

(1) Judgment: 22 December 2022

(2) Judgment: 14 April 2023

Before:
DEXTER DIAS KC
(sitting as a Recorder of the Family Court)

B E T W E E N:

A MOTHER

and

A FATHER

(1) Application for costs following fact-finding hearing
(2) Application to remove parental responsibility

On (1)

For argument (16th November 2022)

MS COOKE appeared on behalf of the applicant father

MS ECOB appeared on behalf of the respondent mother

For judgment (22 December 2022):

MS SHAH (Solicitor) for father

MS WHELAN for mother

On (2)

For argument (8 March 2023):

MS ECOB appeared on behalf of the applicant mother

MR ANDERSON appeared on behalf of the respondent father

For judgment (14 April 2023):

Mother unrepresented and did not attend with court's permission

MS COOKE for father

JUDGMENT

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.

Dexter Dias KC:

(sitting as a Recorder of the Family Court)

§I. OVERVIEW

1. These are two judgments of the court.
2. In this document I combine both judgments from the same case that together detail the concluding procedural phases of the complex, protracted and bitterly disputed private law proceedings in this case. Both judgments were handed down orally to parties on the dates shown above.
3. I have taken the step of publishing the two judgments in one document for two principal reasons. First, because they raise questions of principle and public importance in respect of litigation involving serious allegations of child sexual abuse. Second, in furtherance of the President of the Family Division’s transparency initiative and the “the need for much greater openness” in the Family Courts (*Confidence and Confidentiality: Transparency in the Family Courts*, 28 October 2021, [20]-[32]), so members of the public may see how the court performs its protective duties towards a child where one parent alleges that the other has sexually abused their child - here a father against his daughter. The essential facts are common to both applications; that is another reason to provide this consolidated judicial overview.
4. I subdivide the text into two parts, one each for each judgment, as set out in the table below. **Part A** is the judgment on costs following a fact-finding hearing. **Part B** is the judgment on the further application by the child’s mother to remove the father’s parental responsibility. To make these complicated proceedings more readily intelligible, I further subdivide the text into 12 sections.
5. The importance of these decisions is reflected in the fact that both the applications by the mother are exceptional applications. I shall say more about this later.

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6. Since the parents had differing roles in the various stages of proceedings, for simplicity’s sake, I refer to the applicant in the head proceedings and the respondent in the costs application as “the father”; the respondent in the head proceedings and the applicant in the costs proceedings as “the mother”. The mother is also applicant in the removal of parental responsibility application, and the father again respondent. The child will be referred to as “C” throughout, which I emphasise comes nowhere near to her real name.
7. Substantial anonymisation is necessary. Its purpose is to protect the vital interests in the right to privacy and private life under Art. 8 of the European Convention on Human Rights (“ECHR”) of the child and her mother. I appreciate that using such redaction reduces the living, breathing parties to these proceedings to little more than dimly viewed shadows against the courtroom wall. But protection outweighs the Art. 10 ECHR freedom of expression/right to know and publish full personal details. For that reason, I am satisfied that there should be a proportionate derogation from Art. 10 to protect the child.
8. Therefore, the case should be called “A Mother versus A Father (Costs Following Fact-finding and Removal of Parental Responsibility)”.
9. Given the complexity and extensiveness of proceedings and the number of hearings, the representation altered somewhat. I am grateful to all the advocates listed. I wish in particular to note the contribution of Ms Ecob, who made two bold applications in the best interests of her lay client, the mother. Of no less note are Ms Cooke and Mr Anderson. They acted pro bono on behalf of the father. It does them and the Bar great credit. Equally, the court must pay tribute to their instructing solicitor Ms Shah, who again acted for the father on a pro bono basis. It is important that the public knows the professional and personal sacrifice that members of the legal profession so frequently make, unheralded and unacknowledged, and without which many cases could not proceed effectively or would take significantly longer.

PART A
COSTS FOLLOWING FACT-FINDING HEARING
(22 December 2022)

§II. INTRODUCTION

10. This is an application for costs in family private law proceedings.
11. This judgment examines the proper and principled approach to an application for costs by one parent against the other parent at the end of a fact-finding hearing within child arrangement order proceedings under the Children Act 1989, where serious allegations are made by one parent against the other and are stridently and strenuously denied, but are found proved by the court to the requisite standard of a balance of probabilities following the fact-finding hearing.
12. The parties are as follows: today, the father is represented by his solicitor, Ms Shah; the respondent mother is represented by counsel, Ms Whelan. At the trial of the issue, the father was represented by Ms Savvides of counsel, and the respondent mother was represented by Ms Ecob of counsel, but Mr Harley of counsel stood in for her to take the fact-finding judgment. I am grateful to all the advocates in this case for their assistance.

§III. BACKGROUND

13. The child in these proceedings, C, is a bright and intelligent girl, who at the time of the allegations was aged five; at the time of judgment, aged six. She finds herself caught in the middle of an ongoing and bitter dispute between her parents. It is full of vitriol, allegation and counter-allegation.
14. C herself has made allegations against her father. She says that when she was five years old, her father did “bad stuff” to her while she was spending time with him in his home, following a child arrangements order that a previous court had granted following previous and equally bitter proceedings. The child says he has been touching her genitalia unnecessarily in the bedroom at night. When she has a bath, she plays with her toys and he pretends to wash her with a sponge. However, this is what she describes as a “trick”, and secretly instead rubs her genitalia with his hand; she says that she does not like it and it makes her feel sad.
15. The principal decision before the court at the fact-finding hearing was whether what C said about all of this was true; “true” in that carefully defined forensic sense, proved by the person who seeks a finding, here, C’s mother; proved on the entirety of the evidence, so it is more probable than not. That was the purpose of the fact-finding hearing I conducted; nothing more, nothing less.

16. What had happened was that between 2016 and 2017, the mother made a series of allegations against the father. She said that he had sexually abused their daughter. She also made allegations that he had been abusive towards her, the mother herself. She was granted a non-molestation order by the court, and all contact between C and her father ended. C attended three Achieving Best Evidence (ABE) interviews. The police investigation, however, resulted in no further action being taken against the father.
17. The case then came before the Family Court in front of a District Judge. The court considered the mother's application under the Family Law Act 1996 and the father's cross-application for child arrangement orders under the Children Act 1989.
18. There was a four-day fact-finding hearing in March and April 2018; it was before District Judge Marin. The judge delivered what can only be described as a condemnatory 20-page judgment. It was dated 30 April 2018. He detailed why he found the allegations made by the mother to be wholly without merit and entirely unfounded (see bundle J1-20).
19. The non-molestation order against the father was discharged and a prohibited steps order was made against the mother preventing the child's removal from the jurisdiction. The judge directed a psychological assessment of the mother, and also a Section 7 (broadly child welfare) report by Cafcass.
20. The court granted child arrangements orders in respect of C and there was a phased reintroduction of C to her father. This progressed in the end to unsupervised contact in the community then to contact which was staying contact overnight at his house. On 31 July 2018, at the dispute resolution appointment, a final child arrangements order was made, and C was ordered to spend four days a week with her mother and three days a week with her father. This is how things stood for over a year until the triggering incident.
21. That event took place on 28 November 2019. The mother made allegations to the police that the father had sexually assaulted their daughter. As a result, on 29 November 2019 the father was arrested for sexual assault by way of digital penetration. On 19 December 2019, C and her mother went to an ABE interview with the police. Since the date of the father's arrest there has been no contact between her and her father.
22. On 14 January 2020, the father made a series of applications to the court:
 1. For the enforcement of the 31 July 2018 child arrangements order (bundle B1-13);
 2. A variation of that order (bundle 14-33);
 3. A child arrangements order for C to spend time with him (ibid.);
 4. Permission to disclose papers in the proceedings with the Metropolitan Police (ibid.);
 5. Allocation of proceedings to the same judge, District Judge Marin (ibid.).

