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Neutral Citation Number [2023] EWFC 292 (B)

CASE NO: TA21P00348 & BH22F00199

**IN THE FAMILY COURT SITTING AT BOURNEMOUTH  
IN THE MATTER OF THE CHILDREN ACT 1989**

Date: 25/10/23

Before:

**HIS HONOUR JUDGE DAVID WILLIAMS**

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**BETWEEN:**

**K**

**Appellant**

**-and-**

**W**

**Respondent**

**K v W (fact-finding hearing: permission to appeal and adducing new evidence)**

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**Dr Charlotte Proudman** (direct access) for the **Appellant**  
**Gemma Bower** (instructed by **Nantes**) for the **Respondent**

Hearing dates: 4 October and 16 October 2023  
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### **APPROVED JUDGMENT**

This judgment was handed down at a remote hearing at 2pm on 25 October 2023

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#### **Introduction**

1. In this judgment I refer to the appellant as the mother and the Respondent as the father.
2. This judgment deals with two issues:
  - i) The mother's application for permission to appeal the judgment of District Judge Veal ('the District Judge') in respect of a fact-finding hearing which took place on 15, 16 May, and 18 May 2023 and in respect of which the written judgment was handed down on 31 May 2023;

- ii) The mother's application to adduce new evidence that was not before the District Judge at the time of the fact-finding hearing which the mother says is relevant to an allegation of strangulation and an allegation of a threat to kill;

### **Background**

3. The mother and father never married, but lived together in a relationship from July 2001. The relationship lasted a little over sixteen years.
4. Their daughter (X) was born in 2010 and their son (Y) in 2013.
5. Both the mother and the father allege incidents of domestic abuse against the other during the relationship.
6. They separated around August 2017 and in September 2017 the mother moved with the children to live with the maternal grandparents in their home.
7. In October 2017 the mother and father entered into a Deed of Separation. Paragraph 16.2 of that deed provided that the children would live with the mother and would spend time with the father on dates and at times to be agreed between them, it being recognised that it was in the interests of the children to have as much contact with both of their parents as possible.
8. In around December 2017 the father moved to be closer to the children.
9. Direct contact between the father and the children recommenced in February 2018. Initially this was supervised or supported by the mother, together with either the maternal grandmother or a friend, but it soon moved to unsupervised/unsupported and a pattern of alternate weekends and one day a week was adopted.
10. That pattern continued for a little over two years, changing in March 2020 with the advent of Covid-19 and the first lockdown when it moved to the children spending up to one week at a time with the father.
11. In June 2020 the mother cancelled the direct contact arrangements, her reasons for which included allegations of the father directing abuse at their son and the father threatening to kill the mother.
12. On 26 Feb 2021 the mother obtained a without notice non-molestation order against the father, which was subsequently varied on 6 May 2021, but remained in force.
13. By 3 April 2021 the mother had reported the father to the police for breach of that non-molestation order and on 23 June 2021 the father pleaded guilty to a breach of that order, as a result of which the magistrates imposed a restraining order.
14. In September 2021 the father issued his application for a child arrangements order.
15. In August of 2022 the mother moved with the children to the South East of England, where she currently resides.
16. On 5 Sept 2022 the father was found guilty in the magistrates court of breaching the restraining order.

### **Procedural Chronology**

17. The relevant procedural history is as follows:

1 September 2021	The father issues an application for a child arrangements order (CAO);
12 January 2022	Directions order by magistrates acknowledging that PD12J was engaged;
23 March 2022	The magistrates order interim contact, to be supported by the mother or the maternal grandparents;

28 June 2022	The mother applies for and obtains a without notice non-molestation order;
15 July 2022	District Judge Bridger orders consolidation of the Family Law Act proceedings with the Children Act proceedings;
14 September 2022	Recorder Southern orders a fact-finding hearing is necessary and lists the matter for a two day hearing on 24/25 October;  [That hearing was subsequently vacated due to judicial availability]
24 January 2023	The mother applies to add an additional allegation for consideration at the fact-finding hearing, namely that the father had inappropriately touched the parties' daughter.  The matter is listed for a two day hearing on 28 Feb and 1 March;
28 February 2023	The fact-finding hearing commences in front of the District Judge. Unfortunately the father falls ill on the first day and there are also issues with incomplete police disclosure. As a result the hearing is adjourned with consequential directions;
15/16/18 May 2023	Fact-finding hearing in front of the District Judge. Father represented by counsel, mother appears as litigant in person. An attended in person hearing.  At paragraph 10 of his judgment the District Judge states:  <i>'The fact finding hearing came back before me on 15 and 16 May 2023. At the start of the hearing, I reviewed the scope of the fact finding hearing with the parties and determined that, apart from the allegations said to have taken place at the end of November 2016 and those revealed by the ABE interview of X, no allegation prior to 2020 would be determined by the court. The ruling I gave is to be considered alongside this judgment. Because the police disclosed X's ABE interview late, and because of the sensitivity of it, the rest of the morning of the first day of the hearing was taken up with the parties and the court viewing that interview for the first time. The impact of that was that the hearing was part heard at the end of 16 May 2023, the evidence being complete, and so I heard submissions on the afternoon of 18 May 2023 and agreed to produce a written judgment to avoid further delay.'</i>
31 May 2023	The District Judge hands down his written judgment at a hearing conducted remotely, a judgment which runs to 220 numbered paragraphs and circa 17,000 words.  The mother makes an oral application to the District Judge for permission to appeal. The application is refused.  Neither party makes any requests for clarification, either on or after 31 May 2023

