Neutral Citation Number: [2021] EWFC 106

Case No: FA-2021-000120

IN THE FAMILY COURT
SITTING IN THE ROYAL COURTS OF JUSTICE

On appeal from the Family Court sitting at Chelmsford

Recorder Feehan QC

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 14 December 2021

Before :

MR JUSTICE PEEL

- -

Between :

GK **App**

- and -

PR **Respo**

- -

- -

Charlotte Proudman (instructed by **Duncan Lewis**) for the **Appellant**

Stefanie Wickins (instructed by **Ellisons Solicitors**) for the **Respondent**

Hearing dates: 13-14 December 2021

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Approved Judgment

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

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Mr Justice Peel :

Introduction

1.
Within private law proceedings concerning the welfare of the parties' son who is now 2 years and 8 months old, the mother (to whom I shall refer as GK) appeals against the decision of a Recorder in the Chelmsford Family Court dated 18 January 2021 whereby, after a fact-finding hearing conducted over 14 and 15 January 2021, he dismissed a wide range of allegations of domestic abuse made against the father (to whom I shall refer as PR). I gave permission to appeal on 11 June 2021 and the matter comes before me six months later on the substantive appeal. The delay in securing an earlier listing is very unfortunate, and contrary to the child's interests.

2.
Both parties are represented by counsel, neither of whom appeared below. I am very grateful to them both for their clear and helpful submissions.

Skeleton arguments

3.
I have noted a tendency in cases brought on appeal for lengthy skeleton arguments to be lodged. I have had personal experiences of skeleton arguments exceeding 50 pages, and, in one case, running to 73 pages. This is a practice which must stop. The position is clear (emphasis added):

i)
FPR PD27A by para 2.1(b) applies to all hearings in the Family Court.

ii)
By para 2.2 "Hearing" includes "all appearances before the court, whether with or without notice to other parties, whether at first instance **or (subject to 5.2A.3) on appeal** and whether for directions or for substantive relief.

iii)
By para 5.2A.1 "Unless the court has specifically directed otherwise….and subject to paragraph 5.2A. 2 below.." skeleton arguments are limited to 20 pages.

iv)
By para 5.2 all documents in the bundle (which includes skeleton arguments) must be typed or printed in a font no smaller than 12 point and with 1 ½ or double spacing.

v)
By 5.2A.3 "the bundle must comply with PD30A".

vi)
PD30A makes separate, tailored provision for the filing of documents relevant to an appeal. It does not make separate, or different, provision as to the length of skeleton arguments. That is unsurprising. It would be extraordinary if, on appeal, litigants are entitled to file skeleton arguments limitless in length, whereas for the substantive hearing below they are confined to 20 pages. It would similarly be extraordinary if appeals to the Court of Appeal, which are governed by separate rules, are subject (as they are) to strict limits as to the length of skeleton arguments, but appeals heard by a High Court Judge are not. The same must apply to appeals to a Circuit Judge from a decision made at District Judge level.

vii)

Accordingly, in my view, by PD27A skeleton arguments upon appeal are limited to a maximum of 20 pages, a limit which should be scrupulously observed unless directed otherwise.

The general law on appeal

4.
FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for serious procedural irregularity.

5.
The court may conclude a decision is wrong or procedurally unjust where:

i) an error of law has been made;

ii) a conclusion on the facts which was not open to the judge on the evidence has been reached: **Royal Bank of Scotland v Carlyle [2015] UKSC 13 , 2015 SC (UKSC) 93 .**

iii) the judge has clearly failed to give due weight to some very significant matter, or has clearly given undue weight to some matter**: B-v-B (Residence Orders: Reasons for Decision) [1997] 2 FLR 602.**

iv) a process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust: **Re S-W (Care Proceedings: Case Management Hearing) [2015] 2 FLR 136 .**

v) a discretion has been exercised in a way which was outside the parameters within which reasonable disagreement is possible: **G v G (Minors: Custody Appeal) [1985] FLR 894 .**

6.
The function of the appellate court is to determine whether the judgment below is sustainable. In **Re F (Children) [2016] EWCA Civ 546** Munby P summarised the approach as follows:

22. "Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam) , [2016] 1 FLR 228 , para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."