23. The case came before me as a fact-finding hearing on 7 December 2020. At that point, therefore, and to take stock, the position was this: in November 2019, the mother unilaterally stopped complying with the child arrangements order. On 27 November 2019, she had taken her daughter to hospital. The mother stated C had been staying with her father immediately prior to this incident. C complained that she had soreness in her vagina. At the hospital, upon examination by the medical staff, C was indeed found to have redness around the vagina. The mother states that C told her that the father had been touching her vagina with his finger and hand.

§IV. FINDINGS OF FACT

24. The Scott schedule was subdivided into two parts (the case was case-managed with directions about the structure of allegations prior to the Court of Appeal in *H-N* [2021] EWCA Civ 448). The first part dealt with the six reports that C made about what her father had allegedly done to her. She made those reports to different people. The question in this part is whether the report was in fact made. The second part of the Scott schedule addresses the underlying truth of the allegations. It makes the global allegation that the father had sexually abused C and has acted towards her in a sexually inappropriate fashion as she has described to the police, other professionals, and indeed, to her mother.
25. The allegations were, broadly, that the father tickled C's belly, moving his hand towards her genitalia without actually touching them. He put Sudocrem on her vagina without medical or other legitimate reason, and touched her vagina when she was having a bath.
26. **Part one.** On five occasions, C reported to the mother that her father applied Sudocrem to her genitalia. That was a finding that the court made a fact. In June 2019, she told her mother that the father tickled her with his hand over her belly, moving towards her genitalia. On November 13 2019, she told her mother that her father touched her vagina and would say things to the effect of, "This is my little girl", using comforting and consoling words to the effect that she was doing "good" or "right". On 27 November 2019, C told her mother that her father touched her vagina during the time she spent with him, causing her pain. On 28 November 2019, she told the investigating police officer and the social worker at the hospital that when she was staying with her father she would share his bed, and at night he would touch her vagina; that he would touch her vagina when she was in the bath.
27. On 20 December 2019, she told her school teacher:
- "My daddy did things he should not have. At bedtime, he touches my vagina and puts his finger in my vagina. He says it is a dream, but it is not".
28. The further context in respect of this part of the Scott schedule is the ABE interview. In that, C makes allegations to the police that her father touched her vagina in the bath and would carry her into the bed at night and touch her vagina there.
29. It is vital for me to emphasise again that the court bears in mind that when sexual abuse allegations are made in the context of private law proceedings and disputes

between parents, the court must proceed very carefully and take into account the possibility that there may be ulterior motives for such allegations. That said, I was driven by the factual evidence to the conclusions that I have outlined and will further outline shortly. That was by the sheer weight and cogency of the evidence and its powerful cumulative effect taking all the evidence together, not looking at the evidence in separate compartments.

30. All the findings I had made were more probable than not, in fact, not that it was necessary to do so, the evidence persuaded me considerably beyond that simple civil standard that C had been sexually abused by her father in the way this bright and loving child stated, in the way she told her mother, and in the way she told the police, and the social worker, and her teacher.
31. **Part two.** This part is about what Father was found to have done. The court made the following findings of fact: that the father applied Sudocrem to C's genitalia in circumstances where there was no medical or other justification for doing so. The applications were between February and November 2019; there were five of them. I note that the Scott schedule alleged that the application of Sudocrem was on "many" occasions; the court found that it was five times, not "many". This distinction was largely a matter of factual accuracy and precision.
32. The next Court finding was that in June 2019, the father tickled C slowly with his hand on her belly, moving his hand downwards towards her genitalia.
33. Next, on various dates, the father touched C's vagina with his hand when C was in the bath. This touching was executed by subterfuge by the father: the bath time situation was exploited as a cover for the father's intention to touch his daughter's vagina; the touching was sexual.
34. The next finding of fact, on various dates, the father touched C's vagina with his hand when C was in her father's bed, and it was painful to her.
35. The next finding of fact, on various dates, the father said to C when he was touching her vagina, "This is my little girl, and she is doing right/good". This was an attempt by the father to persuade his daughter that his sexual touching of her was not harmful or wrong, but that it was something that was "good" or "right".

§V. LAW

36. There is a generally circulating misconception that there is a common approach to costs in the Family Court, and that it is that generally costs orders are not made. In fact, the position is more complex and nuanced than that. There are a number of dominant themes that broadly shape but do not determine the various substreams of work that together constitute the work of the Family Court. Proceedings under the Children Act 1989 is one such stream; this work can be further subdivided into public law and private law work.
37. In respect of private law cases determining child arrangements orders, there is indeed a policy that informs the question of costs awards. It was set out amongst other places

by Wilson J, as he then was, in *London Borough of Sutton v Davis (Costs) (No 2)* [1994] 1 WLR 1317. In that case, the judge sought to explain the reason behind the general proposition that it was unusual to make an order for costs in children cases. He stated at 1317:

“Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their cooperation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them... But the proposition is not applied where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable”.

38. Thus, where litigation conduct has been blameworthy, in the sense of being reprehensible or unreasonable, costs are potentially payable. In *Re S (A Child)* [2015] UKSC 20, at [19], Lady Hale deemed this exposition by Wilson LJ to be the “classic” encapsulation of why in Family Court proceedings involving child welfare the courts have generally adopted a “no costs” approach.

39. Of the seminal cases in this field is *R v R (Costs: Child case)* [1995] 2 FLR 95. In that case, the Court of Appeal explained why the practice of not awarding costs in child cases had developed. At pages 96-97, Hale J, as she then was, said:

“The reasons why this practice has developed perhaps fall into three categories. The first is general to all family proceedings and was pointed out by Butler Sloss LJ in *Gojkovic v Gojkovic (No 2)* [1991] 2 FLR at page 237, that orders for costs between the parties will diminish the funds available to meet the needs of the family...

The second reason which is given for there being no costs orders in general in children cases, is that the court's concern is to discover what will be best for the child. People who have a reasonable case to put forward as to what will be in the best interests of the child should not be deterred from doing so by the threat of a costs order against them if they are unsuccessful...

The third reason is suggested by Wilson J in the case of *London Borough of Sutton v Davis (Costs) (No 2)* at page 570 to 571, when he points to the possibility that in effect a costs order will add insult to the injury of having lost in the debate as to what is to happen to the child in the future; it is likely therefore to exacerbate rather than to calm down the existing tensions; and this will not be in the best interests of the child”.

40. At page 97, Hale J goes on to say:

“Nevertheless, there clearly are, as Neil LJ pointed out, cases in which it is appropriate to make costs orders in proceedings relating to children. He pointed to one of those sorts of situation: cases where one of the parties has been guilty of unreasonable conduct”.

41. However, that is not the end of it. The policy to encourage, or at least not deter, active participation by those who have a reasonable interest in the welfare of the child is encapsulated in Part 28 of the Family Procedure Rules 2010 (“FPR”). Generally, in family proceedings, the court starts with a plain sheet in respect of costs, as part 44 of the Civil Procedure Rules (CPR) makes clear: the starting point is rule 44.2. This provides insofar as it is material:

“(1) The court has discretion as to –
a) Whether costs are payable by one party to another;
b) The amount of those costs; and
c) When they are to be paid”.

