

Judgment Approved by the court for handing down
(subject to editorial corrections)



Neutral Citation Number: [2022] EWCA Civ 169

Case No: CA-2021-000079

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT PORTSMOUTH

Recorder Leong

PO21C00010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 February 2022

Before :

LORD JUSTICE BAKER

and

LORD JUSTICE SNOWDEN

L (FACT-FINDING HEARING: FAIRNESS)

Between :

Z

- and -

(1) A LOCAL AUTHORITY

(2) A MOTHER

(3) L (by her children's guardian)

Appellan

Responde

David Sharp (instructed by **Churchers LLP**) for the **Appellant**

Gemma Bower (instructed by **Local Authority Solicitor**) for the **First Respondent**

Nigel Cholerton (instructed by **Biscoes**) for the **Second Respondent**

Helen Khan (instructed by **Child Law Patnership**) for the **Third Respondent**

Hearing date : 8 December 2021

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30am on Thursday 17 February 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

LORD JUSTICE BAKER (giving the judgment of the Court):

1.

This is the judgment of the Court to which we have both contributed.

2.

The principal issue arising on this appeal in care proceedings concerning a little girl, L, is whether the process by which the recorder reached the conclusion that the threshold criteria under [s.31 of the Children Act 1989](#) were satisfied was fair. The appellant, Z, who is L's father, contends that certain of the findings made by the recorder, which went further than those sought by the local authority, were made after a hearing in which he did not have a fair opportunity to meet those allegations.

Background

3.

L's mother has three children who we shall call J (a boy aged 6), K (another boy aged 4) and L (aged 2). The three children have different fathers, who we shall call respectively X, Y and Z. The local authority's children's services department has been involved with the family since April 2017 after an altercation between Y and Z, following which Z was convicted of assault. Thereafter there were allegations about cannabis misuse, anti-social behaviour and domestic abuse in the relationship between the mother and Z. The local authority became concerned that Z was exerting coercive control over the mother. Although the case was closed in 2019, it was re-opened in May 2020 following a referral by the housing department after an incident in which Z was said to have shown aggression during a telephone conversation with a housing officer. Other incidents followed, culminating in a further referral in September 2020 after J spoke to nursery staff about having witnessed Z assault a family friend and break a mirror. The local authority initiated pre-proceedings processes under the Public Law Outline and, in October 2020, J and K went to live with their respective fathers, X and Y, who each then started private law proceedings seeking child arrangements orders under s.8 of the Children Act. Within the proceedings relating to J, a prohibited steps order was made preventing the mother allowing any contact between J and Z save for contact supervised by the local authority.

4.

An initial assessment of the mother and Z recommended that L be placed under an interim care order whilst remaining at home. On 5 January 2021, the local authority therefore started these care proceedings in respect of L. The initial schedule of facts on which the local authority asserted that the threshold for an interim order was crossed included the following allegations:

“(1) The relationship between the mother and Z has featured heated arguments and Z subjecting the mother to verbal abuse and controlling behaviour. L has been present on some of the occasions when this has occurred and was at risk of suffering emotional harm.

(2) Z has on at least one occasion removed L from her mother's care which has disrupted her routines and presented a risk of emotional harm.

(3) The mother has not always engaged in services that were designed to support her. This has made it more difficult for professionals to reduce any risks to the children.

(4) The mother has not been able to maintain separation from Z despite the allegations of domestic violence she makes against him.”

At the first hearing on 27 January 2021, the court was satisfied that the interim threshold under s.38 was satisfied. L was made subject to an interim supervision order whilst remaining in the care of her parents. The proceedings were consolidated with the private law proceedings in respect of J and K who remained in the care of their respective fathers.

5.

In the course of the proceedings, a parenting assessment of the mother and Z was completed. The conclusions were broadly positive. Z was observed to have a good attachment with all three children and his relationship with the mother was described as loving. The assessor added, however,

“I worry around how the mother's low self-esteem and confidence will continue to impact on the dynamics of her relationship with Z, and how this may result in further referrals of domestic abuse concerns within [sic] the future without significant work. It is a grey area in respect of the information shared by the mother regarding her relationship with Z with Police and Children's Services and how this is now disputed.”

6.

On 9 June 2021, the local authority filed its final evidence and care plan under which it proposed that L should stay in the care of her mother and Z with no order under s.31 but subject to a child protection plan.

7.

On 16 June 2021, the local authority filed a revised threshold document, entitled “Schedule of facts the local authority allege in relation to threshold”, in the following terms:

“The date of applying the threshold criteria is 5 January 2021 being the date of the initiation of protective measures.

At that date, the child was suffering or likely to suffer significant harm, such harm being attributable to the care given or likely to be given to him if an order were not made.

The local authority has not made an application for care or supervision orders in relation to J or K and as such the court does not need to consider the application of threshold to them.

The local authority care plan in relation to L does not provide for any public law order so there is no requirement for the court to find that the threshold criteria are met. The local authority is proposing that J and K are looked after by their respective fathers and the facts in this document are sought by the local authority.

It is submitted that the threshold criteria are met for the following reasons:

The relationship between the mother and Z has featured arguments and there have been several occasions when the couple have separated and then reconciled. The children have been present during some of the arguments and were at risk of suffering emotional harm. The facts supporting this are as follows

(a) The mother and Z argue and this is sometimes in front of the children.

(b) Z has called the mother derogatory names including a ‘rat’ during arguments.

(c) On 5 May 2020 police attended the family home after a housing officer reported that Z had telephoned the housing department requesting emergency housing as he had split up with his partner. The housing officer was concerned that Z was shouting at her and a female who was present. The mother confirmed to police that the relationship was over and Z had become frustrated while on the phone to housing.

(d) On 5 May 2020 the housing department provided bed and breakfast accommodation to Z and L for several nights before he returned to live with the mother.

(e) On 27 August 2020 the mother told police that she had been arguing with Z about his use of her money for gambling and stated that during an argument he had demanded her phone and when she refused to give it to him he pushed her and took the phone in any event before using [it]. She also informed the police that she had separated from Z on 16 August 2021 [sic].

(f) On 4 September 2020 the mother presented as tearful and informed the social worker that she had returned to the family home with the children after previously wanting to leave as she felt scared of the repercussions from Z if she did not return to him.

The mother has not always engaged with services that were designed to support her. This has made it more difficult for professionals to reduce any risks to the children

Z used cannabis regularly This added tension in the relationship as the mother told professionals that his unwillingness to assist with the children had contributed to her not being available to work”

8.

Two further case management hearings were held dealing with a number of issues, including drug testing of samples provided by Z and police disclosure of information relating to incidents of alleged domestic abuse. At the first case management hearing on 7 July 2021, orders were made for the parents to file and serve their responses to the local authority’s threshold document prior to the commencement of the final hearing which was listed to start on 20 September 2021 and to last for three days. An order was also made for the attendance of various witnesses, and for there to be a meeting of advocates ahead of the final hearing to deal with the witnesses required for the final hearing and to complete a witnesses timetable.

9.

At the second case management hearing on 25 August 2021 the local authority was given permission to file and serve a final amended threshold document by 1 September 2021 and for the parents to respond to that document by 10 September. It is unclear whether a meeting of advocates to resolve the issue of witnesses needed for the final hearing had taken place, but no further provision was made in the order for any other witnesses to attend than those who had been required in the earlier order.

10.

The local authority did not file its final amended threshold document by 1 September. Nonetheless, on 10 September 2021, Z filed his response to the earlier threshold document in which he indicated he did not accept a number of the allegations made by the local authority.

11.

On Friday 17 September 2021, the local authority filed a final version of the schedule of facts in relation to threshold, making minor amendments to the version filed in June, but in particular amending the particulars relating to the allegations of Z’s drug use and adding:

“On 24 November 2017 Z was convicted of battery following him assaulting X.”

12.

