Neutral Citation Number: [2024] EWHC 1824 (Fam)

Case No: FA-2023-000308

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE CENTRAL FAMILY COURT
HER HONOUR JUDGE COX
ZC21P01461

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2024

Before :

MS JUSTICE HENKE

- -

Between :

A Mother — **Appellant**

- and -

A Father — **Respondent**

Re: A & I (Children: Appeal: Relocation & Joint Lives-With Orders: Fresh Evidence)

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The **Appellant** appeared as a **Litigant in Person**
Paul Hepher (instructed under the **Direct Access Scheme**) for the **Respondent**

Hearing date: 19 April 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 16 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS JUSTICE HENKE

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 children and members of their

family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Ms Justice Henke :

Introduction and Background

1. This is an appeal under Part 30 of the FPR 2010 ("the Rules") against an order made by HHJ Cox sitting in the Central Family Court in private law proceedings which concluded with a judgment given on 10 November 2023.

2. Those private law proceedings relate to the children of the parties' marriage. There are two children. They are both of primary school age. Both attend a private school close to their home. The Appellant is their mother. The Respondent is their father. Both parties are in their forties. Both work and have careers.

3. The parties were married but separated in 2021 when the Appellant was forced to flee the family home. The Respondent's behaviour that day has rightly been described as extremely unpleasant and frightening. The evening before separation, the Respondent was verbally abusive. He took one of the children from the Appellant's room and locked them in the room with him causing significant distress to that child, before eventually allowing them to run back to the Appellant, shaking in fear. The Appellant had to lock herself and the children into her bedroom whilst the Respondent banged on the bedroom door. They were all terrified. Some of these events were witnessed by the maternal grandmother who was advised by the Appellant to leave the home, and she did. The next day, when the Appellant tried to leave with the children, the Respondent refused to allow them to do so, before eventually relenting, allowing them to leave.

4. The Respondent's behaviour on that occasion was the final act of a pattern of angry, abusive and controlling behaviours. In her C1A the Appellant provided a schedule of 40 allegations which span almost the entirety of the marriage. They have been formally admitted by the Respondent. They are too numerous to set out in full in this judgment. However, they can be characterised as falling into five interlinked themes, namely:

    (a) Angry outbursts towards the Appellant during which she was shouted at, insulted with vile names and, from time to time, put in physical fear for herself and the children's safety.

    (b) Angry, bitter and resentful behaviours about the effect of maternity leave on the family's finances;

    (c) Numerous rows and arguments in front of the children fuelled by his intolerance of social events, his frustration at having to care for the children and his ever-present resentment that the Appellant was at home caring for the children whilst he was out at work.

    (d) He was irked by being obliged to finance the family.

    (e) He "*routinely ran the Appellant down*" and undermined her. He placed no value on her contribution to the family.

5. The effect of the Respondent's behaviours on the Appellant has been to destroy her confidence, to undermine her trust in the Respondent and to cause her considerable levels of stress and anxiety in her dealings with the Respondent.

6. During his oral evidence at first instance, the Respondent accepted the characterisation of his behaviours in the terms summarised above.

7. In terms of recent behaviours HHJ Cox found that there had been occasions during 2023 when the Respondent had still been unable to govern the way he expresses his frustration and his opinions to the Appellant to the point that he becomes gratuitously offensive, for example mentioning her family as having been narcissistic and on occasion being overly frustrated by unavoidable events.

8. After separation, the children lived with the Appellant in the family home. The Respondent rented accommodation nearby. It was necessary for the Respondent's contact with the children to be supervised for 19 months whilst he took anger management and domestic abuse courses to address those issues. Thereafter contact gradually increased and became less restricted. By the time of the hearing before HHJ Cox the children were having a mixture of staying and visiting contact with the Respondent.

