



Neutral Citation Number: [2022] EWHC 113 (Fam)

Case No: FA-2020-000207

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

ON APPEAL FROM THE FAMILY COURT SITTING AT DERBY
Order of HHJ Williscroft dated 4th June 2021
DE19P00318

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:20/01/2022

Before :

MRS JUSTICE ARBUTHNOT

Between :

KATE ELIZABETH GRIFFITHS

Appellant

- and -

ANDREW JAMES GRIFFITHS

First
Respondent

- and -

D (A CHILD)
(by the Children's Guardian, Louise Barton)

Second
Respondent

Griffiths v Griffiths: (Guidance on Contact Costs)

Dr Charlotte Proudman (instructed by **Nelsons Law**) for the **Appellant**
Mr Harry Nosworthy (pursuant to the Direct Access Scheme) for the **First Respondent**
Mr Timothy Bowe (instructed by **Moseleys**) for the **Second Respondent**

Hearing dates: 27th & 28th October 2021

Draft Judgment: 13th January 2022

Recusal Judgment: 9th December 2021

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Approved Judgment**Mrs Justice Arbuthnot :****Introduction**

1. On 20th August 2021, the mother’s application for permission to appeal was granted by Lieven J in relation to four grounds of appeal. A hearing took place in front of me on 27th and 28th October 2021. A week later the respondent asked that I recuse myself from the case on the grounds of bias or perceived bias. After some correspondence I refused, gave a short judgment and gave the respondent time to appeal that decision. That decision has not been appealed and it is now out of time.
2. The substantive appeal of Kate Griffiths was against parts of a Child Arrangements Order made by HH Judge Williscroft sitting at Derby Family Court conducting a Dispute Resolution Appointment (“DRA”) on 4th June 2021 in relation to proceedings brought by the father to enable him to have contact in a supervised setting with the mother and father’s child, D, who was born in 2018.
3. For convenience I will refer to the parties as “the father” and “the mother”.
4. I have been provided with a folder of documents including the skeleton arguments and the position statements of the parties. I have also been assisted by written findings of fact dated 26th November 2020 and the transcript of the *ex tempore* judgment of the DRA of 4th June 2021. Other evidence includes statements of the parties at various stages of the proceedings, a Cafcass Section 7 report and separate submissions on the payment of contact costs. Lieven J permitted a risk assessment produced by a contact centre to be relied upon at the appeal. It had not been before HH Judge Williscroft.
5. The mother, father and guardian were all represented. Mr Nosworthy who was instructed by the father by direct access the day before the hearing was very helpful and had clearly worked through the night to get on top of the issues to be considered by the court. Dr Proudman had produced detailed and well-researched arguments. Mr Bowe had a lesser role but was of particular assistance to the court. I am grateful to all three.

Background

6. In July 2018, the parties separated. The mother left the family home with D. The father then had contact with D on an *ad hoc* basis. The father had various mental health difficulties which led to his hospitalisation for a time. On 9th March 2019, supervised contact started, by agreement, on alternative Sundays.
7. In June 2019 the father applied for a child arrangements order.
8. On 31st July 2019, District Judge Parker ordered supervised contact was to take place at the contact centre for two hours a week (“the July 2019 order”). This was expressed as being in the best interests of D. In August 2019, the father was paying the cost of the two hours contact a week in the contact centre.
9. On 24th March 2020, contact was suspended during the lockdown.
10. On 26th March 2020, the father applied for the cost of the contact centre to be met by the mother as he was unemployed and he said the mother was earning a substantial salary. By then the mother had become a Member of Parliament.

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11. An order of 4th May 2020 varied the contact during lockdown to two 30-minute sessions of virtual contact every week, on a Tuesday and a Saturday. The order said that when lockdown was lifted then contact was to resume at the contact centre as per the July 2019 order.
12. The costs of the contact centre were considered on 4th May 2020. The order of July 2019 was amended so that contact costs were to be shared equally between the father and mother.
13. On 6th September 2020, direct contact was reinstated.

Fact-finding

14. Between 10th and 13th November 2020, a fact finding took place. A clear, detailed and impressive decision was handed down by HH Judge Williscroft on 27th November 2020.
15. The Judge found the allegations the mother had made against the father proved. These included her rape and sexual abuse, a pattern of him controlling and behaving coercively towards her and her being physically and verbally abused by him. There were also findings that the father physically abused a relative.
16. The description of the sexual abuse was the following. The father used pressure on the mother to get her to engage in certain sexual acts and texting for his sexual pleasure. He ensured that the mother submitted to his sexual demands.
17. The rapes commenced when the mother was asleep. The father did not attempt to obtain the consent of the mother but went on to have sexual intercourse with her regardless. The Judge rejected the father's contention that these events had not taken place and that the allegations had been made to try and get him to abandon his application for contact. The various forms of abuse had gone on for about ten years.
18. There was one finding of abuse of D. The father had a bad temper and suffered from a lack of self-control. This showed in the way that on one occasion when he was tired, he shouted at D aged three weeks to "shut the fuck up" when D was crying. This was atypical behaviour of the father towards D.
19. With a lockdown starting up again, the father's last contact with D in a supervised contact centre was on 27th December 2020.
20. A section 7 report from Cafcass dated 12th March 2021, recommended that the contact arrangements continue as D was said to have enjoyed time in "a safe and controlled environment". The Cafcass officer said she would not have recommended contact starting up had contact not been already happening.
21. Cafcass also said that the contact centre should undertake a risk assessment. If the centre felt it was able to supervise contact safely, then the guardian would support face-to-face contact resuming.

