

The draft judgment was circulated by email to the parties on 27 February 2024. The approved judgment was handed down in the parties' absence. The time and date of hand down is deemed to be 4.00 p.m. on 1 March 2024.

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Neutral citation: [2024] EWFC 77 (B)

Cases: OX22P00283, RG22F00583 AND RD22P00558

IN THE FAMILY COURT SITTING AT OXFORD

**ON APPEAL FROM THE DECISIONS OF DISTRICT JUDGE DEVLIN ON 23
AND 24 OCTOBER 2023**

IN THE MATTER OF J (A BOY) AND K (A GIRL)

**IN THE MATTER OF THE CHILDREN ACT 1989 AND IN THE MATTER OF
THE FAMILY LAW ACT 1996 PART IV**

Date: 1 March 2024

Before : HHJ Vincent

Between :

MZA

Appellant

and

FHB

Respondent

Mehvish Chaudhry for the Appellant mother, instructed through the public access scheme
Elizabeth Selman for the Respondent father, instructed by Elthorne solicitors

Date of hearing: 21 February 2024

APPROVED JUDGMENT

Introduction

1. The parties have two children, J aged eight and K aged five.
2. The parties were married in June 2014. They separated in January 2022 following an incident at the family home. The father was arrested and later charged with common assault. He was subject to bail conditions prevented him contacting the mother or going to the family home.
3. The father was mostly out of the country between January and June 2022, but did come and visit the children on three occasions during that time.
4. On 17 June 2022 the mother applied for an order that the children live with her and that the time spent with their father should be supervised. She also applied for an order seeking permission to relocate with the children to [country X] (later withdrawn). With her C100 she filed a C1A alleging domestic abuse. The allegations she makes within the proceedings can be summarised as follows:
 - Coercive and controlling behaviour *'designed to harm, punish or frighten the applicant, undermining her autonomy and agency'*;
 - It was alleged that the father had inflicted violence on the mother, in front of the children, and on J directly. It was alleged that the father had threatened violence, used abusive language, and repeatedly demeaned the mother in particular by questioning her mental health;
 - Financial abuse post-separation was alleged;
 - It was alleged that the father and members of his family had put pressure on the mother by bombarding her with messages and texts of a harassing nature, with the intention of getting her to withdraw her complaint in the criminal proceedings and her applications in the family court;
 - It is alleged that this course of conduct caused the mother pain and injury, and in addition that the fear and intimidation that she felt as a result of the father's conduct impacted her mood and self-esteem, causing her anxiety and stress, impairing her decision-making abilities, in particular the decisions she made agreeing to unsupervised contact despite her concerns;
 - It is alleged that the father's conduct had caused J a physical injury, and both children to be afraid, upset, withdrawn, worried and fearful;

- Emotional abuse of the children was alleged, for example it is alleged the father ‘forced’ J to remain at the dinner table to finish a meal, (the father accepts he required J to do this, but rejects the suggestion that he ‘forced’ him), and by telling J, *‘I hate your mother’*, and *‘tell your mother this is now war’*, (which the father does not recall saying), and *‘your mother is a massive liar’* (which the father denies).
5. The father cross-applied for a child arrangements order for shared care, and for a prohibited steps order preventing the mother from relocating to [*country X*] with the children.
 6. On 7 July 2022 the mother applied for and was granted a non-molestation order.
 7. The FHDRA was before District Judge Devlin on 13 September 2022. At that time the father was seeing the children for unsupervised contact, with a third party assisting with handovers. The Cafcass Family Court Adviser supported continuation of unsupervised contact. This was approved by the judge, although there was a dispute about the frequency of contact. A contested hearing was listed.
 8. In November 2022 the criminal trial resulted in the father’s acquittal. The mother has exhibited a letter she received from the Crown Prosecution Service apologising for errors, which in the letter are said to be a failure to provide evidence to the defence, a failure of the police witness to attend Court, and a failure to secure the judge’s agreement to an adjournment, resulting in the CPS offering no evidence at trial. On behalf of the father it is said this is not a true representation of what happened; there was an effective trial before a District Judge, both parties gave oral evidence and he was acquitted.
 9. On 1 February 2023 District Judge Devlin determined that there should be a fact-finding hearing in the private law proceedings. At the same time, he ordered a section 7 report from Cafcass, which was to be filed eight weeks after the fact-finding hearing (anticipated to be in June 2023). The section 7 reporter was directed to make recommendations having considered any findings of domestic abuse, and in particular, to consider the factors set out at paragraphs 36 and 37 of PD12J Family Procedure Rules 2010.
 10. In the interim the judge determined that K should see her father on Mondays after school, when he would take her to a swimming lesson, that J should see his father on Tuesdays after school, when he also had a swimming lesson, and both children should spend one day of every weekend (10am to 7pm) with their father.
 11. The fact-finding hearing was listed in June 2023. On 18 May 2023 there was a pre-trial review, at which the judge directed the filing of amended schedules and further statements. He listed a further pre-trial review on 8 June 2023, for the court to

consider the schedule of allegations, father's response and statements filed by the parties. The further hearing was to consider again whether and to what extent a fact finding is necessary, and if it was, timings and witness requirements.

12. The judge confirmed on 8 June that there should be a fact-finding hearing. The witness template was considered. The fact-finding hearing at that point was listed before District Judge Devlin to start on 12 June 2023.
13. Unfortunately that hearing was vacated by the Court at short notice. The fact-finding hearing was relisted for five days to start the week commencing 23 October 2023.
14. The parties are engaged in parallel financial remedies proceedings. There is a dispute about the extent of the paternal grandparents' financial interests in property that is said to form part of the matrimonial assets. An interim hearing to determine that question was listed for three days but adjourned for lack of a proper time estimate. I understand that a five-day hearing is to be listed in August 2024.