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

"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the

temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".

7.
The appellate court should be slow to interfere with findings of fact. As Lewison LJ said in **Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5 ,** at paras114 to 115:

"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them…..The reasons for this approach are many. They include

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."

Domestic abuse

PD12J

8.
PD12J of the Family Procedure Rules 2010 at para 3 defines domestic abuse as including “any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between

those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass but is not limited to psychological, physical, sexual, financial or emotional abuse.”

9.
The general principle at para 4 of PD12J is that “Domestic abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to domestic abuse, or witness one of their parents being violent or abusive to the other parent, or live in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both parents”.

10.
By para 5 of PD12J, the court must at all stages of proceedings to consider whether domestic abuse is raised as an issue.

11.
By para 16 of PD12J the court must determine as soon as possible whether it is necessary to conduct a fact-finding hearing in order to provide a factual basis for any welfare report and/or assessment of risk, and by para 19 must give directions as to how the proceedings are to be conducted. Para 28 gives guidance as to how the fact-finding hearing is to be conducted.

Re H-N

12.
In **Re H-N and Others (Domestic Abuse: Finding of Fact hearings) [2021] EWCA Civ 448** , the Court of Appeal stated that where one or both parents asserted that a pattern of coercive and/or controlling behaviour existed, that should be the primary issue for determination unless any particular factual allegation was so serious that it justified determination regardless of any alleged pattern of coercive and/or controlling behaviour. At paragraph 71 of the judgment, it was stated that the court should be concerned with how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not come within the definition of rape, murder, manslaughter or other serious crimes. Behaviour which falls short of establishing rape, for example, may nevertheless be profoundly abusive and if so, should not be ignored in the family context.

Vulnerable witnesses: Part 3A

13.
Parliament has now (and since the hearing below) passed the Domestic Abuse Act 2021. S63 provides that where a person 'is, or is at risk of being, a victim of domestic abuse', the court must assume that their participation and evidence will be diminished by reason of vulnerability.

14.
At the time of the hearing below, there were in place extensive provisions governing vulnerable witnesses. These are set out in Part 3A and PD3AA.

15.
Part 3A provides as follows:

3A.3 When considering the vulnerability of a party or witness as mentioned in rule 3A.4 or 3A.5, the court must have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A. 7.

3A.4 (1) The court must consider whether a party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.

(2) Before making any such participation directions, the court must consider any views expressed by the party or witness about giving evidence.

3A.5 (1) The court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.

(2) Before making any such participation directions, the court must consider any views expressed by the party or witness about giving evidence.

3A.6 (1) The court must consider whether it is necessary to make one or more participation directions to assist (a) the protected party participating in proceedings; or (b) the protected party giving evidence.

(2) Before making any such participation directions, the court must consider any views expressed by the protected party’s litigation friend about the protected party’s participation in the proceedings or that party giving evidence.

3A.7 When deciding whether to make one or more participation directions the court must have regard in particular to—

(a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of—

(i) any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or

(ii) any members of the family of the party or witness;

(b) whether the party or witness—

(i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;

(ii) has a physical disability or suffers from a physical disorder; or

(iii) is undergoing medical treatment;

(c) the nature and extent of the information before the court;

(d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;

(e) whether a matter is contentious;

(f) the age, maturity and understanding of the party or witness;

(g) the social and cultural background and ethnic origins of the party or witness;

(h) the domestic circumstances and religious beliefs of the party or witness;

(i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G (6) of the 1984 Act;

(j) any characteristic of the party or witness which is relevant to the participation direction which may be made;

k) whether any measure is available to the court;

(l) the costs of any available measure; and

(m) any other matter set out in Practice Direction 3AA.