42. This principle is echoed in the Family Procedure Rules 2010 at rule 28.1. That provides: “The court may at any time make such order as to costs as it thinks just”. However, the rules then qualify this general principle in the next provision. Rule 28.2 provides insofar as it is material:

“Subject to rule 28.3 (this is concerned with financial remedy proceedings) Parts 44 (except rules 44.2(2)...) of the CPR apply to costs in proceedings”.

43. That rule that was expressly excluded by Family Procedure Rules 28.2 is as follows:

CPR 44.2:

“(1) The court has discretion as to –
a) Whether costs are payable by one party to another;
b) The amount of those costs; and
c) When they are to be paid.
(2) If the court decides to make an order about costs –
a) The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party”.

44. Although it is excluded by rule 28.2 of the FPR, nevertheless it is noteworthy that CPR 44.2 itself contains an exception at (2)(b), which states: “The court may make a different order”. To take stock then, the court is left with a position that it can make any costs order it thinks just, but the rule that the costs follow the event, what is called the “general rule”, deriving from CPR 44.2(2), is disapplied. Thus, to make an order following a fact-finding hearing would not be to disapply the disapplication; it would be, in my judgment, to make an order that the court thinks is just.

45. Further assistance about the exercise of discretion in determining what is indeed “just” is provided by CPR part 44. Part 44.4 provides:

“(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
a) The conduct of all the parties;
b) Whether a party has succeeded on part of its case, even if that party has not been wholly successful”.

46. Thus, there is a wide discretion. That discretion is conferred by statute and statutory instrument. It must be exercised in accordance, therefore, with the overriding

objective. The FPR outlines the overriding objective at rule 1.1. That rule provides to the extent that it is material as follows:

- “(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
- (2) Dealing with a case justly includes, so far as is practicable –
 - a) Ensuring that it is dealt with expeditiously and fairly”.

47. Thus, the question becomes: when would it be just to order costs in Children Act 1989 proceedings, and why? The reason for this application of the general costs following the event rule principle is a species of promoting both the overriding objective ambition of dealing with the case justly and having regard to the paramount principle of section one of the same Act. At section 1(1), the Children Act 1989 provides that “the child’s welfare shall be the court’s paramount consideration”.
48. Do, then, fact-finding hearings engage questions of the child’s welfare? By their definition, they do not: a fact-finding hearing is axiomatically about finding facts. It is those facts, once found, that then inform the welfare decisions of the court, but they are not in themselves about child welfare. One tests that proposition by asking whether one makes a factual determination taking into account what is in the best welfare interests of the child or simply by assessing the evidence and then making a determination of what is proved to the requisite standard, irrespective of the implications for the destination of the child’s living and contact arrangements.
49. It is essentially for this reason that in *Re J (Children)* [2009] EWCA Civ 1350, Wilson LJ found that a fact-finding hearing could be, as the judge put it, “ring-fenced” from the general welfare enquiry. That case was a case involving a fact-finding hearing. While the judgment of the Court of Appeal was delivered by Wilson LJ, as he then was, Ward LJ concurred with the judgment. Thus it is an authoritative court.
50. What had happened was that there was a fact-finding hearing that was conducted by a district judge in 2008. This was an investigation into the allegation by the mother within an application for contact made by the father that in the marriage he had perpetrated acts of violence towards her, including in the presence of one or other of the two children of the marriage, and indeed had to a limited extent been violent towards the older child.
51. At the end of the hearing the District Judge gave a judgment in which to a significant extent, but not completely, he found the mother’s allegations proved. The mother then sought an order for costs for the fact-finding hearing against the father. The District Judge refused the application and made no order. It was against this refusal to make no order as to costs that the mother appealed to a Circuit Judge; she lost again there.
52. The background was that the father had served in the British Army. In 2005, he began a tour of duty in Germany and the family moved there with him. There were difficulties and the marriage came to an end in February 2007, when the mother took the children with her and returned to England. A few months later, the father was

transferred back to England by the Army, and the parents then lived in close proximity in west London.

53. Once he returned to this country, the mother refused to permit him access to the children, other than supervised contact at a contact centre. He therefore applied to the court for an order for unsupervised contact including staying contact, and in his application he reiterated that the mother was fabricating the allegations of domestic violence against him. In light of the mother's allegations, the District Judge convened a fact-finding hearing. That was conducted on 18 and 19 March 2008 and both parties were represented by counsel.
54. At that fact-finding hearing the mother made 20 allegations against the father. The judge ruled that five of them had not been established to his satisfaction. He did not consider one of the allegations, but 14 allegations out of the original 20 were established. Those subdivided into three categories: one allegation which was established only to the extent of an admission by the father; four allegations which had been the subject of a partial admission by the father, but which were established to the more serious extent alleged by the mother; and also nine allegations which the father had denied completely, but were nevertheless established to the requisite civil standard.
55. Wilson LJ said that the District Judge's findings were "entirely at odds with the tone of injured innocence struck by the father at the beginning of his written witness statement". In his witness statement, the father said: "I am not a violent aggressive individual and certainly not the man I am being accused of being through the evidence provided to the court by my wife and her 'supportive witness'".
56. The mother founded her application for costs on the basis that notwithstanding that the hearing had been the context of the father's application for contact, and that it was rare for the court to make an order for costs in proceedings under the Children Act 1989, the hearing was a fact-finding enquiry into allegations that had been properly made by the mother. Furthermore, her claim had to a significant extent been denied by the father and had yet been subject of positive adverse findings against him.
57. The judgment of the District Judge was brief. He said:

"I am not going to make an order in this case. I think the parties had a right to come to court and in those circumstances I am not going to make an order for costs".
58. When that was appealed to the Circuit Judge, the Circuit Judge properly reminded herself that it was indeed unusual to make an order for costs in proceedings under the Act. She properly referred to a decision of the Court of Appeal in *Re T (Order for Costs)* [2005] EWCA Civ 311. It was submitted that the stance taken by the father at the fact-finding hearing was not "irrational conduct which had prolonged unnecessary litigation".
59. In the Court of Appeal, Wilson LJ cited his own judgment that I have already mentioned: *London Borough of Sutton v Davis (Costs) (No 2)*, and the passage at page 570H-571C. The judge continued that the reference to *Re T* "is an example of a

case in which an order for costs was nevertheless made in proceedings under the Act”. He then moved on to consider the nature of this case. He disagreed with the Circuit Judge’s refusal to accept what she called a “compartmentalised approach”:

“The order for a bespoke fact-finding hearing was surely to consign the determination of the mother’s allegations into a separate compartment of the court’s determination of the father’s application for an order for contact”.

60. He stated at [17]:

“...the effect of the direction for a separate fact-finding hearing was that the costs incurred by the mother in relation to that hearing can confidently be seen to be wholly referable to her allegations against the father. There was, in that sense, a ring fence around that hearing and this around the costs referable to it. Those costs did not relate to the paradigm situation to which the general proposition in favour of no order as to costs applies”.

61. He continued at [18]:

“...it would be wrong to consider that the discretion in relation to costs is so fettered that an order can be made only against a party whose conduct has been irrational”.