The next day, Saturday 18 September 2021, counsel served a position statement on behalf of Z for the final hearing. That indicated that Z disputed a number of the factual allegations in the local authority’s threshold document, largely in relation to domestic abuse of the mother. Z’s position statement also made the point that the threshold document was not compliant with guidance in case law, in particular that given by Sir James Munby P in *Re A (Applications for Care and Placement Orders: Local Authority Failings)* [2015] EWFC 11, [2016] 1 FLR 1. Among other criticisms was the lack of a statement either from the housing officer referred to in sub-paragraph (c) of the threshold document or from the police officer to whom the complaint was made referred to in sub-paragraph (e).

13.

On Sunday 19 September 2021, counsel for X served his position statement for the hearing. It was stated that X was neutral on the issue of threshold but, importantly for present purposes, the position statement went on to make a number of submissions concerning the relationship between the mother and Z, with a view to supporting the position that X’s son had settled in his father’s care and should not live with the mother full time. The points including the following,

“23. The relationship between the mother and Z is unstable. There have been frequent periods of separation and reconciliation. During periods of separation the mother appears to start to develop insight into the problems with their relationship but then denies that there are any such problems upon reconciling....

24. Z’s drug misuse is a risk factor

25. The relationship between Z and the mother is unhealthy, with elements of controlling and coercive behaviours.

26. X notes that in July 2020 the mother contacted him at 3 o’clock in the morning asking if she could transfer money to X’s bank account so that Z would not be able to access it. X agreed, and the mother duly transferred a few hundred pounds which she later withdrew. X is of the view that this incident corroborates the concerns that have been raised by the mother and by professionals about Z’s gambling problems, and – more importantly – his propensity to act coercively and abusively.”

14.

In her final report, the children’s guardian agreed with the local authority’s position that there should be no care or supervision order with regard to L.

The hearing before the recorder

15.

At the outset of the hearing on Monday 20 September 2021, the parties addressed the recorder as to the need for a fact-finding hearing in light of the agreements that had been reached between the parties. We have been provided with an agreed note of those submissions.

16.

The argument focused on the approach identified by McFarlane J (as he then was) in *A County Council v DP and others* [2005] EWHC 1593 (Fam). At [16] – [17] McFarlane J stated:

“until the court has determined the facts as best it can, and evaluated whether or not the threshold is passed, it is not appropriate to say that there will in fact be no public law order.... The question of whether or not a particular fact finding exercise is conducted within those proceedings is a question for the court’s discretion”

At [24], McFarlane J continued:

“The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:

- a) The interests of the child (which are relevant but not paramount)
- b) The time that the investigation will take;
- c) The likely cost to public funds;
- d) The evidential result;
- e) The necessity or otherwise of the investigation;
- f) The relevance of the potential result of the investigation to the future care plans for the child;
- g) The impact of any fact finding process upon the other parties;
- h) The prospects of a fair trial on the issue;
- i) The justice of the case.”

17.

In the course of submissions, counsel for the local authority, the mother and Z all resisted a fact-finding hearing taking place.

18.

The local authority’s position was that it might struggle to establish that the threshold was met, in particular because an agency social worker who had previously been involved with the case, Ms. W, could not be located to give evidence because she had moved away and had not been warned that she might be needed to give evidence, either in the case management order of 7 July 2021 or as a result of any meeting of advocates to discuss witnesses. It was Ms. W to whom the mother was said to have made the statements set out in sub-paragraph (f) of the threshold document, and who had also recorded in her family assessment that the mother had told her that the account of abuse that she had given to the police a week earlier, as set out in sub-paragraph (e) of the threshold document, had been correct. In the course of argument the recorder raised what he termed the “concerning” relationship between the mother and Z, to which counsel for the local authority responded that “the perception of it is that it might be an abusive relationship”.

19.

Counsel for the mother and Z both submitted that it would not be in the interests of the family to have an extended fact-finding hearing, that the local authority’s threshold document was “very problematic” and that it would be unfair to their clients if Ms. W was not available, because they would not be able to test her evidence as regards sub-paragraphs (e) and (f) of the threshold document. Neither counsel raised any concerns about the unavailability of the police officers to whom complaints had been made as alleged in sub-paragraphs (c) and (e) of the threshold document.

20.

Counsel for X took a different line, arguing that efforts should be made to locate Ms. W, but that even if she could not be found, the hearsay statements recorded by her could still be put to the parents for comment. He also questioned why the local authority was concerned about demonstrating that the threshold had been met, given that it had filed a revised final threshold document only days earlier. Counsel for X also submitted, by reference to the paragraphs of X's position statement set out above, that if the recorder found a coercive relationship existed between Z and the mother, then it would be surprising if there was no risk of harm to the children. None of the other counsel is recorded as having objected to that submission or taken the point that the final local authority threshold document no longer alleged that Z exercised coercion or control over the mother.

21.

Having heard submissions, the recorder decided to proceed with the fact-finding hearing and gave a short judgment in which he set out his reasons, by reference to the factors identified by McFarlane J. We have been provided with an agreed note of that judgment. In it, under the heading "Interests of the child", the recorder said:

"It is suggested that L's interests point away from a fact find because (1) no public law order [is] sought; (2) there are positive assessments of her parents, which points away from necessity of investigation. It seems to me that this argument ignores the reality of what will happen at the conclusion of proceedings. Whilst no public law order is sought, L will remain subject to a CP plan. The LA involvement will continue. LA can see the benefit of continuing LA involvement. Therefore, in relation to the child's interests, in my view it is in L's interests to know the basis of which LA would need to have continued involvement. It would be in L's interests to know why, and for all professionals working with the family and for all family members to know, the basis upon which there will be continued involvement [and] the reasons for the proceedings' initiation. There is a dispute with regard to the LA threshold of 17 September 2021 between the LA and the parents as to what they say is the factual matrix underpinning the application. Therefore, in my view, it is in L's interests to know if the allegations are true, and whether she was suffering or at risk of suffering significant harm. It is important that the factual matrix is established so that professionals working with L, and her parents moving forward would know and be able to take the appropriate measures to ensure that L's interests continue to be protected. If, as the parents, L's parents say, that the allegations are not true, it is equally important, in my view, for the factual matrix to be established because that would protect not just L but also her parents from being the subject of unnecessary professional intervention and state intervention. So it seems to me that the interests of L do not point away from establishing what the factual matrix is in terms of the trigger for the LA in initiating these proceedings."

22.

With regard to the "evidential result", the recorder noted that Ms. W was no longer employed by the local authority and not on the witness template to give evidence. He accepted, however, submissions made on behalf of X as to "the relevance and proportionality" of her evidence:

"...because the central allegation that underpins threshold and all the professionals' concerns ... that have caused them to be involved in this case revolve around the parents i.e. the mother and Z's relationship, and whether it is domestically abusive or simply as the parents say part and parcel of the sort of ordinary arguments that you would find in a non-abusive relationship. Ms W's evidence on my reading of the documents goes to reports made to her by the mother or by other agencies. The direct evidence will come from the mother and Z. Both filed evidence, both were warned to give evidence in this case. Therefore, both of them will have the opportunity to answer that allegation. So my view is,

whilst not ideal, it isn't in my view fatal to the question of whether or not a fact finding hearing can or should take place."

23.

Under the heading "The prospects of a fair trial", the recorder observed that the mother and Z had had the opportunity to file evidence, and were willing to give oral evidence:

"...so their Art 6 rights to a fair trial are protected by that opportunity to answer those allegations as to whether they are right or wrong. Regarding the fact of a fair trial being compromised by Ms W's non-attendance to be cross examined, her evidence from my reading of the papers is fairly limited to setting out whether or not the mother reported what she reported to her and that is not going to be fundamental whether there was domestic abuse in the relationship between the mother and Z . The direct evidence will come from the mother and Z."

24.

The hearing then proceeded for three days with oral evidence from the social worker with current responsibility for the case, the mother, Z, X, Y and the guardian.

