Neutral Citation Number: [2024] EWHC 80 (Fam)

Case No: BM23P70463

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

TRC (FATHER)

Applicant

and

NS (MOTHER)

Respondent

- -
- -

Mr Michael Gration KC (instructed by **GLS Solicitors**) for the **Applicant**
Mr Aidan Vine KC (instructed by **Chase Morgan Solicitors**) for the **Respondent**

Hearing dates: **18 December 2023**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 January 2024 by circulation to the parties or their representatives by e-mail.

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MRS JUSTICE LIEVEN

This judgment is being handed down in private on 22 January 2024. It consists of 56 paragraphs. The judge does not give leave for it to be reported until it has been anonymised by and approved by the judge.

Mrs Justice Lieven DBE :

1. This is an appeal from a decision of the lay Magistrates sitting in the Family Court in Birmingham on 12 June 2023. The decision was to vacate a fact finding hearing in a dispute between the parents about the terms of a child arrangements order. The issues that arise on the appeal are:

    a. An application to extend time for the making of the application for permission to appeal;

    b. Five Grounds of appeal;

        i. Whether the Magistrates failed to consider paragraph 5 of PD12J;

        ii. Improper weight given to the Father's admissions;

        iii. Breach of the Mother's right to a fair hearing;

        iv. Failure to follow paragraphs 17 and 18 of PD12J;

        v. A lack of evidence to support findings made against the Mother;

    c. An application by the Mother for an intermediary assessment;

    d. An application by the Mother to vary interim contact arrangements.

2. The Mother was represented by Aidan Vine KC and the Father was represented by Michael Gration KC.

The background

3. The parents commenced a relationship in 2015 and were married in 2016. The older child, X (a boy), was born in September 2016. The younger child, Z (a boy), was born in October 2021. The Mother ("M") says that the relationship, from a very early point, was characterised by the Father ("F") being abusive. She records in her witness statements many instances of him being angry, aggressive and controlling of her. The F, as will become clear below, accepts that he was at times angry and verbally abusive, but places much of the responsibility for this on the M's behaviour.

4. Matters came to a head on 26 April 2022 when the M left the family home in Birmingham with the children, contacted the police and alleged the F had threatened to kill her. The F was arrested and then released on bail. The F has been charged but the case has not yet reached trial. The M obtained an ex parte non-molestation order, which was made a final order by agreement on the basis of the F making no admissions and no findings being made.

5. On 27 May 2022 the F made an application for a child arrangements order that the children should live with him. The case took, as is sadly common, a very slow procedural course. A safeguarding letter was served by Cafcass on 29 June 2022 in which they recommended that "the Court list this matter for consideration to be given

to a fact find." On 21 November 2022 the parties were directed to file witness statements and responses and the matter was then listed for a hearing on 19 January 2023 to determine whether a fact finding hearing was necessary.

6. At the hearing on 19 January 2023 the M advised that she was seeking to raise a further allegation, that the F had slapped X. The Magistrates ordered that a fact finding hearing be held to determine the physical abuse allegations only; that the M file a Scott Schedule setting out no more than 5 allegations of physical abuse; the F to file a response; the M was directed to file the recordings she had of conversations with the F. Neither party asked the Court to determine the other allegations.

7. The matter was listed for a fact finding hearing on 12 June 2023. The F's solicitors then questioned the need for a fact finding hearing in the light of the admissions that the F had made. These admissions are set out in the F's response to the Scott Schedule and in his witness statement. It is worth noting that the admissions are highly caveated because although the F accepts that he used vile and aggressive language to the M and in front of the children, each admission is then rapidly followed by the suggestion that this was caused by the M's unreasonable behaviour. Perhaps more importantly than the F's admissions was the fact that the M had placed before the Court a large number of recordings and transcripts of the conversations that had taken place between the parents.

8. At the hearing in June 2023, both parties were represented, the F by leading counsel. The M sought an adjournment so that she could file further evidence from her laptop, which had been returned to her by the police. The F submitted that a fact finding hearing was no longer necessary in the light of the material that was before the Court.

