Neutral Citation Number: [2024] EWHC 839 (Fam)

Case No: FA-2023-000304

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT GUILDFORD
GU21P00308
Mr Recorder Ian Peacock

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2024

Before:

THE HONOURABLE MS JUSTICE HENKE

- -

Re: O (Appeal; Duty to Consider Fact-Find)

- -
- - - - - - - - - - - - - - - - - - - -

Dr. Charlotte Proudman (instructed by **Signature Law Ltd.**) for the **Appellant**
Miss Sima Najma (instructed under the **Direct Access Scheme**) for the **Respondent**

Hearing dates: 11 April 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MS JUSTICE HENKE

This judgment was delivered in public but a reporting restrictions order is in force. 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, members of their family and the parties must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Henke J:

Introduction

1. This is an appeal against a Child Arrangements Order made by Mr Recorder Peacock on 2 November 2023 in private law proceedings concerning two children. They are HA who is 12 years old and SJ who is 9 years old. The appellant is their mother with whom they live. The respondent is their father. He has supervised contact with the younger child; the older child declining to attend.

2. The order of 2 November 2023 was made after the learned judge heard evidence from the mother, the father and the CAFCASS Officer who had reported to the court. The order made by the learned Recorder provided for the younger child's contact with their father to move to unsupervised contact in the community and to progress through stages of unsupervised contact in the community, to visits to the father's home to ultimately phase 4 (as it is described) overnight staying contact which would increase in duration over time. The older child was not subject to an order, but the order recorded that they may attend the contact if they so wished.

3. By appellant's Notice dated 28 November 2023, the Appellant sought permission to appeal the order of 2 November 2023 on the following five grounds:

    (1) **Ground 1:** It was a procedural irregularity not to hold a 'ground rules' hearing prior to the final hearing.

    (2) **Ground 2:** The judge was wrong in failing to implement participatory directions and to ensure that during the hearing the parties did not see each other to assist the mother, a vulnerable party and victim to give her best evidence pursuant to the Domestic Abuse Act 2021 and Part 3 FPR 2010 and PD3AA.

    (3) **Ground 3**: The judge failed to specifically address Part 3 FPR 2010 and PD3AA, which includes an obligation on the court to consider mother's vulnerabilities and how she could be assisted to give her best evidence.

    (4) **Ground 4** The judge was wrong in failing to determine the mother's wider allegations of domestic abuse and coercive and controlling behaviour which were relevant to the welfare decisions for the children.

    (5) **Ground 5** The judge was wrong in making child arrangements orders without applying PD12J given the father's admission that he threatened to slit the mother's throat in front of the children and mother's wider allegations of domestic abuse and coercive and controlling behaviour.

4. On 4 December 2023, I gave directions for the furtherance of the application for permission to appeal and granted a stay of the contact order made by Recorder Peacock pending consideration of the application for permission to appeal. That stay was later extended until the hearing of the appeal itself.

5. On 9 February 2024 I granted the Appellant an extension of time in which to lodge the Application Notice, and proceeded to grant permission to appeal on all 5 grounds stating:

> "*Grounds 1-3 are interlinked. On the basis of the note of judgment before me it appears that the learned Recorder failed to apply Part 3 FPR 2010 and PD3AA either properly or at all. It appears that participatory directions were not given and that the learned recorder did not address the impact of the proposed Appellant's vulnerabilities on her ability to give evidence.*
>
> *Grounds 4-5 are also interlinked. There is a real prospect that the appellate court may consider allegations made by the proposed Appellant of domestic abuse and coercive and controlling behaviours were relevant to the welfare decisions made by the learned Recorder and that a fact-finding hearing ought to have taken place. On the facts of this case, the learned judge ought to have applied PD12J before making a CAO.*"

The Relevant Law

Appeals to this Court

6. At the hearing of an appeal a party may not rely on a matter not contained in that party's appeal notice unless the appeal court gives permission - FPR 2010, rule 30(5).