The 4th June 2021 hearing

22. After the fact-finding hearing in November 2020, HH Judge Williscroft attempted to hold a DRA in March 2021 but in the event the case was not heard until 4th June 2021.

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23. On 4th June 2021, at a DRA, the mother applied to suspend direct contact due to the impact it would have on D and on herself. This was to be until after a psychological report was prepared on the father.
24. That report was initially due on 5th November 2021 although since then due to a problem with legal aid rates an expert has not been identified.
25. On 4th June 2021, HH Judge Williscroft read the written submissions and listened to argument in a hearing which because of pressure of other work was listed for an hour. She also had the advantage of having heard the fact-finding in November 2020.
26. She ordered that once a week indirect contact via Facetime should take place, direct contact should start up again once the centre manager had written a risk assessment and that an expert psychologist should be instructed to report on the father for a later hearing in November 2021.
27. I will consider the detail of 4th June 2021 judgment later.

Grounds of appeal

28. By 11th June 2021, Dr Proudman for the mother, had applied for permission to appeal. Counsel described the risk assessment provided by the contact centre as “shoddy” and “poor”. The risk assessment referred to the “perceived nature of the risk” and to “allegations” rather than to the abuse that had been found to have taken place, including the serious sexual abuse as described above. The report writer also accepted as fact that the father had recovered from his earlier mental health concerns. Dr Proudman relied on the following four grounds of appeal:
 29. **Ground 1:** the Judge was wrong to order that the mother, a victim of rape, share the costs of supervised contact with her rapist, the father. This was wrong in principle, against public policy and breached the mother’s and the child’s Articles 8 and 14 rights. It is wrong in law for the family courts to interpret widely section 11(7) of the Children Act 1989 to the extent that a party is directed to pay for the costs of contact.
 30. Overlapping with Ground 1 was **Ground 2:** the law as presently interpreted by the family courts in permitting a rape victim to be ordered to pay a rapist’s contact costs was in breach of the mother’s Articles 8 and 14 Convention rights.
 31. **Ground 3:** the Judge was wrong to order direct contact and did not apply paragraph 36 of Practice Direction 12J, in failing to consider the short, medium, and long-term harm of contact on the mother and the child and the judge failed to consider at all the father’s capacity to appreciate the effect of past domestic abuse as per paragraph 37(e) of PD12J.
 32. **Ground 4:** the Judge was wrong in failing to apply paragraph 40 of PD 12J and to explain by way of reference to the welfare checklist and the factors in paragraphs 36 and 37 or otherwise why she took the view that domestic abuse having been proven, contact with the perpetrator would not expose the child to the risk of harm and was beneficial for the child.

Permission to appeal

33. In her decision giving the mother permission to appeal, Lieven J said “the case raises issues of public importance as there is no case law on contact costs; and whether a victim of

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domestic abuse should contribute to the costs of maintaining the child's contact with the perpetrator of that abuse. The mother's arguments are arguable".

34. Lieven J also said that "the issues as to the circumstances in which contact should continue when there has been a fact-finding hearing is one where there is not much case law".
35. Lieven J was asked by the mother to stop all contact between the father and D. She refused to do so and ordered that indirect contact should continue.

Appeals: The Court's Approach

36. The role of the appellate court and its approach to appeals is determined by the provisions of the Family Procedure Rules 2010 ("FPR") and by case law.
37. The procedure and rules concerning appeals test are set out in FPR rule 30.12 which provides as follows:

"(1) Every appeal will be limited to a review of the decision of the lower court unless –

(a) ... or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

(2) Unless it orders otherwise, the appeal court will not receive –

(a) oral evidence; or

(b) evidence which was not before the lower court.

(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.

(4) ...

(5) ..."

38. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360.
39. I confine myself to one short passage (at page 1372):

"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the Judge gave in this case. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the Judge knew how

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he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the Judge by a narrow textual analysis which enables them to claim that he misdirected himself."

40. My duty is to identify the essential elements of the case and to deliver reasons which enable the parties to understand why I have reached the conclusions and made the orders I have. The overriding objective in FPR rule 1.1 applies as much to the appeal process as to other applications under the FPR and I must therefore seek to determine this application justly but also proportionately.

Arguments and discussion

41. In my judgment the grounds are better ordered if I consider first whether in principle a court has the power to order that a party pay for contact under section 11(7) of the 1989 Act. Second, I will consider whether the Judge was wrong to order direct contact in the particular circumstances of this case and third, I will consider whether a victim of abuse should pay the costs of contact for the abuser to have contact with the parties' child.

