Neutral Citation Number: [2023] EWCA Civ 346

Case No: CA-2023-000136 & CA-2023-000162

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT TRURO
HHJ Edward Richards
TR21C50014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 2023

Before :

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON

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S (A Child: Findings of Fact)

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- -

Rawdon Crozier (instructed by **Stephens Scown LLP**) for the **1st Appellant**
William Higginson (instructed by **Coodes Solicitors**) for the **Appellant Mother**
Samuel Castlehouse (instructed by **Cornwall Council**) for the **Respondent Local Authority**
Charlie Barrass-Evans (instructed by **Walters & Barbary Solicitors**) for the **Respondent Child by her Children's Guardian**

Hearing date : 22 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 31 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Overview

1. These appeals concern findings of fact made in care proceedings. The appellants are M and F2, the parents of C, a one-year-old girl. The findings concern K, who is M's daughter from her previous marriage with F1. The court found that K was sexually abused at the age of 5 or 6 by F2 and that M was aware of the abuse and failed to prevent or report it.

2. The background is that M and F1 married in 2013 and K was born in 2014. The marriage ended in 2018 and F1 then began to live with Ms Y, who has four children of her own. From March 2019, the arrangement was that K would spend the weekdays with M and the weekends with F1 and Ms Y. Relations between the two homes were acrimonious and in August 2019 M received a police caution for harassing F1 by text messages.

3. In March 2020, M began a relationship with F2. By June 2020, F2 was picking K up from school on occasions, and the school expressed concern to M about that. In August 2020, F1 called social services after seeing a red hand mark on K's bottom. Social services and the police made a joint visit, at which K made no allegations and spoke positively of F2. The police took no further action but in September 2020, after a social work assessment, K was made subject to a child protection plan under the category of neglect due to concern about parental conflict, exposure to M's declining mental health, and the unexplained mark. From that point on it was agreed that she would spend the weekdays with F1 and the weekends with M. In October 2020, F2 moved in with M.

4. In December 2020, F1 and Ms Y made reports to social services and the police that led to investigations and ultimately to these proceedings. Since then K has lived with F1 and Mrs Y.

5. When C was born in late 2021, the local authority brought proceedings and an interim care order was made. A psychological assessment concluded that M's cognitive functioning is in the borderline range. C and M were placed in a parent and child foster placement, which lasted until May 2022. Since then, C has been at home with M, with an order excluding F2 from the property.

6. Following a negative PAMS assessment by an independent social worker, the local authority's care plan has been for C to be adopted. A final hearing was originally listed for April 2022. However, the local authority then applied for an adjournment for there to be a fact-finding hearing to determine the level of risk posed by F2. That hearing did not take place until November 2022, when it lasted for five days, followed by written submissions.

7. The local authority's case was that F2 had sexually abused K on at least three occasions between March and December 2020 and that M knew and failed to protect and report. F2 and M each denied the allegations against them, and M took the position that she did not believe the allegations against F2 but awaited the court's judgment. The Children's Guardian adopted a neutral position. The judge, HHJ

Edward Richards, handed down his judgment on 6 January 2023, making the findings sought by the local authority and listing a three-day final welfare hearing in June 2023. F2 and M each appealed; on 6 March 2023, I granted permission to appeal, and the appeals were heard on 22 March.

8. For the reasons that follow I have concluded that the appeals must be allowed. The evidence might have sustained findings against F2, but the judge's reasoning does not satisfactorily underpin his decision and the allegations against F2 must regrettably be retried. By contrast, the evidence was incapable of sustaining the findings against M and those allegations will therefore be dismissed, an outcome that Mr Castlehouse for the local authority realistically accepted was inevitable if M's appeal was allowed.

9. At the retrial of the allegations against F2 the court will reach its own conclusions and I will therefore only say what is necessary to explain why the appeals must succeed. The rehearing can probably be shortened because the court is unlikely to need to hear oral evidence from witnesses who gave what turned out to be uncontentious evidence. In particular, a number of witnesses from K's school spoke about what she had said to them after she had taken part in her first ABE interview. As the judge recorded at para. 120, it was not disputed that she said the things that they recorded. What matters is what if any weight should be given to those later statements, and that does not require the witnesses to be recalled. The essential points of their evidence might be summarised by the local authority and presented to the other parties in a notice to admit facts under FPR 2021 r. 22.15. Likewise, F2 eventually admitted, and the judge found at para. 71, that he had lied about an occasion when he was found hiding in M's garden. There has been no appeal from that finding and accordingly it could also form part of a notice to admit facts. It will then be a matter for the court to decide what relevance if any the lie and the underlying behaviour might have to the sexual abuse allegation.

The allegations against F2

10. The making of the child protection plan for K in September 2020 reflected a history of concern for her welfare that was charted in a chronology that was available to the judge. It is unnecessary to set out full details here, but these events formed the background for the allegations. For example:

    1) K had been a premature baby and was reported to be at least 2 years behind her peers developmentally in most areas. The extent to which her delay was organic or environmental in origin is currently unclear.

    2) There was a history of cross-allegations being made by F1 and M about their care of K.

    3) When K was making a Father's Day card at school in June 2020, she drew a figure with a penis and then refused to talk about it.