## The Allegations and Findings made

18. The bundle prepared for the fact-finding hearing contained a composite schedule of allegations which itself appears to be undated, but which the index to the bundle dates as 17 October 2022. That schedule was divided into fourteen sections of allegations, with sections 1-7 and 8-9 being allegations by the father against the mother, and sections 8 and 10-14 being allegations by the mother against the father.
19. By a C2 application dated 24 January 2023 the mother sought to add one further allegation of sexual abuse against the father.
20. The order from the hearing on 28 February 2023 records that at the start of that hearing the District Judge commenced a review of the scope of the fact-finding hearing in light of the evidence now available and in light of paragraph 17 of PD12J. However, that review was not concluded due to the father falling ill and the hearing having to be adjourned. The parties were on notice, however, that the review would recommence at the next hearing as paragraph 15 of the order from the 28 February hearing states:

*Both parties have permission to file and serve a position statement (if so advised) dealing with the scope of the fact finding hearing and/or the necessity to have a fact finding hearing, such to be no more than two sides of A4, by 4pm on 10 May 2023.*

21. At the commencement of the fact-finding hearing on 15 May, the District Judge heard submissions on the scope of the fact-finding hearing and ruled that the hearing be limited to those allegations which related to:

*a. the allegation each party makes about domestic abuse on 29/30.11.16;*

*b. the matters from 2020 onwards set out in the composite schedule of allegations between pages A010 and A024 of the hearing bundle; and*

*c. the allegation made by the mother, following an alleged disclosure by X, of sexual abuse of X said to have been perpetrated by the father, as set out in the mother's C2 application dated 24 January 2023.*

22. That decision was recorded in an order dated 18 May, following the hearing of evidence and closing submissions, but prior to the handing down of judgment.

23. In his written judgment the District Judge made the following findings:

- i) The allegation of sexual abuse was not proven;
- ii) As to the incident on 30 November 2016:
  - a. The allegation of strangulation against the father was not proven;
  - b. The mother inflicted injuries on the father and the mother's explanation as to why they were inflicted was not accepted;
  - c. The mother's allegation that the father was making derogatory comments to their daughter about the mother was not proven;
  - d. The mother responded by physically assaulting the father;
  - e. the mother escalated the situation and the father was left having to act protectively;
  - f. The mother was unable to promote their daughter's welfare above the adult dispute;
  - g. The incident was liable to be frightening for their 6 year old daughter.
- iii) As to the remaining allegations:
  - a. The fathers' numbered allegations 1(4), 4(2) and 6(2)-(4) were not proven;

- b. The father's numbered allegations 3(2)-(4), 5 and 9(4) do not need to be determined, but if necessary can be dealt with at the welfare stage;
  - c. The father's allegation 7(1) was admitted;
  - d. The father's allegation 7(2) was not proven;
  - e. The mother's allegations 10 and 13 were proved, but not to the extent alleged by the mother;
  - f. The mother's allegation 11 was not proven;
  - g. There was some support for the mother's allegation 14, the answer to which was to forge effective communication in the future.
24. The District Judge did not reduce these findings into a schedule, either in the body of his judgment or attached to an order.

### **Post Judgment Chronology**

25. The post fact-finding judgment chronology can be summarised as follows:

21 June 2023	<p>The mother files Appellant's notice at court with grounds of appeal attached.</p> <p>Skeleton argument to follow.</p> <p>Seeks stay pending outcome of appeal and vacation of directions hearing listed for 10 July;</p>
5 July 2023	<p>Skeleton argument filed in support of the mother's application for permission to appeal. Drafted by counsel, Dr Proudman. Runs to twenty-five pages and eighty-five numbered paragraphs;</p>
7 July 2023	<p>Order of HHJ Williams, providing for;</p> <ul style="list-style-type: none"> <li>○ the mother to serve a copy of the application for permission to appeal on the father by 12 July;</li> <li>○ the father to file a skeleton argument by 19 July;</li> <li>○ the mother to file appeal bundle by 21 July;</li> <li>○ application listed for hearing in front of HHJ Simmonds at 2pm on 24 July with a time estimate of two hours;</li> <li>○ vacation of direction hearings listed for 10 July.</li> </ul> <p>Hearing on 24 July subsequently vacated due to counsels' availability. Relisted in front of HHJ Williams at 10am on 4 October. An in person attended hearing at Bournemouth.</p>
2 October 2023	<p>Ms Bowers, counsel for the father, files skeleton argument running to fourteen pages;</p>
4 October 2023	<p>Hearing adjourned. The father attended with counsel. The mother attended with her father.</p> <p>Mother's counsel, Dr Proudman did not attend, having emailed HHJ Williams at 17:42 on 3 October to say she was unable to travel to Bournemouth due to the national rail strike.</p> <p>Adjourned hearing listed at 12 noon on 16 October;</p>
16 October 2023	<p>Adjourned hearing of application for permission to appeal.</p>