23 and 24 October 2023

15. Miss Selman represents the father at the appeal hearing, and represented him on 23 and 24 October.
16. In her position statement Miss Selman invited the judge to, *'reconsider whether a fact-finding hearing remained necessary at all or whether perhaps only a truncated form suffices in the context of this case'*. This was the first time Ms Selman had appeared in the case, but this position was consistent with submissions made on behalf of the father in February, May and June 2023, that a fact-finding hearing was not necessary.
17. Miss Selman asked, *'what precisely is the risk of harm or the impact of the allegations that cannot be determined without a FFH?'* She noted that the Court had ordered unsupervised contact with the father three times a week. She submitted this had taken place for over a year without incident, and had not exposed them to an unmanageable risk of harm. She reminded the Court of its duty to have regard to procedural proportionality at all times.
18. The judge was then referred to PD12J, and reminded that it *'does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not required to be resolved for the determination of child welfare issues. Determination of the allegations should only occur where it is 'necessary' to do so.'*
19. She identified the issues in the case as being (i) whether the established unsupported contact should be extended to include overnights and collection to and from school,

(ii) the amount of time that the children should spend with their father, and (iii) whether mother should be given permission to relocate to [country X].

20. In the circumstances, it was said that where the court had been fully aware of mother's allegations for a considerable time but had consistently been satisfied that the children could spend time with their father unsupervised, what would be the purpose of a fact-finding hearing? It was submitted that proof of the allegations would be unlikely to result in the court restricting the children's time with their father, given they had spent a whole year having unsupervised contact with him.
21. Miss Selman then cited the judgment of Sir Geoffrey Vos in *Re K* [2022] EWCA Civ 468, at paragraph 8:

*Thirdly, it is important that a judge considering ordering a fact-finding hearing identifies "at an early stage the real issue in the case in particular with regard to the welfare of the child" (see [8] and [139] in Re H-N). As [14] of FPR PD12J provides, "[t]he court must ascertain at the earliest opportunity ... whether domestic abuse is raised as an issue which is likely to be relevant to any decision of the court relating to the welfare of the child". [17(g) of FPR PD12J is to the same effect. **Fact-finding is only needed if the alleged abuse is likely to be relevant to what the court is being asked to decide relating to the children's welfare.***

22. And paragraphs 63 to 70. At paragraph 67:

*It seems that a misunderstanding of the court's role has developed. There is a perception that the Court of Appeal has somehow made it a requirement that in every case, in which allegations of domestic abuse are made, it is incumbent upon the court to undertake fact-finding, involving a detailed analysis of each specific allegation made. That is not the case. As *Re H-N* explained and we reiterate here, the duty on the court is limited to determining only those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, in what terms.*

23. The rest of the position statement sets out the father's case on the factual issues in dispute, highlighting the father's acquittal in November 2022 of the criminal charges against him.
24. In general terms, the father's case was that there had been disputes between the parties as a result of the break-up of the marriage, that there was fault on both sides, and it was the mother's desire to restrict and control the father's access to the children that was the source of difficulty. He denied allegations of financial control, and said the mother was having difficulties making the transition to a new but inevitably less favourable situation following the breakdown of the marriage.

25. Some attention was given to an incident in March 2022. The father had gone to the family home by agreement to drop off K and to collect some belongings. The mother covertly recorded a conversation between her and the father. He alleged she deliberately said provocative things (you must apologise for what you have done), intended to draw out incriminating statements from him. It was noted that the mother had later provided this recording to the police as evidence of the father's breach of bail conditions and abuse towards her.
26. Before the fact-find commenced, the judge was invited to review transcripts and listen to the recordings from within the police disclosure, which included a 999 call, footage from police body cams, and a the father's police interview.
27. The father was not seeking any specific findings of fact against the mother, but in his witness statement he alleged that the mother has mental health difficulties, is unstable and exhibits bizarre behaviour. He alleged that she has been physically violent to him on many occasions and that he had to protect himself from her '*uncontrollable behaviour*' within the presence of the children. In the statement, he raises concerns about whether it is appropriate for the children to remain in her care.
28. On the morning of 23 October 2023 the parties came into Court ready to start the hearing, the mother taking a seat in the witness box behind a screen, in anticipation of giving her evidence first.
29. The judge opened the hearing by asking the advocates, but particularly Mr McAlinden who represented the mother, questions about the need for a fact-finding hearing. Ms Selman has summarised the nature of these questions as being focused on the following issues:
- How was a fact-finding hearing going to make a difference to the court's decision at welfare stage, given the father had been having unsupervised contact with the children for over a year;
 - What difference would the findings make to whether the children stayed overnight with the father or whether he collected them from school;
 - How were the findings going to affect the welfare of the children? Could that analysis be done by a jointly instructed clinical psychologist?
 - Could the psychologist also consider the dynamic between the parents?
 - What was mother's position on the impact of the findings sought and the allegations of the father's coercive and controlling behaviour on orders at the welfare stage;

- Had the mother's will been 'overborne' by the father in relation to the children (I understand specifically in relation to interim contact).
30. The hearing was adjourned (I understand it was now approaching lunch time) for the judge to view the various recordings in evidence and, according to Ms Selman, for the judge to consider whether or not the fact-finding hearing should go ahead.
 31. The hearing was reconvened after lunch and the judge gave a short judgment determining that there was no need for a fact-finding hearing. The parties were invited to return to court the next day to consider case management. A list was compiled of matters the judge invited them to consider, including interim child arrangements, whether there should be appointment of a clinical psychologist, whether a section 7 report should be provided by Cafcass or an independent social worker, and the position in respect of the non-molestation order.
 32. The parties attended the next morning and discussed these issues outside Court. At 2pm they returned before the judge, set out what recitals and orders were agreed and what remained in dispute. The judge heard submissions on each of the issues in dispute and then made determinations on each point, which eventually led to the order which is the subject of the mother's appeal.
 33. The non-molestation order was discharged and replaced with undertakings recorded in the recital. By those undertakings each of the parties was bound by the terms of the previous non-molestation order – not to use or threaten violence against the other, not to intimidate, harass or pester the other, and only to communicate with one another through the Our Family Wizard app, or solicitors. The father undertook not to go the family home except for handovers, when he would park across the road from the family home and collect the children at the bottom of the driveway.
 34. The mother's application to relocate outside the jurisdiction was recorded as being dismissed, the mother having confirmed she did not seek to pursue the application.
 35. The children's contact with their father was extended to include overnight stays, leading eventually to whole weekends.
 36. Permission was given to instruct a clinical psychologist. The questions to be included in the letter of instruction were recorded as follows:
 - To assess the dynamic in the relationship between the parents
 - To advise as to the impact, if any, of that dynamic on child arrangements
 - Assess the risks if any to the children of the high conflict nature of the relationship with respect to child arrangements.

