

ON APPEAL TO THE CIRCUIT JUDGE  
FROM DEPUTY DISTRICT JUDGE DUNCAN WATSON

Tuesday, 8 June 2021

Before

HIS HONOUR JUDGE AHMED

Re A (Domestic abuse: incorrect principles applied)

The Appellant mother was represented by Dr Charlotte Proudman of Counsel

The Respondent father appeared in person assisted by his McKenzie Friend, Mr P Kedge

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APPROVED JUDGMENT  
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*This judgment was delivered in private. The judge has given leave for this approved version of this 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.*

**HHJ AHMED:**

1. This is an appeal to the Circuit Judge against the order of Deputy District Judge Duncan Watson following a fact-finding hearing in a contact dispute between parents. I allow the appeal and I set aside the order of Deputy District Judge

Watson. I direct a re-hearing of the fact-finding which must be listed before a different judge for reasons which can be inferred from the Judgment in this appeal.

2. The mother had made allegations of domestic abuse against the father. Any findings made or not made by the court were likely to be relevant to the nature of future contact between father and the child.
3. I shall call the child A for anonymity. A was 7 years old at the time of the fact finding hearing. That hearing took place over a period of 2 days on the 4<sup>th</sup> and 5<sup>th</sup> of November 2020 with a reserved Judgment being delivered on 23 November 2020. The mother's allegations were dismissed.
4. The mother applied for permission to appeal which I granted.
5. Dr Proudman made thorough and considered submissions, for which I am grateful. The father did his best to make submissions, but they were of no real relevance to this appeal.
6. I will begin this Judgment with some general observations.
7. The new Domestic Abuse Act 2021 came into force as recently as 29 April 2021. It makes far-reaching changes to the way in which domestic abuse is addressed by the family Court. In addition, there is important guidance in *Re H-N* [2021] EWCA Civ 448.
8. Cases involving allegations of domestic abuse come before the Family Court in large numbers. However, there are relatively few decisions reported that show how the Family Court operates and how decisions are reached. This case is by no means indicative of the way in which Family Court judges approach the issue of domestic abuse.
9. In this case, fundamental principles were not implemented and principles, and outdated attitudes which have no place in the Family Court, were imported. Whilst the judge referred to and even set out some of the provisions of Practice Direction 12J of the Family Proceedings 2010, he failed to address and to follow them. In particular, he failed to identify and apply the correct definition of domestic abuse.
10. Domestic abuse is defined by section 1 (1) of the Domestic Abuse Act 2021 as being abusive behaviour between people personally connected to each other. Behaviour is abusive if it consists of any of the following: physical or sexual abuse, violent or threatening behaviour, controlling or coercive behaviour, economic abuse, psychological, emotional, or other abuse. It does not matter whether the behaviour consists of a single incident or a course of conduct. The reference to 'other abuse' encompasses a wide range of other forms of abuse which are not relevant to this appeal.

11. Under section 3 of the Domestic Abuse Act 2021, a child who sees or hears, or experiences the effects of abuse between his or her parents is considered a victim of domestic abuse. The description by the judge of such abuse as being merely 'inappropriate parenting' was inadequate as it minimised the father's alleged conduct.
12. In this case there was a constellation of failures in the judge's consideration of the domestic abuse issue, including whether certain conduct constituted abuse.
13. The court is dealing with *abuse* and its potential gravity is not to be diluted by the abuse taking place in a domestic setting.
14. I will now consider the specific grounds of appeal, but it is not necessary for me to address each and every ground.
15. The first ground of appeal is that the judge was wrong to apply criminal principles in his consideration of alleged physical abuse of the mother. After the parents separated from each other, they went on holiday with A. Whilst that is an unusual thing for separated parents to do, the mother says that it was to encourage contact and to enable it to take place. Whilst on holiday, there was an altercation between the parents. The allegation was that the father took hold of mother's hand and broke it.
16. The judge approached this case on the basis of a criminal definition of what he described as a 'count' of assault. The word 'count' comes from the description of charges on the indictment in the Crown Court. It is not a word which is used in the Family Court unless referring to an indictment from criminal proceedings.
17. Deputy District Judge Watson identified a number of different kinds of assault and referred to the defence of self-defence. He went into great detail about the criminal principles to be applied. These included the circumstances in which reasonable force could be used in self-defence if a person apprehends an imminent assault of them. He said: "...now, a criminal analysis has some merit, but it also is not the entire picture." He carried out such a criminal analysis. That is demonstrated by his reference to its not being necessary for a jury to weigh to a nicety the exact amount of force to be used in self-defence. Reading those passages of the Judgment has as a whole, it appears that the judge imposed a criminal standard of proof upon the mother, despite saying that he was applying the standard of the balance of probabilities. That is shown in particular by his statement: "I do not find that the father was guilty of an assault on the mother." He adds "... We must look at this as being wider than just criminal liability". However, the judge failed to carry out a wider analysis than criminal principles would allow.
18. McFarlane LJ (as he then was) stated in a case where the father had killed the mother, *R (Children)* [2018] EWCA Civ 198:

“Criminal law concepts should not be applied in family hearings. The purpose of the family tribunal is not to establish guilt or innocence but to establish the facts in as far as they are relevant to inform welfare decisions regarding the children. It may be important for the children to know whether the surviving parent's actions were reasonable, as well as the potential for future harm to them (whether physical, emotional or psychological) if that parent continued to be involved in their care. It will often be necessary to have a fact finding to determine those matters, but the language used to phrase the facts sought and the judgment should avoid direct reference to criminal law concepts or principles such as 'unreasonable force', 'loss of control' or 'self-defence'.”

