

Neutral Citation Number: [2023] EWFC 44 (B)

Case No: ZW22P00049

IN THE FAMILY COURT AT WEST LONDON

West London Family Court,
Gloucester House, 4 Dukes Green Avenue
Feltham, TW14 0LR

Date: 20 January 2023

Before :

HIS HONOUR JUDGE WILLANS

Between :

HT

Applicant

- and -

ND

Respondents

Ben Long (instructed by **Queens Court Law**) for the **Applicant**
Adam McLean (instructed by **All Family Matters**) for the **Respondent**

Hearing dates: 4 January 2023

JUDGMENT

His Honour Judge Willans:

Introduction

- 1) I provide this written judgment following a one-day fact find hearing in which I considered two allegations made by the respondent (“the mother”) against the applicant (“the father”). Underlying this dispute is an application made by the applicant for child arrangements with the parties’ child, B (“the Child”).
- 2) In order to reach my decisions, I have considered the papers contained within the hearing bundle(s); the live evidence of both parties and the written positions and oral submissions made by counsel on behalf of both parties. In this judgment I do not refer to all of the documents or to all of the evidence. It is not necessary to do so to provide a clear determination. I have though borne all of the evidence in mind.
- 3) References within this bundle are to the relevant pages in the hearing bundle.

Legal Principles

- 4) This is a fact-finding hearing, and the following principles apply:
 - a. It is for the respondent to prove the allegations she makes. It is not for the applicant to disprove the allegations in any way. If the applicant raises a reasonable explanation for consideration then it is for the respondent to satisfy me that this does not amount to an explanation for the events in question.
 - b. The respondent will prove her allegations if she satisfies me on balance that they happened. That is to say it is more likely than not that they happened. This is the balance of probabilities test. The fact that these are very serious allegations does not raise the standard to be applied by me.
 - c. Whilst I can have regard to the inherent probabilities of any event happening I have to keep in mind that the inherent probability of an event is fact sensitive, and that otherwise inherently improbable events do occur and where they occur any recourse to inherent improbability rather misses the point.
 - d. Disputes of this sort demand a rigorous assessment of all the available evidence. However, the starting point should always focus on the evidence of the key participants, here the parents. Extraneous evidence can then be brought into consideration in the light of their evidence. The Court is essentially looking at internal consistency of the evidence and also the extent to which the evidence is consistent with other known facts or evidence. It is within this context that the Court will reflect on the inherent probability of what is being said to have happened. The Court will consider the manner in which the party gave evidence but will apply caution bearing in mind that a fact find hearing is not intended to be a ‘beauty contest’ and there is the potential for an honest witness to give evidence in a hesitant or problematic manner whereas a dishonest witness may give fluid but dishonest evidence.

- e. To the extent the Court receives expert evidence this should be considered with care, but it is for the Court to determine any issue in dispute. This is often referred to as the 'expert advising but the Court deciding'.
- f. In the course of my analysis, I might conclude either (or both) of the parties have told me lies. If this is the case I should be mindful not to simply dismiss the balance of that party's evidence or to find that they have lied to me more broadly. There are many reasons why a witness might lie, and the Court must approach any evidence of lies with care. A lie will only be probative as to the issue in dispute where it meets the tests laid out within the case law as explained in cases discussing the Lucas principle.
- g. The Court is not restricted only to those matters pleaded but must take care if it intends to make findings not explicitly set out within a schedule for consideration. The Court must ensure the parties are aware there is potential for a further finding to be made and are given an opportunity to provide an account surrounding that feature. This is required to ensure a fair hearing and outcome is obtained.
- h. The welfare of the child is not relevant to fact finding. Welfare becomes central and paramount at the next stage when the Court considers the appropriate disposal of the case.

