



Neutral Citation Number: [2021] EWHC 1822 (Fam)

Case No: FA-2021-000038

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2021

Before :

THE HONOURABLE MRS JUSTICE JUDD DBE

Between :

AA
- and -
BB

Appellant

Respondent

Lucy Maxwell (instructed by **Levison Meltzer Pigott LLP**) for the **Appellant**
Malcolm Macdonald (instructed on a direct access basis) for the **Respondent**

Hearing dates: 22-23 June 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MRS JUSTICE JUDD DBE

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

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives and any litigants in person by email. The date and time for hand-down will be deemed to be 1030am on 2 July 2021. A copy of the judgment in final form as handed down will be automatically sent to the advocates and any litigants in person shortly afterwards.

The Hon Mrs Justice Judd :

1. This is an appeal against a case management decision made by Recorder Glancy QC to exclude evidence from a fact finding hearing where there are allegations of domestic abuse. Permission to appeal was granted by Lieven J on all four grounds pleaded on 1st March 2021.

Background

2. The principal proceedings with which the court is concerned relate to the parties' two children who are aged 12 and 3. The parents, who are married, first separated in about 2019. In January 2020 the parties each issued applications for child arrangements orders and specific issue orders. In April 2020 they reconciled for a short while, but the marriage broke down by August and proceedings were resurrected. Each party made allegations of abuse against the other and on 28th August 2020 an order was made that the parties were to each file a schedule limited to 5 allegations, and a schedule in response to that of the other party. The case was set down for a First Hearing Dispute Resolution Appointment in October and a two day fact finding hearing in February.
3. At the FHDRA in October further directions were given for the fact finding hearing. As well as dealing with interim contact, disclosure and the bundle, there was an order that the parties should each file and serve a witness statement by 18th December. This was the first such direction.
4. Between December and the hearing listed in February, there were further court hearings to deal with contact and financial matters. It is right to say that the various hearings have been dealt with by a variety of different judges. There has been no judicial continuity.
5. The fact finding hearing was due to start on 4th February before Recorder Glancy QC. The start of the hearing was delayed due to pressure of work at the court, and was only called on for hearing at 2pm. At the start of the hearing, Mr. MacDonald for the father raised a number of preliminary points relating to evidence the mother sought to file, including a statement from her, one from the children's nanny, and one from the maternal grandmother.
6. The point raised by Mr. MacDonald about the evidence was that the mother's statement included allegations going beyond the five permitted in the Scott Schedule, and so did the other statements. The order of 27th October had specified that the parties statements should be limited to the evidence in respect of the allegations on the Scott Schedule and there was

no direction (either requested or granted) for statements from any other witnesses. Mr MacDonald invited the Recorder to make an order excluding all the superfluous evidence.

7. As it happened, the loss of a day to court listing and the preliminary application meant that the fact finding hearing could not go ahead and had to be adjourned for several months. The recorder therefore limited himself to case management issues, and determined the father's application.

Allegations in the Scott Schedule

8. For the five allegations she was permitted to make, the mother selected at (1) an allegation that the father had negligently allowed the younger child to fall from a high table at the age of 6 months, resisted going to the Accident and Emergency Department and then refused to allow the child to be admitted overnight. At (2) she alleged the father had forced her to have sex with him and in doing so passed on a sexually transmitted disease to her. At (3) she stated that the father had slapped the oldest child, thrown a parcel at him and then threatened he was going to kill him. Allegation (4) was the father self harmed and called the police saying that she was responsible, and allegation (5) was that on an occasion in 2020 the father had shouted at the older child, undermined and mocked him, and then twisted his arm to remove a remote control. The father had then shouted at the mother in front of the children.
9. The father filed a Scott Schedule against the mother which included allegations of violence and abuse, and a claim that she had waged a campaign to alienate the older child from him.
10. The mother's statement added more detail and examples of the abuse she alleged the father had inflicted on her and the children. She said that the father's abusive behaviour to her was constant and that from 2019 he had become more abusive and violent to herself and the children. She said that the forced sex as alleged in the schedule was not the only occasion it had happened. She said that her mother had witnessed several serious incidents when the older child had been hit by the father, and that the child himself had told his therapist of these events. She said the father had been forced to resign from his job to avoid being disciplined for bullying at work.