62. And then at [19]:

“I am well aware that, in most disputed cases in relation to children, whether in private or in public law, parties justify their proposals for the future arrangements for the child by reference, at any rate in part, to past events, of which another party or other parties will often present a different version. Thus, to a greater or lesser extent, issues of historical fact arise in probably the majority of these proceedings. I would be concerned if our exercise of discretion in relation to the mother’s costs in this case today were to be taken as an indication that it was appropriate in the vast run of these cases to make an order for costs in whole or in part by reference to the court’s determination of issues of historical fact... the mother’s costs of the hearing before the District Judge fell into a separate and unusual category. The hearing was devoted exclusively to the court’s consideration of serious and relevant allegations against the father of what can only be described as misconduct on his part. Over two thirds of the mother’s allegations were true... Of the true allegations, nine had been falsely denied by the father; and all but one of the remainder had been admitted by him only in part”.

63. Therefore, he concluded at [20]:

“This case is in my judgment one in which a proper exercise of discretion on the part of the District Judge did call for an order for costs to be made against the father. In the light however of the allegations which the mother undertook to establish but failed to establish, and of the limited admissions made by the father prior to the hearing, my view is that he should have been ordered to pay only two thirds of the mother’s costs of and incidental to the fact-finding hearing”.

64. Stepping back then, fact-finding hearings can lead to costs orders. Indeed, in *R v R* at paragraph 99, Staughton LJ stated: “For my part I am not sure that it would be wrong to discourage unreasonable parents from putting unreasonable views before the court”.
65. I must briefly deal with the case of *Re T (Care Proceedings) (Costs)* [2012] UKSC 36 in the Supreme Court. That was a case that considered Wilson LJ’s decision in *Re J*. Lord Phillips, President of the Supreme Court, held at [44] that:
- “...we have concluded that the general practice of not awarding costs against a party, including a Local Authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice and which should not be subject to an exception in the case of split hearings”.
66. One must be clear what was actually decided by the Supreme Court. These were care proceedings; there were allegations of sexual abuse of two children. The grandparents of the children were joined as intervenors as being people who allegedly colluded with the abuse.
67. After a lengthy split fact-finding hearing lasting five-and-a-half weeks, the grandparents were exonerated completely. Because of their financial circumstances, they were disentitled to legal aid, therefore they borrowed £55,000 from a building society. They spent £52,000 on legal fees and they sought to recoup them having been vindicated in the contested proceedings.
68. At the first instance, the trial judge dismissed their application for costs; his decision being reversed in the Court of Appeal. When the matter came to the Supreme Court, that court in turn overruled the Court of Appeal and restored the order of the judge at first instance, which was to dismiss the costs application.
69. The issue of principle that was raised by the appeal must be clearly and carefully identified. It was this:
- “Whether in care proceedings a Local Authority should be liable to pay an intervenor’s reasonable costs in relation to allegations of fact reasonably made by the Authority against the intervenor which had been held by the court to be unfounded”.
70. Therefore, I judge this decision to be fundamentally about public law proceedings and costs; it is distinguishable from private law proceedings. However, it is of course highly persuasive being the judgment of the Supreme Court, but I do not find myself bound by this decision. It did consider what Wilson LJ said in *Re J*, but it considered its application to split hearings in public law Part IV proceedings. Here, the issues in private law fact-finding hearings are subtly, but importantly, different.
71. Nevertheless, putting all the authorities together, I conclude that some form of unreasonable conduct by the party subject to adverse findings is generally necessary. I have been influenced by what was said in the Supreme Court in the case of *Re T*. The Supreme Court emphasised that the unreasonable conduct need not be confined to the conduct of proceedings, but can include conduct prior to proceedings, which must

include the question of whether to bring proceedings at all. The ability to consider conduct prior to proceedings was recognised by Keehan J in *Re A and B (Parental alienation: No 3)* [2021] EWHC 2602 (Fam) at [19], and while examining *Re T*. I turn to this more recent decision.

72. This was a long-running and complex case involving allegations of parental alienation which necessitated both multiple hearings and judgments. At the final welfare hearing, the residence of the child was transferred from the mother to the father. In a third judgment about proceedings, the judge considered the father's application for costs. The judge carefully set out the legal framework and relevant decisions about it ([9]-[20]). He found that the mother's approach to proceedings, in which she had lied repeatedly, amounted to an "ill-judged litigation tactic" and was "so egregious" that it triggered the costs discretion. The judge painstakingly considered whether each of the heads of costs incurred were necessary to proceedings, finding that some could not be characterised as "unnecessary" ([38]-[39]), while finding that applications to join the children as parties to be "inimical to the[ir] welfare best interests" ([43]) and the spurious attack on the professional integrity of a witness to be "wholly unreasonable" ([44]).
73. What can be taken from this is that the court is obliged to assess in general terms the contribution that the unreasonable and reprehensible conduct has made to the cost of proceedings. Keehan J ultimately awarded costs against the mother on an indemnity basis. The approach of Keehan J was confirmed by Arbuthnot J in *C v S* [2022] EWHC 800 (Fam) (see [128]-[129]).
74. Having surveyed the law as it currently stands, I conclude that the proper approach of the court when questions of costs arise in private law fact-finding hearings is reducible to the following ten propositions:
- (1) For fact-finding hearings about child arrangements orders, the court has a wide general discretion as to costs;
 - (2) The disapplication of the general rule that costs follow the event does not itself apply to fact-finding hearings;
 - (3) However, it does not automatically follow that after a fact-finding hearing the party against whom allegations are proved must pay the legal costs, but an adverse finding or findings may trigger the discretion to make such an order;
 - (4) Generally, what is required is some form of unreasonable conduct. In *Re N (A Child) v A and Others* [2010] 1 FLR 454, a decision of Munby J, as he then was, the judge observed at [47]:

"The fact that a parent has litigated in an unreasonable fashion may open the door to the making of an adverse costs order, but it does not of itself necessitate the making of such an order. There is at the end of the day a broad discretion to be exercised having regard to all the circumstances of the case."
 - (5) The discretion must be exercised in accordance with the overriding objective (FPR 1.1 and 1.2);

- (6) The court must take into account the conduct and litigation conduct of parties as a whole, and this examination can include conduct prior to proceedings (*Re T (Care Proceedings) (Costs)* [2012] UKSC 36);
 - (7) The court must have regard to the extent to which party has been successful;
 - (8) As a first approximation, the court should look at the number of allegations proved and not proved;
 - (9) As a second approximation, the court should determine the extent to which the determination of the adverse findings contributed to the cost of the hearing (*Re A and B (Parental alienation: No 3)* [2021] EWHC 2602 (Fam));
 - (10) If the overall successful party has engaged in litigation conduct that was not reasonable, that also may affect discretion and/or the ultimate figure awarded and indeed the basis upon which costs are to be assessed.
75. These are the elementary principles with which I judge this application, to which I now turn.

§VI. DISCUSSION

76. Having conducted an extensive and acrimoniously disputed fact-finding hearing, I found that this was a particularly serious case. The father sexually abused his daughter on repeated occasions; he sought to deny it and cover it up. To do so, he mounted a determined and forensically vitriolic attack on the character of the mother, and sought to question, fundamentally, the account of his daughter, a very young child.
77. He did so knowing two things: first, that he had sexually abused his daughter on many occasions; second, that his denial of the allegations was completely false. He was interviewed by the police and repeatedly lied, feigning innocence under police questioning.
78. He made false denials to the court over a prolonged period under oath. He showed absolutely no insight, regret, or remorse; instead, he maintained his false front. He interrupted the delivery of the court's fact-finding judgment, again dishonestly, to protest his innocence.
79. This course of conduct did not end with the handing down of the judgment. He made an application for permission to appeal to the High Court that was found by the single judge, Peel J, to be "totally without merit". This is entirely consistent with a course of unreasonable and dishonest conduct that I found before me. It lends support to the nature and quality of this father's behaviour.
80. Here the father committed serious acts of child sexual abuse, and with impunity inflicted great distress and uncertainty upon his former partner, and critically, upon the child, he then unnecessarily prolonged the resolution of child arrangements by launching fabricated and false attacks principally against the mother, but also and importantly against the child, in order to cover up his wrongdoing. What is "just" in these circumstances?