The Applications Before the Lower Court

9. The applications before the lower court were as follows:

   (a) The father's application dated 24.9.21, for child arrangements order in relation to both children – he sought a shared care arrangement; and

   (b) The mother's application dated 26.11.21, for child arrangements order seeking:

      i. a live with order in relation to both children; and

      ii. an order that the father's direct contact to the children be limited to supervised contact as a consequence of the domestic abuse he inflicted on her as detailed in her Form C1A.

   (c) The mother's further application dated 20.4.22 to relocate with the children from London to another part of England with which she is familiar. It is where she grew up and where her family live.

10. By order of HHJ Gibbons dated 25 April 2022, the mother's application to relocate was the lead application.

11. On 10 November 2023 HHJ Cox refused the mother's application to relocate and ordered that the children shall live with their mother and father in accordance with a schedule of arrangements set out on the face of the order. That schedule provided effectively for shared care from May 2024 onwards.

This Appeal

12. By an Appellant notice dated 1 December 2023 and issued on 4 December 2023, the Appellant seeks to appeal (1) the decision to refuse to allow her to relocate with the children and (2) the settlement of the child arrangements in such a way that by May 2024 they become one of shared care.

13. The Appellant relies on six grounds of appeal. They are as follows:

> **Ground** 1: The learned Judge failed in breach of strong guidelines in PD12J paragraphs 36-37 to give any or any sufficient weight to the impact of past and ongoing domestic abuse by the Respondent upon the Appellant's mental health and well-being.
>
> **Ground 2**: The court placed too much emphasis on its perception of the Appellant's resilience and the notion that therapy would be likely in the future to alleviate her symptoms.
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> **Ground 3**: The court underestimated the Respondent's propensity for angry outbursts despite evidence of his behaviours within the past few months when he was unable to shield the Appellant from the anger and resentment that he felt towards her. The court assessed the principal cause of the abuse as the parental relationship rather than the Respondent's propensity for uncontrolled anger which would expose the children to an unreasonably high risk.
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> **Ground 4**: The learned judge failed to make a proper and accurate assessment of the financial implications of the mother not being allowed to relocate given the Respondent's inconsistent contribution to the family finances and the maintenance of the family home, and the Appellant's desire to be financial independent of the Respondent in the future.
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> **Ground 5**: The learned judge gave too little weight to the evidence that in her chosen location the Appellant would have family support whilst she would have none in London and was feeling lonely and depressed.
>
> **Ground 6**: The court gave too much weight to the evidence of an Independent Social Worker about the wishes and feelings of the children.

14. On 5 December 2023, Mr Justice Moor granted a stay of the paragraphs of HHJ Cox's order which related to the arrangements to be made after February 2024 half-term and thereafter. At the time, Mr Justice Moor was not in a position to consider the application for permission to appeal because the transcript of the hearing was then outstanding. That was subsequently received and on 27 February 2024, Mr Justice Moor granted the Appellant permission to appeal on all grounds, extended the stay until the conclusion of the appeal, and listed the appeal for hearing.

The Hearing Before Me

15. The appeal was heard by me on 19 April 2024. At that hearing, the Appellant represented herself although leading Counsel had settled the skeleton argument on her behalf. The Respondent was represented by Counsel, Paul Hepher instructed on Direct Access basis.

An Application to Admit Fresh Evidence

16. The Appellant made an application to admit fresh evidence before me. That application was made by notice dated 22 February 2024. The fresh evidence she wished me to admit is in a short witness statement which she has filed and is in the bundle before me. It is said on the face of the notice to update the court on the relevant facts. By its very nature it is evidence which could not with reasonable diligence have been obtained for use at

the trial. The Appellant submitted that if admitted the evidence would probably have an important influence on the results of the case. The Appellant argued the evidence was clearly relevant because it shows the judge was wrong in her assessment of the impact on the children of the abuse and the emotional and financial impact of refusing permission to relocate.

17. The father has filed a supplemental position statement in response. He invited me not to admit the new evidence. He argued that there is a very real danger in permitting the parties to provide their post-determination evaluation of how the judgment has worked out given that it is necessarily a subjective evaluation on the facts as before the court at the time of the judgment. The evidence sought to be admitted is, he says, controversial.