## **Grounds of Appeal**

26. The mother advanced ten grounds of appeal'

### Ground 1

The Judge failed to comply with para 29 of PD12J and produce a schedule outlining the findings made and the effect they would have on the mother and the children.

### Ground 2

The Judge failed to address the impact of the findings of domestic abuse on the mother and the children and failed to identify that the children are victims of domestic abuse in their own right under Section 3 of the Domestic Abuse Act 2021 and para 4 PD12J

### Ground 3

The Judge was wrong to make a finding that the father does not pose a safeguarding risk given the findings coupled with the father having breached the restraining order on two occasions resulting in convictions and the verbal abuse the father subjected the mother and children to and without considering para 35-40 PD12J

### Ground 4

The Judge was wrong to exclude the mother's earlier allegations pre-2020 of threats to kill and strangulation attempts, which were relevant to a pattern of behaviour and a similar course of conduct perpetrated by father

### Ground 5

The Judge was wrong not to make a finding that the father strangled the Mother

### Ground 6

The Judge was wrong to draw an adverse inference against the mother because she did not obtain police reports when the Judge did not state they were necessary and mother is a litigant in person

### Ground 7

The Judge was wrong to minimise domestic abuse and verbal abuse perpetrated by the father especially when finding that there is no safeguarding risk to the children in having contact with their father

### Ground 8

The Judge was wrong in failing to stand back and consider whether the father's behaviour amounted to a pattern of verbally abusive and threatening conduct

### Ground 9

The Judge was wrong to find that the father has not sexually abused his daughter.

### Ground 10

The Judge fails to give reasons for not making a finding in respect of allegation 11: the father left lashing marks on [his son], used to force feed [his son], hit [his son] on the back of his head and called him names (2018-2020) and allegation 14: father refused to return the

children during contact leaving [his son] distressed with no way of contacting father; father refusing to return them and father telling [the mother] to call the police.

### **Fresh Evidence**

27. The mother alleged that in 2016 the father strangled her. At paragraph 80 of his judgment the District Judge states:

*.....Although the mother says that she made an audio recording of the argument, that has not been exhibited in these proceedings.....*

28. The mother's case is that she made an audio recording of an argument in the weeks before the alleged strangulation. The mother says that on that audio recording the father can be heard to say 'if you call the police I will break your neck.'
29. The mother accepts that she did not submit this audio recording as evidence in the fact-finding hearing. The mother says she was under the misapprehension that she could not submit audio recordings to the court.
30. In her skeleton argument, Dr Proudman states that the mother referred to this incident in oral cross-examination and to the threat specifically. By 'this incident' Dr Proudman is referring to the incident in respect of which the mother says she has an audio recording, not the alleged strangulation.
31. The mother says that she tried to send this audio recording after her evidence but that it was not sent to the District Judge.
32. The mother now seeks to adduce that audio recording on the basis it is relevant to the allegation of strangulation and the allegation of a threat to kill.

### **The Law**

33. The law in respect of applications for permission to appeal, substantive appeals, and applications to adduce fresh evidence can be stated as follows:

#### Permission to appeal

34. Pursuant to FPR 2010, r30.3(7) permission to appeal may be given only where –

- (a) the court considers that the appeal would have a real prospect of success; or
- (b) there is some other compelling reason why the appeal should be heard.

35. [In Augousti v Matharu \[2023\] EWHC 1900 \(Fam\)](#) Mostyn J summarises the law in relation to applications for permission to appeal. At paragraph 18 he states:

*In Re B (a Child) [2013] UKSC 33, [2013] 1 WLR 1911 the Supreme Court set out the differing standards to be applied depending on whether the appeal asserts (i) an error of fact; or (ii) a faulty evaluation of the relevant facts and matters, or (iii) a miscarried exercise of discretion. In R (On the Application Of) Wales & West Utilities Ltd v Competition And Markets Authority [2022] EWHC 2940 (Admin) I sought to summarise the standards:*

*“39. An appeal against a finding of primary fact can only succeed where the finding had no evidence to support it; or was based on a misunderstanding of the evidence; or was one no reasonable judge could have reached: see Lord Neuberger PSC at [53].*

36. At paragraphs 22-24, under the sub-heading 'Permission to Appeal (PTA) Mostyn J states:

22. *In Re R (A Child)* [2019] 2 FLR 1033 at [31], Peter Jackson LJ confirmed that the correct test to be applied on applications for PTA based on rule 30.3(7)(a) is “a real prospect of success”, which means that:

“...there must be a realistic, as opposed to fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not.”