25.

The local authority tried without success to locate Ms. W. The local authority was also unable to produce another social worker, Ms. P, notwithstanding that she had been listed as required to attend the hearing in the order of 7 July 2021. Ms. P had filed a statement which, among other things, stated that the mother had given her an account of events in late August 2020 consistent with that recorded in the police log and supporting the matters alleged in sub-paragraph (e) of the threshold document.

26.

In the course of the oral evidence, the mother, Z and X were asked about incidents that went beyond the local authority's schedule of facts relating to threshold. In particular, X gave oral evidence confirming the account in his position statement of an early morning request by the mother to accept at transfer of funds from her account to protect them from Z. The mother was cross-examined about this incident. She did not dispute X's account, but said that she was concerned that Z might spend her money shopping for clothes rather than gambling.

27.

During the hearing, the guardian informed the court through counsel that having heard the evidence, she had changed her mind and now proposed that L be subject to a supervision order.

28.

After the end of the evidence, the hearing adjourned and submissions were then delivered, some in writing, others orally when the hearing resumed on Friday 24 September 2021. At our request, following the appeal hearing, we were sent copies of the written submissions, and an agreed note of those delivered orally.

29.

In powerful written submissions circulated before the final day's hearing, counsel for X criticised the local authority's threshold document and the local authority's failure to ensure that Ms. P attended the hearing. The submissions also criticised the fact that neither the police officer who had logged the mother's complaints of abusive behaviour by Z against her in August 2020, nor Ms. W, had been produced to give oral evidence. However, counsel also very fairly noted that no other party at the case management hearing in July 2021 had identified any need for those two witnesses to be available.

30.

The submissions on behalf of X then made a number of detailed and cogent points to the effect that the contemporaneous documentary records such as the police officer's log and Ms. W's notes were likely to be reliable and accurate. He submitted that the oral evidence of the mother when challenged on the contents of the records "was not persuasive", and Z's evidence had been "entirely lacking in credibility". Counsel submitted that the only plausible explanation was that having told the police and professionals the truth whilst separated from Z, the mother had retracted her allegations for fear of the consequences after having reconciled with him. The written submissions concluded that if the court was satisfied of the truth of what the mother had told the professionals in August and September 2020, then the threshold was satisfied on the basis of a number of factors, the first of which was that "Z was trying to control everything [the mother] did and was excessively jealous".

31.

In written submissions also circulated prior to the final day of the hearing, counsel for the guardian confirmed that in light of the evidence given earlier that week, she now proposed that L be placed under a supervision order. She submitted that the threshold was met and expressed the view that the local authority had underestimated the risks in the household. The guardian's submissions also suggested that the mother's outright denial of allegations in her oral evidence indicated that there were issues of domestic violence and coercive and financial control within her relationship with Z. The guardian expressed concerns that the local authority seemed to have accepted the parents' minimisation of the violence in their relationship and had not explored the issues of coercive control and Z's gambling using money from the mother's bank account.

32.

At the hearing on the Friday, counsel instructed for the local authority conceded that the local authority's threshold document was "not fully *Re A* compliant", but argued that the court could nonetheless make findings and conclude that the threshold criteria were satisfied. She argued that, taking into account all of the evidence about domestic abuse, which included "at least potential for coercive control and behaviour", the court could find that there was a likelihood of significant emotional harm to the children. The local authority held to the view, however, that no order under s.31 was required.

33.

On behalf of the mother and Z, it was argued that, in so far as the local authority's case was based on hearsay evidence from witnesses who had not been presented for cross-examination, it was insufficient to support the findings sought. It seems from the agreed note of submissions that both counsel expressly addressed what was described as the "coercive control issue". On behalf of the mother, it was submitted that there was insufficient evidence of a pattern of behaviour and that "the detail in the cross-examination does not accord with a coercively controlling relationship". Counsel for Z relied on a statement from Z's previous partner that he had not behaved in a controlling way during their relationship and on the fact that there had been no recent allegation of such behaviour in his relationship with the mother.

34.

In oral submissions, counsel for X referred to the points made in his written submissions and reiterated that whilst there was some force in the points made on behalf of the mother and Z about reliance on the hearsay evidence in the police log and Ms. W's records, it was difficult to see how the mother could have been telling the truth in her evidence about those matters.

The judgment

35.

In his reserved judgment, the recorder started by summarising the case and the parties' positions, reiterating his decision on the preliminary issue raised at the start of the hearing, and identifying the legal principles relevant to a fact-finding hearing. He then at [33] considered the complaint made about the threshold document. He acknowledged that some of the allegations "lacked specificity" and that in some instances there was a lack of any link "drawn between the factual allegation pleaded and the harm L has suffered or is at risk of suffering". He continued:

"36. All parties accepted that I am not bound by the threshold document drafted by the Local Authority and I am entitled to make findings on the evidence that is before me. Mr Sharp [for Z] submitted that the parents still required a document with an element of specificity to the case they were to meet.

35. I am not persuaded that the lack of an adequately drafted threshold document is fatal to my consideration and determination of the contested threshold issues. I say this for two reasons. The first is that part of the Local Authority's case is that the relationship between the mother and Z involved elements of coercive and controlling behaviour on the part of Z. I bear in mind the concern expressed by the Court of Appeal in the case of Re H-N and Others (Children) (Domestic Abuse: finding of fact hearings) [2021] EWCA Civ 448 that the requirement for a document distilling the allegations of abuse down to specific factual incidents tied to a particular date and time risked blinding the Court to the wider context of whether there has been a pattern of behaviour that was coercive and controlling. As the President said at paragraph 44 of his judgment in that case:

"Abusive, coercive, and controlling behaviour is likely to have a cumulative impact upon its victims which would not be identified simply by separate and isolated consideration of individual incidents".

36. The second reason why I am not persuaded that the deficiencies in the Local Authority's threshold document presented a bar to my consideration and determination of contested threshold issues is that I am satisfied that the parents had a very clear idea as to the specific allegations they were to meet, particularly in relation to the allegations of domestic abuse. As much of the cross-examination and submissions have revolved around specific allegations of abuse, both the mother and Z have had the opportunity to provide their evidence, both written and oral, about those specific allegations, and the length of this hearing is one indication as to the care with which each of the parents was taken through the factual background to this case.

37. The specific allegations of domestic abuse are also clearly set out in the documents and have also formed the basis for discussions the parents have had with professionals throughout this case. I am satisfied that the mother and Z were well aware of the specific allegations of concern and have had the opportunity to present their response to these allegations both in writing and in their oral evidence to me."

36.

At [41] the recorder cited following passage from the threshold document:

"The relationship between the mother and Z has featured arguments and there have been several occasions when the couple have separated and then reconciled. The children have been present during some of the arguments and were at risk of suffering emotional harm".

He continued:

"42. It is in relation to this threshold finding that most of the factual evidence was heard and factual allegations ventilated during the hearing. It was clear the Local Authority was putting forward the case that not only was the relationship between [the mother and the appellant] abusive due to the arguments but also that that relationship was abusive as it had elements of Z exerting coercion towards and control over the mother.

43. The incidents that I alluded to earlier in my summary of the background were the subject of evidence and submissions and I shall now consider whether the assertion that these incidents were abusive is made out and I shall then consider whether there has been a pattern of coercive and controlling behaviour."

37.

The recorder considered first the incident reported to the police by the housing officer on 5 May 2020. Having summarised the written and oral evidence put before him, he set out the following analysis:

"47. Looking at the evidence around this alleged incident, I note that the report of Housing to the police is consistent with what the mother subsequently reported to the police at the time when the police officers turned up at the house; that there was a telephone call by Z to Housing and that during that telephone call Z had been shouting at the housing officer and at the mother.