18. Unless an appeal court orders otherwise, it will not receive evidence (oral or written) which was not before the lower court - FPR 2010 rule 30.12(2).

19. The principles upon which the power to order otherwise are not spelt out in the rule or in the Practice Direction. Nevertheless, the principles reflected in *Ladd v Marshall* [1954] 1 WLR 1489 are relevant. They are:

> "*First, it must be shown that the evidence could not have been obtained without reasonable diligence for use at the trial. Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. Thirdly, the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible*."

20. In *Hamilton v Al-Fayed (Joined Party)* [2001] E.M.L.R. 15 the Court of Appeal approved the guidance given in *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318. Lord Phillips MR, giving the judgment of the court, said this at paragraph 11:

> "*We consider that under the new, as under the old, procedure special grounds must be shown to justify the introduction of fresh evidence on appeal. In a case such as this, which is governed by the transitional provisions, we do not consider that we are placed in the straitjacket of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in light of the overriding objective of the new CPR. The old cases will, nonetheless remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective*."

21. In *Terluk v Berezovsky* [2011] EWCA Civ 1534, CA, the Court of Appeal stated that the authorities show that the primary rule is given by the discretion expressed in r.52.21(2)(b) coupled with the duty to exercise it in accordance with the overriding objective; consequently, the *Ladd v Marshall* criteria are no longer primary rules constitutive of the court's power to admit fresh evidence. However, those criteria effectively occupy the whole field of relevant considerations to which the appeal court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence.

22. The appeal courts have demonstrated a more permissive approach of the court to the admission of fresh evidence in children's cases – see *B v P (Access)* [1992] 2 FCR 576 per Booth J. If the judgment was wrong on the material before the first instance court, the fresh evidence would be unlikely to affect the result and the appeal will normally be allowed. The fresh evidence may still, however, be relevant to whether the matter should be remitted for rehearing or dealt with by the High Court in the exercise of its powers (*Re C (A Minor) (Care: Child's Wishes)* [1993] 1 FLR 832 per Waite LJ at 837). In *W (Children)* [2009] EWCA Civ 59, the Court of Appeal refused to admit fresh evidence on a straight application of the *Ladd v Marshall* tests. Wall LJ, giving the leading judgment with which Moore-Bick and Wilson LJJ agreed, observed at [135]:

> "*It [Ladd v Marshall] has survived the introduction of the CPR, and its approach is binding on us, although it is, I think, generally accepted that in cases relating to children, the rules it lays down are less strictly applied*."

23. However, in *Re G (A Child)* [2014] EWCA Civ 1365 the Court of Appeal held that the rule is not to be applied too liberally:

> "[16] *For myself, I doubt that this obiter dicta should be interpreted so liberally as to influence an appellate court to adopt a less rigorous investigation into the circumstances of fresh evidence in 'children's cases'. The overriding objective of the CPR does not incorporate the necessity to have regard to "any welfare issues involved", unlike FPR 1.1, but the principle and benefits of finality of decisions involving a child reached after due judicial process equally accords with his/her best interests as it does any other party to litigation and is not to be disturbed lightly. That said, I recognise that it will inevitably be the case that when considering outcomes concerning the welfare of children and the possible draconian consequences of decisions taken on their behalf, a court may be more readily persuaded to exercise its discretion in favour of admitting new materials in finely balanced circumstances*."

24. In *Re E (Children) (Reopening Findings of Fact)* [2019] EWCA Civ 1447; [2019] 3 F.C.R. 334, Peter Jackson LJ at [25] stated that:

> "*A decision whether to admit further evidence on appeal will therefore be directed by the Ladd v Marshall analysis, but with a view to all relevant matters ultimately being considered. In cases involving children, the importance of welfare decisions being based on sound factual findings will inevitably be a relevant matter. Approaching matters in this way involves proper flexibility, not laxity*."