81. The question is whether it is just for the mother of a child who has been abused, to have to resist and defend herself from false allegations of fantasy and fabrication, not be able to recoup any of the costs incurred to prove the truth in court. Here, the mother was seeking to protect her child from being exposed to a man that her daughter said was sexually abusing her, and this was something that the mother, with justice as the court found, was right to believe. The attack upon the mother was upon the clear instructions of the father and was an act of “gaslighting”, suggesting that she was exaggerating or fantasising, or seeing something that was not there, and seeking to deceive the court about it.
82. It was suggested that she had coached her daughter to exaggerate or lie about the abuse the child had in fact suffered. For example, in his sworn evidence to the court the father said:

“I think that C said what she did in the ABE [to the police] because of coaching and projection, or both. For example, the tickling in the pub incident, clearly my daughter had been told to say that she did not like me tickling her”.
83. In this case, the mother upon sound and practical legal advice made a contemporaneous diary of what her child was telling her, detailing the reports of the abuse the child was suffering. It was only coincidentally that this evidence was introduced into the fact-finding hearing when the mother made an off-the-cuff mention of it. She had not intended to use this document. She was then challenged vigorously by the father’s counsel about whether it did really exist. The next day, she was able to provide it. When she did, it was suggested that it was a fabrication.
84. The court considered the document carefully. The court reached the conclusion, unequivocally, that this was a contemporaneously written and detailed account of what had happened at various points to the daughter. Nevertheless, the father through his counsel, about whom not the slightest criticism is made, launched a withering attack about the authenticity of this document.
85. This mother was placed in a dreadful predicament by the father because she was fearful that should she report allegations of abuse against her child, she risked losing her daughter completely. She was in an impossible situation. However, this court found that the diary provided crucial supporting contemporaneous evidence.
86. Understandably, the mother found all of this a deeply distressing experience. There is in this case no prospect of reconciliation in the relationship between the parents. There is a strong and thoughtful Cafcass s.7 report stating that for the foreseeable future, there should be no contact between the father and his daughter.
87. Thus, how should the court’s wide discretion to award costs be exercised in this case? Will it be just to award costs to the mother? The features that are relevant to this evaluation are as follows. Here, there were 12 allegations subdivided into two groups of six. Of these 12 allegations, the court found all 12 of them proved; the only finding that was not made was the court found that it was not sexually touching “many” times, but it was sexually touching “five” times. In the overall scheme of this case, that made no material difference, but it was a matter of factual accuracy.

88. Proved against the father had been acts of serious sexual abuse against a very young child; what was particularly significant was that this child was alone with him and effectively at his mercy. The distress and emotional turmoil inflicted upon that child was exacerbated by the fact that he was not only her father, but she was in his care as part of the previous arrangements ordered by another court. Thus, he chose to exploit the opportunities that these court orders granted him to abuse his five-year-old child on several occasions over an extended period.
89. He lied to the police when the injury and discomfort inflicted upon his child's vagina had led to inspection by the medical staff at the hospital. He then, knowing he had committed acts of repeated sexual abuse, brought proceedings himself in the Family Court to enforce the previous child arrangements order, and again to secure once more unfettered access to his daughter.
90. He lied to the court over a prolonged period, advancing an elaborate story that was false in all the important and disputed particulars. He instructed his counsel to pursue a comprehensive attack upon the child's mother, accusing her of fabricating evidence, and questioning her mental health and emotional stability, and in the process thereby gaslighting her. For example, WhatsApp messages were produced during the fact-finding hearing, and they proved that he was accusing her of suffering from "a delusion of mind" and questioned "her mental state".
91. This attack on her mental health continued during the fact-finding hearing. Mother was accused of being delusional and a fantasist, of exaggeration and fabrication. He then pursued an appeal against the judgment of this court which the appellate court found to be completely unmeritorious.
92. In the judgment of this court, if an adverse costs award was not justified in this case, it is hard to conceive of a case in which it would be. The unnecessary and unreasonable conduct consisted of amounting sustained and deeply personal attacks on the mother's integrity and mental stability, suggesting that she had coached her child to lie and maintaining that the child also participated in this. All of this was totally false. It was reprehensible and unreasonable conduct by the father, broadly equivalent to the conduct found Keehan J in *A and B* at [34]:
- "I am wholly satisfied and find that the mother had made and then maintained allegations she knew to be wholly false against the father throughout this period and sought to prove them to be true at a fact finding hearing, plainly amounted to reprehensible behaviour and was a wholly unreasonable stance for the mother to have adopted in this litigation."
93. The general rule against costs awards in certain family proceedings should never be misused as a shield to inure a sexually abusive party from the consequences of his or her reprehensible and egregious conduct, and particularly where that conduct is harmful to a child.
94. The message must be clear: if at a fact-finding hearing you falsely deny what you are found to have done, and go further by putting the other party to proof, you are at risk of paying the costs of proving your deceptions false. This is especially so if you seek to bolster your lies with strident and spurious denials and the impugning of the other

party. What it comes to is this: there is no longer in these cases any such thing as a forensic free ride.

95. I look at the question of the costs of the appeal. The mother also applies for the costs of preparing documents to respond to the extensive permission to appeal application by the father; that work was directed by the High Court.
96. Presently, I do not have a sufficient basis to justify this court making an order for costs for proceedings in the High Court, but I give permission for further authority to be provided to me electronically. If necessary, I will deal with this point on the papers; there is no need for a further hearing.
97. I turn to the question of the father's financial status; the father continues to be impecunious. However, his financial situation is no objection or defence to an otherwise meritorious application being granted in principle: see *Re G (Contact proceedings: Costs)* [2013] EWCA Civ 1017, the judgment of McFarlane LJ, as he then was.
98. In these circumstances, the mother takes a realistic stance: she seeks an order for costs to be assessed, but would be content with a direction that such an order not be enforced without further leave of the court.

§VII. DISPOSAL: COSTS

99. Therefore, the disposal of the court in respect of costs is as follows:
 1. The father must pay the full costs of the fact-finding hearing.
 2. The costs are to be subject to detailed assessment if not agreed.
 3. By virtue of CPR 44.2(1), I direct that the costs order shall not be enforced without leave of this Court.
 4. I direct a transcript of this judgment be prepared at public expense given the public importance of the issues engaged.
100. To conclude Part A of this judgment, I must complete the procedural narrative. At the dispute resolution appointment, the Cafcass Family Court Advisor recommended that there should be a lives with order in favour of the mother exclusively. The court granted that order.
101. The reporting officer said that the child would find it deeply distressing and retraumatising to have contact with her father. She had repeatedly told the officer that she did not want to see her father. The court judged that such was the exploitation of contact by the father in this case, that exceptionally there should be no contact between this father and his daughter for the foreseeable future. I observe that in the Sentencing Council guidelines on sexual offences, one of the "aggravating factors" is "exploiting contact arrangements with a child to commit an offence". (See "Other aggravating factors" at

<https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-of-a-child-under-13-by-penetration/>.