- Recommend any therapy or support that would benefit either/both the parties.
37. A process for the parties to agree the identity of the psychologist and to agree the letter of instruction was recorded in the order. The parties were to return to District Judge Devlin in the event of a dispute. The expert was to report by 15 January 2024.
38. The previous direction for a section 7 report from Cafcass was discharged. An independent social worker was to be instructed to prepare an alternative section 7 report by 5 February 2024 (this was a shorter time scale than the twenty weeks Cafcass could meet at that time). The independent social worker was to be asked to consider:
- with whom the children should live;
 - the time the children should spend with each parent.
 - the wishes and feelings of the children so far as they can be ascertained.

The judgment

39. There is no official transcript of the judgment. However, Ms Selman and Mr McAlinden have provided an agreed note of the judgment on 23 October 2023, which is sufficient to understand the judge's decision and reasons. There is no transcript or note of the case management decisions made on 24 October 2023, but I have seen three versions of a working document setting out the issues for determination, each amended following further discussion at Court during the course of the morning, and the order, which records those matters which were agreed and those matters which were determined by the judge.
40. It was agreed that it would not be proportionate to adjourn the hearing of the appeal in order to obtain a transcript of the hearing on 24 October. The decisions that were made flow from the essential decision not to have a fact-find.
41. The judge started his judgment by reminding himself of the continuing duty under PD12J, *'to determine whether it is necessary to have a fact-finding hearing to determine disputed allegations of domestic abuse to provide a factual basis for the assessment of risk as relevant to the final welfare decisions the court has to make'*. The judge reminded himself that the purpose of the hearing is not to analyse the parents' relationship per se, and, as submitted by the father, *'it is not the job of PD12J to establish a free-standing jurisdiction to determine whether there has been domestic abuse/coercive and controlling behaviour.'*
42. The judge said he did not diminish the seriousness of the allegations made, *'but the court can look beyond the allegations and, nonetheless, see if it is necessary and proportionate for there to be a fact-finding hearing. The court must be able to identify an issue to which the findings may be relevant to issues regarding future arrangements for the children.'*

43. The judge then referred to the cases of *Re H-N* and *Re K*, noted that he had heard submissions from both sides and concluded as follows:

'[T]he court is not satisfied that the allegations, if true, would impact on the court's decision regarding what orders to make in respect of child arrangements.

Further, the mother raises allegations of financial control and those can be dealt with adequately heard in the financial remedy proceedings in December this year.

It was submitted that this is a case with a high level of parental conflict.

If establish make findings [sic], but many cases, if not the majority, there is conflict as disputes and fact finding hearings increase the level of conflict in many cases, making findings is not going to resolve those underlying issues.

This is not a case where the mother agreed to unsupervised contact because her will was overborne and the mother didn't appeal the court's decision for unsupervised contact, and hence it is not necessary to establish the relationship dynamic.

In many high conflict cases it is worthwhile for there to be a psychological assessment but I am satisfied that any such expert can write a report without the necessity of findings of fact. This is a constructive approach. The letter of instruction can make it clear that the parents and children have been subject to high levels of parental conflict.

The issue of financial control can be dealt with as part of the financial proceedings.

The mother can be protected by orders or undertakings, and any breach of a NMO can be dealt with by this court if the mother makes an application to commit or by the police under orders.

Other issues of risk can be dealt with by specific issue orders e.g. regarding allegations of information passing the order can record a reminder about the limits of disclosure in PD12G and communication can be regulated by a specific issue order.

Similarly, the court can make orders if necessary to prohibit the recording of the children.

Many of the allegations arise when the parties were living together until the father departed the FMH in 2022, and in my judgment, these allegations, even if proved true, would not result in a termination or reduction of the time spent with the father. There are no allegations of breach of contact over the last few months, since May 2023, when the matter was last before the court.'

The appeal

44. An application for permission to appeal was made to District Judge Devlin on 24 October 2023 which he refused, but he extended the time for renewing the application to a Circuit Judge to fourteen days.
45. The appellant's notice seeking permission to appeal was duly submitted within that time limit, together with an application to stay execution of the order. There was a delay in these applications being considered, but on 15 January 2024, I gave permission to appeal on the papers and stayed execution of the order. I listed the appeal on 21 February 2024. Some of the morning was taken up with an application made by the mother to admit fresh evidence, which application was refused. After hearing submissions from Ms Chaudhry for the mother and from Ms Selman for the father, I reserved judgment.
46. As well as the oral submissions I have been assisted by detailed skeleton arguments. In addition to the appeal bundle I have been provided with the fact-finding bundle and a bundle of case authorities.

The law

Appeals

47. An appeal will only be allowed if the Appellant can show that the decision of the Court below was wrong, or the decision was unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
48. An appeal is (generally) limited to a review of the decision of the lower court.
49. Ms Selman took me to a number of authorities emphasising that the appellate court must be slow to interfere with case management decisions, that judges have a wide discretion in that respect, and appellants seeking to appeal case management decisions have '*an uphill task*'. She reminded me that the appellate court must resist the temptation to substitute their own discretion for that of the trial judge. The question to ask is whether the judge was acting within the wide discretion he had. Ms Selman submitted that the appellate court would only interfere if the decision could not reasonably be explained or justified.
50. In [TG \(A Child\) \[2013\] EWCA Civ 5 \(22 January 2013\) \(bailii.org\)](#), Munby LJ, President of the Family Division (as he then was) referred to the wide powers of the first instance family court judge when it came to case management. At paragraph 27:

27. In this connection I venture to repeat what I recently said in Re C (Children) [2012] EWCA Civ 1489, paras [14]-[15]:

"... these are not ordinary civil proceedings, they are family proceedings, where it is fundamental that the judge has an essentially inquisitorial role, his duty being to further the welfare of the children which is, by statute, his paramount consideration. It has long been recognised – and authority need not be quoted for this proposition – that for this reason a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application ... should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without the need for oral evidence. He may ... decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of the evidence.