48. These contemporaneous accounts by the housing officer and the mother are also consistent with Z's and the mother's oral evidence in all respects apart from the account of Z shouting. Having considered the oral evidence of the mother and Z about this incident, I found their oral evidence about why there was this difference in account unpersuasive. Z said that the housing officer had probably fabricated or exaggerated his behaviour during the telephone call, implying that the housing officer was either being malicious or intending to cause trouble for him due to their disagreement on the telephone. I found this an implausible explanation. It is clear from the police log that the purpose of the housing officer contacting the police was not to make a complaint about Z's behaviour towards the housing officer but because she had concerns over the welfare of the mother in the house with Z. It is clear from the police log that the police had attended the property not to speak with Z about his behaviour towards the housing officer but to undertake a welfare check on the mother.

49. The mother's evidence about why there was a difference in her account of the incident now and the account given by the housing officer and more importantly given by her on 5 May was just to deny that she had reported any shouting by Z at all. I found it implausible that the police log could be correct on all the details apart from the precise two details that are damaging to Z's case before me at this hearing.

50. I am satisfied that it is more likely that Z did behave in such a way that a housing officer was so concerned for the mother's welfare that she reported her concerns to the police for the police to undertake a welfare check on the mother.

51. Z accepts that on this date his plan to leave the home with L had been thwarted by the mother's refusal to evict him, as it were, resulting in the housing officer's refusal to provide him with separate accommodation. I am satisfied, on the balance of probabilities, that Z did express his frustrations and shout at the housing officer and at the mother, the two people he saw as blocking his plan to leave, and to shout at the mother in such an abusive manner as to cause the housing officer to become concerned about her welfare."

38.

The recorder then considered the evidence given by X and the mother about the incident, not included in the threshold document, about the request by the mother to transfer money to X's bank account to protect it from Z. As indicated above, the mother agreed that she had made this request but said it was nothing to do with gambling but rather to prevent Z spending her money on clothes. The recorder again observed that he found the mother's evidence unpersuasive, noting that she was unable to explain why the matter was so urgent as to require a message at 3 o'clock in the morning.

39.

The recorder then turned to the incident on 27 August 2020 when the mother had called the police and, according to the police log, reported (a) that she had separated from Z after an argument and gone to stay with the maternal grandmother, (b) that Z had sent text messages demanding that she return L to the home and warning that there would be nothing left in the property and that he would report her to social services, (c) that the argument had occurred after Z had withdrawn all their money as he had a gambling addiction, (d) that she had refused to give him her mobile phone whereupon he had pushed her and taken the phone and used it to clear out the bank account, (e) that he smoked cannabis all the time, and (f) that she was concerned that he would try to take L, not because he particularly wanted her, but to punish the mother. The recorder noted that in her oral evidence the mother had resiled from the account she was reported as having given to the police, saying that there had been no real argument about the phone but rather "just a mild disagreement". Z's evidence had been to the same effect.

40.

The recorder was not satisfied with the parents' accounts because they failed to explain why Z had insisted on using the mother's phone instead of his own or why, if there had only been a "mild disagreement", the parties had then separated. He also rejected the mother's explanation that the references to Z's gambling and cannabis use had come from the maternal grandmother who was present during her conversation with the police, noting that the mother had also said in evidence that she had corrected any mistaken information given by the grandmother. This pointed to a conclusion that her mother's account as recorded in the police log was accurate. The recorder added that the accuracy of that account was supported by the account given to Ms P, as recorded in her statement filed in the proceedings, and to Ms W, as recorded in her family assessment.

41.

At [74] the recorder concluded:

"When I consider what was reported by the mother to the police on 27 August, to Ms. W on 4 September and to Ms. P [as set out in his statement] it is clear that there is a consistency in what the mother was reporting to professionals at this time. When I look at this evidence in the context of the other evidence relating to the urgent transfer of money into X's account in July 2020, I am satisfied that there is a consistency in the mother being worried about gambling in July and then reporting Z's gambling addiction repeatedly in August. When I say 'repeatedly', I mean first to the police and then to Ms W in August and September. I am therefore satisfied, on the balance of probabilities, that the account given by the mother to the police on 27 August 2020, setting out what happened during the phone incident, reporting financial abuse by Z and his gambling and cannabis addiction, and also reporting threats by Z in demanding L's return, was a true account and I reject the mother's and Z's oral evidence to me on those events."

42.

Next, the recorder dealt with evidence concerning another incident not included in the threshold document – referred to as the “mirror” incident – which had come to the attention of children’s services following a report of something said by J at his nursery on 1 September 2020, to the effect that a mirror had fallen off the wall and Z had shouted at and punched a female friend who was visiting the house. The mother had given an account of this incident to Ms W in the course of the family assessment in which she was recorded as saying that Z had shouted at the friend that the children were crying, that the friend had called the police, but that Z had not punched the woman. In her oral evidence, however, the mother gave a different version, aligning herself with the account given by Z who denied he had shouted or been aggressive. Having considered other evidence about this incident, the recorder concluded that the mother’s account to the social worker was more plausible and that Z had behaved aggressively and shouted, frightening the children and causing them to cry. He did not find, however, that Z had punched the friend or broken the mirror because J’s account to the nursery staff was inconsistent with other evidence.

43.

The recorder then considered the evidence about events at the start of September 2020. He recited the evidence about the allegation that Z had called the mother a “rat” and concluded that he had indeed called her a “snitchy little rat” because she had called the police. He then referred to another part of Ms W’s report in which she had recited conversations she had with the mother and Z on or about 7 September. Ms W had recorded that the mother had told her that she had been messaging Z all weekend despite previously saying that she wanted to end the relationship, that she had allowed him back into the house, that he had taken L away and that, at the time of her conversation with Ms W, the mother did not know where he and L were. Ms W had recorded that during her conversation with Z he had been abrasive and uncooperative, would not tell her where he and L were, and had said that he might not bring her back and that she would have to get a court order. The recorder continued at [90]:

“Z accepts that he had L with him on that date and accepts that he did refuse to tell the social worker where he was. Given my other findings in this case, I am satisfied that he did so because it was in keeping with his threats to the mother that he would remove L from her care, and that it is consistent with the mother’s account at the time she was reporting this to the police and the social worker in September of 2020 that Z would threaten to remove L from her care and keep her. I am therefore satisfied that it is more likely than not that the account of what the mother told Ms W as recorded in the family assessment on 4 and 7 September was a true account and that was how Z was behaving at the time.”

44.

The recorder said that he rejected Z’s evidence that the reason he had asked for L to be returned to his care was that he had not seen her for some time and was concerned about her welfare. He added:

“I am of the view that the account given by the mother to the police on 27 August and to the social worker on 4 and 7 September is more likely the true account, and that is the texts and messages that Z was sending to the mother about L, demanding her return home, was more in line with his threats to remove L from the mother’s care as a result of [her] actions not being in keeping with what Z wanted at the time.”

45.

Having considered the individual incidents covered in the evidence, the recorder continued:

"I now therefore turn to consider the issue of whether there has been, as alleged by the Local Authority, coercive and/or controlling behaviour exhibited by Z towards the mother. In my view, it is clear that Z has used L as a tool during his arguments with the mother and has repeatedly held either the removal of L from her care by him or by Social Care ... as a threat over her head on 5 May, 27 August and the weekend of 6 and 7 September. When I put this together with his actions in December 2018, where he, having been compelled to move out of the mother's accommodation, took L with him, a clear pattern of behaviour emerges, in my view. I am satisfied that Z has used L's removal and/or the threat of her removal from the mother's care, either by himself taking L away or by threatening to cause L to be taken away from the mother, as a means of coercion and a means of controlling how the mother behaved."

46.