7. The hearing before me has been a review hearing. There are no circumstances in this case in which it would be in the interests of justice for me to hold a re-hearing - FPR 2010, rule 30.12(1). Accordingly, I have not heard any oral evidence, nor have I taken into account any evidence which was not before the lower court - FPR 30.12(2). However, I have reminded myself that an appeal court may draw an inference of fact which it considers is justified on the evidence before it - FPR 30.12(4)

8. Pursuant to FPR 2010, 30.12 (3) the appeal court will allow an appeal where the decision of the lower court was –

    a) wrong; or

    b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

9. The court may conclude a decision is wrong or procedurally unjust where:

    i. an error of law has been made;

    ii. a conclusion on the facts which was not open to the judge on the evidence has been reached: *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93;

    iii. the judge has clearly failed to give due weight to some very significant matter, or has clearly given undue weight to some matter (*B v B (Residence Orders: Reasons for Decision)* [1997] 2 FLR 602;

iv. a process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust (*Re S-W (Care Proceedings: Case Management Hearing)* [2015] 2 FLR 136);

v. a discretion has been exercised in a way which was outside the parameters within which reasonable disagreement is possible: *G v G (Minors: Custody Appeal)* [1985] FLR 894.

10. The appeal court has power under FPR 2010 rule 30.11(2) to –

a) affirm, set aside or vary any order or judgment made or given by the lower court;

b) refer any application or issue for determination by the lower court;

c) order a new hearing.

d) make orders for the payment of interest;

e) make a costs order.

11. The function of the appellate court is to determine whether the judgment below is sustainable. In *Re F (Children)* [2016] EWCA Civ 546, Munby P summarised the approach as follows:

> "*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*."

Domestic abuse

PD12J

12. PD12J of the Family Procedure Rules 2010 at para 3 defines domestic abuse as including:

> *"any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This*

can encompass but is not limited to psychological, physical, sexual, financial or emotional abuse."

13. Under the heading General Principles, at paragraph 4 of PD12J states that:

"Domestic abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to domestic abuse, or witness one of their parents being violent or abusive to the other parent or live in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with domestic abuse and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both parents".

14. By para 5 of PD12J, the court *must* at all stages of proceedings to consider whether domestic abuse is raised as an issue. If it is then, amongst other matters, the court *must*:

a) at the earliest opportunity, identify the factual and welfare issues involved;

b) consider the nature of any allegation, admission or evidence of domestic abuse and the extent to which it would be likely to be relevant in deciding whether to make a child arrangement order and if so in what terms;

c) ensure that where domestic abuse is admitted or proven, any child arrangement order in place protects the safety and wellbeing of the child and the parent with whom the child is living and does not expose either of them to a risk of further harm;

d) in particular, the court *must* be satisfied that any contact order with a perpetrator of domestic abuse does not expose the child in question and/or the other parent.

15. Paragraph 7 of PD12J states that in proceedings relating to a child arrangements order, the court presumes that the involvement of a parent in a child's life will further the child's welfare, unless there is evidence to the contrary. The court *must* in every case consider carefully whether the statutory presumption applies, having particular regard to any allegation or admission of harm by domestic abuse to the child or parent or any evidence indicating such harm or risk of harm.

16. By reason of paragraph 19 of PD12J where at any hearing an admission of domestic abuse toward another person or the child is made by a party, the admission must be recorded in writing by the judge and set out as a Schedule to the relevant order. The court office must arrange for a copy of any order containing a record of admissions to be made available as soon as possible to any Cafcass officer or officer of CAFCASS Cymru or local authority officer preparing a report under section 7 of the Children Act 1989.

17. Paragraphs 16-20 of PD12J deal with directions for a fact finding. Paragraph 16 states that the court *must* determine as soon as possible whether it is necessary to conduct a fact-finding hearing to provide a factual basis for any welfare report and/or assessment of risk.

18. The factors to be taken into account when determining whether to make child arrangements orders in all cases where domestic abuse has occurred are set out in paraphs 35-37 of PD12J. They state that:

> *"**35** When deciding the issue of child arrangements the court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.*
>
> ***36** (1) In the light of-*
>
> *a) any findings of fact,*
>
> *b) admissions; or*
>
> *c) domestic abuse having otherwise been established,*
>
> *d) 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 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."