16.
By PD3AA para 1.3 it is the duty of the court to identify any party or witness who is a vulnerable person at the earliest possible stage of the proceedings.

17.
Para 5.2 of PD3AA mandates a ground rules hearing prior to any hearing where a vulnerable party, vulnerable witness or protected party is to give evidence, and will at such hearing make participation directions. The sorts of things the court should consider during that ground rules component include the conduct of advocates/parties and any support for the person giving evidence, the form of the evidence, the way in which the evidence is taken, directing the manner of any cross-examination, and considering participation directions, including prescribing the manner in which the person is to be cross-examined.

18.
I note that these various provisions are expressed in mandatory form by use of words such as “must” and “duty of the court”.

The background

19.
I take the essential background briefly from the Recorder’s judgment. The parties met in October 2017. They never had a home together and appear to have lived either at GK’s mother’s home, or PR’s parents’ home. GK is an insulin dependent diabetic who has had a number of admissions to hospital for hypo/hyperglycaemia; stress exacerbates her condition. PR has Tourette’s syndrome and a diagnosis of ADHD. In March 2019, their child was born. In November 2019, they separated. In December 2019, PR applied for a child arrangements order which resulted in interim orders being made in March 2020 and June 2020 providing for the child to see PR on an unsupervised basis but not, at that stage, overnight. In November 2020, GK terminated those arrangements unilaterally. The proceedings had been case managed to a fact-finding hearing on 14 and 15 January 2021, GK having raised wholesale allegations of rape, domestic abuse and coercive and controlling behaviour.

The hearing before the judge

20.
The Recorder came to the case new. He had had no previous involvement. Indeed, there appears to have been no previous judicial continuity. Both parties were represented by counsel, but the task before him was unenviable. The bundle consisted of over 1000 pages. The parties had put in lengthy

witness statements, including a 52-page statement by GK filed in June 2020. The judge had little pre-reading time. These challenges are familiar to all judges practising up and down the land in the field of family law.

21.
On the first morning, counsel for GK handed up a schedule of 29 specific allegations upon which she proposed to rely, which the judge regarded as a helpful distillation of GK's case. It is of note that this approach, which the judge adopted at the invitation of counsel, took place before the following decisions which have cast doubt on the utility and value of Scott schedules, suggesting that a holistic overview is better suited to allegations of domestic abuse:

i)
Hayden J in **F v M [2021] EWFC 4** at para 113**:**

"Ms Jones has invited me to make comment on the use of Scott Schedules (i.e. a table identifying the allegations and the evidence relied on in support) in cases involving this category of domestic abuse. Having given the matter considerable thought I have come to the clear conclusion that it would not be appropriate to give prescriptive guidance. Whilst I entirely see the advantage of carefully marshalling the evidence and honing down the allegations, I can also see that what I have referred to as a particularly insidious type of abuse, may not easily be captured by the more formulaic discipline of a Scott Schedule. As I have commented above, what is really being examined in domestic abuse of this kind is a pattern of behaviour, possibly over many years, in which particular incidents may carry significance which may sometimes be obvious to an observer but to which the victim has become inured. It seems to me that what is important is that the type of abuse being alleged is made clear to the individual who is said to be the perpetrator.