One element of the recorder's analysis related to Z's treatment of the mother's bank account. Although as set out above, the local authority had referred to the mother's complaints to the police about Z's use of her money for gambling, his accessing the bank account had not been expressly mentioned in the threshold document. It had featured, however, in the evidence and this led to the recorder's findings at [95] to [97] in the judgment:

"95. In my view, I am satisfied, on the balance of probabilities, given my satisfaction about the veracity of the reports given by the mother to social services and the police in August and September of last year, that Z did access the mother's account in an abusive way; that he used her money against her wishes and for purposes that she did not agree with. I am therefore satisfied that the free access that he had to [her] account was abusive and controlling That she was not able to exert any control over his use of her money or access to her bank account demonstrates how corroded her personal autonomy had become in that relationship at the time.

96. When I combine what Z had been doing to the mother's monies in July 2020, her complaint about this behaviour again on 27 August 2020 and to the social worker on 4 September 2020 together with the threat he made in his text, that, "There will be nothing left in the flat" if the mother did not bring L back to him, shown to the police on 27 August 2020, a clear pattern of behaviour can be seen of Z using the parents' finances as a means of controlling the mother.

97. It is clear in my view that Z's behaviour and actions did amount to coercion and control because it is plain to see that from the impact it had on the mother's behaviour. Following the threats that Z made in his texts seen on 27 August 2020, the mother returned home with L as Z had demanded despite having made plans with the police and social workers to stay with the maternal grandmother.

98. On 4 September 2020, the mother explained that the reason why she had returned home was because she was scared of the repercussions from Z if she did not return home as he had so demanded. The mother also said that she was terrified of the children being removed from her care, as that is what Z threatens her with. I found that that was what the mother did say to the social worker on that date, and it is an indication of how intimidated, scared, and frightened [she] had become due to the threats and behaviour of Z towards her. Despite Z being excluded from the property with the help of the police on 4 September, Z re-entering the property and removing L from the mother that very weekend resulted in the mother allowing Z to move back into the property, where he has remained since. It is difficult not to draw a direct link between Z's behaviour and the mother's capitulation or subordination of her own wishes and feelings to his demands."

47.

The recorder then considered the other proposed findings set out in the local authority's threshold document. He refused to make the finding that the mother had not engaged with services, holding that "the facts as pleaded do not get anywhere close" to crossing the threshold. He then made a limited finding about Z's cannabis use and the finding relating to his earlier conviction for battery.

48.

At [108] he set out his conclusion on whether threshold under s.31 had been crossed:

"I am therefore satisfied, given the findings that I have made, that the threshold criteria under [section 31\(2\)](#) are made out, and therefore the jurisdictional gateway is crossed in allowing me to consider the welfare outcomes for L within the Local Authority's application under Part IV of the [Children Act 1989](#)."

49.

The recorder then proceeded to consider what order to make in the light of his findings, by reference to the welfare checklist in s.1(3). At [114] to [115], when considering s.1(3)(e) ("any harm which [the child] has suffered or is likely to suffer"), he said:

"114. ... I have already found the threshold has been crossed and that L has been living in and therefore exposed to the domestic abuse that her father has perpetrated against her mother. L has been directly affected whenever there have been arguments between the parents, as Z has either removed her precipitously from her home with her mother and siblings or has threatened to do so. L has also been exposed to the risks arising from Z's cannabis use, either at the risk of being exposed to Z when he is under the influence, not being available to meet her needs, or the impact, or the risk to L of the father being involved with individuals who are providing him with this illegal drug. I have also found, given my findings earlier on, that L has suffered significant harm by being exposed to Z's aggressive behaviour, as I have found during the incidents that I have dealt with in the earlier part of my judgment.

115. Looking at the risk of harm for L moving forward, the question is more complicated and I am not satisfied that I have an adequate, or as the Guardian put it in her closing submissions, 'proper' assessment of the risks as at this stage"

50.

After considering the other factors in the checklist, the recorder concluded that without such an assessment he could not come to a safe conclusion as to the appropriate care plan and order for L. He therefore adjourned the care proceedings to a further case management hearing and invited the parties to make a further application for an expert risk assessment under Part 25 of the Family Procedure Rules. The private law proceedings concerning J and K were concluded with separate orders under which each boy is to live with his father and have defined contact with the mother. The prohibited steps order restricting contact between Z and J was discharged.

51.

The schedule of findings made by the recorder was in the following terms:

"The date of applying the threshold criteria is 5 January 2021 being the date of the initiation of protective measures.

At that date, the children were likely to suffer significant harm, such harm being attributable to the care given or likely to be given to him if an order were not made.

The local authority has not made an application for care or supervision orders in relation to J or K and as such the court does not need to consider the application of threshold to them. However, the findings made are also relevant to the welfare decisions for all three children.

Findings

1. The relationship between the mother and Z at the time of threshold caused the children emotional harm. Z's behaviour and actions amounted to coercion and control which impacted on the mother and it featured arguments and abusive behaviour by Z to the mother, some of which occurred in front of the children. This included

Z has used L as a tool during his arguments with the mother, as a means of coercion and control.

Z using the free access to the mother's bank account to spend money that should have been used for family essentials in a way that was against the mother's wishes for purposes she did not agree with. This caused the mother concern about his spending and their finances.

Z shouting at the mother and using abusive terms during arguments, sometimes in front of the children.

The facts supporting this are as follows

(a) On 5 May 2020 Z telephoned the council's housing section to request emergency housing as he had separated from the mother, during the call shouted at the housing officer and also shouted in an abusive manner at the mother who was present with him. This caused the housing officer to be sufficiently concerned about the mother's welfare to contact the police.

(b) On one occasion in July 2020 the mother made an urgent request to X in the early hours of the morning to transfer a sum of a few hundred pounds of her money to his bank account in order to protect it as she was concerned that if she did not that Z would spend it while gambling.

(c) Shortly prior to 27 August 2020 the mother left Z and was staying with her mother. The couple had argued about Z's use of cannabis and gambling. Z sent the mother a number of texts demanding that she return L to him or he will report her to children's services.

(d) Z called the mother abusive terms such as a "snitchy little rat" for contacting the police on him.

(e) On 1 September 2021 [sic] the mother asked Z to assist with removing a mirror from the wall When Z refused to do so right away the mother and her friend removed it and an argument occurred in front of the children, which involved shouting. Z behaved aggressively and this upset the children causing them to cry and a friend of the mother who was present called the police.

(f) On 4 September 2020 the mother told a social worker that she was scared of Z. She stated that she had returned to the relationship and was scared of the repercussions if she did not return to Z. She also stated that the couple argued all of the time, sometimes in front of the children.

2. Z used cannabis regularly at the time of threshold ... but was not honest about his use of cannabis with professionals putting the children at risk of neglect....

3. On 24 November 2017 Z was convicted of battery following him assaulting Y as a contact handover putting the children at risk of emotional and physical harm should they be caught in the crossfire."

The appeal

52.

Applications for permission to appeal by the mother and Z were refused by the recorder. On 18 October 2021, Z filed notice of appeal to this Court. On 22 November, permission to appeal was granted on two grounds:

(1) If the recorder was going to exercise his discretion to conduct a fact-finding, he was wrong to make so many findings outside the scope of the final threshold document, particularly bearing in mind the inability of the parents to test the evidence of the authors of the hearsay reports on which he was relying in making those findings.

(2) The recorder was wrong to find threshold made out, even if his findings about what Z did are undisturbed, because there was a lack of any adequate linkage from the events found to L suffering, or being likely to suffer, significant harm at the time proceedings were initiated.

53.

Under the first ground of appeal Mr David Sharp on behalf of Z accepted that a court is not obliged to adhere slavishly to the local authority's threshold document. He submitted, however, that the court will need very good reasons to depart from the way the authority has framed its case. Where a judge wishes to make findings not sought by the local authority, he must ensure that they are securely founded in evidence and the fairness of the fact-finding process is not compromised. Both at common law and under Article 6 of ECHR, it is an inherent feature of a fair trial that each party is given a reasonable opportunity to present his case and respond to the case put by the other side. In support of this argument, Mr Sharp cited, amongst other cases, *Re G and B (Fact-Finding Hearing)* [2009] EWCA Civ 10, [2009] 1 FLR 1145 and *Re A (No.2) (Children: Findings of Fact)* [2019] EWCA Civ 1947 [2021] 1 FLR 755, considered below.