23. This decision tells us that the degree of likelihood of success on the appeal does not need to be as high as 51%, but it does not tell us what the minimum degree of likelihood is to justify the grant of permission to appeal. Obviously, the degree of likelihood is likely to be fact-sensitive. That said, it would no doubt be possible to undertake some empirical analysis to gain a well-informed feel for the minimum degree of likelihood.

24. A “real prospect of success” is the same test for an interlocutory injunction: see *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. In *AO v LA* [2023] EWHC 83 (Fam) at [28] I suggested a degree of likelihood of at least 25% would normally be needed to satisfy the “real prospect of success” test for the grant of an interlocutory injunction, and I cannot see why the same metric should not apply to the identical PTA test.

#### Substantive appeal

37. If permission to appeal is granted and a matter proceeds to a substantive appeal hearing, then pursuant to FPR 2010 r30.12:

- (3) The appeal court will allow an appeal where the decision of the lower court was:
- (a) wrong; or
  - (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

38. In [GK v PR \[2021\] EWFC 106 \(14 December 2021\)](#) Peel J sets out the position in respect of a substantive appeal. At paragraph 5 he states:

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

- iv) *an error of law has been made;*
- ii) *a conclusion on the facts which was not open to the judge on the evidence has been reached: Royal Bank of Scotland v Carlyle [2015] UKSC 13, 2015 SC (UKSC) 93.*
- v) *the judge has clearly failed to give due weight to some very significant matter, or has clearly given undue weight to some matter: B-v-B (Residence Orders: Reasons for decision) [1997] 2 FLR 602.*
- iv) *a process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust: Re S-W (Care Proceedings: Case Management Hearing) [2015] 2 FLR 136.*
- vi) *a discretion has been exercised in a way which was outside the parameters within which reasonable disagreement is possible: G v G (Minors: Custody Appeal) [1985] FLR 894.*



39. In her skeleton argument Dr Proudman cites the judgment of Peel J in GK v PR (see above). That is a case with which Dr Proudman is no doubt familiar, not least because it is apparent from Peel J's judgment that Dr Proudman appeared in that case on behalf of the appellant.
40. Dr Proudman should therefore be aware of Peel J's comments in relation to the preparation of skeleton arguments which are set out at paragraph 3 of his judgment.
41. After setting out the rules in relation to skeleton arguments, at para 3(vii) Peel J states:

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

42. It is therefore both surprising and disappointing that Dr Proudman has filed a skeleton argument in support of the present application for permission to appeal which runs to twenty-five pages.

#### Fresh Evidence

43. The test to be applied on an application to adduce fresh evidence was set out in the judgment of Denning LJ in [Ladd v Marshall \[1954\] 1 WLR 1489](#)

*'In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.'*

44. In Augousti v Matharu (see above) Mostyn J also dealt with an application to adduce fresh evidence. There, he was dealing with a financial remedy case in which there had been a request to adduce the fresh evidence prior to the handing down of the perfected judgment. At paragraph 35, after setting out the passage from Ladd v Marshall set out above, he states:

*That well-known test should however be applied with progressively increasing rigour relative to the point in time when the application is made. Thus the test will be applied much more fiercely where the application is to adduce fresh evidence on an appeal than where the application is to adduce fresh evidence at a trial after the completion of the evidence-giving phase but before final submissions.*

45. I can see no reason for the test to be applied any differently in the present application, notwithstanding these are children act proceedings as opposed to financial remedy proceedings.

#### **Decision on Grounds of appeal**

46. In setting out my decision I will deal with each ground of appeal in turn.

#### Ground 1

*The Judge failed to comply with para 29 of PD12J and produce a schedule outlining the findings made and the effect they would have on the mother and the children.*

47. Dr Proudman relies on paragraph 127 of the judgment of Knowles J [in A & Anor v B & Ors \[2022\] EWHC 3089 \(Fam\) \(02 December 2022\)](#).