    4) There are also references stretching back to 2019 to K having had urinary infections or vaginal soreness/irritation, and on one of these occasions (6 October 2020) the GP directly asked her whether anyone had touched her. She said no, but later in the month the soreness was ongoing. Again, in December 2020, F1 twice took K to the GP with similar symptoms that were

variously diagnosed as thrush or vulvo-vaginitis. On 21 December 2020, the GP consulted the Sexual Assault Referral Centre (SARC) and wrote to social services to request a strategy discussion.

11. The next day, 22 December 2020, K and Ms Y were in the bathroom. K, who had some history of constipation, was having difficulty going to the toilet. Ms Y's account was that K said "[F2] put his fingers in my bum hole". F1's account was that he was outside the bathroom door and heard K say "it hurts like when [F2] does it". Calls were then made to SARC, the NHS 111 number and the police. At trial, F2 pointed to the difference between the two accounts of what K had said and asked the judge to consider whether F1's report necessarily amounted to an allegation of sexual abuse.

12. On 23 December 2020, K underwent a medical examination. The physical findings were normal and neither confirmed nor refuted the possibility of digital penetration.

13. There was then a delay of some five weeks before the ABE interview process began, during which K remained with F1 and Ms Y. On 7 January 2021, M signed a written agreement to the effect that F2 would not be present in her home while K was there. On 8 January, after K had gone to stay with M, police visited and found F2 hiding in the garden. Since then, contact between K and M has taken place at a contact centre.

14. During the five-week period, there were several relevant occasions on which K was seen by professionals, including:

    1) On 23 December 2020, social services and the police made a joint visit. Detective Constable S, the officer in the case, recorded that "K was asked about what she told Daddy about [F2]. She said he had put his finger in her bum." It happened in the bathroom in Mummy's house and both her mother and F2 had been there. She said F2 was nice and was her favourite. By contrast, the social work record stated that "K was unable to repeat [the allegation] to the police and duty social worker at the time."

    2) On 11, 20 and 26 January 2021, K's social worker saw her at school. Nothing was directly said by K about F2.

    3) On 22 January 2021, K told Ms D (safeguarding lead) that she had worries and secrets but could not tell them to her.

    4) On 25 January 2021, K said to Ms V, a teacher at her school, that she was sad "because [F2] touches my private parts and I don't like it. I asked him to stop but he won't."

    5) On 27 January 2021, K said to Ms V: "I don't like [F2] poking me down here [pointing to her vaginal area] but I want to see mummy."

    These statements made by K to professionals were of potential significance because they were made after the initial reports but before the ABE interview process began.

15. The ABE process was led by DC S. She had been a child protection officer for five years and had been trained in ABE interviewing. However, she was unaware of and had not read the 2011 ABE Guidance that was relevant at the time, nor its 2022 successor.

16. On 28 January 2021, DC S and Ms S, duty social worker, conducted a "pre-ABE meeting" with K at school. Neither professional made a contemporaneous note, but DC S stated in evidence that her approach was the same as during the later recorded interviews. She made a record after returning to the station:

> "Enquiry Visit to see K at school today in company with duty S/W. Also present was a teacher who K is close to. During the visit K disclosed that [F2] touches her private parts and she doesn't like it because it hurts. He doesn't say anything. Her Mum is present and it happens in her bedroom - it has happened twice. She confirmed the part he touches is the part she uses to wee."

The account therefore differed from that recorded by the officer on 23 December in describing touching on a different part of the body and of the events occurring in a different room.

17. On 2 February 2021, an ABE interview took place, conducted by DC S, Ms S, the social worker, and Ms B, a registered intermediary. The interview lasted for 14 minutes. DC S began by playing K a short video about truth and lies and asked her a question about it. She then tried to build rapport with K, before taking her back to the pre-ABE meeting on 28 January:

> "DC S: … And do you remember when we were sat talking to you, you told us about [F2]?
>
> K: Mmm hmm.
>
> DC S: What did you tell us about [F2] when me and [Ms S] came to see you?
>
> K: Don't wanna tell you.
>
> DC S: Oh, why don't you want to tell me?
>
> K: 'Cause I don't want to.
>
> DC S: Pardon?
>
> K: 'Cause I don't want to.
>
> DC S: Oh okay. Why don't you want to tell me? 'Cause you've told me before.
>
> K: *(inaudible)*
>
> DC S: Okay.
>
> K: 'Cause only if someone, well, only if my dad was with me I could tell you.
>
> DC S: Oh, okay, well, daddy, daddy's on his phone a minute, dad's had to, to make a phone call a minute.
>
> K: But [Ms Y]'s all right.
>
> DC S: [Ms Y]'s all right.
>
> K: Yeah.

DC S: Okay. But you said, you told us about something that [F2] did that made you sad, didn't you? Can you tell [intermediary] what that was?

MS B: Yeah, I couldn't come to your school so I don't know what happened with [F2]. Could you tell me just one little bit of it?

K: *(shakes head)*

DC S: You told us about something [F2] did that hurt you. *(pause)* Can you tell me what that was?

K: *(shakes head)*

DC S: No? Why don't you want to tell me today?

K: 'Cause I don't want to say it.

DC S: Okay.

MS B: K, if that was you, *(puts item on table)* could you show me where [F2] hurt you?

K: *(shakes head)*

MS B: No. Okay.

K: No.