Question 1

42. The first question is whether section 11(7) of the 1989 Act allows for the payment of contact expenses.

Argument

43. Dr Proudman's argument (as set out in her Ground 1) was that it was wrong in law for the family courts to interpret widely section 11(7) of the 1989 Act as allowing for the payment of contact expenses. The section did not allow the court to make that order.
44. Dr Proudman in her skeleton accepted there was no authority on the payment of costs of contact in the circumstances of this case. She relied on *D (Children)* [2016] EWCA Civ 89, where an order under section 11(7) of the 1989 Act had been made to pay an independent social worker. This resulted in a contractual dispute that came before Baker LJ as he now is. Dr Proudman in her argument quoted from paragraph 55 of the case that: "Although s11(7) enables the court, when making an order for contact, to specify conditions as to payment of the costs of supervision, it does not in my judgment invest the court with jurisdiction to resolve a subsequent dispute about these costs, at least when the dispute is with a non-party".
45. Her argument was that case was authority for the contention that the discretion given to the court by section 11(7) was being interpreted too widely. Dr Proudman argued that it did not make sense that the family court which had no jurisdiction in private law proceedings to order a party to pay child maintenance, had jurisdiction to order a party to pay contact expenses.
46. Dr Proudman's contention was opposed by counsel for the father and the guardian.

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Discussion

- 47. Section 11 sets out the general principles to be considered by a court whenever a question of making a section 8 order arises:
- 48. The relevant parts of section 11 are as follows:

“11 General principles and supplementary provisions.

(1) In proceedings in which any question of making a section 8 order, or any other question with respect to such an order, arises, the court shall (in the light of any provision in rules of court that is of the kind mentioned in subsection (2)(a) or (b)) —

- (a) draw up a timetable with a view to determining the question without delay; and
- (b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to.

(2) Rules of court may—

- (a) specify periods within which specified steps must be taken in relation to proceedings in which such questions arise; and
- (b) make other provision with respect to such proceedings for the purpose of ensuring, so far as is reasonably practicable, that such questions are determined without delay.

(3) Where a court has power to make a section 8 order, it may do so at any time during the course of the proceedings in question even though it is not in a position to dispose finally of those proceedings.

(4)

(5)

(6)

(7) A section 8 order may—

- (a) contain directions about how it is to be carried into effect;
- (b) impose conditions which must be complied with by any person—
 - (i) who is named in the order as a person with whom the child concerned is to live, spend time or otherwise have contact;
 - (ii) who is a parent of the child ...;

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- (iii) who is not a parent of his but who has parental responsibility for him; or
- (iv) with whom the child is living,

and to whom the conditions are expressed to apply;

- (c) be made to have effect for a specified period, or contain provisions which are to have effect for a specified period;
- (d) make such incidental, supplemental or consequential provision as the court thinks fit.”.

49. The relevant part of section 8 of the 1989 Act is as follows:

“8 Child arrangements orders and other orders with respect to children.

(1) In this Act —

"child arrangements order" means an order regulating arrangements relating to any of the following—

- (a) with whom a child is to live, spend time or otherwise have contact, and
- (b) when a child is to live, spend time or otherwise have contact with any person;

...

(2) In this Act “a section 8 order” means any of the orders mentioned in subsection (1) and any order varying or discharging such an order.

...”

50. Section 1 of the 1989 Act reads as follows:

“1 Welfare of the child.

(1) When a court determines any question with respect to—

- (a) the upbringing of a child; or
- (b)

the child’s welfare shall be the court’s paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

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(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

(2B) In subsection (2A) “involvement” means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that—

- (a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or
- (b)

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

(6) In subsection (2A) “parent” means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned—

- (a) is within this paragraph if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm; and

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(b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.

(7) The circumstances referred to are that the court is considering whether to make an order under section 4(1)(c) or (2A) or 4ZA(1)(c) or (5) (parental responsibility of parent other than mother).”.

51. Section 11(3) of the 1989 Act sets out the power of a court to make a section 8 order at any time during the course of the proceedings even if it is not a final hearing. Section 11(7) says that a section 8 order may contain directions about how the section 8 order is to be carried into effect; it may impose conditions in relation to contact; the section 8 order may be made to have effect for a specified period or for the provision to have effect for a specified period. Finally, a section 8 order may make such incidental, supplemental or consequential provisions as the court thinks fit (section 11(7)(d)).
52. It is clear that section 11 sets out the wide powers of a court to make directions to give effect to section 8 orders. Section 11 is concerned about delay for the child, the importance of a timetable for the child, the power to make the decision is given to the court “at any time during the course of the proceedings in question even though it is not in a position to dispose finally of those proceedings”.
53. Section 11(7) enables a section 8 order to contain directions about how it is to be carried into effect. There is nothing said to reduce the ambit of this permission. The section 8 order may impose conditions which must be complied with. There is no mention in the 1989 Act of what sort of conditions might be thought to be appropriate. Finally, section 11(7)(d) gives a very wide-ranging power to the court that of making “such incidental, supplemental or consequential provisions as the court thinks fit”.
54. The case of *D (Children)* (above) relied on by Dr Proudman is an example of a situation where the court did not consider an order for the payment of an independent social worker could not be made under section 11(7); it was the consequent dispute about the costs involving a non- party that could not be determined by the family court.
55. In my judgment, it is clear from the section that it was intended for the court to have a wide discretion to enable it to give the directions the court felt appropriate bearing in mind that the welfare of the child is the court’s paramount consideration (section 1 of the 1989 Act above). Section 11(7) recognises that it is impossible to predict and legislate for the varied family circumstances that come before the courts.
56. I find that an order for a party to pay the costs of contact comes within the wide ambit of what is permitted by section 11 of the Children Act 1989.
57. The answer to the first question is yes, the court has jurisdiction to order a party to pay contact expenses.