9. The Magistrates discharged the order for a fact finding hearing and set out in their Recital:

> *"… AND UPON the Court hearing submissions on behalf of the Father as to whether there needed to be a fact find in like of the updated evidence and the Court determining that there was no longer a need for a fact find on the basis that: it has before it today more information that the Court on 19th January 2023; the admissions made by the Father in the recitals to the Order dated 19th January 2023, the Scott Schedule and in his statements; there being a wealth of evidence in the bundle to provide CAFCASS with a factual basis; and there being evidence of both parties using vile language to and in the presence of [W] and [W] being used as a pawn in the adult conflict and, accordingly, a fact find will not now assist in determining the child arrangements in this matter. …"*

10. The M filed her application for permission to appeal the decision on 26 June 2023. It is now accepted by the M that Grounds One to Four challenge a case management decision, and therefore the time for appealing was 7 days, and that period would have expired on 19 June 2023. The application was therefore 7 days out of time.

11. On 28 July 2023 the matter came before HHJ Rowland who ordered the M to file an application to extend time. The M's solicitors had been pursuing a transcript of the Magistrates' reasons and this was eventually produced on 10 October 2023.

12. In the meantime, on 14 September the M had applied for a variation of the interim contact arrangements because of her concerns about the level of supervision of that contact. The children had been having regular contact with the F, both in the community and at his home, with professional supervision.

13. On 15 September 2023 HHJ Burgher vacated the appeal hearing and relisted it on 17 October. It was then vacated on that day because the Court did not have sufficient time to hear it. The matter was then listed before me on 24 November 2023 but again had to be vacated because of counsel's ill health.

14. On 27 October 2023 the M applied for an intermediary assessment and police disclosure.

15. On 18 September 2023 the Family Court Advisor (Ms Piercey) filed the s.7 report and on 20 November a further report was filed by Cafcass answering some supplementary questions largely in respect of the interim contact.

16. The appeal hearing finally came before me on 18 December 2023, some 18 months after the original application had been made.

The extension of time

17. The time for making an application for permission to appeal a case management decision is set out in FPR r30(4) and is 7 days. Mr Vine accepted that the first four Grounds went to a case management decision, and therefore required that the Court gave an extension of time. However, he submitted that the fifth Ground, based on the Magistrates having made findings against the M, was a final decision and not a case management decision, and therefore no extension of time was required.

18. In my view this is a misunderstanding of what a case management decision is. The decision of the Magistrates was that it was not necessary to hold a separate fact finding hearing, and rather that the case should proceed to a final hearing. That decision is undoubtedly a case management decision. They did not purport to "find facts" as some kind of separate determination. I will consider below the degree to which in many private law cases it is possible or useful to draw a bright line division between fact finding and best interests considerations. But, in any event, the Magistrates were not purporting to "find facts", but were merely indicating that there was quite sufficient evidential material upon which Cafcass could produce a s.7 report with recommendations.

19. The appeal skeleton argument (drafted by Mr Vine's predecessor) says *"It is not for Cafcass to weight and analyse evidence – that is for the court".* With respect, that cannot be right. Cafcass routinely has to weigh and analyse evidence in making recommendations. The Court does, in appropriate cases, make findings of fact which, certainly in public law, are treated as binary. But Cafcass officers weigh and analyse the evidence put forward by parents on a daily basis and that forms part of their assessment of the best interests of the children.

20. Here, the Magistrates' decision that Cafcass had sufficient evidence to proceed without a separate fact finding hearing was a case management decision and as such the appeal is out of time for Ground Five, as well as the other Grounds.

21. The next issue is whether time should be extended. The Appellant's Skeleton submitted, without authority, that *Denton v TH White Ltd.* [2014] EWCA Civ 906 does not apply in the Family jurisdiction, but Mr Vine accepted there is no authority for such a proposition. Plainly, *Denton* and its predecessor *Mitchell v News Group Newspapers* [2014] 1 WLR 795, were cases under the Civil Procedure Rules ("CPR") and not the Family Procedure Rules ("FPR"). There are additional considerations under the FPR, namely the interests of the child as set out in s.1 of the Children Act 1989. Albeit, the interests of the child will not be a "paramount" consideration, because this is not a welfare based decision, those interests remain a highly relevant matter in any decision under the Children Act 1989. However, it is important to remember that the interests of the child may pull in different directions when it comes to non-compliance with the FPR. The interests of the child, both in general and in this specific case, are strongly in favour of minimising delay and dealing with cases efficiently. Therefore the stricter and more rigorous approach to issues of non-compliance set out by the Court of Appeal in *Denton* is, in general, strongly in the interests of the children in Family Court proceedings.