DC S: Okay. Where were you when…

K: *(indicates to item)*

MS B: There.

DC S: There.

MS B: Oh, okay, so K pointed to there. *(indicates to item)*

DC S: Okay.

MS B: And where were you when it happened, were you at your house or where were you?

K: At, at mummy's house.

MS B: At mummy's house. What room were you in?

K: I was in my own room.

MS B: In your own room. Okay.

DC S: And you know when [F2] hurt you what did [F2] use to hurt you?

K: Um, his finger.

DC S: His finger. Okay. And you said that you were in your room, so is that your bedroom…

K: Yeah.

DC S: … at mummy's house?

K: *(nods head)*

DC S: 'Cause mummy, and you spoke about daddy, and mummy and daddy live in different houses, don't they?

K: *(nods head)*

DC S: So it was at mummy's house. And do you know where mummy's house is?

K: No.

DC S: No. Okay. So you were in your bedroom. And was anybody else in the room when [F2]…

K: No.

DC S:… hurt you?

K: Just him.

DC S: Just him. Okay. And what did you, did you say anything to [F2] when he was hurting you?

K: *(shakes head)*

DC S: No. And how many times has [F2] hurt you?

K: *(indicates)*

DC S: Twice?

K: *(nods head)*

MS B: Is that two times or lots of times?

K: Two times.

MS B: About two times it was. (?)

DC S: Two times. Okay. And who, who did you tell that [F2] hurt you?

K: Um… *(indicates)*

DC S: Told me, that's right, you did.

CB: I don't know if, if K knows, what were you wearing when [F2] hurt you?

K: A flowery dress.

CB: A flowery dress.

DC S: And when you said that [F2] hurt you with his finger and you pointed on, on your drawing, you pointed to a part, what do you use that part of your body for?

K: For going toilet.

DC S: Going toilet. Okay. And there's two places you go to the toilet, isn't it, two parts of your body that go to the toilet, one part of your body you use for a… what sort of toilet do you have? You have a, you go for a wee.

K: Mmm.

DC S: Um, yeah? And what else do you do, what other sort of toilet?

K: *(inaudible)*

DC S: Pardon?

K: Daddy has (?) different toilet.

DC S: Daddy had a different toilet. No, okay. But, so you have a wee or you have a poo, don't you? Yeah?

K: *(nods head)*

DC S: So where [F2] hurt you was it where you went for a wee or where you go for a poo?

K: Where I go for a wee."

The potentially contaminating effect of questioning of this kind on K's subsequent statements clearly needed to be carefully analysed.

18. Another five weeks then passed before K was interviewed for a second time. During this period, she made frequent statements, mainly to staff at school:

1) On 8 February 2021, she told the teacher Ms V that she wanted F2 to go back to his house and that she didn't like him touching her.

2) On 9 February 2021, she told Ms G (teaching assistant) that "the two ladies are helping me to stop [F2] from touching my private parts".

3) On the same day, she told Ms V that F2 came into her room and "I hided under my duvet when he came in but he found me. Mummy came in and told him off but he wouldn't go to his room so mummy pushed him out the door." K was laughing when she said this.

4) On 10 February 2021, she told Ms V that F2 had said she would get into trouble if she told anyone about him touching her "private parts".

5) On 11 February 2021, she told Ms G that "[F2] pokes my private parts and puts his finger on my private parts." She said that he liked doing it, and did it when she is in her bedroom. She said, "I hide under my duvet but he lifts the duvet up and does it" and that "when he did it in my room once mummy was there but she didn't stop him". When speaking of her mother, K put her head down and appeared sad.

6) On the same day she said to Ms V that she wanted "[F2] to stop and she wanted to tell Ms D".

7) On 12 February 2021, she told Ms D that "[F2]'s been touching my privates and he won't stop". Upon telling Ms D, K is reported to have skipped back to class and told Ms G that she had told Ms D and was much happier now.

8) On 14 February 2021, K told Ms Y's mother that F2 had touched her vagina with his finger.

9) On 23 February 2021, Ms O (lunchtime supervisor) was told by K that she now lived with her father because her mother's boyfriend hurt her and touched her private parts. She says that she "wanted him to stay just in mummy's room with mummy but he was allowed to go in her room".

19. A second ABE interview took place on 8 March 2021. Lasting 34 minutes, it was again conducted by DC S and by Ms B, with a different social worker present. The following is a representative example of the questioning:

"DCS: …Are you worried about [F2] at the moment?

K: *(nods head)*

DCS: Yeah. Okay. And what worries you about [F2], K?

K: *(no visible response)*

DCS: Does it worry you what [F2] is going to say?

K: Um…

DCS: Or does it worry you what [F2] is gonna do?

K: Nmm hmm.

DCS: No, okay. Are you worried about what [F2] used to do?

K: *(shakes head)*

DCS: What worries you? 'Cause if you tell us then we can help you, we can help to keep you safe. But in order to do that you need to tell us stuff. Do you see [F2] at the moment, K? Do you see [F2]?

K: *(no visible response)*"

And later:

"K: I want to go back to my mummy.

MS E: Want to go to mummy's.

DC S: Oh. And stay at mummy's?

K: *(nods head)*

DC S: Mmm hmm. 'Cause you can't, you're not seeing mummy at mummy's at the moment are you?