The judge in such a situation will always be concerned to ask himself: is there some solid reason in the interests of the children why I should embark upon, or, having embarked upon, why I should continue exploring the matters which one or other of the parents seeks to raise. If there is or may be solid advantage to the children in doing so, then the inquiry will proceed, albeit it may be on the basis of submissions rather than oral evidence. But if the judge is satisfied that no advantage to the children is going to be obtained by continuing the investigation further, then it is perfectly within his case management powers and the proper exercises of his discretion so to decide and to determine that the proceedings should go no further."

51. From paragraph 30 onwards of *Re C*, the President stressed the importance of supporting first-instance judges who make ‘*robust but fair case-management decisions*’. He referred to his own judgment in *Re B* [2012] EWCA Civ 1545:

‘The circumstances in which this court can or should interfere at the interlocutory stage with case management decisions are limited. Part of the process of family litigation in the modern era is vigorous case management by allocated judges who have responsibility for the case which they are managing. This court can intervene only if there has been serious error, if the case management judge has gone plainly wrong; otherwise the entire purpose of case management, which is to move cases forward as quickly as possible, will be frustrated, because cases are liable to be derailed by interlocutory appeals.’

52. Nonetheless, a balance must be struck; ‘*robust case management .. very much has its place in family proceedings but it also has its limits*’ (per Black LJ in *Re B* [2012] EWCA Civ 1545). Per the President in the same case at paragraph 37:

‘The task of the case management judge is to arrange a trial that is fair; fair, that is, judged both by domestic standards and by the standards mandated by Articles 6 and 8. The objective is that spelt out in rule 1.1 of the Family Procedure Rules 2010, namely a trial conducted "justly", "expeditiously and fairly" and in a way which is

"proportionate to the nature, importance and complexity of the issues", but never losing sight of the need to have regard to the welfare issues involved.'

53. In evaluating whether an appellant meets the high threshold required to justify its intervention the appellate court must have regard to the principles set out by Lord Hoffman in *Piglowska v Piglowski* [1999] 1 WLR 1360:

'[R]easons for judgment will always be capable of having been better expressed ... reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.'

Fact-finding hearings (domestic abuse)

54. Both Ms Chaudhry and Ms Selman have taken me to Practice Direction 12J, and to *Re H-N and others (children)(domestic abuse: finding of fact hearings)* [2022] EWCA Civ 448 ([Re H-N and Others \(children\) judgment \(judiciary.uk\)](#)). At paragraph 37, the President of the Family Division said:

'The court will carefully consider the totality of PD12J, but to summarise, the proper approach to deciding if a fact-finding hearing is necessary is, we suggest, as follows:

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

55. Both Ms Chaudhry and Ms Selman have referred me to *In Re K (practice note)* [2022] 1 [2022] EWCA Civ 468 ([K, Re \[2022\] EWCA Civ 468 \(08 April 2022\) \(bailii.org\)](#)), already referred to above, which emphasised the need for the court to identify ‘*the real issue in the case in particular with regard to the welfare of the child*’ and noted that a fact finding process would only be necessary, ‘*if the alleged abuse is likely to be relevant to what the court is being asked to decide relating to the children’s welfare.*’
56. The guidance from these two cases has been distilled into a guidance document, issued by the President of the Family Division in May 2022, [Fact-finding hearings and domestic abuse in Private Law children proceedings - Guidance for Judges and Magistrates - Courts and Tribunals Judiciary](#).
57. The fundamentals are relevance, purpose and proportionality. The court only needs to determine allegations of such behaviour to the extent that it is relevant and necessary to determine issues as to a child’s welfare. Even then, the court is only required to assess the overarching issue, rather than every single subsidiary factual allegation that may also be raised.

Decision on appeal

58. The mother’s case from the outset of proceedings has been that she and the children have been the victims of domestic abuse, and that the abuse has continued post separation. She says it has and will continue to have a lasting impact upon her and the children, thereby requiring risk assessment, careful analysis and balancing of welfare issues before final orders in respect of child arrangements orders can be made.
59. For fifteen months the case had proceeded on the basis that the mother’s serious allegations of domestic abuse required investigation and determination by the Court. The purpose of such an exercise was to consider, in accordance with the framework set out in Practice Direction 12J, whether any child arrangements order in place would protect the welfare and safety of the child and the mother (with whom they were living), did not expose them to the risk of further harm, and is in the best interests of the child.
60. Following the judge’s determinations, the case management order re-framed the case as one where that exercise was no longer necessary.
61. The case management order was formulated on the basis that any risk to the children was from the dynamics of the parents’ ‘*high-conflict*’ relationship, the allegations of domestic abuse were largely historic because ‘*many of the allegations arise when the parties were living together*’, and not relevant to the court’s welfare assessment. The parents were exhorted to ‘*co-operate and co-parent*’.

62. This changed the course of the proceedings entirely and put the case on a different footing.
63. The judge was right to wish to explore even at the eleventh hour, the necessity or otherwise for the fact-finding hearing.
64. By 23 October 2023 he had seen the parties at six hearings. He heard submissions following which he gave a judgment in which he set out clearly the reasons for the decision he made not to continue with the fact-finding hearing.
65. However, having carried out a review, I find that the route he took to the decision was wrong, because it did not take into account the matters required to be considered by PD12J, and because it was procedurally unfair.
66. I find each of the grounds of appeal is made out. I will explain my reasons below.

Ground 1: the decision not to hold a fact-finding was wrong, in clear breach of PD12J and the Court of Appeal guidance in respect of how allegations of domestic abuse should be considered in the Family Court

67. The judge did not have regard to the relevant matters set out in Practice Direction 12J when he was analysing the relevance of the determination of the allegations to the court's welfare assessment.
68. He made a statement that if the allegations were proved, this would not impact upon the court's decisions on welfare. This statement was not fully explained, but from the judgment it appears that the judge had in mind that the question to be determined was in broad terms whether contact could be progressed to overnight stays and for longer periods of time. He relied heavily on the father's submissions that contact between the children and their father was going well and no issues had been raised about it.
69. This approach is wrong, because it overlooks the potential consequences of findings being made in line with the mother's allegations. The mother has raised the question of domestic abuse as the central issue in the case. It was incumbent upon the judge to address the substance of Practice Direction 12J when considering the need or otherwise for a fact-finding.
70. The judge did not carry out an analysis, as required by PD12 para 17(g) to consider *'whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court'*.
71. That process requires consideration of the matters the Court would have to consider following a fact-finding hearing, set out at paragraphs 35 to 37 of PD12J. He did not

need to consider each of those paragraphs individually, but he did in my judgment need to address the substance of those paragraphs.