Allegations

5) There are two explicit allegations raised as follows:

- a. [On 14 November 2021] The father sexually assaulted [the child] at the mother's property whilst the mother was in another room praying. On 17.11.21, the mother noticed redness on [the child's] labia lips as well as blood in the area. [The child] disclosed to her mother that 'daddy did it.' The mother immediately took [the Child] to A&E where [the child] disclosed to the consultant that 'that her dad touched her in this area with his fingers'.
- b. The Father would display inappropriate behaviour with [the child] on these occasions:
 - The mother would dress her up in cute baby clothes and when [the father] saw her, he would say 'hello sexy.' [this was dated to around November 2018]
 - [The child] would follow [the father] into the bathroom. The mother would hear [the father] laughing and telling [the child] to stop, in a coy manner. The father told her that '[the child] keeps touching and pulling my willy.' This happened on a few separate occasions. [This was dated to around May 2021].

6) In addition to the above the mother raised a limited number of, it might be felt, related points in the course of her evidence. These included:

- a. A suggestion that approximately one month prior to the November 2021 incident (4(a) above) she noticed similar reddening and some blood in the child's genital area. When asked how it had been caused the child allegedly said, 'daddy did it' but when asked whether this was true corrected her account and said she had 'fallen'.
 - b. The mother reports in June 2021 the father raised the question of a Netflix documentary on paedophilia with the mother and urged her to watch it.
- 7) I will inevitably deal with these points within this judgment albeit they are not strictly pleaded as allegations for consideration. In any event the points were fully considered by the parties and are before the Court
- 8) Quite separate to the above are complaints made by each party against the other which might be described as domestic abuse. For reasons which I later explain I have determined that these matters should not be considered within these proceedings. Further the mother raised a number of points relating to the father's general care of the child. Again, I considered that whilst aspects of this might be relevant to welfare they are not matters for this fact-finding hearing.

Background

- 9) I largely draw the history of this case from both the case summary [A1] and chronology [A7].
- 10) The parties commenced a relationship in late 2017 and separated in June 2020. The child was born in May 2018 and thus conceived early in the relationship. When together the parents occupied the property in which the mother and child continue to reside. The father moved out on separation.
- 11) Having separated contact between father and child continued with the father attending the home and staying for the weekend and having contact from Friday until Monday. This appears to have continued for the period June 2020 to January 2021. However, the relationship between the parents started to deteriorate and from January 2021 the contact changed to visiting contact on one day per weekend. This arrangement continued in place until 14 November 2021 whereafter the key allegation in the case was made as a result of which the mother stopped contact between the child and the father.
- 12) The allegation of sexual assault led to the child being presented at hospital and the hospital, social services and police were involved. The child was seen by the specialist Haven clinic. However, on the available information both the police and social services determined there was no case to pursue.

- 13) As a result of this cessation of contact the father applied by a C100 application dated 12 January 2022. Initial directions were made on 31 March 2022 by Recorder Norman [B17] and included disclosure of documents arising out of the allegations with a directions hearing being listed on 24 May 2022. A request for a prohibited steps order by the mother was refused. An interim lives with order was made in favour of the mother and interim indirect contact was ordered in the form of photographs and an update from the mother.
- 14) CAFCASS provided their safeguarding letter as per the relevant rules¹. At the hearing on 24 May 2022, I considered the safeguarding documents and heard submissions from both parties. Both parties had raised allegation of controlling behaviour and there were issues relating to verbal abuse and physical violence (albeit limited). In summary I determined there was no need for a fact-finding hearing. I considered Practice Direction PD12J and the important cases of Re H-N² and K v K³. I considered the allegations had substantially preceded the party's ability to promote contact post incidents and there was no need for the Court to resolve the cross-allegations to determine the issues surrounding child arrangements. Insofar as the sexual allegations were concerned I considered with the parties the limited information available and the evidential challenges that would arise. I understood the parties to agree there would be no benefit in a fact find hearing. In making this decision I had access to the local authority assessment undertaken at the time of the report.
- 15) I went on to order interim supervised contact and a section 7 CAFCASS report. I now have the benefit of a number of supervised contact records⁴ from July – December 2022. I fixed a DRA before me on 10 October 2022. CAFCASS (Ms Melissa Ganser) duly provided a section 7 report⁵. She noted the local authority had reopened the case in September 2022 following her own referral but had again closed the case without further action. The CAFCASS Reporter noted the positive reports found within the contact reports and contrasted this with the mother's reports of the child not wanting to see her father and her own conversation with the child when she repeated the report of being touched inappropriately by her father. This led the CAFCASS Officer to make the referral noted above.
- 16) The CAFCASS Officer agreed with my assessment as to the generalised complaints made by each parent and considered this was 'situational' in nature. The Officer however felt there needed to be a clear factual matrix with respect to the sexual abuse allegations failing which it would be impossible for CAFCASS to give clear recommendations. She urged the Court to reconsider the need for a fact-finding resolution with regards to these points. Faced by these circumstances I required the mother to review her position and set out in clear terms her position as to the allegations. I made clear it would be her responsibility to prove the allegations and