19. It follows that criminal concepts such as the elements needed to establish guilt of a particular crime or a particular defence have neither relevance nor function within the family court process.
20. The judge referred to and relied upon what he considered to be the absence of violence during the relationship. He wrongly gave this substantial significance when assessing the evidence in respect of the facts that he had to decide. It was not an established fact that there had not been any violence. In any event, any absence of violence was not a relevant factor in the decision-making process. He says in terms: "... and I do mean with violence as opposed to abuse..." By that approach, he was considering violence to be a more serious form of abuse than other forms of abuse. The reality is that some injuries from physical abuse can heal. The psychological effects of emotional abuse can last forever.
21. Deputy District Judge Watson refers to the incident as being "highly situational". He gives no definition of this phrase, nor does he explain its relevance. He says at paragraph 58 of the Judgment: "The mother and father must have felt reasonably comfortable in each other's presence for this to be achieved." He was referring to their going on holiday together. The fact of their going on holiday together could not assist him on whether there was domestic abuse once they were on holiday. The mother's decision to go on holiday with the father can have nothing at all to do with whether domestic abuse took place whilst on that holiday. The judge's reasoning process was therefore flawed.
22. It was alleged by the mother that the father shouted at C, the 15-year-old son of the father from another relationship. It was alleged that he called him "a little shit". The judge found that the father shouted at and berated C and that he did call him what was alleged. He made a finding that it was appropriate to reprimand the teenager in that way, describing it as inappropriate parenting, rather than abuse. He found that A was present and exposed to the father's anger and temper. He added "even if the cause of that anger and temper may have been reasonable".

He said that the court was not looking for perfect parenting standards. The judge referred to an incident where apparently C had broken wind 'on the father'. The judge said, "one might imagine a few expletives would be fairly reasonable in such circumstances." That was wholly inappropriate and not what one may expect a judge of the Family Court to condone.

23. I do not need to consider grounds 4 and 5. I will consider ground 6. Practice Direction 3AA, paragraph 1.3, of the Family Proceedings Rules 2010 imposes a duty on the court, as well as on *all* parties to identify at the earliest possible stage in the proceedings any party or witness who is vulnerable.
24. Paragraph 1.4 provides: "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."
25. None of this was done by the Deputy District Judge, nor by any party. Ultimately, it was the duty of the judge to have considered this issue. However, nothing was done. I find that the Deputy District Judge was wrong in failing to recognise and identify the mother as a vulnerable witness. He was aware that she was a complainant of domestic abuse and thus a potentially vulnerable witness. He failed to provide special measures to ensure that she was able to give her best evidence. There would have been no prejudice to the father from any such measures. He allowed the father as a litigant in person and alleged abuser of the mother to cross examine her. The judge failed to address Practice Direction 3AA, paragraph 3.1, which imposes a duty to ensure that the witness can attend the hearing without significant distress. The mother cried during the father's cross examination of her. There was no screen put in place. No special measures were considered. There was no ground rules hearing. Whilst mother was legally represented, there was a duty on the judge to have considered whether and what special measures were necessary.
26. The final matter with which I need to deal in this appeal is the extent to which the mother was restricted in the presentation of her allegations of abuse. Originally magistrates decided to restrict the allegations by the mother to just one. That was an alleged incident of physical violence on 24 August 2019. There was a successful appeal to the circuit judge against that order. The circuit judge increased the number of allegations to [45](#). It was common for judges to impose such limitations on the number of allegations. However, the restriction made it difficult for the mother to present a case properly on the basis of a pattern of behaviour over a period of time. Nuanced appreciation of the mother's allegations was lost.
27. The way in which the mother ~~put her case~~ wished to put her case was this: "I'm concerned for [A's] emotional well-being and physical safety now and in future. The applicant has a quick and unpredictable temper exacerbated when he is under

stress. He is bullying and abusive. The applicant is controlling and when he does not get his way becomes belligerent in manner, verbally nasty and physically aggressive.”

28. As was said in the *LG (Re-opening of fact-finding)* [2017] EWHC 2626: “Not infrequently, a party alleging domestic violence is directed to identify a few allegations as specimen allegations on which to seek findings. In taking this course however, parties and the court must be careful to ensure that significant issues are not overlooked. Sometimes a pattern of harassment and other forms of domestic abuse is only discernible by conducting a broader examination of the allegations.” Unfortunately, that did not happen in this case and in that respect, and the other matters set out in this Judgment on appeal, the court fell into error such that the Order made by the judge cannot stand.

*Appeal allowed*

*Fact finding hearing to be reheard by a different judge not below Tier 3*

*Order of Deputy District Judge Watson dated 23 November 2020 be revoked*

His Honour Judge Farooq Ahmed

8 June 2021