An intense focus on particular and specified incidents may be a counterproductive exercise. It carries the risk of obscuring the serious nature of harm perpetrated in a pattern of behaviour. This was the issue highlighted in the final report of the expert panel to the Ministry of Justice: 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases' (June 2020). It is, I hope, clear from my analysis of the evidence in this case, that I consider Scott Schedules to have such severe limitations in this particular sphere as to render them both ineffective and frequently unsuitable. I would go further, and question whether they are a useful tool more generally in factual disputes in Family Law cases. The subtleties of human behaviour are not easily receptive to the confinement and constraint of a Schedule. I draw back from going further because Scott Schedules are commonly utilised and have been given much judicial endorsement. I do not discount the possibility that there will be cases when they have real forensic utility. Whether a Scott Schedule is appropriate will be a matter for the judge and the advocates in each case unless, of course, the Court of Appeal signals a change of approach."

ii)
The Court of Appeal in **Re H-N [2021] EWCA Civ 448** at para 46:

"… serious thought is now needed to develop a different way of summarising and organising the matters that are to be tried at a fact-finding hearing so that the case that a respondent has to meet is clearly spelled out, but the process of organisation and summary does not so distort the focus of the court proceedings that the question of whether there has been a pattern of behaviour or a course of abusive conduct is not before the court when it should be."

iii)
Poole J in **FG & HI and JK [2021] EWHC 1367** at paras 25 and 26:

“25. Since Scott Schedules had been prepared and the case has been managed by reference to them, I did not dispense with them but, at my invitation, the parties prepared short narrative summaries of their respective cases about the allegedly coercive and/or controlling behaviour of the other. The summaries were very different in style and illustrated the complexities involved in presenting allegations for a finding of fact hearing such as this one where there are overlapping allegations by the mother against the father of coercion and control, physical violence against the mother, physical violence against the child, and allegations by the father against the mother of control, fabrication, and abduction. How can the party alleging a pattern of coercion and control over a relationship that has lasted several years present that case for a finding of fact hearing in a way that is proportionate and manageable, and without giving a day by day account of the whole relationship?

“26. Patterns of behaviour are formed from many individual incidents of conduct. It is difficult therefore to separate the pattern from the specific events said to establish the pattern. In this case every one of the mother's allegations is denied by the father. The court cannot make findings about a pattern of behaviour without evaluating the evidence in relation to specific incidents that allegedly contributed to that pattern. The difficulty is in identifying a limited number of incidents that would, if proved, establish a pattern of behaviour. Some specific instances of behaviour will not constitute abuse themselves and may appear to be relatively trivial if looked at in isolation but are in fact important evidence of a pattern of abuse, or the effects of abuse, when set alongside other findings.

22.
The risk of applying the Scott Schedule technique is that the judge approaches the case in a formulaic, incident by incident way which detracts from the holistic overview necessary to determine fluid and nuanced patterns. It also runs the risk that incidents which may appear trivial are overlooked and not relied upon. In some cases, a Scott Schedule may be appropriate, for example if the complainant alleges a small number of specific incidents without asserting a pattern of behaviour. But in a case such as this, I am doubtful as to the utility of a Scott Schedule.

23.
During the hearing a number of the allegations were abandoned by GK. The judge identified and categorised the remaining allegations as follows:

i)
3 of sexual abuse;

ii)
13 of verbal abuse;

iii)
6 separate, individual allegations which did not fit into either of the above categories.

24.
The hearing was conducted on a hybrid basis. GK gave her evidence on the first day by videolink, not as a special measure but because she was shielding. Later that day, and after she had given her evidence, she became unwell, and was admitted to hospital for an episode of diabetic ketoacidosis. Her instructions to counsel were for the matter to continue and that she would participate from hospital via her phone using earphones. There was no application to adjourn. The case continued and PR gave his evidence in court. Judgment was reserved and handed down in commendably short order, on 18 January 2021.

25.
Subsequent to the hearing, a letter from GK's GP dated 9 June 2021 confirming the hospital admission on the second day said as follows:

"She was unwell and was in resus for a couple hours while her condition stabilised. Her symptoms started after the court hearing on 14th; she was extremely stressed and anxious. She was questioned about past trauma which included about when she was raped, smothered and choked by her ex-partner on several occasions….She reports her symptoms were highly likely the stress of this event….".

This letter was, of course, not available to the judge during the hearing. It indicates the enormous stress which GK may have been under whilst giving her oral testimony.