¹ D41-52

² [2021] EWCA Civ 448

³ [2022] EWCA Civ 468

⁴ D246-284

⁵ D53-66

there would need to be either a fact finding or an acceptance that the Court would proceed on the basis the allegations were not true. I gave the mother time to reflect and set out directions towards a PTR hearing on 16 December 2022 and fixed this fact-finding hearing in default to avoid further delay.

- 17) By the time of the PTR the mother had provided the schedule of allegations on which the case proceeded. There was a discussion as to outstanding police disclosure however I made clear that whilst I would give further directions in this regard the fact finding would proceed in any event. I made this decision in the knowledge that the child had not been subject to ABE interview, and it was agreed had not made any allegation to the police. The best that could be said was that any disclosure might give insight as to the child's presentation when not making an allegation. It was suggested this might be informative. I have to say I was doubtful as to this suggestion given it would be surrounded by issues as to interpretation.
- 18) This point was repeated at the fact-finding hearing in the absence of all the documents identified. Those acting for the mother sought to adjourn the case. I refused this in part because they had failed to pursue the documents in the short time available as directed. Secondly, I remained of the view the disclosure would unlikely assist given the general understanding of the parties as to absence of any allegations being made. Third, I considered a key part of the disclosure had been received being a note from a teacher of a joint meeting between police, teacher and child. I have received statements from the parties and disclosure from CAFCASS, the school and Children services. I have some police disclosure and significant medical disclosure with respect to the initial attendance at hospital in November 2021. I am entirely satisfied I have the necessary documents required to fairly resolve this case. In any event I have the key testimony of the parents as to what they say took place to the best of their knowledge.

The evidence received

- 19) The mother gave an account of a largely unskilled (from a parenting perspective) and somewhat uninterested father. I do not intend to make findings in this regard. I simply cannot see the material relevance of the same at this time given the subsequent events and the ongoing contact. Both parents also make generalised allegations against the other. I have explained why I do not intend to make findings in such regard.
- 20) Turning to the issues under consideration the parties gave diametrically opposed information as follows:
- a. The mother explained⁶ that when the child was very young in November 2018 having dressed the child in 'cute' baby clothes the father on a number of occasions responded by saying 'hello sexy'. The mother said that when this happened a number of times she 'finally' told the father this was

⁶ §7, C5

inappropriate and told him to use different words. In her live evidence she told me that she had picked him up on this after he first said it, but he continued to use such words. The father entirely denied this interaction⁷. He made clear that whilst English is not his first language there is no room for misunderstanding in the words used and he has never spoken in this way to be corrected by the mother or otherwise.