K: *(shakes head)*

DC S: And that's because something happened with [F2].

MS E: Okay, what happened with [F2]?

K: I want [F2] to go home.

MS E: You want [F2] to go home.

K: Yeah.

MS E: And why do you want [F2] to go home?

K: I just want him to.

….

DC S: Why, why don't you want [F2] at mummy's house?

K: I don't want to.

DC S: Okay. Did something happen?

K: *(nods head)*

DC S: what happened?

K: I don't want [F2] at mummy's.

DC S: Okay.

K: I want him to stay at his.

DC S: You want him to stay at his.

K: Yeah

DC S: Why, why don't you, why don't you like [F2]?

K: I'm tired.

DC S: You're tied?

K: *(nods head)*

DC S: Okay. Why, why don't you like [F2]?

K: 'Cause I don 't.

DC S: 'Cause' you don 't.

K: Can I go back to daddy?

DC S: Yeah."

It can be seen that K's initially positive view of F2 had by now decidedly changed. That needed to be considered, as did the possible impact on K of further suggestive questioning.

20. Thereafter, K continued to make statements to teachers and others:

1) On 10 March 2021, K said to Ms D that "[F2] picks my private parts".

2) On 30 April 2021, K told Ms V that she was not worried about [F2] anymore because she was "going to tell the support workers everything" and she is "never going to see [F2] again".

3) On the same day, whilst waiting for her father to collect her, K spoke with Ms S (office administrator) about the school CCTV and said, "is that so you know who is coming in… so [F2] can't hurt me now?"

4) On 25 May 2021, K told Ms V that she could not go to her mother's home "because of [F2]. Because he will hurt my privates".

5) On 15 September 2021, K told Ms J, a teaching assistant, that she had a bad dream about F2 and he had hurt her in the dream. When asked whether F2 had hurt her before, K said, "yes… he touched my private parts".

6) In June 2022, K told an independent social worker that she was in the bathroom and F2 came in and "started playing with my privates (it hurt), mum was downstairs cooking tea".

7) On 3 October 2022, K told teacher Ms O that she wanted to live with her mother but was not allowed to because her partner had hurt her.

The judge's decision

21. The judge made these findings:

> "1. Between 01.03.20 and 22.12.20, F2 penetrated K's anus with his finger on at least one occasion.
>
> 2. Between 01.03.20 and 22.12.20, F2 penetrated K's vagina with his finger on at least one occasion.
>
> 3. Between 01.03 .20 and 22.12.20, F2 touched K's vaginal area on at least one occasion which was separate from the occasion in allegation 2.
>
> 4. The penetration and touching in allegations 1, 2 and 3 was sexual as there was no innocent reason for F2 to touch K's anus, vagina or vaginal area.
>
> 5. M was present in K's bedroom on at least one occasion when F2 touched K: M "told F2 off" and to leave and pushed him out of the room when he did not leave voluntarily.
>
> 6. M has failed to protect K from F2 by being present in the room when F2 had touched K's vaginal area and not (i) stopping F2 from touching K and (ii) not reporting him to the police."

22. In a reserved judgment, the judge introduced the issues and summarised the evidence of the nine professional witnesses, mainly from the school, and five family members. He gave himself an appropriate legal self-direction in the form of a summary agreed by the parties. In particular, he referred to the authorities on the significance of lies, on the evaluation of allegations made by children, on breaches of the ABE Guidance and on failure to protect. He expressed concern at the delay, which had deprived witnesses of an opportunity to give evidence about events nearer the time.

23. Assessing the witnesses, the judge found that the school witnesses gave evidence in a straightforward and clear manner and there was no dispute that K has said what was recorded. He also described DC S as a straightforward witness and considered her lack of knowledge of the Cleveland Inquiry and the ABE guidance to be a criticism of her employer rather than of her. He had no criticism to make of F1, Ms Y or her mother. He expressed concern that M struggled to contemplate the possibility that F2 had been abusive. He found that F2 and M had both lied about the time when F2 had come to M's home in breach of the written agreement, but that F2 had eventually admitted that he had been inside for some time and had then gone outside to hide.

24. The judge analysed the ABE interviews:

> "110. The ABE interviews of K were not conducted in accordance with the ABE guidance. Of concern is that right from the outset of the main part of the interview DC S introduced F2 into the conversation by starting with "What did you tell us about F2 when me and Ms S came to see you?". The initial approach should be free flowing, just letting the child speak and yet in this case the interviewing officer immediately names F2. Counsel for F2 also raises concerns about the quality of the pre planning notes, which I accept should have been better. On the positive side, is that K was properly supported by an intermediary and

> the social worker was present. The officer properly dealt with truth and lies and careful consultation was undertaken with children's social services prior to the interview.
>
> 111. It is also of concern that the pre-ABE notes amount to a brief summary rather than a detailed note.
>
> 112. The court has to decide what weight if any to place on the ABE in light of the failings in that process. Counsel for F2 submits no weight. Counsel for the local authority submits that it should be given significant weight.
>
> 113. I have to take into account what effect the breach of the guidance may have on the evidence of K. The most significant is the suggestion by DC S that F2 has hurt her. This is being suggested by an adult, in authority to a child of 6. It is wholly inappropriate and may ordinarily lead to little or no weight being given to the ABE due to possible contamination.
>
> 114. However, I do take the ABE interview evidence of K into account for the following reasons:
>
> i) A failure to follow the guidelines does not mean an automatic bar.
>
> ii) The error on the part of the interviewing officer was significant but that is against the background that K has made similar allegations to family members and professionals both before and after the ABE interview. The ABE interview does not stand on its own. Indeed, the allegations made by K at school, a safe environment for her, are more detailed.
>
> iii) What K has said to her family and professionals supports what she said at the ABE interviews
>
> iv) There are the parts of the process that the interviewing officer did get right as set out above.
>
> v) DC S is trained in undertaking ABE interviews even though there was a flaw in the process on this occasion."