26.
The reserved judgment dated 18 January 2021 is structured as follows:

i)
By way of introduction, the judge referred to the large volume of evidence, and said that "Many of the allegations made depend upon the findings I make as to the credibility of the parties. I see my task in this judgment as being to survey the broad canvas of the evidence, to make findings as to who I can rely upon, to compare oral testimony with any documentary support or contradiction and then to indicate the effects of that exercise in setting put what I do and do not find".

ii)
The judge set out the background.

iii)
He then cited well-established principles as to the approach to be taken in fact-finding cases. He referred to the caution to be applied when considering demeanour. He referred at other points in the judgment to the fact that people lie for different reasons (the Lucas direction, although he did not reference it by name) and cited the seminal judgment of Russell J in **JH v MF [2020] EWHC 86 (Fam**). He made a number of references in the judgment to patterns of coercive and controlling behaviour.

iv)
The judge went on to review the written and oral evidence of the parties and concluded that GK's evidence left him with grave concerns, whereas PR overall tried to assist the court with truthful answers.

v)
He then proceeded to analyse each of the sexual allegations, the grouping of verbal abuse allegations, and the further six uncategorised allegations, in each instance either positively rejecting GK's case, or making no finding, being unpersuaded that she had proved her case.

27.
On 21 January 2021, at a further hearing, the judge reinstated contact between the child and PR, progressing to overnight contact. I am told that the Cafcass Officer is supportive of the contact which is proceeding in accordance with the court order.

The appeal

28.

GK's appeal raises six, overlapping Grounds of Appeal.

Ground 1: Failure to apply Part 3A of the FPR 2010, PD3AA and PD12J

29.
GK was, at least potentially, a vulnerable party and witness, with particular reference to the impact on her of any actual or perceived intimidation. The court therefore had a duty ("must" to quote Rule 3A. 4) to consider whether her participation in the proceedings was likely to be diminished by reason of that vulnerability.

30.
PR submits through counsel that GK was represented and no request for special measures was made either at the outset of the trial or during it, save that the camera should not point at PR during GK's evidence. It is further submitted that participation by videolink in itself provided GK with reassurance in that she was not physically in the same location as PR.

31.
I agree with Judd J who said in **K v L and M [2021] EWHC 3225 (Fam) at [62]** that the obligation to consider vulnerability is upon the court, not least because the rules so mandate. The extent of that obligation, or duty, must depend on the context, the issues, the nature of the allegations, the way in which case management has taken place and submissions made by legal representatives. When parties are represented, and in particular where a ground rules hearing has taken place, then I would expect the judge to need to do no more than cast a brief overview over the proposed arrangements.

32.
In this case, despite the fact that both parties appeared by counsel, I am troubled by a number of matters:

i)
No ground rules hearing took place before the fact-finding trial. The rules are clear as to the need for a ground rules hearing. Had it taken place, the vulnerability issues raised in this case would have been addressed. As it is, the judge was left without any previous court guidance, and in my view ought therefore to have applied a more critical, or proactive, eye to participation measures. This case demonstrates, in my opinion, why early identification of potential vulnerability, and a ground rules hearing, are indispensable elements of the case management process.

ii)
The judge made no reference to Part 3A in his judgment.

iii)
This was not a straightforward case. The allegations contained in the witness statements were numerous. Even when refined in the Scott Schedule they still numbered, initially at least, 29. The bundle was extensive. Some of the allegations were of the utmost gravity.

iv)
GK has a medical condition which is exacerbated by stress, and counsel referred to her anxiety and health at the start of the fact-finding hearing. It is apparent from the GP letter (available now to me, but of course not available to the judge, and therefore I have the wisdom of hindsight) that her condition resurfaced as a result of the process of giving evidence. The anxiety for a woman giving evidence in court against a former partner, alleging abusive conduct, and in the context of seeking to (as she sees it) protect her child, cannot be underestimated. The transcript shows that, albeit after

giving her evidence, she became unwell during the hearing, towards the end of the first day, including saying that she was struggling to breathe.