22. In *Denton* the Court of Appeal, following *Mitchell*, held that the Court should carry out a three stage analysis:

> *"We consider that the guidance given at paras 40 and 41 of Mitchell remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1) . If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]". We shall consider each of these stages in turn identifying how they should be applied in practice. We recognise that hard-pressed first instance judges need a clear exposition of how the provisions of rule 3.9(1) should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities."*

23. The first stage is to identify and assess the seriousness of the failure to comply, see *Denton* [25]-[28], including the defaulter's previous conduct, although this is better considered at stage three, see [27]. There is no reason, in my view, why this stage of the analysis should not be the same in Family cases.

24. Here the default was serious in the sense that it was a failure to lodge the originating application, the appeal notice, within the time allowed under the Rules. However, the period in issue was quite short. A failure to lodge an appeal in time is in my view a serious or significant default because such time rules go to the fundamental discipline and finality of litigation. A party is generally entitled to assume that once the time for filing an appeal is past, then the order which has been made is final. This is rather different from a failure to lodge a particular document, such as a skeleton argument or

witness statement on time where the proceedings are themselves in order and ongoing. However, the time period in issue here, 7 days, was short.

25. The second stage is the reasons for the default, see [29]-[30]. The reasons advanced here are that the solicitor did not realise that this was a case management decision and therefore that the time period was 7 days; and that counsel, despite repeated "chasing", failed to produce the attendance note. In a CPR case, such failure by lawyers would not generally be considered a good reason for failure to comply, see the White Book para 3.9.16. However, it is at this point that there is a material difference between many civil cases and Family cases. In civil cases the potential to recover damages/financial compensation from the party's lawyers at least in part compensates for the default of the lawyers. However, given the nature of the issues, there is unlikely to be financial compensation for default in Children Act cases.

26. In my view the consequence of this is that where the default is solely the fault of the litigant's legal advisors then that is more likely to lead to relief from sanction in a Family case than in a civil case. This does not, of course, mean that default by lawyers will necessarily result in the court granting relief.

27. The third stage is to consider all the circumstances of the case. In *Denton*, the Court of Appeal devoted considerable attention to the overriding objective and the precise terms of CPRr3.9, see [32] onwards. In the FPR the overriding objective is set out at FPRr1.1:

> *"**1.1 The overriding objective***
>
> *(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.*
>
> *(2) Dealing with a case justly includes, so far as is practicable –*
>
> *(a) ensuring that it is dealt with expeditiously and fairly;*
>
> *(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;*
>
> *(c) ensuring that the parties are on an equal footing;*
>
> *(d) saving expense; and*
>
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."*

28. This must be read together with s.1(1) of the Children Act 1989:

> *"**1 Welfare of the child.***
>
> *(1) When a court determines any question with respect to—*
>
> *(a) the upbringing of a child; or*

> *(b) the administration of a child's property or the application of any income arising from it,*
>
> *the child's welfare shall be the court's paramount consideration."*

29. As I have said above, it cannot be assumed that the welfare of the child supports allowing relief from sanctions simply because one parent so asserts. There is a strong interest in Family litigation for cases to be dealt with efficiently and expeditiously, as is made clear in the overriding objective.

30. In considering the overall circumstances of the case here, I take the view that it is appropriate to extend time. The period involved is short and the only prejudice is the fact of the continuation of appeal. However, given the nature of the issues here, that should not have had much detrimental impact on the F. In practice there has been detrimental impact because the effect of the appeal has been to extend proceedings by many months. However, that is in large part because of delays in the court process. Further, the reason for the failure to lodge in time was that of the lawyers and not the M. Given all those factors together it is appropriate to extend time.