102. I emphasise that I am not making a finding about criminal responsibility. But court-sanctioned contact arrangements were exploited to abuse a child. The child's abuser then repeatedly sought to use a previous court judgment to cover it up. I have found this to be a particularly egregious case.

PART B
APPLICATION TO REMOVE PARENTAL RESPONSIBILITY
(14 APRIL 2023)

§VIII. APPLICATION TO REMOVE: Section 4(2A)

103. At the hearing for costs, the mother made an application for the removal of the father's parental responsibility. I emphasised to counsel how serious a step this is and that I was not prepared to deal with it during the course of argument at what was essentially a costs hearing. I judged that this would be unfair to the father and a breach of his Art. 6 rights. Therefore, I ordered a s.7 report from CAFCASS to make recommendations on the welfare considerations in either direction should parental responsibility be removed. I directed that parties provide skeleton arguments applying the facts to the law. The first date available for the hearing was 8 March 2023; the first date for judgment, 14 April 2023. It was as fast as it was possible to go.

§IX. LAW

104. There is a conceptual distinction between legal parenthood and parental responsibility. Parenthood lasts for the entirety of the child's life. Parental responsibility is a legal relationship which ends without further order when the child reaches maturity at the 18th birthday. When the parents are not married at birth, the father may nevertheless acquire parental responsibility in a number of ways as set out in statute. The same statutory provision also provides for the removal of that acquired parental responsibility.

105. Section 4 of the Children Act 1989 as amended provides (insofar as relevant to these proceedings):

“(1) Where a child's father and mother were not married to each other at the time of his birth, the father shall acquire parental responsibility for the child if:

- (a) he becomes registered as the child's father under any of the enactments specified in subsection (1A);
- (b) he and the child's mother make an agreement (a 'parental responsibility agreement') providing for him to have parental responsibility for the child or
- (c) the court, on his application, orders that he shall have parental responsibility for the child.

(1A) the enactments referred to in subsection (1)(a) are

- (a) paragraphs (a) (b) and (c) of section 10 (1) and of section 10A (1) of the Births and Deaths Registration Act 1953.

...

(2A) A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders.

(3) The court may make an order under subsection (2A) on the application

- (a) of any person who has parental responsibility for the child... ”

106. As Baker J (as then was) said in *CW and SG* [2013] EWHC 854 (Fam) at [14], “It is very unusual for parental responsibility to be terminated by order of the court.” In *CW and SG* [2013] EWHC 854 (Fam), Baker J continued at [59]:

"As in *Re P*, I find that if the father did not have parental responsibility it is inconceivable it would now be granted to him, and that this is a factor I should take into account when considering this application to terminate his parental responsibility. Furthermore, like Mr. Justice Singer in *Re P*, I find that in this case there is no element of the bundle of responsibilities that make up parental responsibility which this father could, in present or foreseeable circumstances, exercise in a way which would be beneficial for D".

107. In *D v E and G* [2021] EWFC 37, MacDonald J provided clear guidance on the approach to the forensic problem. It repays consideration in detail:

52. The authorities set out above make clear that the court must ask itself whether, were the father now to be applying for an order conferring parental responsibility for G on him, an application for parental responsibility would be granted. In seeking the answer to this question the court will consider, amongst other factors, evidence of attachment and a degree of commitment, the presumption being that, other things being equal, a parental responsibility order should be made rather than withheld in an appropriate case. I also have regard to the fact that the removal of parental responsibility from a parent is serious step that must be justified on the available evidence and proportionate. However, these factors must all be considered with a view to answering the *fundamental* question for the court, namely whether it can be said to be in G's best interests for the father to have parental responsibility for her, taking her welfare as the court's paramount consideration.

53. In light of the matters set out in this judgment, I am entirely satisfied that were he now to apply for a parental responsibility order, such an order would not be granted to the father. There is no evidence before the court demonstrating an attachment between the father and G. Indeed, G has no memory of her father by reason of the termination of contact consequent upon the father's sexual offending. Likewise, there is no evidence before the court that the father has demonstrated the level of commitment to G that would support the making of a parental responsibility order. First, the father engaged in offending behaviour that was entirely antithetic to his continued safe and consistent involvement in G's upbringing and the exercise of parental responsibility for her. Second, the father has taken no steps since his convictions to address his offending behaviour or the risk he has been assessed to continue to present to adolescent children and former partners so as to permit safe contact and relationship building with G. I am satisfied that this speaks to a lack of commitment on the part of the father to his daughter. That conclusion is reinforced in my judgment by the fact that, third, within these proceedings the father has failed to engage, including failing to follow through on his stated intention to seek legal advice and apply for orders designed to reinstate his relationship with G. In addition to these matters, having regard to the nature of the father's convictions, and the risk assessments that are before the court, I am satisfied that were he to have parental responsibility for G there is a significant risk he would seek to use it to seek to control the mother in the context of his historic harassment of her and other former partners. In circumstances where the mother would have to consult the father with respect to decision making for G if he had parental responsibility, having regard to the conduct for which the father has been convicted and cautioned and the risks identified that the father has in no way taken steps to mitigate I am further satisfied that this would be intolerable for the mother and would act to destabilise her, with a concomitant impact on the stability, safety and security of G.
54. Within this context, and reminding myself that, other things being equal, a parental responsibility order should be made rather than withheld in an appropriate case and that the removal of parental responsibility from a parent is a serious step that must be justified on the available evidence and proportionate, I am entirely satisfied that the father would not succeed in securing parental responsibility if applying for it at this point. In the circumstances, I make an order terminating the father's parental responsibility for G as being manifestly in her best interests.”

108. From these decisions, I derive the following 9 principles:

- (1) There is a presumption against removal of parental responsibility; put another way, once granted, parental responsibility should not lightly be withdrawn;
- (2) The removal of parental responsibility is a rare or exceptional course;
- (3) Among the relevant factors to assess, the court should consider whether parental responsibility would be granted in the circumstances if the party did not already have it;
- (4) The court should apply section 1 of the Children Act 1989 and give paramountcy to the child's welfare;

- (5) The court should have regard to the welfare checklist factors to structure its analysis;
 - (6) No one factor takes priority (*D (Withdrawal of Parental Responsibility)* [2014] EWCA Civ 315 [13]);
 - (7) Termination is a severe interference with the Article 8 rights of both the father and child and must therefore be necessary and proportionate;
 - (8) The proportionality test to apply is the structured *Bank Mellat* test (see *R (Lumsdon) v Legal Services Board* [2015] UKSC 41 at [26], confirming);
 - (9) The applicant must satisfy the court of the above matters on a balance of probabilities.
109. Having identified the governing legal principles, I turn to the court's evaluation of them on the facts of this case.