- b. The mother in her written evidence⁸ spoke of occasion post May 2021 when the father would visit the toilet in the flat and the child would follow him. She reported hearing him laugh and 'cooly' telling the child to stop. After this had occurred on more than one occasion she asked him what had happened. He reported that the child had approached him and grabbed at his penis. She reported asking him why he allowed this, and he is reported to have 'brushed her off'. Again, the father disputed this account.⁹ He was clear that he used the toilet privately and left the door closed behind him. There had been an occasion when the mother had asked him to leave the door open as the child was trying to follow him and responding negatively when the door was closed. However, he denied anything like that reported had occurred or that the parents had spoken as reported.
- c. The mother alleged¹⁰ that in June 2021 the father has seen a documentary about paedophilia on Netflix and encouraged the mother to watch it. She did not want to, and he does not appear to have pressed her to do so. The mother suggests the father was 'excited' in the way that he presented this and appeared to gain some 'gratification' from this. Again, the father denied any such discussion taking place¹¹.

21) Understandably there was much greater information concerning the key allegation in the case. Having considered the evidence it appears to me there are three parts to this allegation which can be broadly grouped as follows:

- a. The account given by the parents prior to the child's admission to hospital
- b. The process undertaken post admission to hospital/December 2021
- c. The evidence of events subsequent to November/December 2021 leading up to the further review in September 2022.

Prior to hospital admission

22) It is agreed the father visited for contact on 14 November 2021. He was at the property for about 4 hours. The property is a relatively contained 2-bedroom flat with a toilet, kitchen and living room. The majority of contact took place with the father and child in the living room. The parents agree there were relatively short periods

⁷ §8, C33

⁸ §9, C6

⁹ §10, C33

¹⁰ §10, C6

¹¹ §11, C33

when the mother left the room to clean or work in the kitchen. The mother claims she also left the room for about 15 minutes to pray. The father disputes this. In any event the mother claims during this period the child came into her bedroom when she was praying on a series of occasions, was upset but was calmed by her. The mother also gives an account of seeing the father 'rushing' the child to the toilet whilst she was praying. The father disputes taking the child to the bathroom. In their evidence both parents agreed the father did not generally take on intimate care of the child during contact (toileting and bathing).

- 23) After concluding her prayers, the mother gives an account of the child again being upset and having 'disarranged' pyjamas. In live evidence she said this was with the bottoms appearing pulled to the side rather than sitting naturally on the child. In the course of her upset the child is said to have been asked what was wrong and pointed at her father before pointing at the door and saying 'monster'. The mother then reported the child going to the father and being cuddled with the father allegedly saying, 'sorry baby'. The father entirely disputed this account. It is agreed there was no explicit allegations made on that day. As to the 'monster' suggestion the father did give some evidence as to the mother talking about there being a spirit in the hallway.
- 24) The mother told me the child had a regular daily bath. She was bathed daily over the following days and mother did not notice anything unusual. She also told me about the child having a dental visit on I think 16 November 2021. The mother describes the child being needy and clingy over those days and avoiding the toilet on 17 November 2021. The mother reports the father calling on 17 November 2021 and asking if the child was 'OK' on two occasions. This was said to be unusual behaviour on his part. The father has provided screen shots of the messaging and states these messages were entirely explicable in the context of the dental visit.
- 25) On the evening of 17 November 2021, the mother bathed the child and when drying her the child complained it hurt. She checked the child and noticed an abrasion on her vulva/labia like a carpet burn. She also noticed some blood in the area. She asked how this happened and if she had fallen whereupon the child said, 'daddy did it'. The child confirmed this when further asked. Following a discussion with a friend over the phone the mother took the child to hospital. The father was unaware of this process. As I understood the mother's evidence the child did not give a report beyond her father having 'done it'.
- 26) In the course of her discussions with the CAFCASS Officer in around August 2022 and for the first time the mother gave an account of an occasion in October 2021 when she noticed similar marking and blood (but less) and spoke to the child. On that occasion the child had reported that her father 'did it' but then denied this was the case and said she had fallen. This was not reported to the police/hospital/social services in the initial process as the mother felt she was not being believed and so 'shut down'. In addition, the mother told me, for the first time, that she regularly carried out 'spot checks' when she was examined the child's body for injuries. I was

somewhat surprised by this, and the inference was that the mother was checking to guard against physical and perhaps sexual abuse. I did not understand the mother to claim to have found anything of relevance to this enquiry save as detailed above.