25. Having reminded myself of the above, I refused the application to admit the fresh evidence. The appeal could be determined justly without its admission. The evidence the Appellant sought to place before the court would be unlikely to have an important influence on the outcome of the appeal.

The Arguments Before Me on Appeal

26. In the skeleton argument on behalf of the Appellant, the central ground of appeal is that "*set out against a background of continuing domestic abuse inflicted against the mother by the father, the court gave inadequate weight to the impact on the mother's mental health and well-being of the refusal of the application which was designed to give her*

emotional and financial independence". The imposition of a shared care arrangement based on the Appellant and the children staying in the family home and a shared care arrangement has, it is said, forced the Appellant to have frequent contact with the Respondent who subjected her to years of violent and abusive behaviours.

27. On behalf of the Appellant, in the skeleton argument seeking permission to appeal, I was asked to remit the case for rehearing. However, at the hearing itself the Appellant's position changed. In the event that I allowed the fresh evidence in, then it was accepted that the appeal should be remitted. However, if I did not, then I should proceed to make my own evaluation. In his skeleton argument opposing the appeal, the Respondent invited the court to dismiss the appeal. Within that document, he argued against remission and submitted that the last thing that was needed in this case was further litigation. His then position was that a rehearing would be financially ruinous to the parties and lead to considerable uncertainty for the parties and the children. It was said on his behalf that the court below made sufficient findings which are not subject to appeal. The appeal is against HHJ Cox's evaluation. In those circumstances, it was submitted that the court can, if the appeal is allowed, proceed to make its own evaluation. However, at the conclusion of the appeal hearing itself, the Respondent's position had altered. His then position was that if the appeal were allowed, this court should not impose a decision and should remit the case for re-hearing.

28. The Respondent filed his own skeleton argument in response to the appeal. He attached to that skeleton argument, the skeleton argument and annexes that had been produced on his behalf by leading Counsel who appeared on his behalf at first instance. He argues that HHJ Cox did not err in law nor principle. She came to a decision she was entitled to reach based on the evidence before her. Her decision cannot be said to be wrong. The appeal should be dismissed.

29. Mr Hepher developed those arguments before me on behalf of the Respondent most eloquently. HHJ Cox is an experienced and respected Circuit Judge. The written evidence before her was in the region of 2000 pages. She heard evidence from the parties and two Independent Social Workers. She had the benefit of written and oral advocacy on behalf of both parties from leading silks. This court does not have the benefit of transcripts of the oral evidence HHJ Cox heard. The judgment was truly extempore being given at the conclusion of the hearing. It is argued on behalf of the Respondent that given the judgment under consideration here was an extempore judgment, there will be points of detail which are missing from the judgment but that does not justify interference. HHJ Cox was entitled to make the evaluation she did and reach the conclusions she did. This was a balanced judgment. A reading of the judgment plainly shows that HHJ Cox did properly consider the impact of the domestic abuse on the Appellant. I was specifically referred to paragraphs 5, 8-10, 15-16, 28, 35-37, 55, 67-68, 81-84, 89-91, 97 and 111 of her judgment.

The Law in Relation to Appeals

30. I accept the law as set out on behalf of the Respondent.

31. In *Re F (Children)* [2016] EWCA Civ 546, Sir James Munby P (as he then was) summarised the approach the appellate court should take as follows:

"*22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."*

23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372): "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These 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." It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".

32. The appellate court should be slow to interfere with findings of fact. As Lewison LJ said in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, at paras 114 to 115:

"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them…..The reasons for this approach are many. They include i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed. ii) The trial is not a dress rehearsal. It is the first and last night of the show. iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case. iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping. v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence). vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

> *115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."*

The Scheme of HHJ Cox's Judgment

33. HHJ Cox gave a judgment at the conclusion of a three-day hearing at which both parties were litigants in person, but both had instructed King's Counsel on a Direct Access basis. It is a lengthy judgment and one I have read and re-read with great care.