25. The judge then considered the significance of the lies told by M and F2 about how F2 came to be in M's garden and found that this had been an attempt to deceive the court. He noted that M had persisted in the lie. He directed himself that they did not have to prove anything and that such lies did not prove the primary case.

26. The judge's conclusions concerning F2 were these:

> "118. K made her original allegation whilst on the toilet in December 2020 witnessed by F1 and Ms Y. It is crucial to consider the first point in time an allegation is made and the circumstances surrounding this as set out in *Re P (Sexual Abuse - Finding of Fact Hearing)* [2019] EWFC 27.

i) The setting and situation were a natural environment for such an allegation when K was having difficulties in passing a stool.

ii) There were minor inconsistencies as to where F1 was and whether the door was open, but it was clear and not disputed that F1 would be able to hear. F1 and Ms Y used slightly different language in their reports to the police. This was a traumatic event for a parent and a carer and immaculate recall is not to be expected. The same is true of the sequence of events, as to which professional was called first following the allegation made. It is a matter of record that the professionals were called, and this is not in dispute.

iii) There was a degree of acrimony between the parents. F1 had left M with a 4 year old to look after and had quickly entered a new relationship and Ms Y soon became pregnant ... After a while F1 and Ms Y became concerned about K. This related to the red 'slap mark' in August 2020 as reported to the police and concerns over her itchy vagina. Both considered abuse to be an option.

iv) That suspicion of abuse does not affect the initial allegation made by K as neither M nor F2 is actively suggesting that this was simply made up by Ms Y and F1. Having heard F1 and Ms Y give evidence I find that K did say what is reported by F1 and Ms Y.

119. I accept the evidence of the school staff in respect of what K said to them and when. Each member of staff has been trained in safeguarding and gave clear evidence of their recollection to the best of their ability. Counsel for F2 focused on the record keeping by the school. Each witness was clear as to how they kept records and how it was fed back to the central system. The late provision of some records was certainly not desirable, but no party sought an adjournment, and I am satisfied that all parties had sufficient time to deal with the records.

120. Counsel for F2 submits that the school record keeping was such that the court should give the records no weight but also in his closing submissions says 'There is little point in going through all the recorded allegations. lt is not in dispute that they were made and recorded'. I am satisfied having heard a number of witnesses from the school that each has properly recorded the information given to them by K. They are properly trained; they are professionals working with children and each explained in evidence what they did.

121. It can be seen from the various allegations made over a number of weeks that K has variously alleged that F2 has digitally penetrated her vagina and anus. She has used different language. She has made reference to '[F2]' being naughty, to being frightened of him and not wanting to see him. It has been suggested that these slightly differing accounts make them less reliable. I find that this is not a reason to discount them in any way. DC S found the consistency and length of time over which the allegations were made was impressive. Variations

must be expected for a child of K's age. No evidence of any coaching of K has been put before the court. I find that K has not been coached.

122. Whilst not putting forward an allegation of coaching Counsel for F2 has suggested that the evidence of K may have been contaminated, in particular:

i) That there had been an acrimonious relationship between her parents, and this was not known by DC S when she started her investigation. I accept DC S's evidence that this was not required during the initial stages.

ii) That K was with F1 and Ms Y between December 2020 and the ABE in February 2021 and that this may have influenced her thinking. DC S was clear that there were good welfare reasons discussed with the social workers to allow K to settle before the process began.

iii) That M discussed adult issues with K especially about the breakup with her father. The connection to this as being a possibility of contamination is not clear.

123. There was vagueness and inconsistencies in the evidence of M and F2 about F2 spending any time alone with K.

i) M said that F2 did not go in to say goodnight to K on his own. F2 said that he may have done sometimes.

ii) M, as reported to professionals at the school felt F2 should have the 'same rights' to spend time with K as Ms Y irrespective of how long he had known K. Insofar as F1's (*sc.* M's) evidence differs from the school, I prefer the reporting of the school.

iii) M disputes that she had told the school that F2 took K out for treats. Again, having assessed M giving evidence and the witnesses from the school, I prefer the witnesses from the school. Put simply the school witnesses are independent.

124. Against the backdrop of F2 and M freely lying about their contact in breach of the written agreement in January, their inconsistencies as to whether F2 was left alone with K, for how long and how frequently, I am satisfied that F2 had ample opportunity to assault K as alleged.

125. I have surveyed the wider canvas, I prefer the account of K and having discounted any other reason for that account, it follows that I find allegations l- 3 against F2 made out to the required standard of proof. F2 was clear in his evidence that he had never inadvertently touched K in the area of her vagina or anus and thus it must follow that allegation 4 is made out, that the touching was sexual.