The Grounds

31. Grounds One and Four both raise arguments that the Magistrates failed to properly consider PD12J and those Grounds are very closely related. I will therefore deal with them together. Ground One relies on paragraph 5 and 6 and Ground Two, paragraphs 17 and 18 of PD12J:

> *"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 CAFCASS 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*
> - *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 doing so.*
>
> *…*
>
> *"17. In determining whether it is necessary to conduct a fact-finding hearing, the court should consider –*
>
> *(a) the views of the parties and of Cafcass or CAFCASS Cymru;*
>
> *(b) whether there are admissions by a party which provide a sufficient factual basis on which to proceed;*
>
> *(c) if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;*
>
> *(d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;*
>
> *(e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact finding hearing;*
>
> *(f) the nature of the evidence required to resolve disputed allegations;*
>
> *(g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and*
>
> *(h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.*
>
> *18. Where the court determines that a finding of fact hearing is not necessary, the order must record the reasons for that decision."*

32. These paragraphs have to be read in the light of the Court of Appeal authorities, in particular ***Re H-N*** [2021] EWCA Civ 448 and ***K v K*** [2022] EWCA Civ 468. It should not need saying that the Court of Appeal sets out the law, which is binding on this Court and on the Magistrates, whereas PD12J is guidance, to which weight must be given, but

which is not legally binding. I will refer to *K v K* because that is the later authority, and the Court makes extensive reference to *Re H-N*. At [41] and [42] *K v K* the Court of Appeal says:

> *"41. We start this section by setting out the most crucial passages from Re H-N (deliberately out of order) as follows:*
>
> *8. Not every case requires a fact-finding hearing even where domestic abuse is alleged. As we emphasise later, it is of critical importance to identify at an early stage the real issue in the case in particular with regard to the welfare of the child before a court is able to assess if, a fact-finding hearing is necessary and if so, what form it should take.*
>
> *139. Domestic abuse is often rightly described as pernicious. In recent years, the greatly improved understanding both of the various forms of abuse, and also of the devastating impact it has upon the victims and any children of the family, described in the main section of this judgment, have been most significant and positive developments. The modern approach and understanding is reflected in the 'General principles' section of PD12J(4). As discussed at paragraphs 36–41 above that does not, however, mean that in every case where there is an allegation of, even very serious, domestic abuse it will be either appropriate or necessary for there to be a finding of fact hearing, so much is clear from the detailed guidance set out in paragraphs 16–20 of PD12J and, in particular, at paragraph 17:*
>
> *"(g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court;*
>
> *(h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case."*
>
> *37. [suggesting the correct approach as follows]*
>
> *i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).*
>
> *ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.*
>
> *iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.*
>
> *iv) Under PD12J.17(h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties*

> *should have in mind as part of its analysis both the overriding objective and the President's Guidance in "the Road Ahead".*
>
> *42. A decision to hold a fact-finding hearing is a major judicial determination within the course of family proceedings. The process will inevitably introduce delay and postpone anything other than an interim determination of issues relating to the child's welfare, which is contrary to the statutorily identified general principle that any delay in resolving issues is likely to be prejudicial to a child's welfare (section 1(2) of the CA 1989). Further, the litigation of factual issues between parents is likely to be adversarial and, whatever the outcome, to have a negative impact on their ongoing relationship and ability to cooperate with each other as parents. It is therefore important for the court, in every case where fact-finding is being considered, to take time to identify the welfare issues, to understand the nature of the allegations, and then to consider whether the facts alleged are relevant to those issues and whether it is, therefore, necessary for the factual dispute to be determined."*

33. It is clear from these passages that the court, here the Magistrates, has considerable discretion in determining whether a fact finding hearing is necessary and proportionate, depending on the facts of the case.

34. The essence of Ground One is that the Magistrates did not follow the process set out in PD12J paragraphs 5 and 6. At the heart of the complaint is the fact that the Magistrates had in January 2023 determined that there should be a fact finding hearing, but in June 2023 they changed their mind.

35. In my view there are two parts to this Ground. The first is whether the Magistrates needed to go through a formal staged process pursuant to paragraph 5 of PD12J, and needed to record reasons in relation to each stage. The second is whether they were legally entitled to change their mind without there having been an appeal against the earlier decision.

36. On the first point, it is clear from ***K v K***, and indeed commonsense, that PD12J is not setting out a formal process that must be followed and evidenced in every case. To require a court to go through such a process would be highly onerous, and to a considerable degree a "tick-box" exercise. The duty on the court is to consider whether a fact find is necessary and proportionate, and to have regard to PD12J, including the matters in paragraph 5, and apply the relevant caselaw. The Appellant accepts that the Magistrates were advised both as to PD12J and ***K v K***. Therefore the appeal cannot be based on them having failed to take the Guidance and law into account. This part of the Ground really comes down to a reasons challenge – did the Magistrates set out sufficient reasons to establish that they properly considered the issues?