v)
No thought was given to a different process of cross examination (perhaps written questions and/or questions directed via the judge, or a focus on particular topics). The very fact of reducing a long witness statement to a number of identified examples, while perhaps of assistance to a judge trying to pick his way through the evidence, may not have best served the case.

vi)
It became clear during the hearing before me that, during GK's evidence at the fact-finding hearing, PR was able to see her throughout on screen. It also appears that she was able to see PR as the camera was pointed at his counsel, behind whom he sat. In my judgment, these arrangements were not appropriate and although her counsel does not appear to have raised objection, it should have been addressed at the outset given the nature of the allegations, GK's potential vulnerability and the possible impact upon her.

33.
Further, in my judgment the judge nowhere considers the impact of GK's vulnerability on her giving evidence. He refers to her oral evidence appearing pre-prepared and "dissociated" without considering whether or to what extent trauma induced vulnerability may have caused or contributed to her presentation. Again, in my judgment the subsequent GP letter casts more light on this for me. If GK was indeed subject to extreme stress, caused by revisiting traumatic episodes, that may in part have contributed to what the judge perceived as the unconvincing way in which she gave her evidence.

34.
For matters of this gravity, GK was entitled to have the case, and the hearing, managed in such a way as to enable her to participate as fully as possible and give oher best evidence. The judge, as the transcript shows, was fair and courteous throughout, and tried his best to make the parties feel comfortable. But I am left with the uneasy feeling that GK was not afforded the opportunity to give evidence in the most appropriate form and, in a case where witness presentation was of the utmost importance to the judge, that in itself risks undermining the conclusions.

Ground 2: Wrong to dismiss the allegations of rape

35.
The essence of the submission on behalf of GK is that the judge failed to consider the general context of coercive and controlling behaviour, and weigh up the allegations of sexual assault by reference to the totality of the evidence. PR submits in response that these were findings of fact made by the judge, and the appellate court should (as the case law makes clear) only rarely interfere with such findings.

36.
In my judgment there is some force in the submission that, contrary to the judge's stated intention at the outset of the judgment to view the "broad canvas" of the evidence, he in fact adopted a linear approach to the allegations. From paragraphs 32 to the end, the judge carefully considered each allegation, or group of allegations, but to my mind he did not satisfactorily explain how all the allegations, and relevant evidence, impacted on each other in a holistic way. That is particularly important, in my judgment, when a significant aspect of the asserted case is a pattern of behaviour

which does not easily lend itself to an analysis of specific incidents, some of which may individually be of relatively little import but cumulatively are destructive, undermining and intimidating. True, the judge referred to controlling and coercive behaviour, but in my opinion, he did not draw all the strands together and survey how all the evidence interlocked.

37.
In that regard, it is of note that little mention is made by the judge of GK's reports to police, and ABE interview, which (on GK's case) corroborate, or at the very least are consistent with, her evidence in the family court. Nor is mention made of medical records in which GK reported emotional, physical, and sexual domestic abuse at the hands of PR.

38.
I acknowledge that there was evidence pointing in PR's favour, such as exchanges of text messages after one of the events complained of which in tone do not sit easily with allegations of abuse, but it was incumbent on the judge to weigh these up (both as to content and tone) in the context of all the evidence pertaining to (i) GK's vulnerability, (ii) the reports to police and medical practitioners and (iii) GK's case as to controlling conduct, rather than, as seems to me to have been be the case, weighing them up in the context of this one particular allegation.

39.
There is, too, some merit in the submission that at times the judge appears to have minimised the seriousness of the sexual abuse allegations. For example, he says "I would not be surprised if a healthy young man were to ask repeatedly for sex after a period of abstinence" which could be construed as mitigating, or excusing, inappropriate behaviour, particularly in the context of the other allegations. Elsewhere the judge suggested that "inexperienced young men and women in their first sexual relationships commonly miss cues and misunderstand responses" which, again, could be read as exculpating certain types of behaviour.

