Neutral citation number: **[2022] EWFC 74**

No. SD21P00301

IN THE FAMILY COURT
(Sitting at Hastings)

Hastings County Court and Family Court
The Law Courts
Bohemia Road
Hastings
TN34 1QX

Thursday, 17 February 2022

Before:

MR RECORDER TALBOTT

(In Private)

B E T W E E N :

F
(Respondent to the Appeal) — Applicant

- and -

M
(Appellant in the Appeal) — Respondent

ANONYMISATION APPLIED

THE APPLICANT appeared in Person.

MS C. CIBOROWSKA (instructed by Goodlaw Solicitors LLP) appeared on behalf of the Respondent.

J U D G M E N T

(Via Cloud Video Platform)

THE RECORDER:

1 This is an appeal brought by the appellant, M. The application for permission to appeal has already been considered and granted by HHJ Ahmed. The respondent to this appeal is F. I have heard on behalf of M from Ms Ciborowska. F is unrepresented and has appeared today in person, addressing me directly. This is a case concerning L (female) who is now nine years old, having been born on 15 January 2013.

2 The decision that is subject to appeal is one made by a Deputy District Judge. The matter has had a relatively short history. On 18th April last year, F applied for a Child Arrangements Order. M, the appellant in this hearing, then set out within her C1A form allegations of domestic abuse including controlling and coercive behaviour against F. As is standard, those allegations were set out within the C1A form in a numbered table. The third of the allegations made is that F would "grope" (the word used by M within the C1A form), M when they were out in public. For the avoidance of doubt, that is an allegation of repeated non-consensual sexual touching in public which is made by M towards F.

3 The matter first came before the court for a First Hearing Dispute Resolution Appointment (FHDRA) on 28th July 2021, and directions were made to progress the case. Most importantly for the purposes of this appeal, directions were made for police disclosure and for West Sussex County Council to provide the court with information of the involvement it had had with the family.

4 The next hearing was listed on 3rd November 2021 before the Deputy District Judge. That hearing was intended to focus on the arrangements for any fact-finding hearing. It is part of the order made on that occasion with which this appeal is concerned.

5 It was argued on behalf of M before the Deputy District Judge that as a result of the police disclosure, and to a lesser extent the information contained within the West Sussex County Council documentation, that two principles were clear:

(1) That a fact-finding hearing was necessary.

(2) That fact-finding hearing should include the allegations outlined by mother within her C1A form, and the allegation of parental alienation made by F.

6 I have read very carefully the transcript of the exchanges that took place between the Deputy District Judge and counsel representing M on that occasion. The Deputy District Judge, having heard argument, formed the view that the allegation of non-consensual sexual touching should not be part of a fact-finding hearing. It is important to note that the police disclosure included clear reference to M's allegation that F touched her in a sexual manner without her consent.

7 It is that case-management decision in respect of that particular finding that this appeal is brought against. There is no issue taken with the decision of the Deputy District Judge that all of the other allegations made by both M and F should be determined at a fact-finding hearing. In summary, those allegations related to:

a) Controlling and coercive behaviour.

b) Verbal and emotional abuse and aggressive behaviour.

c) Cannabis use.

d) An occasion when it is alleged that F shouted at and then kicked S (male).

e) The allegation from F against M that she is alienating his daughter from him.

8 This appeal, as I have outlined, relates to the issue of whether the non-consensual sexual touching should have been an issue determined as part of the fact-finding process. As permission to appeal has already been granted in this case, I must consider, under r.30.12 of the Family Procedure Rules, with whether the decision of the Deputy District Judge in respect of that finding was "wrong" or was "unjust because of a serious procedural or other irregularity in the proceedings" in the lower court. As is set out within the same rule, my role is limited to a review of that decision and is not to take an overview of the evidence as a whole, nor to consider any further evidence not available to the lower court.

9 It is important to recognise the pressures on all judges currently working within the Family Court, and in particular district judges and deputy district judges. They have to work under a great pressure of time, and a great pressure brought about by the sheer amount of information that is put before them prior to hearings. Often this information is provided to them with little notice and little reading time available.

10 In this case there was a great deal of police disclosure, information from West Sussex County Council, and information from the child's school which the Deputy District Judge, particularly in respect of the police disclosure, had not had a chance to look at prior to the hearing commencing. The District Judge was, to their credit, entirely candid about that and was referred to key parts of the documentation by counsel for M during the hearing. I have had the opportunity to consider the transcript of the proceedings prepared of the hearing before the Deputy District Judge, albeit there is, everyone agrees, a part at the end which is not transcribed and is not available. However, within the 14-page transcript I have read, I am very able to ascertain what was argued during the hearing and the approach adopted by the Deputy District Judge.

11 I have considered fully the papers provided to me in respect of this appeal including the skeleton arguments and grounds for appeal submitted on behalf of the appellant. I have also considered PD12J and two very important judgments relevant to allegations of domestic abuse within the Family Court.

12 Firstly, the case to which I have referred in the course of submissions of *Re: H-N* [2021] EWCA Civ 448, which was, as is well-known now to all Family Court judges and practitioners, a judgment from the President sitting with King and Holroyde LJJ which addresses, amongst other important points, the approach that should be taken by the court to allegations of controlling and coercive behaviour, and the way in which fact-finding hearings should be conducted in the Family Court when there are issues of domestic abuse and, in particular, controlling and coercive behaviour which fall to be determined.

13 I have also considered the authority of *Re: JK* [2021] EWHC 1367, that being the judgment of Poole J. Within that case, which was heard post-*H-N*, the court helpfully set out a number of established principles and also suggests a way forward which may be applicable to appropriate cases in respect of the way allegations involving controlling and coercive behaviour are considered and determined.

