coached. He felt too much was being made of FC's autistic status and of the suggestion of confabulation. I accept his evidence. He also pointed to strong emotional overlay with EW becoming very upset when he inadvertently referred to '...' (removed to preserve anonymity) and she mistook this to be a reference to TM. Likewise he pointed to FC constructing a 'slider' for his better understanding. This was something he had never experienced before. His sense was that this presentation supported the suggestion that the assaults were part of their lived experience.
- g) I have regard to my assessment of the evidence. I have commented above on my assessment of various witnesses. I was less impressed by both TM

and JM. I give full allowance for TM's learning issues (he was supported by an intermediary throughout the hearing and ground rules were used to protect his interests) but I was left with the very strong impression that he was significantly both downplaying his role in the home and distancing himself from that place. The end result was a sense that he had spent very little time in the company of the children. I have rejected this account. Unfortunately I am left with little subsisting account from TM to bring into the balance. I continue to have regard to the potential for this to have been generated out of fear of being wrongly implicated in misconduct. However, in this case and when bringing into the assessment the broad canvas I am left with the strong impression that the distancing cannot simply be seen as innocent distancing. I have likewise formed the same impression in respect of JM's evidence. I found her evidence inconsistent and at times deeply implausible. I was left with the clear impression that neither TM or JM were telling me all that they knew, and my assessment is that they have taken this route as they do not wish to give me a full account.

72. I find it more likely than not that TM did hit the children and did so as alleged, on occasion using his hands by slapping and on occasion by hitting with a 'slider'. For my part I consider very little turns on the debate as to whether TM owned slider's or not. I note there is photographic evidence of him wearing the same, but I note his account that these belonged to JM. I accept the evidence of CW of seeing him wearing 'sliders' in the summer of 2019. It is of note that in interview one of the children makes the point that she does not know whether these are his or not. As with much in this case the literal debate has not assisted.
73. As to the detail of the assaults I have reached the following conclusions:

- a) I am satisfied the assaults had the character described by the children in that they surrounded events such as getting toys out when told not to; eating when they shouldn't and the towel incident. I considered this last event to have a real sense of truth about it. I consider it less likely the children would make up a story in which they soiled a towel for lack of toilet paper. From a child's perspective this is likely to have some level of embarrassment associated with it. There are many other reasons they could make up without coming to this account. On balance I consider it likely there was an incident when TM smacked the child on the bottom and pulled clothing aside to do so. I do not consider this had any sexual element.
- b) The force used is impossible to determine with any fine calibration. However, it is clear to me it was sufficiently forceful so as to cause the children to cry. It stung and was painful. It was not a mere tap.
- c) As to timing I consider it unlikely this preceded the September incident alone. On balance I consider the assaults post-dated that event. I judge it likely that this event was significant as TM had crossed a boundary of using force (albeit against JM) and that thereafter the prospects of further use of force were greater. In any event I do not think it likely the children were looking back 7 months when they recounted the assaults. Furthermore there is some evidence from the children of the last assault

being proximate to the police interviewing. There is also the point made above as to the potential tension in the household in the period of paternal family removal (and during covid 19 lockdown). Having read about TM's suspicions and jealousy which led to both the September and June incidents I am far from confident these were isolated incidents. It more likely than not that tensions resurfaced at other points and there is a real likelihood these may have factored into a loss of control with the children.

74. I am satisfied the conduct caused significant harm. On the facts of the case the children were being hit by an individual who did not have permission to hit them. He was hitting them hard enough to hurt them. He hit them with a slider and did so more than once. They were hit for actions which did not justify being hit let alone in the manner they were hit. This likely caused significant harm at a physical but as much an emotional level.
75. I find allegations 1(a) – (c) proven as set out above.

**Allegation 2: Failure to protect**

76. This allegation is put on the basis of knowing awareness of the assaults (as now proven). Such an allegation could also be established on the basis of wrongly placing the children at risk.
77. JM's evidence was that she had not witnessed such behaviour and would have acted promptly if she had. But her evidence was also of TM having no opportunity to commit these acts, save for short periods of time when she might have popped to the toilet or gone for a drink.
78. In reaching my findings I have fundamentally rejected the account as to TM's presence in the home and my assessment of this allegation must proceed on the basis as found. In that context TM was in fact in the home and was having contact with the children on a free and unfettered basis in accordance with those arrangements. He had the chance to hit the children outside of the account that JM gives and did. I therefore have to evaluate this allegation in a context of a more natural home environment. Plainly this is one in which events might take place without being seen by the other resident adult.
79. The failure of JM to give a truthful account has limited my ability to assess this point. She has not given a truthful account of daily routines and I am left to therefore guess. This complicate my task.
80. However I have formed the clear assessment that it is more likely than not that there was a failure to protect. I have done so on the following basis:
- a) The September incident: This armed JM with a very clear understanding as to what TM could do. This informed her as to his poor anger management control and his quick adoption of physical force.
  - b) Her belief that he was using drugs and the impact this had on his selfcontrol.



- c) The events leading to the refuge. For reasons given elsewhere I consider this decision indicates the level of understanding of JM as to the attendant risks. I reject her account which appeared to downplay the reasons for leaving her home. I do not accept she went to a refuge simply because the police suggested the same. I do not know the real detail, but it perhaps matters only that I am confident this is a clear indicator as to understanding.
  - d) The decision not to place the children with MW at this point on the basis the children would not be safe there (from TM). On any basis this reflects understanding the children were at risk.
  - e) The decision to then resume the relationship and moreover permit TM back into the family home, knowing all of the above.
  - f) The fact that all of this took place in the context of third parties (the social worker and paternal family members) expressing reservations as to risk. This was further objective information that informed JM's decision-making.
  - g) On my finding of TM assaulting the children it is plain I have accepted notwithstanding all of the above JM permitted TM time with the children during which they were assaulted.
  - h) I consider it unlikely JM could have been wholly unaware of what was taking place. The account is of the assaults hurting and the children crying. Whilst I do not find JM was aware of the detail of each event, she was aware something was happening between TM and the children and they ended up crying. For reasons which can be found elsewhere in this judgment she took no active steps to intervene.
  - i) Sadly I consider JM permitted her own needs to be prioritised over those of the children.
81. In reality whilst I make this finding it is questionable how relevant it is. The key components of allowing TM back into her home and the children being assaulted has relevance whether JM's knowledge meets the requisite legal standard or not.
82. This judgment will now be forwarded to counsel who can share it with their respective clients. It will be formally handed down on the final day of the welfare hearing and time will run from that date. I accept there are likely to be drafting errors which flow from the time constraints arising. I will accept any corrections or requests for clarification made prior to hand down. I accept the parties involved in welfare decision making will need time to digest this decision. In the first instance I propose adjourning the case to not before 12 noon on Monday. The parties will need to reflect on whether the witness template remains as drafted. I ask for the judgment to be circulated to MB in advance of his further evidence (assuming he is still required). I would welcome an update from the parties at the earliest opportunity.

His Honour Judge Willans