Ground 3: wrong in the approach to allegations of verbal and emotional abuse and coercive and controlling behaviour.

40.
A number of specific allegations were grouped together by counsel for GK, and that approach was adopted by the judge. GK's allegations against PR included words or phrases such as: "dirty", "fat", "a tramp", "fucking stupid", "worthless", "fat bitch", "fucking die", "I fucking hate you", "I will fucking drown you in court" and "Not even your fucking dad wants you". The judge found that unkind things were indeed said, but concluded that none of them, whether individually or collectively, amounted to coercive control. In one passage of his judgment, he refers to them as "shouting, name-calling, accusations of ungratefulness, asking [GK] to leave the home and so on. They are the stuff of many a "matrimonial row". Again, I tend to the view that the judge was underplaying the significance of such words. At any level they are cruel and undermining, but in the context of the various other behaviours identified by GK could clearly constitute controlling and coercive conduct. I am a little troubled by the judge's assessment of GK as having a "capacity to feel victimised where a more robust (or simply perhaps more honest) person would see her interlocutor simply had a different point of view" and "M has a tendency to hyper-defensiveness and a capacity to build a case on microscopic detail which others may be able to deal with by the possession of broader shoulders"; such comments suggest that her own sensitivities were in some way contributory to the behaviour complained of. I am troubled also that the judge at para 30 refers to many of the incidents as being "minor or even petty, but the real question for any future court having regard to the child's welfare is whether the words or actions

alleged show a course of conduct by which [PR] is **deliberately** [my emphasis] coercive, controlling and undermining of [GK] so that domestic abuse becomes a serious issue ion this case". I cannot accept that intentional misconduct is a pre-requisite for a finding of abusive behaviour. In this regard, I was referred to **Re T ([2017] EWCA Civ 1889** in which it was said at para 42 that: "…none of the authorities require that a positive intent to molest must be established".

Ground 4: Wrong to dismiss further six allegations of domestic abuse.

41.
I do not propose to deal with every single allegation. A number of points are made, which are of a piece with the various matters to which I have referred.

i)
An allegation was made that PR covered GK's mouth and nose in a threatening manner. In dismissing the allegation, there is no mention of a report to medical professionals of being choked by PR which, on the face of it, is consistent with GK's account.

ii)
Another choking allegation is not found to be proved, but the judge did not refer to reports made by GK to the police and medical professionals of the alleged incident.

iii)
When referring to text messages after separation, the judge described them as an irritant, yet GK's reports to the police laid bare what she described as their abusive and harassing nature i.e the impact upon her of the nature and quantity of messages sent by PR was not properly considered by the judge.

Ground 5: Failure to consider corroborative evidence.

42.
The thrust of the complaint is that the judge did not weigh in the balance what is said to be corroborative evidence from the police records, (including 4 statements taken from GK, and an interview with her, as well as a summary of an interview with PR), medical records, and a witness statement from Ms H in support of GK. Counsel for GK pointed to certain parts of the police evidence which are purportedly consistent with her account to the family court (I have already referred to some of these). On the other hand, counsel for PR says that there are parts of the police evidence which are not consistent, and complaints by GK were made late. The police disclosure is not before me, and I can make no findings. But more importantly, although it was before the judge, he undertook no analysis of the police disclosure in his judgment. He was not assisted by counsel, in that no questions were put to GK in cross examination about her reports to the police. Indeed, the transcript suggests that she had not been given the police disclosure. That being so, I do not see how the judge could have said in a brief sentence in the judgment that there were "different accounts…in both her police and family court statements". In the absence of any analysis of the extensive police records, and how that affected his overall assessment, and given that GK was not asked questions on this topic, in my view the judge fell in error in reaching this conclusion. The same applies to the medical records, as to which the judge makes no mention. These are highly significant matters, particularly in a case where the judge was strongly influenced by his impression of each party as a witness. I am less persuaded by the submission as to Ms H, who was not called by GK to give oral evidence.