54.

Mr Sharp submitted that the findings made in this case ranged well beyond the threshold document, in particular the findings relating to the mother's request to X to allow her to transfer money to his account, the "mirror" incident, Z's aggressive and threatening behaviour after the mother left the home with L in August 2020, Z's refusal to disclose L's location to the social worker after removing her from the mother, and the conclusion that Z's conduct amounted to a pattern of coercive control. He argued that, had the parents known that the court would be minded to make these findings, they would have sought to adduce further evidence. By way of example, he submitted that, had the parents known of the possibility of the finding that the mother transferred money to X to prevent Z using it for gambling, they would have adduced bank statements and other evidence about their financial transactions.

55.

Mr Sharp also submitted that, in making most of the additional findings beyond the threshold document, the recorder had relied heavily on hearsay evidence from witnesses who were not called about statements allegedly made by the mother, in particular the social worker Ms W. Mr. Sharp submitted that the requirement to call witnesses and require others to attend for cross-examination depends on knowing the findings which are likely to be made against you. He submitted that had the findings made by the recorder been included in the schedule of findings sought by the local authority, the parents would have insisted on Ms W giving evidence, and possibly in addition would have required Ms P, the housing officer and the authors of the police logs to attend the final hearing to be cross-examined. Mr Sharp submitted that the context in which this hearing went ahead was that the local authority had been clear for some time that it would not be seeking any order in respect of L,

and that the absence of such witnesses meant that Z had been placed in the invidious position of being unable to test the written evidence against him.

56.

Under the second ground, Mr Sharp contended that the local authority threshold document said “next to nothing” about the linkage between the findings sought and any significant harm. He submitted that this omission extended to the judgment in which the recorder said little about how any of the matters of fact relied on by the local authority either caused significant harm to L or gave rise to a likelihood of significant harm. In particular, he submitted that, in paragraph [108] of the judgment, the recorder had failed to identify whether he was finding that the threshold criteria had been satisfied on the grounds that L had suffered significant harm, or that there was a likelihood that she would suffer such harm in the future.

57.

Z’s appeal is supported by the mother. On her behalf, Mr Nigel Cholerton also conceded that it had been open to the recorder to extend the scope of the fact-finding hearing beyond the confines of the local authority threshold document. But he submitted that an assessment of whether the process had been fair in this regard turned on two points, which he described as “how you get there” and “the extent of the disparity”.

58.

On the first point, he submitted that the recorder had been wrong to say that the best witnesses were the parents themselves and that it was fair to proceed without the social workers and others being called. The starting-point ought to have been to evaluate the quality of the evidence on which the local authority relied. By effectively ruling that he did not need to hear from those witnesses, he had prevented the mother and Z challenging their evidence. It was submitted that this was tantamount to reversing the burden of proof, as demonstrated by the fact that at points in the judgment the recorder observed that he found the evidence given by the mother and Z “unpersuasive”. On the second point, given the considerable disparity between the local authority schedule and the recorder’s ultimate findings, he submitted that it could not be said that the process was fair.

59.

In opposing the appeal, Ms Gemma Bower for the local authority (who did not appear before the recorder) submitted, relying on A County Council v DP, that it was entirely within the recorder’s discretion to proceed with the fact-finding hearing notwithstanding the fact that at the outset of the hearing no party was seeking any order under s.31. His decision to proceed in the absence of Ms. W or Ms. P on the basis that the direct evidence about the allegations of domestic abuse would be provided by the mother and Z was also within his discretion.

60.

In her skeleton argument, Ms. Bower compared and contrasted the findings made by the recorder against those sought by the local authority. She submitted that, in so far as the findings made were not expressly sought in terms in the local authority schedule, they were fully supported either by the written evidence or the oral evidence given at the hearing. Although she accepted that it would have been preferable if Ms. W had been available, Ms. Bower submitted that her evidence would have been confined to whether the statements she attributed to the mother were accurately recorded in her report. The scope for challenge in cross-examination would therefore have been limited.

61.

For the guardian, Ms. Khan supported the local authority in resisting the appeal. She submitted that the recorder had rightly embarked upon the fact-finding exercise and that it could not be said that his findings were unsupported by the evidence. She also submitted that it was significant that at no stage was any application made for an adjournment by any of the parties.

Case law

62.

A number of reported authorities were cited to us, but the principles are straightforward and uncontroversial.

63.

In *Re G and B (Fact-Finding Hearing)* [2009] EWCA Civ 10, [2009] 1 FLR 1145, Wall LJ said, in words which have been endorsed in subsequent cases:

“15. I am the first to acknowledge that a judge ... is entitled to take a proactive, quasi-investigative role in care proceedings. Equally, she will make findings of fact on all the evidence available to her, including her assessment of the parents' credibility; she is not limited to the expert evidence. I am also content to decide the question in this appeal on the basis that a judge ... is not required slavishly to adhere to a schedule of proposed findings placed before her by a local authority. To take an obvious example: care proceedings are frequently dynamic and issues emerge in the oral evidence which had not hitherto been known to exist. It would be absurd if such matters had to be ignored.

16. All that said, however, the following propositions seem to me to be equally valid. Where, as here, the local authority had prepared its Schedule of proposed findings with some care, and where the fact finding hearing had itself been the subject of a directions appointment at which the parents had agreed not to apply for various witnesses to attend for cross-examination, it requires very good reasons, in my judgment, for the judge to depart from the schedule of proposed findings. Furthermore, if the judge is, as it were, to go “off piste”, and to make findings of fact which are not sought by the local authority or not contained in its Schedule, then he or she must be astute to ensure; (a) that any additional or different findings made are securely founded in the evidence; and (b) that the fairness of the fact finding process is not compromised.”

64.

In *Re A (Applications for Care and Placement Orders: Local Authority Failings)* [2015] EWFC 11, [2016] 1 FLR 1, in passages to which the parties alluded before the recorder, Sir James Munby P at [8] - [9] observed that the fact that the burden of proof rested on the local authority carried with it the important practical and procedural consequence,

“that the local authority, if its case is challenged on some factual point, must adduce proper evidence to establish what it seeks to prove. Much material to be found in local authority case records or social work chronologies is hearsay, often second- or third-hand hearsay. Hearsay evidence is, of course, admissible in family proceedings. But, and as the present case so vividly demonstrates, a local authority which is unwilling or unable to produce the witnesses who can speak of such matters first-hand, may find itself in great, or indeed insuperable, difficulties if a parent not merely puts the matter in issue but goes into the witness-box to deny it.”

At [12] he also noted a further “fundamentally important point” was,

“the need to link the facts relied upon by the local authority with its case on threshold, the need to demonstrate why, as the local authority asserts, facts A + B + C justify the conclusion that the child

has suffered, or is at risk of suffering, significant harm of types X, Y or Z. Sometimes the linkage will be obvious, as where the facts proved establish physical harm. But the linkage may be very much less obvious where the allegation is only that the child is at risk of suffering emotional harm or, as in the present case, at risk of suffering neglect.”

65.

Before this Court, reference was made to *Re W (A Child)* [\[2016\] EWCA Civ 1140](#); [\[2017\] 1 WLR 2415](#). The judge in that case had conducted a fact-finding hearing over allegations of sexual abuse against a family member, which he found not to have been proved. But in the course of his draft reserved judgment, the judge made findings of serious misconduct against the local authority social worker (SW) and the police officer (PO) involved in the case. They had no advance warning of the judge’s intention to make those findings and appealed, asking that the findings be redacted from the judgment.

66.