Re H-N

19. In *Re H-N and Others (Domestic Abuse: Finding of Fact hearings)* [2021] EWCA Civ 448, the Court of Appeal stated that where one or both parents asserted that a pattern of coercive and/or controlling behaviour existed, that should be the primary issue for determination unless any particular factual allegation was so serious that it justified determination regardless of any alleged pattern of coercive and/or controlling behaviour. At paragraph 71 of the judgment, it was stated that the court should be concerned with how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not come within the definition of rape, murder, manslaughter or other serious crimes. Behaviour which falls short of establishing rape, for example, may nevertheless be profoundly abusive and if so, should not be ignored in the family context.

Vulnerable witnesses: Part 3A

20. Section 63 of the Domestic Abuse Act 2021. Section 63 provides that where a person 'is, or is at risk of being, a victim of domestic abuse', the court must assume that their participation and evidence will be diminished by reason of vulnerability.

21. Pursuant to FPR 2010, 3A.2A (1) it is the court's duty to consider making participation directions where a party or witness is or is at risk of being a victim of domestic carried out by a party, a relative of another party, or a witness in the proceedings, the court must assume that the following matters are diminished:

    a) the quality of the party's or witness's evidence;

    b) in relation to a party, their participation in the proceedings.

    Under subparagraph (2), the party or witness concerned can request that the assumption set out in paragraph (1) does not apply to them if they do not wish it to. Under subparagraph (3), where the assumption set out in paragraph (1) applies, the court *must* consider whether it is necessary to make one or more participation directions.

22. FPR 2010 3A.4 sets out the court's duty consider how a party can participate in the proceedings.

23. FPR 20201 3A.5 places a duty on the court to consider whether the quality of the evidence given by the party or witness is likely to be diminished by reason of the vulnerability and if so, whether it is necessary to make one or more participation direction.

24. FPR 2010 3A.9 (1) provides that the court's duties under rules 3A.3 to 3A.6 apply as soon as possible after the start of proceedings and continue until the resolution of the proceedings.

25. Rule 3A.10 sets out the procedure when a party wishes to apply for protective measures. FPR 2010 3A.11 sets out what the court must do when it decides to make participation direction as part of its own initiative.

Practice Direction 3AA

26. PD 3AA includes the following:

> "***1.3*** *It is the duty of the court (under rules 1.1(2); 1.2 & 1.4 and Part 3A FPR) and of all parties to the proceedings (rule 1.3 FPR) to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings.*
>
> ***1.4*** *All parties and their representatives are required to work with the court and each other to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished and without being put in fear or distress by reason of their vulnerability as defined with reference to the circumstances of each person and to the nature of the proceedings.*
>
> ***1.5*** *In applying the provisions of Part 3A FPR and the provisions of this Practice Direction, the court and the parties must also have regard to all other relevant rules and Practice Directions and in particular those referred to in the Annex to this Practice Direction.*"

27. Pertinently in relation to Ground Rules Hearing PD3AA states as follows

> "***5.2*** *When the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence there shall be a "ground rules hearing" prior to any hearing at which evidence is to be heard, at which any necessary participation directions will be given-*
>
> *a) as to the conduct of the advocates and the parties in respect of the evidence of that person, including the need to address the matters referred to in paragraphs 5.3 to 5.7, and*
>
> *b) to put any necessary support in place for that person.*
>
> *The ground rules hearing does not need to be a separate hearing to any other hearing in the proceedings.*"

28. In *GK v PR* [2021] EWFC 106 Peel J sets out the law under the Domestic Abuse Act 2021 and Part 3A. At paragraph 18 Peel J stated "*I note that these various provisions*

are expressed in mandatory form by use of words such as "must" and "duty of the court"". Peel J agreed with Judd J in *K v L and M* [2021] EWHC 3225 (Fam) at paragraph 62 wherein in relation to FPR 2010 rule 3A she stated, "*the obligation to consider vulnerability is upon the court*". I consider that the wording of FPR 2010 rule 3A is clear. It places mandatory obligations on a court in relation to vulnerable persons. The obligations on the court exist independently of the obligations placed on the parties and those representing them before the court. On the plain reading of the rules, those obligation arise as soon as possible after the start of proceedings and continue until the resolution of the proceedings – FPR 2010 Rule 3A.9(1).