Ground 6: Judge failed to address additional allegations of domestic abuse.

43.

The judge was in an invidious position. GK's counsel presented a schedule and mounted a case based on the allegations contained in the schedule. But it is apparent from the judgment that in the course of her written evidence GK had raised a number of other serious allegations. The judge referred to three at the start of his judgment: (i) that PR threatened to choke GK in her sleep until she did not wake up, (ii) that shortly before separation he threatened to kill her on several occasions, and (iii) that on five occasions he covered GK's nose and mouth while she was in bed and snoring or breathing loudly. The first was in fact dealt with by the judge. The second and third do not appear to have been so. I do not think the judge can be criticised for not directly addressing these, as they were not advanced at the hearing in the Scott schedule, but my sense of unease about how the hearing unfolded is only heightened. If the court is required to survey the totality of the evidence, allegations such as these would have been directly relevant. I accept that it was GK's counsel who put forward a Scott schedule omitting these allegations, probably in order to try and make it manageable, but to my mind the unsuitability of a Scott Schedule approach in this case becomes all the more clear.

Conclusions

44.
I am satisfied that the judge's findings cannot stand. The failure to consider Part 3A, GK's vulnerability, and appropriate special measures severely undermines the judgment, particularly in the light of the subsequent GP letter. I cannot be confident that GK was able to give evidence in the best possible way.

45.
I am further satisfied that the judge (i) did not properly consider and weigh in the balance the police and medical disclosure, (ii) minimised the nature of some of the allegations and their potential impact upon GK, (iii) did not consider the totality of the evidence in the round, nor fully address how the individual pieces of evidence played into a narrative of coercive and controlling behaviour, and (iv) relied heavily upon an assessment of each party as a witness, without factoring in the likely impact on GK of giving evidence of traumatic episodes as a vulnerable witness, in the context of a pressurised court setting.

46.
I have considerable sympathy for the judge. He was faced with a mountain of documents, and presented with a Scott Schedule which in my judgment did not adequately get to the heart of the issues at play. Some matters (particularly the police and medical disclosure) should have been more fully explored by the parties during the hearing. Counsel did not invite him to adopt any particular approach to GK's vulnerability and the apparent stress on GK during her evidence has come to light since the hearing, through the GP's letter. In the end, however, I am clear that the appeal must succeed.

The way forward

47.
I will remit the matter to the Chelmsford Family Court for re-hearing. I suggest that it be listed for a half day directions appointment to consider (i) ground rules and participation directions, (ii) how best to examine the case forensically (e.g. by Scott schedules, or, more likely, by the sort of process suggested in **FG & HI and JK**, or in some other way), (iii) whether the fact finding and welfare aspects of the case should be heard together and (iv) the length of the fact-finding , or combined fact-finding/final hearing.

48.
I decline to impose a stay on the current child arrangements whereby the child spends time each weekend overnight with PR and daily during the week. I have no insight into the welfare issues and note, for example, that the Cafcass Officer is supportive. This hearing has been purely about the fact-finding hearing before the Recorder. I have overturned the findings, but not substituted them with a finding that the allegations are proven. It will be for the court below to determine whether any adjustment to the current arrangements should take place.

49.
For the avoidance of doubt, this judgment should not be taken as suggesting, let alone finding, that GK's allegations are proved, or are likely at the re-hearing to be proved. I have confined myself to a determination that the judge's approach was flawed in a number of respects and his findings cannot stand. But that is not the same as saying that on a rehearing a judge cannot, or will not, reach the same conclusions as the Recorder. The judge may, or may not. The judge will start completely afresh and is not in any way constrained by either the hearing below or this decision on appeal.