11. The statement also included other allegations, for example that the father had stolen her passport and those of the children so that they were unable to go on a holiday or travel, that he had been controlling about money, and that he did not have any relationship with his older children.
12. Attached to the mother's statement were a number of documents. First there was an opinion from counsel instructed to advise the father as to a proposed claim for constructive dismissal from work. The mother claimed that material in the advice demonstrated that there was a lot of evidence the father had bullied people at work, and that it should be admitted as 'similar fact' evidence. Second there were a number of letters from professionals treating the oldest boy, setting out allegations he had made against his father and the mental health difficulties he was suffering as a consequence.

The recorder's decision

13. The recorder, in large part, acceded to Mr. MacDonald's application which was made pursuant Rule 22.1 Family Procedure Rules which states as follows:-
 - (1) The court may control the evidence by giving directions as to –
 - (a) The issues on which it requires evidence;
 - (b) The nature of the evidence which it requires to decide those issues;
and
 - (c) The way in which the evidence is to be placed before the court.
 - (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
 - (3) The court may permit a party to adduce evidence, or to seek to rely on a document, in respect of which that party has failed to comply with the requirements of this Part.
 - (4) The court may limit cross examination.
14. In his judgment the recorder considered those elements of the mother's statement which had been highlighted by Mr. MacDonald as being irrelevant, inadmissible or otherwise objectionable. He noted that to permit only evidence which related to an allegation in the Scott Schedule was 'a little on the narrow side' as an allegation may need to be put into context, but that it was also important to ensure that the hearing did not become unnecessarily lengthy. He then concluded that significant sections of the mother's statement should be excluded, for example;
 - (a) the statement by the mother that the father's violent and abusive behaviour towards the children had worsened in 2019;

- (b) The mother's statement that the occasion when she said the father had cajoled or pressured her into having sex 'was not the first time';
- (c) The mother's statement referring to the 'constant' abuse of the older child;
- (d) The mother's contention that the father would frequently mock the older child and be nasty to him, and that the child had explained this to the therapist;
- (e) The mother's statement that her own mother had told her she had witnessed several incidents where the older child had been hit by the father;
- (f) The views of the psychologist about the older child;
- (g) Allegations that the father had had affairs, slept with prostitutes;
- (h) Allegations about the father using a fake passport, stealing passports and the use of a credit card.

15. The recorder ordered that the mother should file a new statement excluding these allegations.

16. The recorder also considered the two new statements filed on the mother's behalf. He gave permission for the maternal grandmother's statement to be filed but stated that the contents went far beyond the allegations in the Scott Schedule and contained a number of allegations that were new, and neither relevant to the allegations in the schedule or to the immediate context. It is not entirely clear to me from the judgment what the recorder did and did not consider should be adduced, but it appears that the objectionable part related to allegations that the father had been abusive throughout the relationship, that he isolated the mother, that he assaulted her when she was in hospital and that he had thrown flowers to the floor.

17. The recorder gave permission for a statement from the nanny to be admitted in full. It was a short statement but contained a general allegation that the father had an abusive character and that he was aggressive and humiliating to the older child and the mother.

18. Finally the recorder excluded evidence from the treating professionals and counsel's opinion relating to the father's employment. He stated that the views of the treating professionals may be relevant to the welfare stage of the case rather than to the fact find. He quoted from the report of one doctor which stated that the older child had complained to him that the father had hurt him and become very angry with him but then said '[the child's] relationship with the father is not an issue which is relevant to the fact finding enquiry'.

19. As to the issue of the father's employment he considered that counsel's opinion would not assist the trial judge to determine the matters before him.