29. I have also been taken to Morgan J's decision in *CM v IP* [2022] EWHC 2755 (Fam). In particular, I have reminded myself of the following paragraphs of her judgment with which I agree:

"*38 The absence of any reference to H-N & Ors is a surprising omission in July 2021 because the decision, which had been widely heralded as a Court of Appeal consideration within conjoined cases at appeal of whether PD12J was fit for purpose, and with intervention from interested bodies at the invitation of the Court of Appeal. The judgment had been handed down a little more than three months before the 7 July hearing and had attracted significant attention, unsurprisingly, both amongst the profession and the judiciary. So, its omission from the recorded thinking of HHJ Dodd on 7 July 2021 is surprising even within a busy court.*

39 The appellant and the child, though not the respondent, are recorded at that hearing as being represented and so it may be thought surprising that the appellant's representative did not raise it before the judge if the mother were at that stage seeking to revisit the need for a factfinding. But whilst again that provides some sympathy for the situation the judge finds himself in, it does not relieve him, I regret to say, of the obligation to give consideration to PD12J, not just at the earliest opportunity but to keep the matter under review throughout the court process, and explicitly by PD12J s.14, to make it clear in his order that he has done so."

This Hearing

30. Having set out the relevant law, I now turn to the hearing before me.

31. At the time I granted permission to appeal, the Appellant had filed only a note of the judgment. Since then, the full transcript has been obtained. It is before me in the bundle prepared for this hearing.

32. At this hearing, I have had the benefit of reading an Appeal Bundle of 278 pages which includes skeleton arguments on behalf of the Appellant and the Respondent. I also have had before me a second iteration of the schedule of allegations prepared on behalf of the Appellant for the lower court and the N162 which is entitled Respondent's Notice.

33. Today's hearing has been in open court subject to a Transparency Order that I have made. I have heard oral submissions from Dr Proudman who represents the Appellant and from Miss Najma on behalf of the Respondent. I am grateful to both Counsel for their succinct and focused advocacy. Neither were Counsel at first instance.

The Issues

34. There is significant agreement between the parties in relation to this appeal. It is agreed that the appeal should be allowed and the order for contact made by Recorder Peacock should be set aside. It is also agreed (i) that I should remit the Respondent's application for a Child Arrangement Order for re-hearing before a Circuit Judge and (ii) that it is for the trial judge to consider whether or not a fact-finding is necessary. I therefore queried with the advocates whether or not this appeal could proceed on an agreed basis. I was told it could not. There remains a dispute upon the grounds upon which the appeal should be allowed.

The Parties' Positions

35. The Respondent in the skeleton argument filed on his behalf accepts that Grounds 1-3 are made out. It is accepted on his behalf that there was a pre-trial review hearing in these proceedings on 18 July 2023. By an order of that date, protective measures were granted for the Appellant but no specific directions were given as to what measures would be in place at the remote hearing which was to take place before Mr Recorder Peacock. It is accepted on behalf of the Respondent that both parties were represented before Recorder Peacock. There is no explanation placed before me as to why the issue of protective measures for the Appellant was not raised with the Recorder by the advocate for the Appellant or the Respondent. However, the stark fact is they were not. Nevertheless, the court has a mandatory duty (a) to ascertain if a party/witness is vulnerable and (b) to ensure that there are participatory directions in force to assist that person to give their best evidence. Despite that mandatory duty, Recorder Peacock failed to address or apply Part 3 FPR 2010 and PD3AA in circumstances when he clearly should. It is accepted on behalf of the Respondent that this omission was wrong and/or a serious procedural irregularity. Ground 5 is also accepted in part. The part that is accepted is that "*the judge was wrong in making a child arrangements order without applying PD12J given the father's' admission that he threatened to slit the mother's throat*". That acceptance is put on the following basis, with which I agree:

    a) *Given the admission of domestic abuse by the Respondent, the court ought to have applied paragraphs 35 to 37 of PD12J considering child arrangements in cases where the court is satisfied that such harm has occurred:*

    b) *The court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.*

    c) *The court should apply the individual matters in the welfare checklist set out in s.1(3) of the Children Act 1989 with reference to the harm that has occurred, and any expert risk assessment obtained.*

    d) *In particular, the court should consider any harm which the child, and the parent with whom the child is living, is at risk of suffering if a child arrangements order is made.*

e) The court should make an order for contact only if it is satisfied 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.

f) The court should consider, inter alia, 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 abuse against the other parent and the capacity of the parents to appreciate the effect of past abuse and the potential for future abuse.

g) Whilst the Recorder at paragraphs 43-46 of the transcript refers to the law, it is not apparent that the Recorder considered the specific paragraphs 35 to 37 of PD12J.

h) President of the Family Division, Sir Andrew McFarlane makes clear at paragraph 28 of H-N and Others (children) (domestic abuse: findings of fact hearings) [2021] EWCA Civ 448 *that:*

> *"PD12J is and remains, fit for the purpose for which it was designed namely to provide the courts with a structure enabling the court first to recognise all forms of domestic abuse and thereafter on how to approach such allegations when made in private law proceedings. As was also recognised by The Harm Panel, we are satisfied that the structure properly reflects modern concepts and understanding of domestic abuse. The challenge relates to the proper implementation of PD12J".*

36. What remains in issue is the entirety of Ground 4, namely that "*the judge was wrong in failing to determine the mother's wider allegations of domestic abuse and coercive and controlling behaviour which were relevant to the welfare decisions for the children*" and that part of Ground 5 which relates to the appellant's "*wider allegations of domestic abuse and coercive and controlling behaviour*".

37. In relation to the outstanding grounds the Appellant argues that it was necessary for the Recorder to determine the Appellant's other allegations because they were relevant to the welfare decision he had to make. She relies on paragraphs 42 and 43 of Morgan J in *CM v IP* (above)

> "*42. I regret to say that, even relying, as he does, on the advice of the Children's Guardian, that taken together with the earlier lack of application of those matters to which the court is required to have regard within PD12J s.17, I find myself with a real disquiet to the approach taken to the application on behalf of the appellant at the outset of the hearing. PD12J s.17 directs the court that in determining whether a fact-finding hearing is necessary, a court must consider, amongst other things, whether the nature and extent of the allegations, if proved, would be relevant to the issues before the court. I cannot see anywhere here the court's consideration of this or an explanation of any conclusions reached. The closest that it comes to is the reliance on the views of the Children's Guardian, as expressed in her analysis, that the allegations are mainly 'historic' and that they do not prevent self-arrangements for the child being made, which, as I will come onto, I regard with some disquiet also.*

> *43 Furthermore, s.17 of PD12J requires the court also to consider whether matters which are set out in 36 and 37 of the PD can be determined without a fact-finding hearing. When I look at this case, and I reflect that the court should be considering, per 36, any harm 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 he is living is at risk of suffering if a child arrangements order is made. The court is directed that it should make an order for contact only if it is satisfied 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 the parent will not be subjected to further abuse.*"

38. The Appellant disputes that she did not want to pursue any findings of fact beyond the admitted threat to slit her throat (see Respondent's case below). She denies withdrawing her allegations. The judgment of Recorder Peacock makes reference to her *unhappiness* that the allegations had not been determined and the Appellant's view that that is when the case "*went wrong*".

39. It is argued on behalf of the Appellant that without a fact-find the Recorder cannot have considered or analysed risk. Part of the Appellant's case was that the father emotionally manipulated the children in contact. Part of the Schedule of Allegations which the Appellant had placed before the court were said to be relevant to that issue. Coercive and controlling behaviour is a pattern of behaviour.