72. The mother's allegations of domestic abuse related to the time the parents were living together, and extended beyond separation and throughout proceedings. The judge was wrong in relying upon the fact that many of the allegations arose during the time the parties lived together as a reason to abandon the fact-finding. Firstly because this mischaracterised the mother's allegations. She alleges economic abuse post-dating the parties' separation and ongoing, and ongoing coercive behaviour. Secondly, the impact of domestic abuse can continue beyond the parties' separation, particularly where the parties continue to be engaged in disputes about the arrangements for co-parenting and for sorting out of finances on divorce.
73. The allegations are of physical and emotional abuse, controlling and coercive behaviours and financial control. If such allegations were proved, the impact on the mother and children would be likely to be regarded as significant and wide-ranging, and relevant to the analysis required by PD12J.
74. The mother has alleged that the father has directly caused physical and emotional harm to the children. If findings were made, this would be relevant to the court's eventual welfare determination.
75. The allegations that the father has perpetrated abuse towards the mother are also relevant to the court's ultimate welfare determination.
76. A parent who is a victim of the abuse described is likely to be stressed, fearful and anxious, both at the time of the abuse, and while there continue to be issues around how to manage the fall-out of the separation and the arrangements for the children's care. This impacts the children because they are growing up in a household infused with that atmosphere. They are likely to be concerned and may feel responsible for that parent. The stress and anxiety may become overwhelming at times which may prevent that parent from being able to prioritise their children's care.
77. If a parent has exerted control over an adult carer in the past, there is a risk that they will have the same need to exert control over their children.
78. Further, a child may become aligned with the controlling and more dominant parent, whether out of a need for self-protection or otherwise. The children may then adopt similar attitudes and behaviours towards the parent that has been subject to the controlling and coercive behaviour.
79. The judge said that the mother's will had not been 'overborne' when agreeing the arrangements for interim contact. This was not accepted by the mother. Her case is that she has in fact been subject to continuing and excessive pressure from the father

and members of his extended family to agree to contact arrangements. She asserts the father has tried to pressurise her to abandon her complaint in the criminal proceedings, and has put her under financial pressure, which has had a direct impact upon her ability to provide for the children, and has been a means of control and manipulation.

80. If proved, this would give rise to a risk that the father may exert pressure on the mother in the future around arrangements for the children. This may indicate a desire on his part to use the process of setting up arrangements for co-parenting as a means of continuing a form of domestic abuse against the mother, rather than being motivated to promote the best interests of the children (PD12J paragraph 37(c)).
81. A child may be regarded as 'safe' when spending time with the controlling parent, because they have not been neglected or come to physical harm, or they have not been outspoken about their worries. However, paragraphs 35, 36 and 37 of PD12J require greater exploration of the potential for the harm that can arise where findings of domestic abuse have been made, or are sought. They are risks that need to be identified, understood, and analysed, so that consideration may then be given to the ways in which those risks could be managed to enable a child's relationship with both parents to be promoted.
82. The mother's case was that both she and the children have been significantly and adversely affected by the domestic abuse. She has raised concerns about the children's presentation before and after contact, and says the impact upon both her and the children, particularly J, of the current arrangements is causing difficulties.
83. The judge's conclusion that the findings if made could have no impact upon the eventual arrangements for the children was wrong as a matter of law because, contrary to the requirements of PD12J, the judge did not consider '*the nature and extent of the abuse alleged*', and its potential relevance to the welfare decision.
84. He did not explain in his judgment why he had concluded that making findings in accordance with some or all of the mother's allegations could have no impact upon the eventual arrangements for the children.
85. In her written and oral submissions Ms Selman highlighted the areas of the mother's case which she asserted were not credible. These points were also made to the District Judge. There is of course the potential that the mother's allegations are not proved, and a risk assessment of the type envisaged by PD12J is ultimately not required. However, that is not a reason to abandon the fact-finding, rather the reverse. If the mother has made allegations that are not proved, but remains resistant to the children spending time with their father, then a fact-finding exercise may well help to provide a narrative for the family and for professionals working to help them. If the judge's conclusion was that the hearing was not necessary or proportionate because there was

no prospect of the mother proving her case at trial, then he should have made that clear and explained the reasons that he had come to that view.

Ground 4: the judge was wrong to determine that the mother's allegations in respect of financial control can be dealt with within the financial proceedings

86. I take this ground of appeal out of turn, because it follows on from ground one.

87. The allegations of historic and ongoing financial control were raised within the Children Act 1989 proceedings as part of the alleged pattern of conduct of coercive and controlling behaviour.

88. The allegations are relevant to any consideration of the factors in PD12J, and properly fell to be considered within the Children Act proceedings. The judge was wrong to identify these allegations as something between the adults only that could be hived off for determination on another occasion.

Ground 2: the judge's determination to order a progression in the spending time arrangements (including to overnight stays) in absence of a fact-finding determination or section 7 report was wrong, in clear breach of PD12J, and the Court of Appeal guidance in respect of how allegations of domestic abuse should be considered by the Family Court

89. PD12J paragraphs 26 and 27 set out the matters the court should take into account before deciding interim child arrangements:

26

In deciding any interim child arrangements question the court should—

(a) take into account the matters set out in section 1(3) of the Children Act 1989 or section 1(4) of the Adoption and Children Act 2002 ('the welfare check-list'), as appropriate; and

(b) give particular consideration to the likely effect on the child, and on the care given to the child by the parent who has made the allegation of domestic abuse, of any contact and any risk of harm, whether physical, emotional or psychological, which the child and that parent is likely to suffer as a consequence of making or declining to make an order.

27

Where the court is considering whether to make an order for interim contact, it should in addition consider –

(a) the arrangements required to ensure, as far as possible, that any risk of harm to the child and the parent who is at any time caring for the child is minimised and that the safety of the child and the parties is secured; and in particular:

(i) whether the contact should be supervised or supported, and if so, where and by whom; and

(ii) the availability of appropriate facilities for that purpose;

(b) if direct contact is not appropriate, whether it is in the best interests of the child to make an order for indirect contact; and

(c) whether contact will be beneficial for the child.