27. The judge then addressed the allegations against M:

126. I then need to consider the allegations against M. That M was in the room when F2 touched K's vaginal area and allegation 5 'she told him off and pushed him out of the room' and allegation 6 she failed to stop the touching and failed to tell the police. I note the following:

i) I have taken into account M's vulnerabilities.

ii) M accepts that she was very badly affected by the breakup of her marriage and F1's new relationship and his partner's pregnancy.

iii) I accept the concerns of the parenting service and the school that M became somewhat fixated on F1 and then F2 when she met him.

iv) M quickly entered into a relationship with F2 in March 2020. She was vague as to when she introduced F2 but by June 2020 Ms D [the] school recorded that F2 had collected K from school.

v) M in evidence was vague as to whether she would split up with F2 if allegations were made against him.

vi) M was vague in evidence as to why she did not accept what K had said and the upsetting nature of the ABE interviews.

vii) M was prepared to immediately break the working agreement in January 2021 prioritising her need to see F2 over the needs and safety of K.

viii) I accept that K loves her mother and that she wants to see her mother. It is suggested by her Counsel that this is evidence that M did not know about what F2 was doing. I consider this to be too simplistic.

127. I have accepted the evidence of K as reported to the school and with lesser weight at the ABE. K clearly says to her school that M was present when F2 touched her vaginal area and that she pushed him out of the door when he would not leave. She also reported that M was present on an occasion when F2 touched her, and she did not stop him. I accept no reference was made to this by K in her ABE interviews however she has at least on 2 occasions made reference to her mother being there when the assaults took place. This I have considered against the wider background set out in para. 123 above and M's prioritisation of F2. Accordingly, I find, to the required standard of proof, that M failed to protect K by failing to stop F2 assaulting her and by failing to report the incident to the police. Thus, allegation v and vi are made out to the required standard of proof."

28. F2 and M appeal from the findings that relate to them. The local authority seeks to uphold the judgment, while C's Guardian takes a neutral position.

F2's appeal

29. F2's grounds of appeal are that:

(1) The judge correctly stated the law but his application of it to the facts of the case was fundamentally flawed.

(2) There was a deficient analysis of K's initial disclosure.

(3) The reasons for rejecting the possibility of memory contamination were inadequate.

(4) It was wrong to give any weight to the ABE interviews.

(5) K's allegations were wrongly described as having been consistent.

30. On behalf of F2, Mr Crozier submitted that the evidence required a much more detailed analysis. The judge recited the correct legal principles, but he did not apply them. Flagrant deficiencies in the investigation were excused and there was a disparity of approach to the other evidence, with valid criticisms being glossed over.

31. For the local authority, Mr Castlehouse relied upon the unique position of a trial judge making findings of fact. The local authority had conceded departures from the ABE Guidance, but the judge was entitled to attach some weight to the interviews for the reasons he gave at para. 144. K gave some limited information in the first interview by pointing to part of a figurine that she was colouring in, by referring to F2's finger, and by saying where she had been touched and what she had been wearing. The important things were that she had made multiple unsolicited statements to independent, trained professionals, and that the evidence of F2 and M had been untruthful, vague and inconsistent. It was also of significance that K had refused to answer questions on occasions and had spoken of secrets and worries.

32. Counsel developed these submissions, but it is unnecessary and undesirable, as there is to be a rehearing, to document them. Instead, I now set out my reasons for allowing the appeal.

33. First, the evolution of K's statements needed to be charted. The judgment did not do that (so that time during the appeal hearing was spent in constructing a chronology) but instead summarised each witness's evidence in sequence. It then considered the ABE interview process and placed it against a broad account of the other evidence. It would in my view have assisted the judge if he had identified and focused on the chapters of time covered by the evidence. These might conveniently have been arranged under these headings: the background, the first accounts, the ABE process, K's subsequent statements. This approach would have allowed the judge to focus on the situation K found herself in at various stages and to address F2's case effectively.

34. Next, as has been said may times, including by MacDonald J in *Re P (Sexual Abuse - Finding of Fact Hearing)* [2019] EWFC 27:

> "… it is well recognised that it is important, forensically, in a case of alleged sexual abuse, to examine the first point in time at which a child gives an account or accounts of alleged sexual abuse, the precise circumstances in which the account or accounts arose and how those were treated subsequently by those to whom they were made. It is therefore necessary, as I have noted, to consider not only what each of

> the children has said but also, and importantly, the circumstances in which they said it."

Here, the judge recited some of the evidence about K's family situation both before and after F2's arrival. That led him to conclude at para. 118(iv) that F1 and Ms Y suspected abuse before K's initial allegation but that the suspicion of abuse did not affect K's initial allegation as it was not suggested that M nor F2 had made it up. That finding was important, but it is not clear what the judge found about the more difficult question of whether the atmosphere surrounding K and the investigations into her symptoms may have had any influence on what she was reported to have said.

35. Third, and in the same vein, the court needed to make its best assessment of what K was describing. As noted above, she was reported to have spoken about being touched on different parts of the body and in different rooms. There were also fleeting mentions of M having been present. The judge's conclusion that K did say what F1 and Ms Y reported on 22 December did not engage with the difference in the two accounts. At para. 119, when considering later reports from the school he focused on the integrity and training of the staff rather than on the differences or suggested discrepancies in the recorded accounts. The judgment does not contain this analysis. At all events, no weight could be attached to DC S's opinion about K's consistency, particularly when she had so markedly failed to follow guidance.