At paragraphs [91]-[94] Macfarlane LJ explained the factual background and the reason for allowing the appeal as follows,

91. During the detailed submissions ... we were taken to the transcript of the oral evidence which demonstrated beyond doubt that the matters found by the judge were not current, even obliquely, within the hearing or wider process in any manner. None of the key findings that the judge went on to make were put by any of the parties, or the judge, to any of the witnesses and there is a very substantial gap between the cross examination, together with the parties’ pleaded lists of findings sought, and the criticisms made by the judge. In this respect this is not a matter that is finely balanced; the ground for the criticisms that the judge came to make of SW, PO and the local authority, was simply not covered at all during the hearing.

92. For my part it became clear from reading the transcript that the cross-examination of SW and PO had been entirely conventional in the sense that it dealt with ordinary challenges made to the process of inquiry into the allegations of sexual abuse and was conducted entirely ... within the four corners of the case. At the conclusion of the oral evidence, in closing submissions no party sought findings that went beyond those conventional challenges. At no stage did the judge give voice to the very substantial and professionally damning criticisms that surfaced for the first time in the bullet-point judgment.

93. It can properly be said that by keeping these matters to himself during the four-week hearing, and failing to arrange for the witnesses to have any opportunity to know of the critical points and to offer any answer to them, the judge was conducting a process that was intrinsically unfair.

94. For my part, in terms of the decision in this appeal, it is not necessary to go further than holding that, unfortunately, this is a fundamental and extreme example of “the case”, as found by the judge, not being “put” to SW and PO.”

67.

In *Re W*, MacFarlane LJ then went on to make some observations on procedural fairness in the context of Article 8 ECHR. Notwithstanding the very different factual scenarios, it was argued that the approach in the present circumstances should be the same. MacFarlane LJ said:

“95. Where, during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the following:

- a) Ensuring that the case in support of such adverse findings is adequately 'put' to the relevant witness(es), if necessary by recalling them to give further evidence;
- b) Prior to the case being put in cross examination, providing disclosure of relevant court documents or other material to the witness and allowing sufficient time for the witness to reflect on the material;
- c) Investigating the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness.”

68.

The passages cited from Re G and B and Re W were recently endorsed by this Court in Re A (No.2) (Children: Findings of Fact) [2019] EWCA Civ 1947 [2020] 1 FLR 755. They were cited by Peter Jackson LJ in support of his succinct summary of the approach at [96]:

“Judges are entitled, where the evidence justifies it, to make findings of fact that have not been sought by the parties, but they should be cautious when considering doing so.”

69.

In Re H-N and others (Children) (Domestic Abuse: Finding of Fact Hearings) [2021] EWCA Civ 448, this Court gave guidance on the proper approach to managing cases involving allegations of coercive control. At [41] the Court observed:

“For any part of the legal process to function fairly and efficiently, there is a need for material that is to be placed before a court to be organised and structured so that all involved in the court process may understand its significance. The need for, in lay terms, an agenda, or in terms of criminal law, a charge-sheet or indictment and, in terms of a civil action, 'pleadings', is seen as essential both in terms of allowing a party against whom a case is being brought to understand what is being said against them, and, secondly, on grounds of basic efficiency.”

Up to that point, it had been the usual practice in family cases to set out allegations of domestic abuse in a Scott Schedule. In Re H-N, this Court at [44] identified a problem with this approach in cases of alleged coercive control:

“The principled concern arose from an asserted need for the court to focus on the wider context of whether there has been a pattern of coercive and controlling behaviour, as opposed to a list of specific factual incidents that are tied to a particular date and time. Abusive, coercive and controlling behaviour is likely to have a cumulative impact upon its victims which would not be identified simply by separate and isolated consideration of individual incidents.”

Discussion

70.

In assessing whether the process by which the findings were made was fair, we start by considering the disparity between the case advanced by the local authority and the recorder's findings. As Snowden LJ observed in the course of the hearing, the greater the extent of the disparity, the greater the need for procedural safeguards. There is undeniably a disparity between the local authority's final schedule and the findings ultimately made by the recorder. We are uncertain whether, to adopt Wall LJ's colourful phrase in Re G and B, the recorder could be described as having gone “off piste”. But

for the reasons that follow, we accept Ms Bower's submission that the recorder's findings were not, to use McFarlane LJ's phrase in Re W, outside the "known parameters" of the case.

71.

We were impressed with Ms Bower's skilful comparison of the final version of the threshold document with the findings made by the recorder (set out respectively at paragraphs 5 and 6 and 51 above). The majority of the findings in paragraph 1 and in particular as detailed in sub-paragraphs (a) – (d) and (f) are either in line with the local authority's schedule or an expansion of the findings sought. It is almost invariably the case that the evidence will develop and expand during a contested hearing, often in ways which could not be fully predicted at the outset of the hearing, particularly where, as here, there are several parties pursuing his or her own case and seeking to draw out different points from the evidence. There is nothing exceptional in that. Similarly, the significance of a piece of evidence is often obscure at the start of the hearing and only becomes apparent during the oral evidence.

72.

As Ms Bower concedes, one of the specific findings of fact made (the "mirror incident") in sub-paragraph (e) was not mentioned at all in the local authority schedule. It was, however, alluded to in the written evidence and was the subject of questions put to the mother and Z in oral evidence. It is notable that the recorder was careful to confine his findings to Z's aggression and did not make findings on aspects (as to the breaking of the mirror and the allegation that Z punched the visitor) on which there was a conflict of evidence.

73.

It is also true that the recorder also made an important finding relating to coercion and control of the mother by Z which was an allegation that had not been included to in the final version of the "Schedule of facts the local authority allege in relation to threshold".

74.

But, applying the approach set out in the authorities above, we consider that the recorder had good reason to depart from the local authority threshold document, his finding was securely founded in the evidence, and it was made in a way that did not compromise the fairness of the process.

75.

Although coercive control was not expressly pleaded in the final version of the local authority's threshold document, it was a concept that had featured prominently in the proceedings from the outset and had been addressed in the written evidence.

76.

The preliminary statement from the social worker at the outset of the care proceedings dated 9 December 2020 put Z's behaviour towards the mother at the forefront of the issues:

" ... the local authority are concerned that L has been exposed to aggressive, abusive, controlling and coercive behaviour from her father towards her mother. This has placed her at risk of significant physical and emotional harm.

Z exhibits characteristics that are typical of a controlling and dominating personality, and his behaviours include isolating the mother from her supportive network...

Z appears to use L as a way of controlling the mother. She has told me that when she previously went to stay with her mother, Z sent her text messages demanding that she return L to him and threatening to report her to the police and children's social care..

If further incidents occur, L will undoubtedly continue to be at risk of emotional harm. She has been raised, so far, in a home environment where her father is dominating and controlling her mother, and her mother appears to be unable to recognise this..”

77.

In its initial “interim schedule of facts” filed at the outset of proceedings on 4 January 2021, the first allegation by local authority in support of its submission that the threshold criteria were met also included an allegation of abusive and controlling behaviour,

“The relationship between the mother and Z has featured heated arguments and Z subjecting the mother to verbal abuse and controlling behaviour. L has been present on some of the occasions when this has occurred and was at risk of suffering emotional harm...”

The same document also alleged that the mother had not been able to maintain separation from Z despite the allegations of domestic violence she had made against him.

78.

In her response, the mother had asserted, inter alia, that she and Z occasionally argued and had disagreements, but not more than any other normal couple, and that she had never felt scared of Z and had never felt powerless in the relationship. In his response, Z also accepted that there had been some verbal arguments in the presence of L. He did not directly address the allegation of controlling behaviour, simply stating that the allegation was “not accepted as drafted”.

79.

As indicated above, the local authority deleted the express allegation of controlling behaviour in the revised draft of its threshold document served on 16 June 2021. Nonetheless, the fact that the local authority had been concerned that Z's behaviour towards the mother had been controlling and abusive was acknowledged and addressed by Z in his subsequent witness statement in the proceedings dated 13 September 2021 in which he said:

“At the start of these proceedings the social worker was very concerned about the relationship between the mother and me. The social worker was of the view that I was controlling and abusive. She recommended that I complete a course with the X Trust. At the time I denied – and continued to deny that our relationship is abusive. I did contact the X Trust but they did not accept the referral because I deny abusing the mother. (It should be noted that the mother also denies that I have abused her.)”