*Finally, I have already commented on the failure by the judge to either produce his own schedule of findings or, if what I was told was correct, to endorse the schedule drafted by counsel. He was not alone in so doing, as the judge in the ABC appeal also failed to produce her own schedule of findings (though one was later produced by counsel at her invitation and attached to her order). Paragraph 29 of PD12J requires a schedule of findings to be attached to the court order following a fact-finding determination. In my view, it is desirable that, with the definitions of domestic abuse contained in PD12J firmly in mind when doing so, a judge produces her/his own schedule of findings, either incorporated into the body of a judgment or appended to its conclusion. That course avoids any lack of clarity about the detail of what the judge found, and any schedule can then be incorporated in or appended to the court's order. I make this suggestion fully conscious of the pressures on the family judiciary engaged in what can often be a relentless train of successive fact-finding determinations, but it is not intended to make the task of judgment writing more difficult. On the contrary, I hope it represents good practice which may help to illuminate a judge's evaluation of the evidence and to inform their ultimate findings.*

48. There is no dispute that in the present case the District Judge failed to produce his own schedule of findings, either incorporated into the body of his judgment or appended to its conclusion.
49. It should be noted that the actual requirement of paragraph 29 of PD12J is for a schedule of findings to be attached to the court order following a fact-finding determination. PD12J is silent as to whose responsibility it is to produce that schedule. Clearly, as per Knowles J, it is desirable (but not mandatory) for the Judge to produce his/her own schedule.
50. In the present case the District Judge set out all his findings in the body of his judgment, with clear reference back to each numbered allegation in the composite schedule of allegations all parties were working from at the hearing. But he did not draw those findings together into a schedule of findings, nor attach that schedule to the order.
51. As to the criticism made of the District Judge for the absence of a schedule of findings, I endorse and adopt the comments made by the father's counsel Ms Bower where she addressed this issue in her skeleton argument:

*This is not a reason to appeal. In fact, to the contrary, the law is clear, it is not sufficient for a party to draw attention to an alleged deficiency in a Judgment by way of an application for permission to appeal. It is incumbent on the party to point out the deficiency and to request clarification or a supplementary judgement on the issue (Re A (Child Abuse) [2008] 1 FLR 1423, CA. The Court of Appeal is losing patience with the failure of practitioners to follow this procedure before seeking permission to appeal. It has recently been observed that it is about time the Family Bar woke up to the fact that the procedure set out applies to family cases and must be followed.*

52. The appropriate course of action in circumstances where a Judge has failed to produce a schedule outlining the findings he has made is to bring the matter to the attention of the judge and request him/her to rectify the issue. Indeed, if one or more of the parties are legally represented, it would be open to the legal representatives to produce a schedule of their own which could be submitted to the Judge for approval, as appears to have happened in one of the cases referred to by Knowles J in the passage above.

53. It is unfortunate that neither party brought this oversight to the attention of the District Judge after the handing down of his judgment.
54. Dr Proudman's primary submission is that the judgment should be set aside and the matter remitted for a rehearing, which would make the absence of a schedule from the set aside judgment irrelevant. However, if any appeal is unsuccessful, Dr Proudman submits that I should prepare a schedule which reflects the findings set out in the judgment.
55. Ms Bowers submits that, if permission to appeal is refused, the appropriate person to prepare the schedule is the District Judge. It was his judgment and he is best placed to record his findings in a schedule.
56. I agree with Ms Bowers.
57. In view of the above I am satisfied that this ground of appeal has no prospect of success and permission to appeal is refused. Indeed, it should never have been a ground of appeal. The matter should have been taken up with the District Judge.

### Ground 2

*The Judge failed to address the impact of the findings of domestic abuse on mother and the children and failed to identify that the children are victims of domestic abuse in their own right under Section 3 of the Domestic Abuse Act 2021 and para 4 PD12J*

58. It is clear that the District Judge had PD12J at the forefront of his mind when considering the issues in this case. There are multiple references to PD12J in his judgment – particularly at paragraphs 14-27. At paragraph 23 he states:

*The concept that domestic abuse is harmful to children speaks to a great extent for itself. If any explanation were needed, it can be found in paragraph 4 of Practice Direction 12J and paragraph 31 of Re H-N. I set that out below.*

59. He then revisits the subject at paragraphs 196 to 199. At paragraph 196 he quotes paragraph 4 of Practice Direction 12J. Then at paragraph 197 he quotes paragraph 31 of the judgment in Re H-N, a paragraph which deals with the harm to a child living in an abusive household being not limited to cases of actual violence to the child.

60. Then at paragraph 198 he states:

*'this court is often told by experts about the effects of parental acrimony on children. That is, that children caught in the centre of their parents' conflict, will often feel conflicted themselves and that may manifest itself in a number of ways and perhaps not immediately.*

61. And continuing at paragraph 199 he states:

*In my judgment, there is good evidence that the children have been involved in the adult conflict, and for some time.*

62. This is not an exhaustive list of the references in the judgment to the children having suffered harm as a result of the acrimony between the parents.

63. In view of the above, and on any objective careful reading of the judgment, this ground of appeal has no prospect of success and permission to appeal is refused.