90. I do not have a note of the judge's reasons for coming to the conclusion that it was appropriate to progress contact in the way he did on 24 October 2023. However, from the judgment on 23 October and the recitals on the order, the reasons for the decision seem clear.

91. He placed weight on the father's submission that contact had proceeded successfully and without incident for over a year, the father had not been supervised, and no harm had come to the children. He noted that the mother had not sought to reduce contact, and had not sought to appeal the decisions he made to maintain it at twice a week for each child. In the circumstances, he concluded that there were no findings of fact that could be made which would be likely to lead to a reduction in contact.

92. From the order, it appears that he also reached a conclusion that any risk to the children was likely to arise from the dynamic between the parents, which risk was being managed with current contact arrangements.

93. On this basis he concluded it was safe for contact to be extended, progress to overnights and eventually some kind of shared care arrangement.

94. I acknowledge that this experienced judge, who had case managed the case throughout, would have had ample opportunity to make his own assessment of the dynamics of the parental relationship. The issue of interim contact had been argued before him at all previous hearings and by October 2023 he would have had a good sense of how well it was working.

95. However, the mother did not accept the father's characterisation of contact. Her case was that the children, particularly J, were struggling with contact. Her case was and is that the impact of domestic abuse upon her and the children, both in the past and ongoing, is a factor that must be taken into account before any long-term decisions are made about the arrangements for the children.

96. The judge said that making findings in respect of the mother's allegations of domestic abuse could have no effect on the ultimate welfare decision. The effect of that statement was to regard her allegations as irrelevant. If that was his conclusion, he needed to explain why.
97. In accordance with paragraphs 26 and 27 of PD12J it was incumbent upon the judge to give particular consideration to the nature of the allegations made, the risks of harm, and the means by which those risks might be managed, before ordering the progression of contact.

Ground 3: the judge's determination that the mother's allegations are 'unproven' amounts to an unjustified summary dismissal of the mother's allegations

98. The recital to the order of 24 October 2023 states that *'the Court proceeds on the basis that the respective allegations made by both parties are not proven. The parties accept there are high levels of parental conflict'*.
99. The mother was seeking findings against the father. The father was not seeking findings against the mother, although his witness statement did level a number of accusations towards her.
100. If allegations are found to be proved, the Court proceeds on the basis they happened. If, after hearing evidence, allegations are held to be not proved, the Court proceeds on the basis that they did not happen. When the decision was made not to proceed with the fact-find, the mother's allegations remained neither proved nor not proved; they were untested. They remained allegations.
101. The recital is unhelpful because it gives the impression that there were allegations made on both sides, when it was only the mother who had alleged domestic abuse, and that they have been found 'not proven'.
102. In an email sent in January 2024, when there was some correspondence around the instruction of a clinical psychologist, the judge made clear that the allegations remained neither proven nor unproven. He said:

'I approve the respondent's draft letter with some amendments. There is no need to mention the fact finding hearing was ordered and then not considered proportionate and unnecessary. That information will be of no help to the psychologist in answering the questions posed. The psychologist does not need the whole trial bundle but only essential reading. The schedule of allegations can be included with a clear caveat that none of those allegations have been determined as either true or false. The witness statements are probably sufficient for the expert would probably be able to answer the questions without any papers at all.'

103. That email could be regarded as an aid to interpretation of the case management order. The judge makes clear that the allegations have not been determined and remain allegations.

104. However, the ultimate effect of the decision not to proceed with the fact finding and the subsequent case management order is to recast the nature of the issues in the case. The mother had alleged domestic abuse and sought the court's determination of the allegations she made before welfare decisions for the children could be made. After the judge's decision, the case became one where the relationship was recast in the terms argued for by the father, where any disputes between the parties were regarded 'situational' to the end of the relationship, with each of the parents bearing responsibility for unedifying behaviour. The effect of this recasting was that the mother's allegations of domestic abuse were regarded as irrelevant, and she was no longer permitted to raise the allegations for determination by the Court. I find that this did amount to a summary dismissal of the mother's case.

105. Ms Chaudhry refers me to the Ministry of Justice's Harm Report, [Assessing Risk of Harm to Children and Parents in Private Law Children Cases \(justice.gov.uk\)](https://www.justice.gov.uk/publications/assessing-risk-of-harm-to-children-and-parents-in-private-law-children-cases), published in June 2020. At paragraph 5.5, the risks of reframing domestic abuse as high conflict are described:

'High conflict' relationships are to be thoroughly distinguished from relationships involving domestic abuse of one party by the other. In many instances the effects of coercive control will be such that the victim of abuse has not for many years challenged anything the abuser has done. It may take the victim many years to speak about the abuse and, as noted above, the delay in doing so may be taken by the professionals as an indication of a lack of credibility. If and when the victim does attempt to break free of the abuser's control, their resistance is not from a position of equality in the relationship. However, despite the very clear difference between 'high conflict' relationships and domestic abuse, victims and professionals told the panel that they had experiences of domestic abuse being reframed into evidence of a 'high conflict' or mutually abusive relationship, for which the solution was considered to be mutual reduction of conflict and encouragement of cooperation rather than protection of the child and adult victim from the other parent's abuse. As some of the victims feared, and were legally advised, raising any concerns about contact with an abusive partner, was perceived as evidence of hostility to co-parenting.

106. It may yet prove that this case is one of high conflict with each parent playing their part, and the mother's allegations of domestic abuse not made out, and therefore not relevant to the ultimate welfare determination. However, such a conclusion can only be reached following exploration of all the evidence, and testing of the parties' evidence in cross-examination.

Ground 5: the judge was wrong to discharge the orders for Cafcass to carry out a risk assessment after the fact-finding hearing and to instead direct independent social worker and psychological assessment on the basis that this was a ‘high conflict’ case as opposed to a case where domestic abuse had occurred

107. This ground follows on from, and is effectively the same as ground 3. At the hearing in February 2023 the judge specifically directed a Cafcass officer to assess risk in accordance with paragraphs 36 and 37 of PD12J, in the light of any findings that had been made.