80.

It is also significant that, whilst the parenting assessment of the mother and Z filed in the course of the proceedings in June 2021 was broadly positive, the assessor expressed concern about the mother's low self-esteem in her relationship with Z and whether, without further work, this might result in further allegations of domestic abuse.

81.

As we have indicated above, it is also apparent that the issue of coercive control was raised squarely by X in his position statement served shortly before the start of the hearing (see paragraph 13 above) and was addressed by his counsel in argument on the first day when he indicated (apparently without

opposition) that he would wish to cross-examine on those matters to establish that it would not be in the interests of his son to return to live with the mother.

82.

The issue of coercive control was also raised during the oral evidence. The allegation concerning the mother's request to transfer funds to X to prevent Z spending them was also confirmed by X in his oral evidence and was put to the mother during her evidence so that she had the opportunity to deal with it.

83.

The allegation of coercive control also featured prominently in the written closing submissions on behalf of X and the guardian, and it clear from the agreed note of oral closing submissions that counsel for the mother and for Z expressly addressed the issue of coercive control on the merits. Beyond their earlier objections to the general inadequacies of the threshold document and the reliance on hearsay evidence, counsel for the mother and Z did not suggest that the either party had been taken by surprise by the allegation or that it was wrong in principle for the recorder to consider it. Nor did they suggest that they might wish to have an adjournment to adduce any specific documentary evidence by way of bank account statements or the like to deal with the allegations concerning access to the mother's bank account or Z's spending.

84.

In those circumstances, it is in our view unsurprising that the recorder considered it appropriate to expand both his investigation of the issue of abuse to include consideration of the question of coercive control, and to make findings in relation to it.

85.

This case is a long way removed from the extreme facts of Re W in which the allegations were not even canvassed at the hearing or put to the relevant witnesses and only appeared in the draft judgment for the first time. The allegation of controlling behaviour had been part of the instant case from the outset, and although the local authority had decided not to proceed with it at the start of the final hearing, X undoubtedly had made it an important part of his case. As X had pursued his case on coercion and control, the recorder was obliged to address the issue in his judgment.

86.

In our view, it was open to the recorder to find that the totality of the evidence put before him, including the oral evidence given by the mother and Z, was sufficient to establish that Z had exerted coercive control over the mother and he was entitled to rely on that finding when considering whether the s.31 threshold was crossed.

87.

Indeed, if the recorder interpreted the evidence in that way, it was his duty to say so. As this Court observed in Re H-N and others, supra at [51]:

"consideration of whether the evidence establishes an abusive pattern of coercive and/or controlling behaviour is likely to be the primary question in many cases where there is an allegation of domestic abuse, irrespective of whether there are other more specific factual allegations to be determined. The principal relevance of conducting a fact-finding hearing and in establishing whether there is, or has been, such a pattern of behaviour, is because of the impact that such a finding may have on the assessment of any risk involved in continuing contact."

The decision in Re H-N was handed down in March 2021, in the course of the current proceedings. The recorder was rightly alert to the need to consider whether the evidence of Z's conduct established the pattern of coercive control before deciding what order to make for L's future protection. There was an obvious benefit in seeking to reach clear findings about the extent of the abuse and controlling behaviour which could inform future work with the couple to ensure the protection of the children. The fact that all parties were agreed that no order under s.31 was required did not absolve the recorder from taking the course he did if he considered that it was in the interests of the child's welfare. The fact that the guardian changed her position in the course of the hearing demonstrates that the recorder was right to insist on the hearing going ahead.

88.

We have also carefully considered the complaint that a number of witnesses were not available for cross-examination. The mother and Z knew that the local authority were seeking a finding that the threshold had been crossed on the basis of findings that were in dispute. Although the parties were agreed that there was no need for a s.31 order, all of the legal representatives recognised that it was for the court to determine what order should be made if the s.31 threshold was crossed. For those reasons, they ought to have identified at the earlier case management conference in July 2021 all relevant witnesses who they might wish to cross-examine, such as, for example, the housing officer to whom Z was allegedly aggressive in May 2020 (sub-paragraph (c) of the threshold document) and Ms. W (whose evidence was relevant to sub-paragraphs (e) and (f)). They did not do so.

89.

Further, if a relevant witness was not available, it was open to a party to apply to adjourn the final hearing. No such application was made. In oral submissions at the appeal hearing, Mr Sharp said that it had been a difficult decision whether to seek an adjournment of the September hearing because, if successful, it would have inevitably led to a delay in the proceedings concluding. It therefore seems clear that a conscious decision was taken not to seek an adjournment. In those circumstances, it is difficult for the appellant to complain that the recorder went ahead and reached a decision on the evidence put before him.

90.

The recorder was, moreover, careful to take into account the fact that certain witnesses had not given evidence. He concluded that the scope of any cross-examination of those witnesses would be restricted to the issue of whether their records of the mother's statements were accurate. In that regard he pointed out that the mother and Z accepted the accuracy of much of the hearsay evidence save for points which were damaging to their case. He also noted the consistencies between hearsay evidence of two accounts given by the mother to professionals, and that the mother accepted that she had contacted X in the middle of the night. He found the oral evidence given by the mother and Z to be implausible in a number of respects, for reasons that are entirely understandable. We find his treatment of the hearsay evidence to be balanced and proportionate. Furthermore, we do not interpret the recorder's use of the phrase "I am unpersuaded" or his reference to finding the mother's evidence "unpersuasive" as indicating a shift in the burden of proof.

91.

In conclusion, we consider that the totality of the evidence before the recorder was plainly sufficient to support the recorder's findings and that no party was unfairly disadvantaged by the process by which the findings were made. It would have been better for the parties to have identified the discrepancy between the local authority's threshold document and the case which X intended to advance, and to have clarified expressly at the outset when the decision was taken to proceed with the

fact-finding, that coercive control was potentially to be part of the argument on threshold. But counsel for the mother and Z plainly knew that the point was live and had the opportunity to address it whilst the evidence was being taken and in argument. In those circumstances we see no basis upon which this court could properly set aside the findings.

92.

Given our conclusion about the first ground of appeal, there is plainly no merit in the second ground. If, as we have found, the recorder was entitled to conclude that Z's conduct towards the mother amounted to coercion and control, he was manifestly entitled to conclude that L was likely to suffer significant harm as a result of their care. This is a good example of a case where it might be open to argument that there was no basis for saying that the child suffered or was likely to suffer significant harm as a result of one or all of the individual incidents taken individually, but there was plainly a likelihood of harm resulting from the pattern of coercive control. It illustrates the crucial importance of a judge looking carefully at allegations to see if such a pattern can be discerned, as the recorder rightly did in this case.

93.

There is no merit in the appellant's criticism that the judge failed to specify how the threshold criteria were crossed. The omission of such a statement from paragraph [108] of the judgment cited by Mr Sharp is rectified elsewhere in the judgment – in particular in the summary of the recorder's findings in paragraph [114] when considering the welfare checklist – and in the schedule of findings approved by the recorder.

94.

There is a disparity between what is said in the schedule of findings, in which the recorder states that on the basis of those findings he concluded that the children were likely to suffer significant harm at the material time, and the judgment at [114] in which he stated that L had suffered significant harm by being exposed to Z's aggressive behaviour. But this anomaly does not give rise to a ground of appeal. On any view, the threshold was crossed. It seems clear to us that the recorder decided that both limbs of s.31(2) were satisfied. It may be that the recorder will on reflection decide to amend the schedule of findings, but that is a matter for him.

95.

For these reasons, the appeal is dismissed.