34. The judgment begins by providing an introduction and brief history before setting out the respective cases of the parties. At paragraph 8 of HHJ Cox's judgment, the learned judge set out the Appellant's case in relation to relocation. In brief there were two overlapping reasons, namely (i) the emotional toll upon her of the abuse she had suffered in the relationship and (ii) the need to be nearer family and friends in her home area who can provide her with emotional and physical support and enable her to gain greater financial and emotional independence. The Appellant's case was that that would provide the children with a better quality of life. The Respondent saw the desire to relocate differently, he saw it as based on the Appellant's perceived needs and a desire to "whitewash" him from the children's lives.

35. The learned Judge then set out summaries of the evidence of the two Independent Social Workers who have been instructed in this case before returning to the cases advanced on behalf of both parents.

36. The next section of the judgment deals with the law that she must apply to the facts of the case. The legal framework which she adopts is not criticised in this appeal; indeed, it could not be. The law is correctly stated as is the task she must perform.

37. At paragraph 47 of her judgment HHJ Cox begins her analysis of the evidence in earnest. She starts with a consideration of the parties' financial positions and how that impacts on the children's welfare and their parents' respective proposals for them. It was part of the Appellant's case that the relocation she proposed was, from her perspective, a financial necessity and that "huge upheaval" cannot be avoided in this case because of the parties' financial circumstances. The Respondent was more optimistic about his finances. In essence, at paragraph 53 of her judgment, HHJ Cox considered the Respondent's propositions about his past two years finances were reasonable and although she made no hard finding at this point in her judgment, she appears to have accepted his more optimistic outlook. HHJ Cox returned to the parties' finances at paragraph 106 and found that the Appellant's pessimistic financial overview was not made out to the requisite standard.

38. At paragraph 55 of her judgment, HHJ Cox began to examine the parties' respective proposals and the issues of domestic abuse through consideration of Practice Direction 12J, the welfare checklist and the evaluation of the children's welfare by the Independent Social Workers. In doing so she considered the wishes and feelings of the children as captured by the Independent Social Workers. The children, she found were well attached to each parent. They are happy and relaxed and at ease in each parent's home. At paragraph 59 she said this:

> "*I take these factors into account when considering the impact of the domestic abuse upon each of the children and conclude that there is little evidence that their experience of admitted domestic abuse has had a lasting negative effect upon either child. Over and above their parents' separation and the continuing tensions in the co-parenting relationship.*"

39. In terms of the children's wishes and feeling about relocation, the older child expressed worries that she would feel lonely. They would miss their school and their friends. She would feel hopeless if their father did not relocate with them. The younger child appeared angry at the thought of having to move without their father. At paragraph 67, the learned judge records that when the children's wishes and feelings were put to the Appellant in evidence, "*she became visibly distressed and said the children's wishes and feelings were obviously important to her, but that they did not understand the reality of the situation facing the family and that she could not explain it to them. By that, I understood her to be referring to her feelings of being powerless in the face of what she perceives as a financially unstable situation and of being controlled both financially and in terms of the continuing conflict between herself and the children's father which she perceives, still, as being critical and abusive*".

40. At paragraph 88 of the judgment, HHJ Cox states that it is clear from the evaluation of one of the Independent Social Worker that the Appellant's own experiences of domestic abuse are having a distorting effect of her perception of risk that the Respondent poses to the children now and that this "*may affect her ability to support and promote the children's relationship with their father*". At paragraph 89 she finds that the effects of domestic abuse on the children have been ameliorated with time and comments at paragraph 92 that the Appellant's perception of the father's capabilities (as a parent) needs gradually to change.

41. HHJ Cox begins her comparative exercise of what she saw as the two options before her, namely, the children remaining where they are and being co-parented or moving with their mother to the new location. She acknowledged that she "*did not have much information about what the situation would be were they to remain (where they are located) but be obliged to move school and home*". As part of her comparative appraisal HHJ Cox came to the clear view that the children require their close and regular relationship with both parents to be maintained. Relocating as the Appellant wished would result in a significant diminution of the Respondent's involvement in their lives. She described the need to maintain a close relationship with their father as "*crucially important*" to their future welfare. It would result in a "*real emotional challenge for the children*" if it were disrupted.