108. The judge discharged that direction and ordered assessments of both parents on the basis that they were equally to blame for the high conflict situation, and in which the independent social worker was not asked to consider the issue of domestic abuse.

109. While this may yet prove to be the case, the judge was not in a position on 23 and 24 October 2023 to reach that conclusion.

Ground 6: the summary dismissal of the mother’s non-molestation order application was wrong in the circumstances of the allegations made by the mother

110. The non-molestation order was made on the basis that the Court was satisfied on the evidence that the mother required the protection of the Court.

111. I do not have a note of the judge’s reasons for concluding that such protection was no longer needed. There had not been a fact-finding hearing in respect of the allegations she had made in either the Family Law Act application or the application pursuant to the Children Act. The mother had not withdrawn any of the allegations.

112. Sub-section 46(1) of the Family Law Act 1996 provides that the Court has power to accept an undertaking in place of a non-molestation order. However, sub-section 46(3A) provides:

(3A) The court shall not accept an undertaking under subsection (1) instead of making a non-molestation order in any case where it appears to the court that—

(a) the respondent has used or threatened violence against the applicant or a relevant child; and

(b) for the protection of the applicant or child it is necessary to make a non-molestation order so that any breach may be punishable under section 42A.

113. The judge’s decision recast the dispute between the parties as ongoing high conflict where each was equally to blame, and orders were needed to govern both of their behaviours towards one another.

114. Before the mother's allegations had been tested in Court, the judge was not in a position to come to the conclusion that the non-molestation order could safely be discharged. If he had come to the conclusion that there was no merit in the mother's allegations, this was something he should have conveyed to the parties and explained the basis for that decision.

Ground 7: the manner in which the decision not to hold a fact-finding hearing was made was procedurally irregular and in breach of the mother's Article 6 rights

115. At each of the hearings in February, May and June 2023, the father filed a position statement arguing that (a) contact with the children should progress to overnight stays, and (b) a fact-finding hearing was not necessary or proportionate.

116. At each hearing the judge heard submissions from the parties and determined both issues; a fact-finding hearing was necessary, and contact should remain as it was pending the outcome of the fact-finding exercise.

117. The position statement which was sent to the mother on Saturday 21 October 2023 repeated the same arguments. The father had not made a formal application for the hearing to be vacated, the fact-finding hearing to be abandoned and replaced by a further case management hearing. The position statement covers in some depth the factual matters in dispute. The parties and their representatives had prepared for a five-day contested hearing.

118. Contact had continued throughout the case at the same level. Apart from the passage of time, there had not been any significant change in the arrangements, which were a holding position until the fact-finding hearing.

119. Before the fact-finding hearing the judge had the opportunity to review all the evidence in the case. But he had been well aware of the nature of the dispute between the parties from the very outset. The mother had continued to make serious allegations of domestic abuse, the father had continued to deny those allegations, and to highlight the matters which he said clearly showed the mother's allegations were not justified, and, he said, driven by the mother's need to interpret every single interaction between them as a manifestation of control and abuse. The judge had first determined in February 2023 that a fact-finding hearing was needed.

120. Apart from the passage of a further four months of time since the first fact finding hearing was vacated in June 2023, it is not clear what was different in October 2023. If the only reason was that a further four months had passed, that was not in my judgment sufficient to justify the late change of direction.

121. The judge concluded that a fact-finding hearing would only serve to heighten the conflict between the parents and thereby reduce the chances of them having a co-operative relationship in co-parenting their children. The fact-finding hearing was

likely to be difficult for both parties, and likely to lead to an increase in tension and conflict. But the judge was required to consider whether, nonetheless, the hearing was necessary to resolve the issues between the parties. On three previous occasions the judge had concluded that a fact-finding hearing was required. He had put in place measures in order to ensure that all could participate fairly and to the best of their abilities.

122. When the judge raised the question of the fact-finding hearing the mother was sitting in the witness box, ready to give her evidence once housekeeping matters had been dealt with. On any view she would have been blindsided by the change of tack and at a disadvantage in giving instructions to her counsel. It is submitted on her behalf that she was completely thrown. It was submitted that the mother then found herself at a significant disadvantage throughout the whole two days, as she tried to process the fact that she was not giving evidence, that a decision was being made about whether the fact-finding hearing was going to go ahead at all, and then that she was required to give instructions to assist with negotiations about a new way forward, in which the allegations of domestic abuse that had been the focus of the case since June 2022 were no longer to be considered.

123. The judge did give the parties an opportunity to make representations before he made his decision, but the mother had very little chance to consider the issue, take advice, and give instructions to her counsel, who would not reasonably have come to court prepared to defend the need for a fact-finding hearing yet again.

124. Thereafter, the mother was required to enter into discussions to work out the consequential directions, which were premised on the case going forward on a completely different footing than anticipated. The suggestion of the instruction of the clinical psychologist and of a different kind of welfare report appeared to come from the judge. The mother did not have an opportunity to consider the draft letter of instruction or the identity of the expert in advance of the direction being made.

125. In all the circumstances, I find the way in which the judge came to make his decision to abandon the fact-finding hearing was procedurally irregular and not fair to the mother.

Consequences of decision on appeal

126. The appeal is allowed on each of the grounds pleaded.

127. The directions made on 24 October 2023 are discharged and the case shall be remitted before another judge for a fact-finding hearing, to take place as soon as possible.

HHJ Joanna Vincent
Family Court, Oxford

Draft sent out by email: 27 February 2024

Approved judgment: 1 March 2024

Supplementary judgment

HHJ Vincent:

1. Three issues have arisen since the judgment on appeal was handed down; (i) publication of judgment; (ii) costs; and (iii) whether or not the non-molestation order should be continued pending the fact-finding hearing.