Submissions made by the parties

20. The appellant mother appealed on four grounds. Ground 1 was that the recorder was wrong to exclude the matters in the mother's sworn statement on the basis that they were irrelevant and inadmissible. By doing so he limited the mother's ability to explain the history of the behaviour and the background to the specimen allegations. He excluded relevant evidence from the child. It was submitted it was perverse for the judge to invite counsel for the father, being the alleged perpetrator, to propose redactions to the mother's statement. Ground 2 was that the recorder was wrong to exclude the professional evidence which was relevant to the child's allegations and the impact of the alleged abuse. Ground 3 was that the recorder was wrong to exclude similar fact evidence, namely the evidence (contained in counsel's opinion) about the father's behaviour at work. The fourth ground was that the recorder's conduct of the hearing resulted in procedural fairness. Ms Maxwell did not press this aspect of the case in the absence of a transcript of the hearing.
21. In her skeleton argument on behalf of the mother, Ms Maxwell made detailed submissions in support of the Grounds, in particular relying on the dicta of the Court of Appeal in Re H-N, Re T, Re H and Re B-B [2021] EWCA Civ 448, and of Hayden J in F v M [2021] EWFC 4 as to the limitations of Scott Schedules and an intense focus on particular allegations at the expense of looking at patterns of overall behaviour. She also pointed out a number of comments made by the recorder which she said suggested that he considered wider or further allegations made about the father's behaviour to be prejudicial and irrelevant.
22. Ms Maxwell submitted that the judge was wrong to exclude the professional evidence, and pointed out that in paragraph 29 of PD12J the court was required to consider the impact of abuse upon a child. The child's allegations against his father were relevant and admissible.
23. She also made a number of submissions about similar fact evidence, citing the case of Re R-P (Children: Similar Fact Evidence) [2020]

EWCA Civ 1088. She argued that the evidence about the father's employment demonstrated the father's propensity to bullying behaviour.

24. On behalf of the father, Mr MacDonald pointed out that the mother had been represented since October 2020 but at no stage had sought to appeal the case management orders requiring the parties to limit themselves to 5 allegations each, and that the narrative statements should not stray outside this. The statements they produced for the fact finding hearing did not comply with those directions, and because there were difficulties in arranging for the simultaneous exchange of statements they were not seen by the father's team until just a few days before the hearing. This placed the father in a very difficult position, for the mother was seeking at the last minute to expand the allegations and file new evidence.
25. Mr. MacDonald further argued that the recorder's approach to the matters contained in the statements of the mother and maternal grandmother had not been a narrow one, and he specifically rejected the contention that no evidence apart from that relating to the schedules should be produced. In any event, he had simply been acting consistently with the decision of the previous judges case managing the proceedings. The recorder had a wide discretion and had exercised it appropriately for the evidence the mother wished to adduce was not 'subtle and persistent patterns of behaviour' but new allegations.
26. Mr MacDonald pointed out that the recorder could not be expected to take into account the guidance given in Re H-N by the Court of Appeal when the judgment had not been reported at the time of his decision.
27. Mr MacDonald submitted that the father had had no involvement with or knowledge of the older child's treatment and pointed out that the mother was inviting the court to rely on this evidence without making any attempts to obtain statements from the individuals concerned or to make them available to give evidence. Whilst hearsay evidence is admissible, the nature of the allegations would make reliance on this evidence without a more focussed enquiry unfair.
28. Finally, Mr. MacDonald submitted that the opinion from counsel as to the father's employment was a privileged document provided to him. It was therefore inadmissible, and in any event, irrelevant as similar fact evidence or otherwise.

The law

29. An appeal court will only interfere with case management decisions in very limited circumstances. In Re TG (Care Proceedings: Case Management: Expert Evidence) [2013] EWCA Civ 5, Sir James Munby, P stated

‘a judge making case management decisions has a very wide discretion and anyone seeking to appeal against such a decision has an uphill task.....Robust case management.....very much has its place in family proceedings but it also has its limits’.

‘The task of the case management judge is to arrange a trial that is fair, that is, judged both by domestic standards and by the standards maintained by Articles 6 and 8. The objective is that spelt out in r 1.1 of the Family Procedure Rules 2010, namely a trial conducted ‘justly, expeditiously and fairly’ and in a way which is proportionate to the nature, importance and complexity of the issues’, but never losing sight of the need to have regard to the welfare issues involved’.

30. In Re H-N above, the Court of Appeal considered the use of Scott Schedules and the practice of judges limiting the number of allegations of abuse that should be determined at a fact finding hearing. At paragraph 27, the President of the Family Division stated:-

‘It is now accepted without reservation that it is possible to be a victim of controlling or coercive behaviour or threatening behaviour without ever sustaining a physical injury. Importantly it is now also understood that specific incidents, rather than being seen as free-standing matters, may be part of a wider pattern of abuse or controlling or coercive behaviour. It is of note that none of the submissions to this court suggested that the current definition of domestic abuse in PD12J required substantial amendment. Although the structure of the definition of domestic abuse in clause 1 of the Domestic Abuse Bill currently before Parliament differs from that in PD12J, the content is substantially the same’.