§X. DISCUSSION

110. I first identify the factors both in favour of and against the application to remove parental responsibility. Following factor-identification, I evaluate the competing factors together and holistically.
111. The factors that ranged against the application are:
- (1) During the three years of these proceedings, the father has not sought to misuse his existing parental responsibility by interfering with the decisions about the child's life; that should be weighed in his favour in assessing his future intentions and conduct;
 - (2) The CAFCASS report states that the father effectively wishes to move on and not interfere with child's upbringing;
 - (3) A prohibited steps order offers significant restrictions on the father's parental responsibility and would protect the child without extinguishing his relationship with his daughter;
 - (4) The father's previous connection to the child has been "a significant part of her life story" (D42);
 - (5) Termination of parental responsibility will, it is submitted, "erase" the years that he has lived with and cared for his daughter.
112. The factors supportive of the application are:
- (1) The CAFCASS report recommends that parental responsibility should be removed;
 - (2) CAFCASS judges that a prohibited steps order would be insufficient to provide the protection the child needs;
 - (3) The findings of fact made by the court document serious sexual abuse perpetrated by the father against his daughter;
 - (4) The sexual abuse was committed under the cover of a child arrangements order sanctioned by the court that the father exploited for sexual gratification;
 - (5) The father's conduct has inflicted serious harm on the child;
 - (6) If there was an application by the father for parental responsibility following court findings of sexual abuse against her, it is submitted that the court would

not grant such an order;

(7) While the father previously had been present in the child's life and contributed to her care, that is rendered of secondary importance given that he used his allocated time to care for her to sexually abuse her.

113. **Exceptionality.** The law is clear. There must be exceptionality before a father's parental responsibility can be removed. Here the father sexually abused his daughter and exploited a court order to do so. He applied for a further child arrangements order knowing he had sexually abused his child. He lied to the police repeatedly. He lied to this court on oath repeatedly. He sought to dispute the allegations of sexual abuse by gaslighting the mother and questioning her emotional and psychological stability. I find exceptionality in this case.
114. **Granting parental responsibility.** I have absolutely no doubt that if the father made an application for parental responsibility, it would be resoundingly refused. It is inconceivable that any court properly seized with the facts of his systematic sexual abuse of his daughter, would grant him parental responsibility. The court would be bound to consider "the evidence of attachment and degree of commitment" as MacDonald J put it in *D v E and G* at [52]. Notwithstanding that the father wishes to have his daughter remaining in his life, that must be balanced against her wish, strongly and emotionally expressed to CAFCASS, that she does not see him anymore. Indeed, the prospect of future contact with her father is deeply distressing to her. I judge that the true nature of the father's commitment to his child cannot be judged just by the fine words of affection to her, but by his acts: the systematic and repeated sexual abuse. I accept that he played a part in caring for her in the first few years of her life. But he used that opportunity to exploit her. He is concerned that termination of parental responsibility will result in the "erasure" of her memories of their life together. One of the ongoing features of her life moving forward will be how and to what extent she can process the memories of being abused by her father. Whether she will be able to erase such intrusive thoughts and whether that would be psychologically healthy is not a matter for this court now. However, the question of memory erasure is complex and cuts sharply both ways.
115. **Prohibited steps order (combined with a section 91(14) order).** I must carefully consider a chief plank of the father's case: whether a prohibited steps order in combination with a section 91(14) order would provide sufficient protection. The father states with complete factual accuracy that he has not sought to interfere with parenting decisions during the course of proceedings. But this ignores a stark fact. That is that these proceedings exist because of him in two distinct senses. First, because he sexually abused his child which led to the distress of his daughter being reported to authorities. Second, because despite that, he sought to have contact with her again by issuing private law proceedings. Looking at the impact on her life, and fairly recognising his involvement in various ways in her early upbringing, I judge that by far the most significant impact he has had on her life viewed objectively at this point is his repeated sexual abuse. This is something that will undoubtedly have a lasting and damaging impact on her. Presently, it is not possible to quantify it. Her attitude towards her father, as expressed to the CAFCASS officer, speaks powerfully about how his abuse has damaged her attitude towards him. He is the sole author of all this. Yet not once during these proceedings has he shown the slightest insight or remorse.

116. Instead, he brazenly clings to his lies and repeats them. Following the court’s fact-finding judgment, the delivery of which he interrupted with intemperate and dishonest protestations; he sought to appeal on a basis that the High Court determined was totally without merit. His actions towards his child have been exceptionally harmful. The risk he poses to her in the future if he retains parental responsibility, even combined with a prohibited steps order, remains high. He would retain the capacity to make applications to the court and inflict further uncertainty on the mother. A section 91(14) order acts as a leave filtering requirement, but not an absolute bar (except very rarely). I have seen at close quarters the tremendously damaging impact these proceedings have had on the mother. These courts are increasingly aware of how such a damaging impact on a parent can affect the child through the impact on the parent’s emotional resources and availability. Accordingly, s.3 of the Domestic Abuse Act 2021 provides:

3 Children as victims of domestic abuse

(1) This section applies where behaviour of a person (“A”) towards another person (“B”) is domestic abuse.

(2) Any reference in this Act to a victim of domestic abuse includes a reference to a child who—

(a) sees or hears, or experiences the effects of, the abuse, and

(b) is related to A or B.

(Emphasis provided) - not clear where emphasis has been provided - agreed

117. The statutory guidance to the Domestic Abuse Act 2021 reinforces this message at [128]. I have no doubt that, separately from the direct impact on the child, the continuing distress caused to the mother by the father retaining parental responsibility is likely to adversely impact the child indirectly. I find that there is a significant risk of that happening here. Once the spotlight of proceedings moves on, I have little confidence that this father would be able to restrain himself. The fact that he brought these proceedings and then sought to appeal the court’s judgment on a spurious basis confirms that.
118. Further, as Baker J held in *CW and SG* at [59], there is nothing in the bundle of rights and duties that attach to parental responsibility that the father can exercise to the benefit of the child. The principal point advanced on the father’s behalf is that retaining the father-daughter link will be of benefit to the child should she in future wish to resume her relationship with him. It was put in this way by Mr Anderson:

“The benefit to her is that if in future she seeks out her father, it would not be in the context of him knowing nothing about her, but he would have some minimal basis about his daughter, and that would provide a firmer foundation rather than coming from nothing. If she does not seek out the contact, there is no detriment to her.”

119. However, what should happen in the interim? Should the child be told the truth by her mother about whether her father was being kept informed about her life, if the child asked? When pressed, counsel accepted that the child would have to be told the truth. This must be right. The court cannot countenance the child being lied to. It is necessary therefore to consider the impact of this on the child, given her firmly set views about not wishing to see her father. Mr Anderson, realistically, accepted that potentially this could cause her additional harm. It strikes me that there are two problems with the course advocated by the father.
120. First, whilst almost anything is theoretically possible, there is nothing concrete in the evidence to suggest that the child would seek out her father in future. This possibility is highly speculative. Second, one must weigh this remote future benefit against what is a real risk of future additional harm to the child. It strikes me as disproportionate to retain parental responsibility on the basis of the remote eventuality of future contact and a desire not to start that from a “standing start”. I cannot see how the situation would be materially improved with the combination of a section 91(14) barring order. As said, it is not an absolute prohibition, but a leave requirement before further application by the father. However, the mother would have to be informed of the application, and that in itself is likely to produce distress in her. Moreover, the father still refuses to accept the findings of fact by the court.
121. The father states that he would not oppose a section 91(14) order. However, his stance strikes me as being inconsistent. One of the reasons he wishes to retain parental responsibility is a professed concern that the child will be taken to the country of the mother’s birth. But if he truly does not intend to interfere or participate in his daughter’s life while she is in her minority, and will not try to see her, that cannot be a matter of great concern to him. What it does indicate is that despite his external stance, there is at least the risk of further attempted intervention in her life, which is the crux of the mother’s application. This was an inadvertent pointer to his underlying intentions.
122. **Welfare checklist.** As indicated by Baker J in *Re CW* at [25], I should also consider, to the extent that they are relevant, the statutory factors identified by the welfare checklist at s.1(3) of the Children Act 1989.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