### Ground 3

*The Judge was wrong to make a finding that the father does not pose a safeguarding risk given the findings coupled with the father having breached the restraining order on two occasions resulting in convictions and the verbal abuse the father subjected the mother and children to and without considering para 35-40 PD12J*

64. The heading immediately prior to paragraph 25 of PD12J reads:

*Factors to be taken into account when determining whether to make child arrangements orders in all cases where domestic abuse has occurred*

65. Paragraph 26 of PD12J reads:

*When deciding the issue of child arrangements the court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.*

66. At paragraph 27 of his judgment the District Judge says:

*For present purposes, however, it is helpful if I further identify that, if domestic abuse is found in a case, paragraphs 35 – 37 of Practice Direction 12J deal with additional factors which need to be considered at the welfare stage. Those include the physical and emotional welfare of the parent with whom the children live, before, during and after contact.*

67. In my view this ground of appeal is misconceived, as it conflates the welfare stage with the fact-finding stage.

68. This matter has not reached the welfare stage. The District Judge has made findings and then listed the matter for a directions hearing, a hearing which has yet to take place due to this application for permission to appeal.

69. At no stage in his judgment has the District Judge sought to make or determined whether to make a child arrangements order.

70. It is correct that **at paragraph 219 of** his judgment the District Judge states:

*Fundamentally, parental conflict aside, there is in my judgment no immediate safeguarding issue arising out of the evidence that I have considered which should prevent contact between the father and the children.*

71. Contrary to Dr Proudman's submission, I do not accept that this amounts to a finding that *'the father does not pose a safeguarding risk.'*

72. The statement clearly includes a caveat: *'parental conflict aside'*. In other words, the District Judge is clear that putting the parental conflict aside, he did not consider that any immediate safeguarding issue arose out of the evidence he had considered.

73. Further, the statement includes a limitation – *'the evidence I have considered.'* But this Judgment is at the fact-finding stage. The District Judge is not ruling out any further evidence. Further evidence may well be adduced at the welfare stage, including possibly expert evidence. That has yet to be decided. And if there is further evidence, that will need to be considered when determining whether to make a child arrangements order – as per PD12J.

74. Finally, the District Judge only refers to *'contact between the father and the children'*. He does not refer to direct contact, nor does he refer to whether any direct contact would be supervised or supported. All these questions were clearly being left to be considered at the welfare stage. This was also evidenced by the fact the District Judge did not order

any contact to place in the interim, but left the situation as it was prior to the handing down of his judgment, namely no direct contact between the father and the children.

75. This ground of appeal is therefore at best premature and conflates the fact-finding stage with the welfare stage. Accordingly it has no prospect of success and permission to appeal is refused.

#### Ground 4

*The Judge was wrong to exclude mother's earlier allegations pre-2020 of threats to kill and strangulation attempts, which were relevant to a pattern of behaviour and a similar course of conduct perpetrated by father*

76. In the course of her oral submissions Dr Proudman accepted this that was a case management decision, (made at the start of the fact-finding hearing on 15 May), that the application for permission to appeal had been made out of time, and that no application for permission to appeal out of time had been made.

77. Accordingly Dr Proudman confirmed that this ground of appeal was no longer being pursued and was withdrawn.

78. I will take the next two grounds together.

#### Ground 5

*The Judge was wrong not to make a finding that father strangled the Mother*

#### Ground 6

*The Judge was wrong to draw an adverse inference against mother because she did not obtain police reports when the Judge did not state they were necessary and mother is a litigant in person*

79. The words 'adverse inference' do not appear in the District Judge's judgment.

80. At paragraph 191 he says:

*Equally, the mother has not produced any records from the police, and nor has she applied for an order that the police disclose any such documents. She has had access to legal advice during these proceedings. The consequence of that is that there is no contemporaneous record of the incident before this court, even in terms of it setting out what would, at its highest, no doubt, have been mother's reported position at the time.*

81. On any objective reading of the judgment it is clear that the District Judge did not draw an adverse inference against the mother because she did not obtain police reports. The District Judge listed a number of factors which were relevant to his finding in respect of the alleged incident.

82. The relevant passage starts at paragraph 189 of the judgment and relates to cross allegations arising from the events of 30 Nov 2016. The mother alleges the father tried to strangle her. The District Judge found that allegation to be not proven.

83. First, the District Judge summarises the mother's evidence of the incident. Secondly, he notes the absence of any photographic evidence of her alleged injuries, notwithstanding the fact the mother had taken and retained photographic evidence of injuries she says had been inflicted on other occasions, and had retained photographic evidence of empty beer bottles taken on the night of 30 Nov 2016. Thirdly, he notes the absence of any medical evidence in relation to the alleged injuries.

84. It is at this point that the District Judge gets to paragraph 191 as quoted above. In other words, paragraph 191 is the fourth point, where he notes that the mother has not

produced any police reports, and in respect to that he notes that the mother has had the benefit of legal advice during these proceedings.