Question 2

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58. The second question has two parts. The first is whether the Judge was wrong to continue an order for direct contact after the finding of abuse and the second was whether she failed to consider the welfare checklist and PD12J appropriately.

Argument

59. I take these arguments from Dr Proudman’s skeleton argument on grounds 3 and 4 which overlap. She contends that HH Judge Williscroft was wrong to continue an order for direct contact. The Judge failed to consider the welfare checklist and failed to apply paragraphs 36, 37 and 40 of the Practice Direction 12J (“PD12J”).
60. Dr Proudman contends that HH Judge Williscroft should have explained why she took the view that domestic abuse having been proven, contact with the perpetrator would not expose D to the risk of harm and was beneficial for the child. Dr Proudman submitted that it was wrong of the court to find that contact should simply continue because it was ordered before the real risks posed by the father were known. She questioned why the mother should have had to relive the abuse in the fact-finding hearing if there was not going to be any change to the contact arrangements.
61. As Dr Proudman put it in her skeleton argument “The landscape has significantly changed and as a result so must the contact arrangements. The risk of harm posed to [D] has been put into sharp and acute focus with the court’s judgment, as has the impact of contact upon the mother, yet the court has wholly failed to address this” (C18 paragraph 65). The court should have considered section 1(3) of the 1989 Act and PD12J and failed to.
62. Dr Proudman submitted that the Judge “bizarrely found” (C19 paragraph 66) indirect phone contact would have a detrimental impact on the mother whilst direct contact would not.
63. It was wrong, Dr Proudman contended, for direct contact to take place before a risk assessment had been carried out by an expert. The risk assessment carried out by the contact centre was not robust enough, a criticism which was endorsed by the guardian (see below).
64. Mr Nosworthy submitted that the supervised contact in the centre was long established. It was an accredited centre with a “good” rating from Ofsted. The contact centre manager was appropriately qualified and experienced. He contended that the mother had never raised any concerns about the quality of care at the centre and significantly the centre had supervised hundreds of hours of contact between the father and the child.
65. Mr Nosworthy explained that the risk assessment conducted by the centre had been greatly delayed but when it was received it made clear that in-person contact between the child and the father was safe to proceed. The mother then refused to allow direct contact to take place.
66. The contact centre manager had produced the risk assessment in the light of reading HH Judge Williscroft’s fact-finding judgment and after speaking to the guardian. Mr Nosworthy pointed out that the reports of the relationship between the father and D are glowing and at no stage have there been any concerns expressed about the father’s behaviour.

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67. The father had accepted the conclusions reached by the judge save as to the rape findings. He had apologised for the pain that he had caused the mother. He accepted his behaviour was wrong. He had undergone two parenting courses, one of which is the Triple P “Positive Parenting Programme” online and one the “Happier Parenting” course which took six weeks and was one-to-one.
68. The guardian represented by Mr Bowe took the view that the order for direct contact should be set aside as the contact centre’s risk assessment was not sufficient to enable that to take place. There should be no requirement to have a pro-contact/contact at all costs approach when very serious findings of domestic abuse, perpetrated over a number of years, had been found. D was at the heart of any evaluation but until the child’s views are obtained with careful reference to the welfare checklist and PD12J and the expert report had been received “any balancing exercise would be incomplete” (Guardian’s Position Statement page C39 paragraph 23).

Discussion

69. The abuse found proved in this case is very serious and it continued for about ten years. Any abuse within a family is particularly serious as it affects not just the immediate victim of the behaviour but also any children who are present or become aware of it or whose primary carer suffers abuse which affects the way they care for the children.
70. The effect of the abuse not just on the victim of the behaviour but on other family members has become increasingly recognised in recent years and courts are better trained and more experienced at dealing with it. The definition of abuse has widened considerably and been updated to reflect current views on the damage abuse causes to members of a family including to very young children who may once have been thought not to have been aware of the abuse if they had not witnessed it but have experienced its effects.
71. Practice Direction 12J sets out what the court is required to do in any case where domestic abuse is alleged, admitted or proven or there is other reason to believe that the child or a party has experienced it.
72. I set out the paragraphs of PD12J below which are particularly relevant to this appeal.
73. Domestic abuse is defined in PD12J paragraph 3. I set out the relevant parts of the definition below as amended recently by the Domestic Abuse Act 2021 (the 2021 Act):

“Interpretation**3**

For the purpose of this Practice Direction “the 2021 Act” means the Domestic Abuse Act 2021;

...

“coercive behaviour” ...means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;

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“controlling behaviour” means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour;

“development” means physical, intellectual, emotional, social or behavioural development;

“harm” means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another, by domestic abuse or otherwise;

“health” means physical or mental health;

“ill-treatment” includes sexual abuse and forms of ill-treatment which are not physical;

...; and

“victim of domestic abuse” includes, but is not limited to, a child who is a victim of domestic abuse by virtue of section 3 of the 2021 Act, which provides that-

“Children as victims of domestic abuse

3.- (1) This section applies where behaviour of a person (“A”) towards another person (“B”) is domestic abuse.

(2) Any reference in this Act to a victim of domestic abuse includes a reference to a child who—

(a) sees or hears, or experiences the effects of, the abuse, and

(b) is related to A or B.

(3) A child is related to a person for the purposes of subsection (2) if—

(a) the person is a parent of, or has parental responsibility for, the child, or

(b) the child and the person are relatives.