42. Having reached her decision to refuse the application for relocation, HHJ Cox at paragraph 111 set out that she had taken into account the Appellant's "*bitter disappointment*" that the Appellant will feel if the application to relocate was refused.

She however was not aware of any specific evidence that the Appellant would not be able to manage that disappointment.

My Analysis

43. On behalf of the Appellant, I have been reminded of PD12J paragraphs 36-37 which state as follows:

> "*36*
>
> *(1) In the light of-*
>
> *(a) any findings of fact,*
>
> *(b) admissions; or*
>
> *(c) domestic abuse having otherwise been established, the court should apply the individual matters in the welfare checklist with reference to the domestic abuse which has occurred, and any expert risk assessment obtained.*
>
> *(2) In particular, the court should in every case consider any harm-*
>
> *(a) which the child as a victim of domestic abuse, and the parent with whom the child is living, has suffered as a consequence of that domestic abuse; and*
>
> *(b) which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made.*
>
> *(3) The court should make an order for contact only if it is satisfied-*
>
> *(a) that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during and after contact; and*
>
> *(b) that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.*
>
> *37 In every case where a finding or admission of domestic abuse is made, or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other and towards the child and the impact of the same. In particular, the court should consider –*
>
> *(a) the effect of the domestic violence or abuse on the child and on the arrangements for where the child is living;*
>
> *(b) the effect of the domestic abuse on the child and its effect on the child's relationship with the parents;*
>
> *(c) whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent;*

(d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and

(e) the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse."

44. In this appeal, there is admitted domestic abuse and PD12J is clearly engaged. As HHJ Cox acknowledged and set out in her judgment, paragraphs 36 and 37 of PD12 J are directly relevant. When setting out paragraphs 36 and 37 of PD12J above, I have underlined for emphasis those passages which require a consideration of the harm the child, as a victim of domestic abuse, and their parent has suffered and the impact of that harm upon them. Whilst paragraph 37 particularises specific considerations for a court to consider when looking at the issue of effect, it does not seem to me to be or be intended to be an exhaustive list.

45. When looking at the judgment, through the prism of paragraphs 36 and 37 of PD12J, I acknowledge that within her judgment, at paragraphs 5 and 89 in particular, HHJ Cox considers the impact of the domestic abuse on the children in the context of their relationship with their father. However, I consider that she has erred in that she has failed to consider the impact of (i) the admitted past abuse and (ii) her findings about the Respondent's behaviours in 2023, upon the Appellant and thus the likely indirect impact on the children. This was a mother who by reason of that abuse expressed herself as feeling hopeless and unable to cope.

46. I have already set out the scheme of HHJ Cox's judgment above. In the paragraphs below, I set out my analysis of her consideration of the impact of the abuse on the Appellant herself and thus the likely indirect impact on the children.

47. I begin with paragraphs 8-10 of the judgment wherein HHJ Cox sets out the Appellant's case and her emotional needs to distance herself from the Respondent and her need to be surrounded by the emotional support of her family. At paragraph 15 -16 she sets out the abuse the Respondent has inflicted on the Appellant and the children in the past. At paragraph 36 of her judgment, HHJ Cox finds that it is "*probable that the father's behaviour as described and admitted in this case is best described as psychological, emotional or other abuse and threatening behaviour*". At paragraph 67 of the judgment, HHJ Cox sets out her understanding that the Appellant feels powerless in terms of the financially unstable situation and being controlled both financially and "*in terms of the continuing conflict between herself and the children's father which she perceives, still as being critical and abusive*". At paragraphs 68 and 72 of her judgment, the learned judge finds that the parents are "*largely and in so far as they are able protecting*" the children from the continuing conflict between them. At paragraphs 82-85 of her judgment HHJ Cox considers the impact of the abuse upon the children in terms of their relationship with their father and the future risk he poses to them. At paragraph 84 of her judgment, HHJ Cox makes her findings in relation to the Respondent's recent conduct. Those findings are set out in this judgment above. They have not been appealed. However, nowhere in that paragraph of her judgment nor in the preceding paragraphs does HHJ Cox consider the impact of (i) the past domestic abuse and (ii) that found to have occurred in 2023, on the Appellant and her ability to care for the children. Instead at paragraph 88, she considers the impact of the abuse from the perspective of the Appellant's ability to promote the children's relationship with their father. At paragraph 90 HHJ Cox finds that the Respondent is not using the process to