85. Then, at paragraph 193, the District Judge notes that by contrast, the father produced evidence of his injuries, which the mother admits inflicting as a matter of fact.
86. The District Judge's findings on strangulation and in relation to the incident on 30 Nov 2016 are findings of fact. Therefore, for the purposes of the present application for permission to appeal, the mother has to show that she has a realistic prospect of showing at a substantive appeal hearing there was either no evidence to support the findings, or they were based on a misunderstanding of the evidence, or they were findings which no reasonable judge could have reached.
87. The District Judge correctly identified that insofar as the allegation of strangulation was concerned, the burden of proof in proving that allegation was on the mother.
88. For the reasons I have set out above, I am satisfied the evidence was considered carefully and extensively by the District Judge. There was clearly evidence to support his findings, which he has set out. He was entitled, based on that evidence, to find that the mother had failed to discharge the burden of proving her allegation of strangulation.
89. There is no basis for asserting a misunderstanding of the evidence and his findings were not those which no reasonable judge could make. Accordingly I consider the mother has no prospect of succeeding at a substantive appeal hearing and in respect of these two grounds permission to appeal is refused.

#### Ground 7

*The Judge was wrong to minimise domestic abuse and verbal abuse perpetrated by the father especially when finding that there is no safeguarding risk to the children in having contact with their father*

90. For the reasons set out above, the second part of this ground is incorrect. Consideration of this ground is therefore limited to the assertion that the District Judge was wrong to minimise domestic abuse and verbal abuse perpetrated by the father.
91. In her oral submissions, Dr Proudman took me to a number of paragraphs which she submits demonstrate a minimisation of domestic abuse and verbal abuse perpetrated by the father.
92. In respect of some of those paragraphs, the context shows that the judge was merely summarising either the parties' positions, or their evidence, so what is said or not said cannot sensibly be attributed to the District Judge and cannot amount to the District Judge minimising the abuse.
93. However, the more fundamental objection to Dr Proudman's submissions and to this ground of appeal, is that it looks at individual paragraphs in isolation and seeks to draw a conclusion from each paragraph alone. Such an approach will almost inevitably lead to error.
94. The correct approach is to step back and consider the judgment as a whole, with each paragraph being considered and interpreted alongside and in light of all other paragraphs. When that approach is adopted it becomes immediately and abundantly clear that the District Judge in no way minimised any abuse. He made findings as to what had occurred and placed those findings within the broader context of the relationship as a whole.
95. Accordingly, the assertion that the District Judge minimised domestic abuse and verbal abuse is plainly wrong and the mother has no prospect of succeeding at a substantive appeal hearing in respect of this ground. Permission to appeal is refused.

#### Ground 8

96. *The Judge was wrong in failing to stand back and consider whether father's behaviour amounted to a pattern of verbally abusive and threatening conduct*
97. Albeit in the context of considering the allegation in respect of sexual abuse, at paragraph 174 of his judgment the District Judge states:

*Standing back and looking at the evidence overall, and re-evaluating the provisional views expressed above, there are number of conclusions that I reach which impact various parts of the factual matrix. It is necessary for me to articulate my findings in a linear way. In reality, the strands of information which inform my decisions are intertwined and each of the answers I give is informed by the whole context.*

98. It is difficult to comprehend of a more obvious and clear rebuttal of this ground of appeal than the words of the District Judge I have quoted above.
99. On any sensible and objective reading of not just this paragraph but the whole judgment, it cannot sensibly be asserted that the District Judge failed to stand back and consider the father's behaviour, and whether it amounted to a pattern of verbally abusive and threatening conduct. The approach set out at paragraph 174 above was not limited only to that allegation.
100. It is a detailed and carefully constructed judgment in which the District Judge goes to great lengths to set out the evidence and to place it within the context of the relationship between the parties.
101. Accordingly, I am satisfied that this ground of appeal has no prospect of success and permission to appeal is refused.

#### Ground 9

*The Judge was wrong to find that the father has not sexually abused X*

102. As with grounds 5 and 6 above, this is a finding of fact. Therefore, for the purposes of the present application for permission to appeal, the mother has to show that she has a realistic prospect of showing at a substantive appeal hearing there was either no evidence to support the findings, or they were based on a misunderstanding of the evidence, or they were findings which no reasonable judge could have reached.
103. The District Judge deals with this allegation at paragraphs 152 to 188 of his judgment.
104. It is clear that the District Judge carefully weighed the evidence for and against this allegation, and explained the basis of his finding. For the reasons he set out, there was clearly evidence to support his finding. He was entitled, based on that evidence, to find that the mother had failed to discharge the burden of proving her allegation of sexual abuse.
105. There is no basis for asserting a misunderstanding of the evidence and his findings were not those which no reasonable judge could make. Accordingly I consider the mother has no prospect of succeeding at a substantive appeal hearing and in respect of this ground permission to appeal is refused.