40. Further it is submitted on behalf of the Appellant that the Recorder wrongfully downplayed the seriousness of the threat "*I will slit your throat*" in paragraph 12. Nowhere did he say it met the threshold for PD12J, nor did he make any reference to the impact of that threat on the mother. There are passages in the judgment which are examples of "*victim blaming*".

41. In response it is argued on behalf of the Respondent that: -

    a) It is unclear what the Appellant means by the *wider allegations*.

    b) The courts had already determined what allegations it was necessary for the court to determine in order to make a welfare determination. The first Schedule of Allegations presented to the court by the Appellant is dated 3 September 2021. The Lay Magistrates considered the necessity for a fact-finding hearing in relation to that schedule at the FHDRA on 26 October 2021. They determined that the Respondent's acceptance that he had said to the Appellant in the presence of the older child was sufficient and that it was not necessary to hold a fact-findings hearing in relation to the other allegations raised. At a FLA hearing three months later, a District Judge listed a fact-finding hearing but limited the hearing to a consideration of the context in which the Respondent has stated "*I will slit your throat"*. Against that background it is said the Appellant produced a second schedule of allegations which included the same allegations as had been considered by the lay bench. She did this without the prior permission of the court. On 24 November 2022, the fact find set down at the FLA hearing came before a District Judge for hearing. At that hearing the Appellant, who was represented, did not seek any

findings of fact against the Respondent over and above the admission. A way forward in relation to contact was agreed. No appeal has ever been made against the Lay Bench's decision or the order of 24 November 2022.

c) On the basis of the above, it is argued that the Appellant had had every opportunity to pursue her allegations and chose not to do so. It is now said to be too late and too disingenuous for the Appellant to seek a fact-finding hearing and to criticise the Recorder for failing to consider whether it was necessary to determine any of the allegations made by the Appellant.

d) The Recorder did consider whether or not he should proceed on the basis of the admission or whether he should consider the further allegations made by the Appellant. In support of that argument the Respondent relies on the following paragraphs from the judgment at first instance:

> "*9. The proceedings for the non-molestation order concluded in November 2022 on the basis of undertakings given by the father with the non-molestation order being discharged. Earlier in the Children Act proceedings the mother made allegations of domestic abuse against the father and set out a series of allegations in a schedule, pursuant to an order of the court. The court decided that it would be disproportionate to carry out any fact-finding hearing. The father, although he initially denied the threat that was made, subsequently admitted it and the court found that, given the father's admission and the nature of the other allegations in the mother's schedule, which were, I think it is fair to say, less serious than the threat, it will be disproportionate to hold a fact-finding hearing.*
>
> *10. The mother in her evidence has made plain her unhappiness with that decision and I think described that as the point where these proceedings went wrong, but no application has been made by Ms Pascoe for me to revisit that decision. And even if it had been, I may well have needed some persuasion that it was open for me to do so when the court's order on the issue had not been appealed.*
>
> *11. As a result, I proceed on the basis of the admitted allegation only. There has been some argument about the context of that remark with the father saying that the remark has to be seen in its context, and the mother saying that the father is seeking to minimise what has been said. I decided not to listen to an audio recording of part of the conversation that led to that remark. In the bundle before me is a fairly full transcript which I have considered, and it makes for deeply unhappy reading.*
>
> *18. The mother says that the difficulties are also as a result of the father's abusive behaviour which had taken place prior to that threat. As I said, the court has decided that no fact finding should take place and I cannot proceed on the basis that there was any such abusive behaviour. But what I can proceed on the basis of, and which both parties are agreed about, is that the relationship had become increasingly toxic prior to the final breakdown.*"

My Decision

42. I agree with the analysis on behalf of the Respondent that Grounds 1-3 and in part Ground 5 are made out for the reasons given and set out above.