36. Fourth, and crucially, I consider that the conclusions the judge drew about the ABE interview process undermine his overall assessment. The ABE process is there for a reason. It is designed as a safeguard against unsound findings based on accounts that are unreliable or misunderstood. Of course, the fact that the guidance has not been followed does not mean that findings of abuse cannot be made where the evidence as a whole justifies it. But the worse the breaches of guidance the more careful the court must be.

37. In *Re JB (A Child) (Sexual Abuse Allegations)* [2021] EWCA Civ 46, [2021] 1 FCR 574, Baker LJ drew together the principles from the ABE Guidance and the authorities:

> "11. The importance of complying with the ABE guidance, which is directed at both criminal and family proceedings, has been reiterated by this Court in a series of cases including *TW v A City Council* [2011] EWCA Civ 17, *Re W, Re F* [2015] EWCA Civ 1300, *Re E (A Child)* [2016] EWCA Civ 473, *Re Y and F (Children) Sexual Abuse Allegations)* [2019] EWCA Civ 206 and in the judgments of MacDonald J in *AS v TH and others* [2016] EWHC 532 (Fam) and *Re P (Sexual Abuse: Finding of Fact Hearing)* [2019] EWFC 27. It is unnecessary to repeat at any length the extensive comments set out in some of those judgments. For the purposes of this appeal, the following points are of particular relevance. (Save where indicated, the paragraphs cited are from the ABE guidance.)
>
> (1) "The ABE guidance is advisory rather than a legally enforceable code. However, significant departures from the good practice advocated in it will likely result in reduced (or in extreme cases no)

weight being attached to the interview by the courts." (*Re P (Sexual Abuse: Finding of Fact Hearing)*, supra, paragraph 856)

(2) Any initial questioning of the child prior to the interview should be intended to elicit a brief account of what is alleged to have taken place; a more detailed account should not be pursued at this stage but should be left until the formal interview takes place (paragraph 2.5).

(3) In these circumstances, any early discussions with the witness should, as far as possible, adhere to the following guidelines.

(a) Listen to the witness.

(b) Do not stop a witness who is freely recalling significant events.

(c) Where it is necessary to ask questions, they should, as far as possible in the circumstances, be open-ended or specific-closed rather than forced-choice, leading or multiple.

(d) Ask no more questions than are necessary in the circumstances to take immediate action.

(e) Make a comprehensive note of the discussion, taking care to record the timing, setting and people present as well as what was said by the witness and anybody else present (particularly the actual questions asked of the witness).

(f) Make a note of the demeanour of the witness and anything else that might be relevant to any subsequent formal interview or the wider investigation.

(g) Fully record any comments made by the witness or events that might be relevant to the legal process up to the time of the interview (paragraph 2.6, see also *AS v TH*, supra, paragraph 42).

(4) For all witnesses, interviews should normally consist of the following four main phases: establishing rapport; initiating and supporting a free narrative account; questioning; and closure (paragraph 3.3).

(5) The rapport phase includes explaining to the child the "ground rules" for the interview (paragraphs 3.12-14) and advising the child to give a truthful and accurate account and establishing that the child understands the difference between truth and lies (paragraphs 3.18-19). The rapport phase must be part of the recorded interview, even if there is no suggestion that the child did not know the difference between truth and lies, because "it is, or may be, important for the court to know everything that was said between an interviewing

officer and a child in any case" (per McFarlane LJ in *Re E*, supra, paragraph 38).

(6) In the free narrative phase of the interview, the interviewer should "initiate an uninterrupted free narrative account of the incident/event(s) from the witness by means of an open-ended invitation" (paragraph 3.24).

(7) When asking questions following the free narrative phase, "interviewers need fully to appreciate that there are various types of question which vary in how directive they are. Questioning should, wherever possible, commence with open-ended questions and then proceed, if necessary, to specific-closed questions. Forced-choice questions and leading questions should only be used as a last resort" (paragraph 3.44).

(8) Drawings, pictures and other props may be used for different reasons – to assess a child's language or understanding, to keep the child calm and settled, to support the child's recall of events or to enable the child to give an account. Younger children with communication difficulties may be able to provide clearer accounts when props are used but interviewers need to be aware of the risks and pitfalls of using such props. They should be used with caution and "never combined with leading questions". Any props used should be preserved for production at court (paragraphs 3.103 to 3.112).

(9) "The fact that the phased approach may not be appropriate for interviewing some witnesses with the most challenging communication skills (e.g. those only able to respond "yes" or "no" to a question) should not mean that the most vulnerable of witnesses are denied access to justice". It should not be "regarded as a checklist to be rigidly worked through. Flexibility is the key to successful interviewing. Nevertheless, the sound legal framework it provides should not be departed from by interviewers unless they have discussed and agreed the reasons for doing so with their senior managers or an interview advisor" (paragraph 3.2).

(10) Underpinning the guidance is a recognition "that the interviewer has to keep an open mind and that the object of the exercise is not simply to get the child to repeat on camera what she has said earlier to somebody else" (per Sir Nicholas Wall P in *TW v A City Council*, supra, at paragraph 53)."