123. **Factor a.** Ms Ganser of CAFCASS did not meet with the child. She did not think it proportionate to meet C as Ms Lacey, the former Family Court Adviser, previously met C when she was younger. The interview with CAFCASS and the child took place by video on 19 October 2022 and in person on 20 October 2022.
124. The focus was on C's wishes in respect of seeing her father, not about the removal of parental responsibility. That was the proper approach. Termination is a complex issue beyond the reasonable comprehension of a child of her age. C had clear wishes and feelings. It is documented at §16 that she doesn't want to see him again. As C said this, she squashed a toy into a ball. Ms Lacey wondered if that was a way to channel difficult feelings, and noted her change in tone and presentation as she spoke about her father.
125. Ms Ganser gave some further evidence at the hearing. She said that "some weight" should be placed on her expressed wishes and feelings as the child is now 8. Ms Ganser confirmed that from the conversations with mother, there is no reason to think the child's wishes and feelings about future contact have changed. I would add that the child is around the point that one ought to begin to take her views into account, without the issue being determined by them. She is an intelligent child with no additional learning needs and some weight should be attached to her wishes and feelings.
126. **Factor b.** C's emotional need is to be emotionally secure. The prospect of having her father involved in her life is something that causes her distress. She has not had contact with her father for several years. Should that position change in future, that would cause her distress. It would produce, as Ms Ecob put it, "a traumatic response" in her. It must be made clear that there is no psychological report. The father submits that this should make the court hesitate before concluding that there would be harm. However, it seems to me that the court is perfectly competent to assess the totality of the evidence. It can reach a conclusion about whether there is a real risk of future harm. In my judgment, it is absolutely clear that given the level and seriousness of the abuse of the child and her great reluctance to see him, that an obvious and safe inference is that having the father retain parental responsibility is likely to create emotional harm to the child he has sexually abused.
127. **Factor c.** The change by removing her father having parental responsibility and thus denying him information about her would likely be something she would welcome. It would be, as Ms Ecob submits, a "positive change" for her.
128. **Factor d.** The child is now an 8 year-old female who has been sexually abused by her father when she was aged approximately aged 5.
129. **Factor e.** Of great relevance, she has been caused emotional and physical harm by her father as a result of his sexual abuse and the risk of future harm should the father continue to be part of the child's life.

130. **Factor f.** It is submitted on behalf of the father that “meeting needs” is not a relevant factor. I cannot accept that submission. Given his treatment of her, he has proved incapable of meeting her needs in the most important sense of keeping her safe, secure and free from emotional distress and physical harm.
131. **Factor g.** The powers available to the court include that statutory power under s.4(2A) of the Children Act 1989 to remove parental responsibility.
132. Standing back, it is unarguable but that the balance of these factors points strongly to the child’s welfare being best promoted by removing his parental responsibility.

Proportionality

133. I must also consider the question of Convention rights. Removal of parental responsibility will be a very serious interference with the Art. 8 rights of the father and indeed the child. The court is obliged to take a structured approach.
134. I apply the four-limbed proportionality test enunciated by Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, who surveyed the concept, reaching back to Thomas Aquinas and Aristotle’s *Nicomachean Ethics*. The Supreme Court has confirmed that this “structured proportionality” test is the correct one to apply when Convention rights engaged (*R (Lumsdon) v Legal Services Board* [2015] UKSC 41 at [26]). I provide this court’s commentary after the emboldened text, which represents Lord Reed’s articulation of the test at [74]:
- (1) **The objective is sufficiently important to justify limiting a fundamental right:** here the objective to protect a child from future direct and indirect emotional harm from a father who has sexually abused her;
 - (2) **The measures designed to meet the objective are rationally connected to it:** rational connection simply means that the measures further the legitimate aim. The removal of parental responsibility would further the aim of preventing emotional harm to the child by removing the possibility of his being able to influence her life and giving her the security to know that he does not know important details about it;
 - (3) **The means used to impair the right or freedom are no more than is necessary to accomplish the objective:** removal of parental responsibility is the least intrusive measure that can be taken to properly protect the child since I judge that a prohibited steps order would provide insufficient protection and carries the risk of further harm in the future, even if combined with a section 91(14) order;
 - (4) **The measure strikes a fair balance between the rights of the individual and the interests of the community:** the question of balance here is classically between the rights of the child, her mother and the public to have the child protected and the Art. 8 rights of the father. I judge that it would be unfair and harmful to the child if she were to be inadequately protected by the court, thus the fair balance must be to ensure that she is effectively protected.
135. Further, I find that there is a conflict between the interests of the father and the child. The law is clear on resolving such conflict. The rights of the child must prevail over

those of the parent. In *Yousef v Netherlands* [2003] 1 FLR 210, the ECtHR stated at [73] that:

"in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail."

No order

136. I consider the no order principle for the purposes of s.1(5) of the Children Act 1989. I find that it is better in the welfare interests of the child to order the removal of parental responsibility rather than not.

§XI. DISPOSAL: TERMINATION

137. I have no hesitation in making a finding of exceptionality in this case. I am completely satisfied that the factors in favour of removal significantly outweigh those against it. Further, together they rebut the presumption against removal. Applying the paramountcy principle and evaluating the welfare checklist factors without giving any individual factor priority, it is unquestionably in the child's best welfare interests for parental responsibility to be terminated. Removal is a draconian step, involving a severe interference with the father's Convention rights and indeed those of the child. There is no getting away from that. However, I judge that it is also necessary and proportionate in the precise circumstances of this case.
138. I find that the mother has proved on a balance of probabilities that the father's parental responsibility should be removed in the welfare interests of the child for the purposes of ss. 1 and 4 of the Children Act 1989. I grant the application.

§XII. LETTER TO C

139. I informed parties that I intend to write a letter to C, so that in the years to come and when she is sufficiently mature and psychologically ready, she can read it should she wish. It is to explain the court's decision to her. An extract of that letter is below:

Dear C

I am the judge who over the last two years has been in charge of the case in which your mother and father could not decide with whom you should live and who you should see and for how long. But at all times I had right at the front of my thoughts that this case was actually about you. All the way through, what was best for you was the single most important thing I thought about in making all the many different decisions I had to. These decisions are very important, and I knew when I was making them that they would shape your life. I totally got that. So I felt it right that I write to you at the end of this long case to tell you why it was I made some of the decisions I did.

It will be some years before you read this. I suspect you may never forget what your father did to you. How he abused his trust and hurt you physically and sexually. In the long time between me sitting down now to write this to you and your reading it, you might have wondered many times why I decided that your father should not be part of your life. It was to protect you. It was to make sure that you would be able to have a happy life and achieve everything you can achieve. Everyone says you are a bright and intelligent girl. I have seen a video of you and I can see why people say that. You have just as much a right as anyone else in this country to grow up free from harm. I wanted to make absolutely sure that from this point on that would happen by taking steps to keep your father out of your life. I know you did not want to see him any longer. I thought about it very carefully because it is a huge step. But I decided that you were absolutely right. And so was your mum. Given what your father had done, it made no sense for him to have anything more to do with the important decisions in your life. My decision was to make sure that this could not happen again. I have a duty to protect children and this is what I have done.

I want you to know that none of this means that you are anything less than anyone else. I want you to know that your mother fought incredibly hard to protect you. I saw how tough it was for her to keep going at several points, but she did not give up. That was because of her love for you.

Above all, I want you to know that none of this, not a single thing, was your fault. I wish you every success in what I know will be a very bright future.

The Judge
Dexter Dias KC

140. That is my judgment.