43. In relation to the grounds in dispute, namely Ground 4 that the judge was wrong in failing to determine the mother's wider allegations of domestic abuse and coercive and controlling behaviour which were relevant to the welfare decisions for the children and Ground 5, that the judge was wrong in making child arrangements orders without applying PD12J given the Appellant's wider allegations of domestic abuse and coercive and controlling behaviour. I conclude that the Recorder should have considered the issue of whether to make findings of fact in relation to coercive and controlling behaviours alleged by the Appellant and should not have relied upon any prior determination either in November 2022 or earlier by the Lay Bench. He should have kept the matter under continuous review. The issue of the determination of the allegations was clearly on the facts of this case a matter before him. At paragraph 10 of his judgment the Recorder sets out that no application for a fact-finding hearing was made before him on behalf of the Appellant. Given the Appellant's expressed unhappiness at the first instance hearing, it is regrettable that no application for a fact-finding hearing was made on her behalf before the Recorder. However, that failure did not absolve the Recorder of his obligation to consider whether a fact- find was necessary to resolve the allegations in this case.

44. That the Recorder should have considered whether or not a fact-find was necessary independent of any application before him is apparent from paragraphs 17 and 18 of his judgment. Those paragraphs refer to the older child's mental health difficulties and the Appellant's case that that child's difficulties are not simply as a result of witnessing the admitted threat to the Appellant by the Respondent but also as a result of prior abusive behaviours by the Respondent which the Appellant asserts occurred. In that context the Recorder states: "*As I said, the court has decided that no fact finding should take place and I cannot proceed on the basis that there was any such abusive behaviour. But what I can proceed on the basis of, and which both parties are agreed about, is that the relationship had become increasingly toxic prior to the final breakdown*". Those two sentences in my judgment illustrate the difficulty the Recorder got himself into by not considering whether or not he should determine the facts. On the one hand he says he cannot determine the allegations and then on the other he proceeds to conclude the parental relationship was "*toxic*" which implies blame on both sides and thus is implicitly a determination on the facts. Later in his judgment, the Recorder proceeds to consider the Appellant's allegations that the Respondent was emotionally manipulative of the younger child in contact. The Appellant's case is that the court should have considered that aspect of the case in the wider context of allegations made by the Appellant of controlling and manipulative behaviour by the Respondent towards the children in the past. Nowhere within the judgment did the Recorder consider the potential nexus between the allegations about behaviour in contact and past alleged behaviours of controlling and coercive behaviour. Nowhere in his judgment did he consider whether determining the allegations of past behaviour was relevant to the establishment of the facts or whether they established a pattern of behaviour relevant to welfare. I thus consider that the learned Recorder was wrong not to consider whether or not to have a fact-finding hearing in relation to the allegations the Appellant made.

45. In the circumstances of this case, I thus conclude that the learned Recorder erred in that he failed to consider whether the nature and extent of the allegations, if proved, would be relevant to any issue before the court - PD12J(17)(g) applied. Accordingly, I find that the learned Recorder was wrong not to consider whether or not a fact-find was necessary. However, I do not go so far as to say that he should have decided to have a fact-find. I do not go that far because I do not need to do so for the purposes of this appeal and because I am conscious that it will be for the judge who rehears the case to decide on the facts and arguments presented to them whether or not a fact-find is necessary.

46. I agree with the parties that the appeal should be allowed and the order for contact made by Recorder Peacock should be set aside.

47. Grounds 1-3 and Ground 5 in part are made out. Ground 4 and the remainder of Ground 5 is made out in so far as the Recorder should have considered himself whether or not there should have been a fact-find. I do not go so far as to say he should have determined the allegations.

48. I remit the Respondent's application for a Child Arrangement Order for re-hearing before a Circuit Judge. There shall be a PTR/directions hearing before the trial judge. It will be for the trial judge to consider whether or not a fact-finding is necessary in this case.

49. I bring *Aziz v Harb* [2017] EWCA Civ 2215; [2018] 1 W.L.R. 2709, CA, to the attention of the parties. In *Aziz* the Court of Appeal stated, at paragraph 41 and following, that where an appeal court had allowed an appeal and ordered a new trial, the original trial and any findings in it are no more than historical facts of no legal significance.

50. I ask the Advocates for both parties to submit a draft of the order I have made. If there are any ancillary matters which requires me to consider, I will do so on the papers.

51. That is my judgment.