14 In this case there was no dispute that the Deputy District Judge was right to determine that a fact-finding hearing was necessary. Fact-finding hearings are necessary in cases in which it is incumbent on the court to determine facts to inform a proper assessment of risk. It is only once those findings have been made in a case of this nature that any appropriate plans in the welfare best interests of a child can be made.

15 The dispute in this appeal focuses on whether the Deputy District Judge was wrong to conclude that the allegation of non-consensual sexual touching should be excluded from determination as it would have no impact on the assessment of risk posed regardless of the finding made.

16 The Deputy District Judge, within their judgment, referred specifically to the duty that they felt they had to the child in this case, saying:

> "I am not saying that allegations about the mother do not matter but it would not be improper use, it seems to me, of case management powers for me to say, well, I am afraid if they have not been thought about properly in the two months since the documents were received, then tough; those cannot be made. But in respect of the children, I have got a separate duty, it seems to me."

17 It appears clear to me that the District Judge was referring quite properly to the duty to deal with cases expeditiously in the Family Court in line with the overriding objective and to ensure that delay is kept to a minimum. It is enshrined within the Children Act that delay is prejudicial to a child's welfare.

18 Whilst it is right that judges at all levels must exercise robust case management throughout a case (particularly in current climate with the pressures on the Family Court system), the need to avoid delay and to deal with cases expeditiously has an important qualification; those case-management decisions must never lose sight of the need to have regard to the welfare issues involved in the case. Dealing with a case justly involves ensuring that the case is dealt with fairly and expeditiously in a way which is proportionate to the real issues, but it is vitally important never to lose sight of the need to have regard to the welfare best interests of the children concerned. That principle is, of course, reiterated within *H-N* itself.

19 The Deputy District Judge on this occasion, in my view, did fall into error in deciding that the allegation of non-consensual sexual touching should be excluded from those to be tried at the fact-finding hearing. What the Deputy District Judge did, perhaps understandably in the circumstances of having not had the opportunity to read the police disclosure, is adopt a starting point, in my words, of 'even if that finding is proved, it does not really affect the plans that are going to be made for L because, ultimately, contact is going to be supervised in any event.'

20 In my judgment, the Deputy District Judge erred in approaching the matter in that way because that approach is the complete opposite of what is required in dealing with allegations of controlling and coercive behaviour within the Family Court. The approach adopted by the Deputy District Judge was to artificially isolate an individual aspect of behaviour (non-consensual sexual touching in public) from an alleged overarching pattern of behaviour which, if proved, would establish controlling and coercive behaviour on behalf of F.

21 It is clear from reading the comments made by the Deputy District Judge during the course of submissions that they formed the view that the allegation of non-consensual sexual touching in public was not significant enough if proved, in comparison to the other allegations made by both M and F, to be determined. Indeed, the Deputy District Judge specifically referred to the child seeing similar behaviour in public anyway and seeing worse on television.

22 The Deputy District Judge also said of the alleged non-consensual sexual touching in public:

> "Of course, I deplore that behaviour; it is part of the huge debate that is going on currently within society about how men regard women inappropriately." And
>
> "She (the child) is going to know before she is much older that he is not the only man who behaves like that towards women."

23 It is clear to me that the Deputy District Judge fell into error by minimising the significance of the alleged non-consensual touching itself by concluding that it was somehow less likely to be relevant to the assessment of risk in respect of the child in this case because it was a behaviour experienced by many women at the hands of men. This approach was plainly wrong and led to the Deputy District Judge mistakenly minimising the significance of the allegation made by M against F in this case and its importance in determining any risk posed to L.

24 The Deputy District Judge also erred by considering the allegation of non-consensual sexual touching in isolation rather than as part of an alleged pattern of controlling and coercive behaviour. It is abundantly clear that the focus of the Family Court in determining allegations of domestic abuse must be to focus on patterns of behaviour capable of amounting to controlling and coercive behaviour. The Deputy District Judge failed to approach their decision in this way.

25 The Deputy District Judge was therefore wrong not to allow the allegation of non-consensual sexual touching to be determined as part of the fact-finding as it would, if proved, amount to behaviour capable of forming part of a pattern of controlling and coercive behaviour.

26 What the Deputy District Judge should have done, in my judgment, is to order narrative statements setting out how each parent describes their relationship, what behaviour of the other parent is said to contribute to a pattern of controlling and coercive behaviour, and further details of any specific incidents which are serious enough to warrant separate consideration. The benefit of that course is that F, in his case, can respond to the allegations made against him fully and fairly and make any allegations, such as of parental alienation, that he seeks to.

27 The Deputy District Judge fell into error in another way, which was to criticise those representing M for not having amended what was referred to in the course of submissions as "the schedule" contained within the initial C1A form compiled on behalf of M. M's C1A was before the court at the FHRDA on 28th July 2021. That C1A did, in fact, contain an allegation by M that *"The Applicant would often grope me in public despite my request that he not do so"*. Whilst it is right that the allegation was to be expanded following the receipt of the police disclosure (which I reiterate the District Judge had not had the opportunity to read), that is unsurprising in the circumstances of a case in its early stages in which the initial C1A is served prior to disclosure from the police being received and considered.

28 Undoubtedly, judges at all levels must robustly manage cases and consider whether fact-finding hearings themselves are necessary in a particular case, and if so, what issues it is necessary and proportionate to determine within that fact-finding process in order to inform an assessment of risk. However, in making those decisions a judge must have proper regard to PD12J and the guidance within both *H-N* and *JK* as to the approach to be adopted in cases before the Family Court in which allegations of domestic abuse are made.

29 I allow the appeal and vary the order of the Deputy District Judge to allow the allegation of non-consensual sexual touching to be determined at the fact-finding hearing and to direct narrative statements from each parent as described.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.