further the abuse nor is he motivated to do so and at paragraph 91 she finds that the Appellant's "*evaluation of his* [the Respondent's] *parenting capabilities is predicated by her experience of domestic abuse rather than the children's experiences of him as a father*". In this regard, HHJ Cox considered the Appellant's perception of the Respondent's parenting capabilities needs within paragraph 92. At paragraph 94, HHJ Cox then stated the following:

> "*In the future the children are likely to continue to suffer harm if mistrust and poor communication between the parents continues. I consider it will be of assistance if the children's mother is able to undertake some therapeutic work in order to come to terms with the emotionally damaging experience that she has lived through and the domestic abuse she has suffered. It is not for her to mend herself because she has been abused, but the effects of trauma need to be ameliorated for her by learning how to manage its negative effects. It is a question of health rather than addressing harm which has been caused by someone else*."

Having made the decision to refuse to allow the Appellant to relocate, at paragraph 111 HHJ Cox then stated:

> "*I have, throughout all my deliberations, taken into account the bitter disappointment that this decision will be to the children's mother and how in the witness box she displayed her hopelessness and described how she felt that she was unable to cope. I am aware that she is taking antidepressant medication, but I am not aware of any specific evidence that would demonstrate that she will not be able to manage her disappointment to continue to provide the excellent quality of care that she affords her daughters in every aspect of her parenting. I sincerely hope that the father will not see this decision as a demonstration that his assertions and criticisms of the mother during the course of these proceedings are justified. They are not. The mother had every reason to be cautious about the way in which the children began to rebuild their relationship with him and he still has work to do in management of the way in which he treats the mother of his children which should be with respect, courtesy and tact rather than with impatience, frustration and criticism which have all too often featured in his communications with her*."

48. Standing back and looking at the judgment, I consider HHJ Cox fell into error when considering the issue of the effect of the domestic abuse on the Appellant. She considered it in the context of the Appellant's ability to promote the children's relationship with the Respondent. However, she did not consider the direct and continuing impact it was having on the Appellant herself despite the Appellant having displayed her "*hopelessness*" in the witness box. She did not consider the likely indirect impact on the children if their mother continued to feel controlled and hopeless. The learned judge considered whether the Appellant could manage her disappointment but did not consider, as in my judgment she ought, that the impact on the Appellant of not relocating might be greater than mere disappointment. There was no evidence that any therapeutic work the Appellant might be willing to undertake would have an effect or, at least, an impact in the timescales for these children. In the circumstances, I have decided that Grounds 1 and 2 are made out. I also consider Ground 5 is made out. The learned Judge considered the support the Appellant had in London in terms of friends or colleagues but failed to take into account that the support of friends etc may not meet the need of the Appellant given the abuse she had suffered .The support of friends and colleagues, however close, sometimes just is not the same as that which family

members can provide, especially in terms of emotional support. On those grounds, I find that the decision of HHJ Cox was wrong and cannot stand. There is thus no need to consider the other grounds of appeal. The appeal is allowed and paragraph 2 of the order of HHJ Cox is set aside as is paragraph 3 in part, namely paragraphs 7- 9 (which were stayed by Mr Justice Moor).

49. This case shall be listed before me for further directions before the end of term to determine the way forward.

50. That is my judgment.