38. In the present case there was a wholesale failure to follow a number of these principles. There was a delay in interviewing, while K remained with carers who believed that she had been abused. The pre-ABE visit was not noted at the time, and the record that was then made was of little value, particularly as the conversation was said to have been approached in the same way as the later interviews. Such indications as K may have given at interview were in response to blatantly leading or forced-choice questions from the officer and even from the intermediary. The overall

impression is not of an exercise seeking to understand what if anything K wanted to say, but rather of an attempt to persuade her to repeat something she had already said.

39. In these circumstances, the judge's reasoning at para. 114 does not sustain even the limited weight he attributed to statements made by K during the ABE process. Likewise, although he referred at para. 110 to "the positive side", the matters he listed there do not merit that description. At the retrial, the court will have to form a fresh view of whether the ABE evidence (including the preparatory meeting) can be said to support or detract from the reliability of K's statements.

40. Fifth, and of equal significance, at para. 122 the judge noted but did not respond to the submission that K's various accounts may have been contaminated by a range of pressures. F2's case was that she may have been affected by the adult acrimony, the beliefs of her carers, the suggestive questioning at ABE interview by people in authority, and the anxious attention she received from concerned adults whenever she spoke about F2, whom she had previously described in positive terms. These matters demanded attention but at para. 114(ii) the judge treated statements made after the ABE process began in the same way as statements made before. That was an error of approach.

41. Finally, it is unclear what conclusions the judge drew from F2's lies about being at M's home. At para. 115, he gave himself a *Lucas* warning and concluded that F2 had lied deliberately to deceive (para. 115), but that took the matter no further in the absence of an entirely different finding the lie was told in order to conceal the fact that he had sexually abused K.

42. I would therefore allow F2's appeal on the basis that the judge's survey of the evidence lacked the necessary rigour. I again emphasise that this does not indicate any view about the outcome of the rehearing, at which the court will independently reach its own conclusions.

M's appeal

43. M's grounds of appeal are:

    (1) (As Ground 1 above.)

    (2) The judge failed to make allowance for M's cognitive impairment.

    (3) The evidence did not contain an adequate basis for the finding that M was present during abuse or failed to protect K from it.

44. Mr Higginson and Mr Castlehouse join issue on whether the judge's reasoning sustained his conclusion.

45. My starting point is that K said nothing about M in either ABE interview. The positive case against M depended on two statements in particular:

    1) To Ms V on 9 February 2021: "I hided under my duvet when he came in but he found me. Mummy came in and told him off but he wouldn't go to his room so mummy pushed him out the door..

2) To Ms G two days later: "When he did it in my room once mummy was there but she didn't stop him".

For completeness, DC S noted that K had said on 23 December 2020 and on 28 January 2021 that M had "been there" or was "present", but no other detail is recorded. Much later, in June 2022, M was described as being "downstairs cooking tea".

46. The judge's findings were that M was present in K's bedroom on at least one occasion when F2 touched K; that she "told F2 off", told him to leave and pushed him out of the room when he did not leave voluntarily. She failed to protect K by not stopping F2 from touching her in her presence and not reporting him to the police.

47. The allegations against M were striking in portraying her as standing by when K was being abused and they self-evidently required careful analysis. In my view, the judge's reasoning at paras. 123, 126 and 127 fell short of what was necessary to justify such findings, for these reasons:

1) As K said nothing about M in the ABE interviews, the court was not able to assess her statements for itself and was bound to approach them cautiously.

2) This young, developmentally delayed child gave the barest of accounts of her mother's presence on an unspecified date or dates some months previously. The judge's description of the statements as "clear" did not acknowledge this.

3) The statements at school were made within days of the pre-ABE discussion and the first ABE interview, with the possibility that those discussions had influenced K.

4) In those circumstances, the evidence on which the judge relied was an insufficient basis for a finding of this nature in the absence of significant reinforcement from elsewhere.

5) The judge sought that reinforcement in the nature of the relationship between M and F2. He found that M was vulnerable and fixated on F1 before quickly starting a relationship with F2, and that she prioritised her relationship with F2 in the senses described in paras. 123 and 126: she had broken the written agreement and lied about it, she was vague about F2's opportunity to have abused K and about whether she would end the relationship if findings were made.

6) These findings undoubtedly damaged M's credibility, but the judge did not explain how lies and loyalty to F2 provided positive support for the specific allegations against her. M's vulnerability and attitude towards past and present relationships were very general matters that did not particularly point towards guilt. Likewise, considering M's cognitive profile, her response to being asked in evidence whether she would separate from F2 if findings were made against was unlikely to shed light on the matter, particularly as counsel very fairly agree that, rather than being vague, she was so upset that she could not give an answer.

7) Looking at the matter in the round, none of these considerations were individually or collectively capable of bolstering K's very brief and non-specific statements to the extent that the court could safely find the allegations proved. As the evidence will not change, it would not be right to remit for a rehearing.

Outcome

48. I would therefore allow the appeals, remit the allegations against F2 for rehearing by a judge to be nominated by the appropriate Family Division Liaison Judge, and dismiss the specific allegations against M, so that they will no longer form part of the ultimate welfare decision about C's future.

Lady Justice King:

49. I agree.

Lord Justice Lewison:

50. I also agree.