(4) In this section— “child” means a person under the age of 18 years; “parental responsibility” has the same meaning as in the Children Act 1989 (see section 3 of that Act); “relative” has the meaning given by section 63(1) of the Family Law Act 1996.”

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3A Reference is made at various points in this Practice Direction to making findings of fact in relation to domestic abuse. It should be noted that Part 3A FPR makes provision in relation to victims of domestic abuse in the specific context of participation in proceedings and giving evidence. In that context, it is not necessary for the court to make findings of fact in relation to domestic abuse before assuming that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, relative of another party, or a witness in the proceedings: see rule 3A.2A FPR.

74. The general principles are set out at paragraph 4:

“4

Domestic abuse is harmful to children, and/or puts children at risk of harm, including where they are victims of domestic abuse for example by witnessing one of their parents being violent or abusive to the other parent, or living 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 and being victims of domestic abuse and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents.”

75. What the court must consider is set out at paragraphs 5 and 6:

“5

The court must, at all stages of the proceedings, and specifically at the First Hearing Dispute Resolution Appointment ('FHDRA'), consider whether domestic abuse is raised as an issue, either by the parties or by Cafcass or CAF/CASS Cymru or otherwise, and if so must –

- identify at the earliest opportunity (usually at the FHDRA) the factual and welfare issues involved;
- 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 arrangements order and, if so, in what terms;
- give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly;
- ensure that where domestic abuse is admitted or proven, any child arrangements 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 the risk of further harm; and

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- ensure that any interim child arrangements order (i.e. considered by the court before determination of the facts, and in the absence of admission) is only made having followed the guidance in paragraphs 25–27 below.
- In particular, the court must be satisfied that any contact ordered with a parent who has perpetrated domestic abuse does not expose the child and/or other parent to the risk of harm and is in the best interests of the child.

6

In all cases it is for the court to decide whether a child arrangements order accords with Section 1(1) of the Children Act 1989; any proposed child arrangements order, whether to be made by agreement between the parties or otherwise must be carefully scrutinised by the court accordingly. The court must not make a child arrangements order by consent or give permission for an application for a child arrangements order to be withdrawn, unless the parties are present in court, all initial safeguarding checks have been obtained by the court, and an officer of Cafcass or CAFCASS Cymru has spoken to the parties separately, except where it is satisfied that there is no risk of harm to the child and/or the other parent in so doing.”

Before a fact-finding and where abuse is not admitted

76. Paragraphs 25 to 27 of PD12J, apply to domestic abuse before a fact-finding has taken place which is not the situation in this case. Those paragraphs make it clear that a court should not make an interim child arrangements order if it has given directions for a fact-finding hearing unless it is in the interests of the child to do so “and that the order would not expose the child or the other parent to an unmanageable risk of harm (bearing in mind the impact which domestic abuse against a parent can have on the emotional well-being of the child, the safety of the other parent and the need to protect against domestic abuse including controlling or coercive behaviour)”.
77. Paragraph 26 highlights the importance of taking into account the matters set out in section 1 of the 1989 Act (see above) and to give particular consideration to the risk of harm to the child and parent as a consequence of making or not an interim order. Paragraph 27 enjoins the court to consider in addition the arrangements to ensure the risk to the child or parent is minimised.
78. Paragraphs 32 onwards concern the steps to be taken by the court where the domestic abuse has been proved to have occurred. Paragraphs 32 to 34 concern the need for expert assessment and whether an Activity Direction under 11A and 11B of the 1989 Act should be made.

After findings or an admission of domestic abuse

79. PD12J paragraphs 35 to 40 set out the factors to be taken into account when determining whether to make child arrangements orders in all cases where domestic abuse has occurred.

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The overriding factor is set out in paragraph 35, that it has to be in the best interests of the child.

“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,

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;

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- (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.

38

Where any domestic abuse has occurred but the court, having considered any expert risk assessment and having applied the welfare checklist, nonetheless considers that direct contact is safe and beneficial for the child, the court should consider what, if any, directions or conditions are required to enable the order to be carried into effect and in particular should consider –

- (a) whether or not contact should be supervised, and if so, where and by whom;
- (b) whether to impose any conditions to be complied with by the party in whose favour the order for contact has been made and if so, the nature of those conditions, for example by way of seeking intervention (subject to any necessary consent);
- (c) whether such contact should be for a specified period or should contain provisions which are to have effect for a specified period; and
- (d) whether it will be necessary, in the child's best interests, to review the operation of the order; if so the court should set a date for the review consistent with the timetable for the child, and must give directions to ensure that at the review the court has full information about the operation of the order.

Where a risk assessment has concluded that a parent poses a risk to a child or to the other parent, contact via a supported contact centre, or contact supervised by a parent or relative, is not appropriate.

39

...

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In its judgment or reasons the court should always make clear how its findings on the issue of domestic abuse have influenced its

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decision on the issue of arrangements for the child. In particular, where the court has found domestic abuse proved but nonetheless makes an order which results in the child having future contact with the perpetrator of domestic abuse, the court must always explain, whether by way of reference to the welfare check-list, the factors in paragraphs 36 and 37 or otherwise, why it takes the view that the order which it has made will not expose the child to the risk of harm and is beneficial for the child.”