31. The question as to the use of Scott Schedules is dealt with in paragraph 41 onwards of the judgment. There was effective unanimity amongst the parties to the appeal that the value of these had declined to the extent that, in the view of some, they were a potential barrier to fairness and good process. One of the problems was that the reduction in the court’s focus towards a limited number of incidents risked robbing the court of the vantage point from which to view the quality of the alleged behaviour as a whole and to determine if there was a pattern.

32. Whilst it was accepted that there needed to be a move away from the use of Scott Schedules in this way, quite how this is to be achieved is another

matter. The Court of Appeal stated that work was being conducted by bodies such as the Private Law Working Group and the Harm Panel's implementation group to consider the way forward. At paragraph 59 it was stated that where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact finding hearing is necessary, that assertion should be the primary issue for determination at the fact finding hearing. Any other more specific factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour and not otherwise unless any particular allegation is so serious it justifies determination irrespective of any pattern.

Discussion and conclusions

33. I have every sympathy for the recorder who came to these proceedings for the first time at the listed fact finding hearing, and who had not made any of the previous case management orders. Those orders required the parties to limit their allegations to five before any narrative statements were produced and recited that allegations older than a year were unlikely to be helpful. Those orders were not appealed. At the time of the hearing the judgment in the case of Re H-N, which was very much on point, was not available.
34. What is more, the mother produced the new material late in the process so that the father and his team had had little time to absorb and respond to it.
35. In the circumstances it is not surprising that objections were made on the father's behalf about the admission of the evidence.
36. Nonetheless, I am satisfied that the recorder's decision that the mother could not adduce the evidence she sought to do in her own statement and that of her mother cannot stand.
37. The allegations beyond those in the Scott Schedule were not either inadmissible or irrelevant; quite the opposite. The fact that the father was alleged to have hit the older child not once but several times was plainly an allegation of a pattern of behaviour which is highly relevant to an application for contact. So too were allegations he had forced the mother to have sex on several rather than one occasion, that as well as being physically violent to him the father treated the older child in a humiliating manner, and that he was a bully. These matters are also relevant to the father's case, in particular that the mother was the one who was violent, not him, and that she was alienating the children from him. These

allegations (some of which had been set out in the mother's initial C1A) demonstrated that strict adherence to single incidents in the Scott Schedule would have to be reconsidered.

38. There will be occasions when a judge refuses to admit relevant evidence produced at the last minute before a hearing, when, for example it is not highly significant in relation to the other evidence and/or it cannot be adduced fairly without an adjournment of the trial which will itself cause harm and delay for the child.
39. In this case, however, not only were the allegations highly significant but the hearing had to be adjourned in any event. The fact finding hearing was relisted in September meaning there was time for the nature and scope of this to be considered at a further case management hearing listed in July.
40. In those circumstances I will allow the appeal and set the recorder's order so far as it relates to the filing of evidence. I will order that the mother should file a narrative statement setting out her allegations against the father, including any allegations of a pattern of violent, abusive or controlling behaviour. The father should file a narrative statement in response including any allegations that he makes against the mother. These should then be considered by the trial judge at the pre-trial review listed in July, alongside the mother's application to adduce evidence from her mother, the nanny, and the treating doctors. At this point the trial judge should consider what specific incidents and allegations should be determined at the fact finding hearing in order for the applications for child arrangements orders to be decided at a later stage.
41. The mother's application to adduce factual evidence from the treating professionals should also be determined at the pre-trial review. Those representing her should set out the purpose for which it is proposed this evidence should be adduced. If the purpose is to demonstrate that the allegations are true, then statements from the individuals concerned setting out the context in which they were made are likely to be necessary.
42. I do not intend to say more about the mother's application to adduce evidence as to the father's employment and whether it amounts to 'similar fact evidence' which should form part of the hearing. This is not something that should be dealt with in isolation, but by reference to the rest of the evidence in the case at the pre-trial review.

43. I do not underestimate the difficulty of case management in proceedings such as this, or the significant pressure on the courts in finding sufficient time to deal with these cases proportionately and fairly. As well as the passages from *Re H-N* which I have quoted above, at paragraph 36 the President quoted from *'The Road Ahead'*, guidance issued in 2020;

'43. If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear'. ...46. Parties will not be allowed to litigate every issue...'

44. For all the reasons set out, the appeal is therefore allowed.

1.