37. It needs to be remembered that these cases arise in necessarily busy lists and to impose a complex duty to give reasons would significantly impede the administration of justice. It is important that the Magistrates set out sufficient reasons as to explain, in short terms, why they reached the decision they did.

38. In the present case, the Magistrates did this in the Recital set out above. They explained that in their view there was sufficient evidence before the Court, largely in the form of

the transcripts of audio recordings and the witness statements, for the Cafcass Family Court Advisor ("FCA") to advise and for them to ultimately reach a decision on the children's welfare interests. In those circumstances it was neither necessary nor proportionate to have a separate fact finding hearing. In my view that is all they needed to explain.

39. The second part of Ground One is whether they were entitled to change their mind, and whether they gave sufficient reasons for doing so. Mr Gration accepted that in principle it was always open to a court in these circumstances to change an earlier case management decision, subject to normal principles of reasonableness and relevant grounds. Here there was a clear change of relevant circumstances between January and June 2023. By June the Magistrates had extensive transcripts of the interactions between the parents, as well as detailed witness statements with the parents' respective positions.

40. It is critical to have in mind what the Court of Appeal said in *K v K* at [64]-[67]:

> *"64. The judge in this case did not at any stage, either in the FHDRA or fact-finding, identify the issues that arose as to the future arrangements for these three children. The judge concluded that a fact-finding hearing was required before the mother had identified the allegations she wished to pursue, and before disclosure of relevant material had been obtained.*
>
> *65. A fact-finding hearing is not free-standing litigation. It always takes place within proceedings to protect a child from abuse or regarding the child's future welfare. It is not to be allowed to become an opportunity for the parties to air their grievances. Nor is it a chance for parents to seek the court's validation of their perception of what went wrong in their relationship. If fact-finding is to be justified in the first place or continued thereafter, the court must be able to identify how any alleged abusive behaviour is, or may be, relevant to the determination of the issues between the parties as to the future arrangements for the children.*
>
> *66. At the risk of repeating what has been said at [37] in Re H-N and at [41] above, the main things that the court should consider in deciding whether to order a fact-finding hearing are: (a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of the child arrangements order, (b) that the purpose of fact-finding is to allow assessment of the risk to the child and the impact of any abuse on the child, (c) whether fact-finding is necessary or whether other evidence suffices, and (d) whether fact-finding is proportionate.*
>
> *67. It seems that a misunderstanding of the court's role has developed. There is a perception that the Court of Appeal has somehow made it a requirement that in every case, in which allegations of domestic abuse are made, it is incumbent upon the court to undertake fact-finding, involving a detailed analysis of each specific allegation made. That is not the case. As Re H-N explained and we reiterate here, the duty on the court is limited to determining only those factual matters which are likely to be relevant*

to deciding whether to make a child arrangements order and, if so, in what terms."

41. The Family Court is not there to adjudicate on why the parents' relationship failed, or past grievances. A fact find is only justified if it is necessary for determining the welfare outcomes for the children. On the facts of this case the Court had plentiful material on the parents' past conduct. Both parents, presumably with the support of their lawyers, have put in 100s of pages about what had happened in the relationship, much of it of very little forensic value to the issue that is actually before the court. The Magistrates were in my view entirely correct to conclude that they did not have to have a hearing to make findings of fact about this past conduct. In particular they had transcripts of communications between the parents, which could not be disputed, and which gave them sufficient understanding of the parents' conduct to determine the welfare outcomes for the children.

42. There was therefore quite sufficient material upon which the Magistrates were entitled to reach a different decision in June as to whether a fact finding hearing was necessary and proportionate.

43. Ground Four is effectively the same issue, whether the Magistrates sufficiently considered PD12J. They plainly did so.

44. Ground Two is whether the Magistrates gave improper weight to the F's admissions. The F's admissions were set out in his response to the M's Schedule of Allegations and to some extent in his witness statement. The weight that the Magistrates give to a piece of evidence is a matter for them, subject to it being plainly "wrong". But in any event, this Ground misunderstands what the Magistrates were doing. The Magistrates were only determining whether they needed a separate fact finding hearing. They were not making findings or determinations on the material they had before them. As I have said above, they were entitled to take the view on the evidence that in the light of that material, no separate fact finding was necessary.