80. On 4th June 2021, HH Judge Williscroft had one hour set aside for a hearing which was to consider a number of issues including the future progress of contact. Time was limited. It was a busy court list. The guardian suggested that the question of contact be adjourned to another day but the Judge decided to press on likely believing that delay would not have been in D’s best interests. In the event HH Judge Williscroft gave an *ex tempore* judgment which in broad terms dealt with the issues raised.
81. HH Judge Williscroft’s judgment of 4th June 2021 is at E53 in the bundle.
82. The question for me is whether the Judge was wrong in her approach to the decision about contact and whether the decision itself was wrong that contact should continue in the same way as before the fact-finding.
83. I would start by observing that the Judge was not giving herself enough time to decide on interim contact which was disputed. She should have followed the guardian’s suggestion and adjourned the question to another day, for evidence if that was required and for detailed submissions applying PD12J and the welfare checklist.
84. Dr Proudman’s argument is that HH Judge Williscroft failed to apply PD12J and failed to consider the welfare checklist.
85. I bear in mind in particular the short passage in *Piglowska v Piglowski* (above) in which Lord Hoffman reminds the appeal court that judgments will always be capable of being better expressed, particularly so if it is an *ex tempore* one. I should read the reasons on the assumption that the Judge knew how she should perform her functions and which matters should be taken into account. This is particularly so for the Welfare Checklist in section 1 of the 1989 Act which judges consider in nearly every application which comes before them. The question is therefore whether the Judge had considered the checklist and the various provisions of PD12J even if she had not referred to them in terms.
86. HH Judge Williscroft dealt with contact at paragraph 8 onwards of her judgment. I recognise it was a difficult decision to reach.
87. The Judge accepted that contact was a serious issue, because of the suggestion that it continue in its previous form and that the mother pay for the costs of it. She set out the arguments for and against direct contact resuming.
88. In the arguments in favour of direct contact she said that it had been taking place since 2019, that it was professionally supervised in a contact centre and would be safe. She explained that as long as the father did not overlap with the arrival or departure of the mother the issue of safety had not varied since 2019. Another factor was the fact that D had an established relationship with the father.

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89. The Judge also bore in mind that the only reason contact had altered was because of the pandemic. She decided the fact that it had altered should be ignored.
90. In the arguments against direct contact the Judge recognised that the mother was saying that contact had an impact on her and that she was anxious about it. The Judge said that was why there was a need to instruct an expert psychologist to report on *inter alia* the father's understanding of the nature of abusive relationships and of the impact his behaviour had had and would have on the mother and child. The Judge noted the importance of the father and mother not meeting each other at contact and the arrangements made to ensure that it would not happen.
91. The Judge considered that fielding telephone calls between D and the father must be more difficult for the mother as she had to answer the call and connect D to the father. The Judge therefore cut indirect Facetime contact down to once per week. The Judge clearly had the impact on the mother of such contact well in mind.
92. The Judge decided that the present contact should continue and considered the unusual situation where the victim was being asked to pay for the contact of the child with the perpetrator.
93. The Judge had in mind the Children's Guardian recommendations and accepted that if they were on day one of this case, "knowing what we do know about the past, it would be a different set of circumstances we are looking at (sic). Looking at the history which began with very serious anxieties about Mr Griffiths' mental health and the arrangement of contact to avoid those anxieties and risk to the child, I am not persuaded at this time that there is good reason to prevent that contact taking place" (page E55 paragraph 10).
94. The Judge then continues and says "I am of course aware of the intention and impact of practice direction 12J, that is why [the expert] is being instructed to assist the Court because this decision about a relationship of father and child is one that is very much subject to expert advice about its benefit to the child, the risk to the child and to the mother as a result of it continuing" (page E55 paragraph 11). In the next paragraph the Judge points out that the only reason contact became indirect was because of the pandemic and "is a circumstance which in reality I should properly ignore".
95. The Judge said once the risk assessment was received, (subject to any concerns), the father's direct supervised contact would resume each week for two hours. The cost of the direct contact was to be paid equally by the parents.
96. With genuine respect to the Judge, who had a difficult task, I agree with the contentions of Dr Proudman that she failed to consider or at least refer to the findings she had made in November 2020 and should have done so. The Judge had made serious findings against the father.
97. HH Judge Williscroft speaks of "knowing what we do know about the past". In her consideration of the history of concerns, the Judge notes the father's mental health issues and the risks to the child from that and then says: "I am not persuaded at this time that there is good reason to prevent that contact taking place". Yet in my judgment, there was good reason, which is that she had found the mother had been raped by the father and been the victim of abuse.