Publication of judgment

2. The mother seeks publication of the judgment in anonymised form.
3. The father objects to publication. He says that the mother has been inappropriately willing to share information in the local community about the father. He suggests she will be bolstered in her attempts to lower the father in the eyes of others by reference to the judgment, which she may say could be read as supporting the truth of her allegations. It is submitted this would be harmful to the children and to the father, particularly so where the allegations have not yet been tested in Court.
4. It is submitted that research has shown that children generally oppose publication, even in anonymised form, of judgments about themselves or their families.
5. It is further submitted that there is no public interest in publishing the judgment in this particular case.
6. In deciding whether and if so when to publish a judgment, I must have regard to all the circumstances, the rights arising under any relevant provision of the European Convention on Human Rights, including Articles 6 (right to a fair hearing), 8 (respect for family and private life) and 10 (freedom of expression), and the effect of publication upon any current or potential criminal proceedings (*Transparency in the Family Courts: Publication of Judgments: Practice Guidance*, issued on 16 January 2014 by Sir James Munby, then President of the Family Division).
7. I have had also had regard to *Practice Guidance: Family Court – Anonymisation Guidance*, issued on 18 December 2018 by Sir Andrew McFarlane, President of the Family Division, as well as his report dated 28 October 2021, following work by the Transparency Review Panel, entitled '*Confidence and Confidentiality: Transparency in the Family Courts*'.
8. In favour of publication, the President says, '*it is legitimate for the public to know of these judgments, to provide a basis for trust in the soundness of the court's approach and its decisions, or to establish a ground for concern in that regard. These, and other factors, establish that there is a significant and important public interest in our*

society having and maintaining confidence in the work of the Family Court. Conversely, a largely closed system, where the public are given no account of how the court operates, leads to accusations that this is 'secret' justice and that the approach of the court is unsound, unfair or downright wrong. Openness and accessibility to the work of the court may also enhance the ability for the system and those who work within it to learn and improve.

9. On the other hand, the President continues, there is a strong and important force in favour of maintaining 'a cloak of confidentiality around the identity and personal information of the children and adult parties who come before the court. The voice of children and young people on this issue is strong and clear; they do not wish to have their personal information and the detail of their lives made public.'
10. As Ms Selman submits, the judgment is at Circuit Judge level, is not binding on other Courts and applies established principles from the Higher Courts. To that extent it has no great significance. However, the President's guidance on transparency is that there is a public interest in publishing judgments that show the everyday workings of the Family Court.
11. If published, the judgment will have a warning in standard terms at the top as follows:

IMPORTANT NOTICE This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child[ren] and members of their [or his/her] family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.
12. Plainly this means that any person who refers to the judgment as a document that identifies themselves, the children, or wider family members, as the persons involved, is at risk of a finding of contempt of court. An assertion that the other party may on publication be likely to commit a contempt of court in this way is not a good reason for not publishing.
13. The judgment will be anonymised so that the names of the parties, their families and any indicators of where they live, work, or the children go to school will remain confidential. The mother's allegations are set out in general terms, they could relate to any private law family case. There are no specific facts which would lead to identification of this family if published.
14. I have considered whether consideration of publication should await the conclusion of the fact-finding. However, having reviewed the judgment, I cannot see any way in which publication of the judgment on appeal could be said to foreshadow any findings that may or may not be made.

15. The judgment acknowledges the allegations of domestic abuse are serious and if proved, sets out the potential impact of such findings on a welfare assessment, hence the need for them to be considered by the Court. However, the judgment makes clear that the allegations are untested, and no findings have been made. The judgment contemplates the prospect of the allegations not being proved following a contested fact-finding hearing.
16. In all the circumstances, any threat to the parties' Article 8 or Article 6 rights as asserted by Ms Selman from publication are either not significant, or can adequately be managed by the process of anonymisation.
17. Having weighed the relevant factors in the balance, I consider the judgment should be published.

Costs

18. Part 28 of the Family Procedure Rules 2010 deals with costs.
19. Rule 28.1 provides that 'the Court may at any time make such order as to costs as it thinks just.'
20. Rule 28.2 provides that the framework for assessing costs set out in the Civil Procedure Rules (CPR) applies to family cases, with some exceptions, notably that the general rule (CPR 44.3(2)) that 'costs follow the event' is excluded.
21. The following provisions of CPR 44.3 are relevant:
 - (4) *In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –*
 - (a) *the conduct of all the parties;*
 - (b) *whether a party has succeeded on part of its case, even if that party has not been wholly successful; and*
 - (c) *any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.*
 - (5) *The conduct of the parties includes –*
 - (a) *conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;*
 - (b) *whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

22. 44.3(4)(b) and (4)(c) are not relevant to family proceedings; (*T (care proceedings: costs)* [2012] UKSC 36).

23. The other rules are examples of circumstances which will be relevant when considering the result that justice requires in the individual case, per Lady Hale in *Re T*. However, costs in family proceedings, including appeals, are only awarded exceptionally. Lady Hale went on to say at paragraph 11 of *Re T*:

'In family proceedings, however, there are usually special considerations that militate against the approach that is appropriate in other kinds of adversarial civil litigation. This is particularly true where the interests of a child are at stake. This explains why it is common in family proceedings, and usual in proceedings involving a child, for no order to be made in relation to costs.'

24. *Re T* confirmed the general practice in family cases that the Court should not award costs against a party unless their conduct had been shown to be unreasonable or reprehensible. This was confirmed in *Re S (a child)* [2015] UKSC 20.

25. In this case, permission to appeal was granted on the papers, meaning the appeal was found to have a real prospect of success. That does not mean however that success was certain, let alone that it was incumbent upon the father to concede the appeal at that stage.

26. The father did not act unreasonably or reprehensibly in seeking to defend the appeal, nor are there any other circumstances I have identified to depart from the general approach in family cases.

27. There is no good reason to defer consideration of the costs relating to the appeal until the conclusion of the proceedings.

28. There shall be no order for costs on the appeal.

Non-molestation order

29. I set out my conclusions in respect of the non-molestation order at paragraphs 110 to 114 of the judgment, concluding:

'Before the mother's allegations had been tested in Court, the judge was not in a position to come to the conclusion that the non-molestation order could safely be discharged. If he had come to the conclusion that there was no merit in the mother's allegations, this was something he should have conveyed to the parties and explained the basis for that decision.'

30. For the reasons given, in my judgment the non-molestation order should remain in force, to put the parties back in the position they were before the fact-finding.
31. There could be no reasonable objection to a recital recording that the non-molestation order is made without any findings having been made against the father.

HHJ Joanna Vincent
Family Court, Oxford

Draft supplementary judgment sent out by email: 29 March 2024

Approved: 9 April 2024