#### Ground 10

*The Judge fails to give reasons for not making a finding in respect of allegation 11: the father left lashing marks on [his son], used to force feed [his son], hit [his son] on the back of his head and called him names (2018-2020) and allegation 14: father refused to return the children during contact leaving [his son] distressed with no way of contacting father; father refusing to return them and father telling [the mother] to call the police.*

106. As to allegation 11, the District Judge had in fact excluded those matters which predated 2020 (see ground 4 above), leaving only the 'lashing marks' allegation to be determined. In respect of that allegation, at paragraph 216 the District Judge states:

*Allegation 11, which is limited to the dressing gown cord issue, is not proved. The father says that it was an accident and the mother does not discharge the burden of proving that it was abuse.*

107. Earlier, at paragraph 102 the District Judge set out the father's evidence relating to this incident:

*Whilst he accepted that Y had sustained a mark across his back as a result of the father whipping him with a dressing gown cord, he said that that had occurred during a game and that it was an accident.*

108. It is therefore clear that the District Judge did set out his reasons for not making a finding in respect of this allegation. He accepted the father's evidence that the mark occurred during a game and he found the mother's allegation to be no proven.

109. The criticism of the finding in respect of allegation 14 is less clear. At paragraph 217 of his judgment the District Judge states:

*There is some support for allegation 14, even on the father's evidence. However, the answer to it is in forging effective communication between the parties in the future, which brings me back to the problem which has permeated all of the evidence in this case.*

110. It is clear that the District Judge did not dismiss this allegation. It was open to the mother to seek clarification of the District Judge's finding in relation to this allegation, but no such request was made.

111. In respect of allegation 11, there is no basis for asserting a misunderstanding of the evidence and the District Judge's findings were not those which no reasonable judge could make. As to allegation 14, the District Judge deals with the allegation and if further clarification is required a request should be made to the District Judge.

112. Accordingly I consider the mother has no prospect of succeeding at a substantive appeal hearing and in respect of this ground permission to appeal is refused.

### **Decision on Fresh Evidence**

113. No statement has been filed by the mother in support of her application to adduce fresh evidence. The only facts before me are those set out in Dr Proudman's skeleton argument. The relevant facts are:

- i) The mother made an audio recording of an incident which took place in the weeks prior to the alleged strangulation on
- ii) At the time of the incident, the father was unaware that the mother was making an audio recording.
- iii) On the audio recording the father can be heard to say to the mother 'if you call the police I will break your neck'

114. At paragraph 13 of her skeleton argument Dr Proudman states:

*Applying the test in Ladd v Marshall (see above) M submits the following:*

*a. M is vulnerable by virtue of being a victim of domestic abuse and thus pursuant to Part 3A and PD3AA FPR 2010, by way of a participation direction when she raised that she had evidence of the threat, M should have been permitted to disclose it and the Judge should have relied on it.*

*b. M struggled to give evidence due to her distress;*



*c. M was found to be a domestic abuse victim and as such, M struggled to provide all of her evidence due to the trauma she had suffered.*

115. In the course of her oral submissions Dr Proudman accepted that there was no evidence before the court to support this application. Further, Dr Proudman accepted that the mother was unable to cross the threshold of the first of the three tests in Ladd v Marshall.
116. Accordingly, Dr Proudman confirmed that the application to adduce fresh evidence was no longer being pursued, and the application is therefore dismissed.

### **Conclusion**

117. For the reasons set out above, permission to appeal is refused on each of the ten grounds of appeal and the application to adduce fresh evidence is dismissed.
118. The matter will now return for a directions hearing in front of the District Judge. Having spoken to the listing office I have been able to list the matter for a hearing on 3 November at 10am. That will be a fully remote hearing conducted via Teams.
119. In his order of 18 May the District provided for both parties to file and serve statements in response to his findings and any part 25 applications being pursued. It appears the father has complied with the former, but no statement has been filed by the mother. I will make an order for the mother in the same terms as those made by the District Judge, namely:

*to file and serve a statement by 4pm on 31 October 2023, in response to the findings of the Court, setting out whether or not she accepts the findings of the Court and specifically the extent of any acceptance or otherwise. In addition, such statement to set out her proposals for a way forward in terms of the Children Act application.*

120. In addition, as per the District Judge's order I will make an order that:

Both parties must, no later than 4pm on the day 2 working days before the next hearing, file and serve:

- a. Any Part 25 application/s for expert evidence which they wish to be determined at that hearing; and
  - b. A position statement. Such shall set out their respective positions as to directions including, for example, whether or not a Rule 16.4 guardian should be appointed, their position on any further assessment / reports, whether there is an application for costs, and contact going forward.
121. Finally, I will deal with the application for wasted costs against Dr Proudman which was made orally on behalf of the father at the hearing on 4 October and which arose out of Dr Proudman's failure to attend that hearing.
122. At the conclusion of oral submissions on this application for permission to appeal, counsel for the father informed me that the application for wasted costs had been compromised by Dr Proudman and was therefore no longer being pursued. Accordingly, I shall record that the application was formally withdrawn.