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98. The Judge appreciated that contact had an impact on the mother and that she was anxious, but the Judge linked this to the instruction of an expert to look at the potential impact on D of the behaviour of the father. She failed to consider sufficiently, in my judgment, the emotional and psychological impact on the mother of enabling D to have contact with her rapist. She should have considered separately the consequences of her findings in November 2020. The fact that contact had been stopped by the pandemic was neither here nor there, but it gave the court the opportunity to sit back and take stock, and one approach may have been to order indirect contact until the expert had reported.
99. I do not accept that HH Judge Williscroft did not have D's best interests as her paramount consideration. The tenor of her judgment was to consider what was best for this child who had been seeing the father and having good quality contact with him.
100. In terms of PD12J, although the Judge mentions it in her judgment and she says she is aware of its intention and impact, having made such serious findings of abuse, in my judgment, she should have referred in more detail to some of the individual paragraphs which are of particular relevance to a situation such as this.
101. I am reminded of paragraph 28 in the recent case of *H-N and Others (children) (domestic abuse: findings of fact hearings)* [2021] EWCA Civ 448 where the President of the Family Division, Sir Andrew McFarlane considered the courts approach to PD12J in four cases: "We are therefore of the view 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".
102. PD12J encourages the courts to take a more in-depth approach although of course this has to be in accordance with the Family Procedure Rules and the overriding objective.
103. PD12J instructs the courts to approach child arrangements orders in a more structured and more comprehensive way as it recognises the impact, for example, that contact can have on the child because of the impact on his or her mother.
104. Dr Proudman relies on paragraphs 36, 37 and 40 in particular and says the Judge should have considered these. I have set these out above. Paragraph 32 onwards is the part relevant to cases where findings of abuse have been made (or where there have been admissions). Paragraph 35 reminds the court that contact must in the best interests of the child. I am satisfied that HH Judge Williscroft had that well in mind.
105. Paragraph 36 reminds the court to apply the individual matters in the welfare checklist. I accept that the Judge had the welfare checklist well in mind.
106. Paragraph 36(2)(a) and (b) is more specific. The court "should in every case" consider 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 which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made.". These subparagraphs lead me to conclude that the Judge should have given greater weight to the abuse the mother had suffered at the hands of the father.

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107. Paragraph 36(3) is also relevant, in that a 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...”. The Judge should have considered the emotional safety of the mother in this case before ordering the resumption of direct contact.
108. In paragraph 37, whenever a finding or admission of domestic abuse has been made, “the court should consider the conduct of both parents towards each other and toward the child and the impact of the same”. The court should consider a number of factors including at (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 father to appreciate the effect of past domestic abuse and the potential for future domestic abuse. The court should have considered in more depth the impact of contact on the mother.
109. Paragraph 38 concerns the situation of a court ordering direct contact after an expert risk assessment has been obtained the court can impose conditions or make directions if those are required. At (d), there is a paragraph which sets out the position where a risk assessment concludes that a parent poses a risk to a child “or to the other parent”, in which case certain sorts of contact would not be appropriate. This contact could not be via a supported contact centre or contact supervised by a parent or relative.
110. Finally, paragraph 40 of PD12J, says that the court “should always make clear how its findings on the issue of domestic abuse have influenced its decision on the issue of arrangements for the child”. The paragraph goes on, “In particular, where the court has found domestic abuse proved but nonetheless makes an order which results in the child having future contact with the perpetrator of domestic abuse, the court must always explain, whether by way of reference to the welfare check-list, the factors in paragraphs 36 and 37 or otherwise, why it takes the view that the order which it has made will not expose the child to the risk of harm and is beneficial for the child”. In my judgment, HH Judge Williscroft should have explicitly considered the findings she had made and how they influenced her decision on contact.
111. In the circumstances, I agree with Mr Bowe when he says that the Judge should not have ordered direct contact without considering the aspects raised above. In my judgment the order to continue direct contact was premature, it should not have been ordered at the DRA hearing.
112. There were two further criticisms of the Judge’s decision which I do not accept, the first is Dr Proudman’s contention that the relationship between father and child was not “established”. In my judgment, D had a long-standing relationship via either indirect or direct contact with the father. The direct contact that took place was described in a positive way. Second, I did not accept Dr Proudman’s description that the Judge’s decision to allow direct contact but to cut down indirect contact was wrong (the Judge “bizarrely found...” at page C19 paragraph 66). It made sense in my judgment because of the proximity to the father forced on the mother who had to facilitate phone or Facetime calls rather than drop the child off at the centre and collect the child at the end.
113. The two parts of the second question were whether the Judge was wrong to continue an order for direct contact at the DRA and whether she failed to consider PD12J appropriately. The answer to both is yes.

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114. The direct contact order will be set aside and the issue of direct contact will be returned to be redetermined at first instance once the necessary report is obtained, when detailed consideration of PD12J can take place.

Question 3

115. The question for the court is whether a victim of rape or domestic abuse should share the payment of the costs of contact with their child with the perpetrator of that rape or domestic abuse.

Argument

116. Dr Proudman's contention was that it would be quite wrong for the payment of costs for contact to happen. This was wrong in principle, against public policy and breaches the mother's and the child's Articles 8 and 14 Convention rights.
117. Dr Proudman describes that situation as being "perverse and sickening". She relies on a letter from the mother's psychotherapist which raises issues relevant to the mother's emotional and physical anxiety associated with contact. The letter says the mother's reaction to contact between D and the father might have a negative impact on the way she cares for D. I noted the letter from the mother's psychotherapist was admitted on appeal and was not before HH Judge Williscroft at the time when she reached her decision.
118. Dr Proudman points out that the use of a contact centre in this case is only necessary because the father has raped and abused the mother and been coercive and controlling towards her and been verbally abusive on one occasion to the child at three weeks old. Dr Proudman argued that making a rape victim pay a rapist's costs of contact is a continuation of coercive and controlling behaviour but this time it is being "perpetrated by the family courts".
119. Dr Proudman says the mother cannot afford to pay for the costs of contact. She and the father were found to be impecunious by the family court and the mother has not been ordered to meet the costs of a psychologist. She can barely meet the costs of D's childcare.
120. Dr Proudman's overall contention was that there should be a strong presumption against payment of the costs of contact when allegations of abuse are made but that in a case where rape, domestic abuse or coercive and controlling behaviour have been proved then the victim should never be ordered to pay the costs of contact. Dr Proudman added that the same presumptions should apply to assessments of the perpetrator, but this was not argued before me and it may be that different considerations apply. Dr Proudman set out a range of factors that the court should address when considering whether a victim of domestic abuse should pay for contact.
121. Dr Proudman in her arguments encouraged the court to consider the Parliamentary proceedings in relation to the Domestic Abuse Act as it went through Parliament. Peers in the Upper Chamber reflected specifically on whether victims should ever pay the costs of contact with the perpetrator. Their view was no.
122. Mr Nosworthy set out the factors that the court should consider when looking at the costs of contact and whether a victim of rape and abuse should pay them: the age of the child, the nature of the contact order made, the parties' conduct which the court thinks relevant,