45. This case is a good example of why separate facts finds will often be neither necessary, nor indeed helpful in a private law dispute such as this. There is a very strong overlap here between the "facts" and the welfare analysis of what is in the children's best interests. The holding of separate fact finding hearings, and the concept of findings of fact being "binary" emerged from public law cases. In public law cases under Part IV of the Children Act 1989, it will often be necessary to make findings of fact before threshold is crossed, see (inter alia) *Re H (Minors) (Sexual Abuse)* 1996 AC 563. Threshold must be crossed before intervention by the public authority is lawful.

46. However, in private law there are no "threshold" findings and it may well be that issues of the factual matrix and welfare interests are closely bound up, and best considered together. The jurisdictional basis for private law orders are the considerations under s.1 of the Children Act 1989, and the welfare checklist. This encompasses matters of fact, but also welfare issues. It is both difficult, and often unhelpful to try to compartmentalise these matters.

47. In many private law cases with allegations of domestic abuse, where the court is focusing on the relevance of such allegations to the best interests of the children, it is much less clear that separating fact finding from welfare is a helpful way to proceed.

The welfare checklist focuses the court in considering the case in a holistic manner. The neat categorisation of truth and untruth and hard binary facts, often sits uneasily with the reality of failed relationships. It may be much more useful for a court to consider the evidence, including that of the FCA, in a holistic way rather than trying to separate facts from welfare.

48. Here, the F's admissions were relevant to understanding the dynamic between the parents, but also the ongoing impact of the F's conduct on the M and the children. There was nothing unreasonable or wrong about the Magistrates putting weight on them in determining the usefulness of a separate fact finding hearing.

49. Ground Three alleges that there was a procedural irregularity because the Magistrates changed their decision. This Ground is in my view hopeless. The M had full warning that the F was going to apply to discharge the direction for a separate fact finding hearing. It is not disputed that the Magistrates were entitled to change their mind, see above. In those circumstances there was no breach of natural justice in their decision. The M's Skeleton Argument suggests that there was a "summary" determination, but the Magistrates simply made a case management decision, as they were entitled to do.

50. Ground Five is that there was no evidence for findings against the M. However, as is explained above, the Magistrates did not make findings against they M. They decided they did not need a separate fact finding. This Ground is therefore again, misconceived.

Other Issues

51. The M applies for an intermediary assessment to assess the measures necessary to allow her to fully prepare her case and give her evidence. I note that the M and her lawyers have prepared a number of witness statements, and this application is made after the case was listed for a fact finding hearing, and two hearings have taken place.

52. There is nothing in the material before the court that suggests that the M cannot fully participate in the proceedings so long as appropriate steps are taken within the normal rules. In my view it is wholly unnecessary to order an intermediary assessment given the evidence that has already been submitted and the M's ability to participate so far.

53. In respect of the M giving evidence, and the stress of the final hearing, appropriate measures can be put in place, including a screen and separate waiting area so that the M does not feel so intimidated by the proceedings. If her representative feels she needs a mid morning and afternoon break so that she can decompress, and anything necessary can be explained to her, then naturally that would be allowed. Further, the court will ensure that questions are put in a simple, straightforward and polite way, as should always be the case in any event.

54. The M also applies for more intensive supervision of the F's contact. It would be fair to say that the M and the contact supervisors, New Leaf, have rather lost confidence in each other. The M feels that the supervisors fail to ensure that paternal family members do not disparage her to the children, particularly W. She considers that the contact supervisors are biased against her in their reports. There is some evidence that New Leaf feel that the M has been inclined to raise domestic abuse as a reason to oppose contact.

55. The evidence, and the view of Ms Piercey, is that the children get on well with the New Leaf supervisors, and it would be destabilising for them to change the supervisors.

56. I am seeking to list this case before me for a one day final hearing in February 2024. In those circumstances there will not be a long delay before there is a final hearing. In my view it would be better to continue the current interim contact arrangements, rather than change either the venue or the supervision that is provided at the moment. In my view it is not proportionate to require two contact supervisors to be watching the contact at the paternal home. It may be the case that both sides, whether directly or via other family members, are not being supportive of the children being with the other parent. The F alleges the M has been ”alienating” the children from him, the M alleges the F’s family have been destabilising their placement with her. These are not unusual allegations in this type of case, and do not justify supervision so heavy handed as to have two contact supervisors with the F’s contact.