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the parties' financial resources, the cost of the contact, the parties' respective financial resources and the effect on the parties of any order made in relation to the costs of contact and finally whether the contact would take place in the absence of the order for the payment of costs.

123. Mr Bowe for the guardian contended this court should not be overly prescriptive about how other courts should exercise their discretion on the issue of costs of contact. After a positive finding of domestic abuse (or an admission), he considered a court would want to take into account the age of the child, the nature of the abuse found by the court, or the nature of the allegations made if contact was being considered ahead of a fact-finding, the effect of the findings on the caregiver with consideration being given as to whether it would give rise to financial control of the victim; the financial means of the parties and provision of maintenance for the caregiver and the costs associated with contact arrangements, in other words whether it is supervised, it involves travel, activities etc.

Discussion**Guidance on the ordering of costs for contact in proved or admitted cases of abuse**

124. The findings in this case were of particularly serious abuse including of rape, that abuse having taken place over ten years. The facts proved to have taken place included the coercive and controlling behaviour of the mother by the father.
125. It is very unusual and probably unique that a victim of abuse is being asked to pay for contact costs as happened here. HH Judge Williscroft recognised how unusual it was when she said "I will, I am afraid, continue the current costs issues...I accept it is very unusual for somebody to have to contribute to the cost of somebody who has abused them in order to see their child, and note the unusual circumstances in which Mr Griffiths is now, as I understand it, without an income. But it is again a long-standing situation and because I have determined that the contact should continue I have therefore got to determine it is an expense that is appropriate" (E55 para 12).
126. In this exceptional situation, there is a tension between a decision that it is in the best interests of the child to see the father and a situation as there is in this case, where the unemployed father cannot afford to pay for the whole of the costs of contact in a centre and he was not paying any child maintenance to the mother. Dr Proudman describes her client as impecunious and struggling to pay for childcare. Whether that is the case or not, there is a question of principle at stake, the question of a victim funding their child's contact with the rapist.
127. The Judge considered the question of costs very briefly in her decision as set out above. I am not critical; it was an *ex tempore* judgment and there are no authorities on the point.
128. Lieven J suggested that guidance is required on the question of costs. I am wary of giving guidance which is too narrow and which might not cater for an extraordinary situation.
129. I cannot envisage a situation where a court would order the victim to share the costs of contact, but I bear in mind it is impossible to give guidance which will cater for every case that comes before the family courts which must be able to do justice to all the different situations which they encounter.

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130. My guidance in relation to cases where abuse has been found or admitted is the following:
131. First, there must be a very strong presumption against a victim of domestic abuse paying for the contact of their child with the abuser.
132. Second, if, wholly exceptionally, the court has to consider this, the matters a court might want to take into account could include the following:
- a. The welfare checklist including the age of the child
 - b. The factors in PD12J (set out above)
 - c. The nature of the abuse proved or admitted, and the parties' conduct that the court considers relevant
 - d. The impact of the abuse on the caregiver with consideration as to whether any payment would give rise to financial control
 - e. The extent of the relationship between the child and the abusive party
 - f. The nature of the section 8 order made
 - g. The parties' financial resources
 - h. The cost of the contact
 - i. Whether, if the contact is in the best interests of the child, it would take place without a sharing of the costs.

Conclusion

133. As I have said above at paragraph 114, I set aside HH Judge Williscroft's order for direct contact. The issue of direct contact will be redetermined at first instance, when detailed consideration of PD12J should take place once the expert report has been obtained.
134. In relation to the payment of the costs of contact, I set aside the Judge's order that the mother pay a proportion of the costs of contact. If on redetermination the Judge decides that direct contact should take place, the guidance on contact costs set out above should be applied and the Judge determine whether this case falls within the "wholly exceptional" category described.
135. The appeal is allowed on grounds 2 and 3 and allowed in part on grounds 1 and 4 (see above). The order for direct contact is set aside, the order that the mother pay direct or indirect contact costs is set aside and indirect contact shall continue in the interim.
136. I leave the order for indirect contact, which is supervised by a worker from the contact centre and has been continuing since permission to appeal was granted, unchanged on the basis that this will be considered in due course.
137. I will refer the case to Lieven J, the Family Division Liaison Judge for the Midlands, who will determine within the next two weeks where and when the next hearing should take place.