- 27) There is an evidential dispute as to what details are alleged to have been given by the child to the mother prior to leaving for the hospital. In her written evidence the mother disputes the social workers report of the mother confirming the child had - whilst in the bath - reported her father had 'touched her nonnie'. This is the word it is agreed the child uses to refer to her vulva area. Instead, the mother relates a hospital report which appears to suggest the child told the staff at the hospital about this. My understanding of the mother's evidence is of no detail being told to her as to what 'daddy did'. However, this appears to conflict with the medical history taken [D194] in which the mother is reported as saying the child repeatedly said 'he put his fingers'. This appears to be confirmed at [D162] where a typed comparable history is reported as having been given by the mother. It should also be noted that the report attributed to the social worker appears to derive from the treating clinician [D9] with the note being '*[the father] put his fingers in her vagina*'. This note reads as being part of the report relayed by the child to the mother rather than to the doctor personally by the child.

Events at hospital and in ensuing period

- 28) I have started to set out the suggested account given at hospital. I note the child was spoken to [D163]. There are reasons to believe these were leading questions when the child failed to respond and were informed by the history already given. So, it appears the child said yes when asked if anyone had touched her in the knickers area but was quiet when asked who. She was specifically asked if her father 'touched', and she said yes. In fact, the identity of the individual is redacted but taking all the documents together it seems clear this is the father. It appears she was asked if an object was used, and she denied this. It appears she was asked if this was only her father's finger and she said yes.
- 29) Other than the above detail the child made no further allegation to the hospital, police or subsequently to the social worker. As such the child's reported account is of 'daddy did it' and a reference to 'his finger(s)' and her 'nonnie' being 'touched'. I do note that within documents introduced by the mother late in the course of the hearing (documents from Children's Services) there is the following update report from the police:

Mum gives [the child] a bath and as mum starts to dry her [the child] says mum that hurts. Mum opens [the child's] legs and looks at her virgina (sic) which appears swollen. Mothers asks [the child] who has done this ? [The child] says daddy hurt me. Mum calls maternal grandmother who is unavailable and then she calls her best friend who then advises her to go to A&E. [The child] then changes her story and says the towel caused the injury but when in hospital [the child] repeats the same initial account. [my emphasis]

- 30) She was medically examined, and the following was noted:

On examination there was red congealed blood and skin breaks around the clitoris, between labia majora and evidence of irritation to the vagina. There was also mild redness around the anus

The relevant body map at [D172] notes the child suffers from occasional constipation. Subsequently the Haven were involved but they did not draw any meaningful conclusions. I understand the marks are neither indicative of sexual abuse nor contrary to the same.

31) As a result of this information both police and Children Services determined there was no basis on which to bring proceedings or take action. The child was not subjected to an ABE interview, and I understand the father only spoke informally with the police. He also spoke to professionals and wholly denied the allegations claiming the mother was raising these issues to stop him seeing his daughter.

32) I note from the CAFCASS section 7 report:

Some additional information [the mother] provided me, which is not held within the Bundle, complicates matters further in my view. She told me [the child] suffered from soreness in the vaginal area prior to November 2021 and on several occasions between November 2021 and June 2022 (when she was not seeing [the father]). She said she has taken [the child] to the GP on at least three occasions, was told it was due to moisture and prescribed cream. It does not appear the GP made any further referrals to social care and no medical evidence has been submitted to Court about this.

In live evidence the mother agreed to this history. When asked whether there was a potential for the child to have been experiencing an infection during this period which led to discomfort and irritation with the potential that this caused the child to worry the area leading to the marks seen, the mother dismissed the notion. Rather she felt an infection was likely secondary to abuse.

33) When I asked the father whether there was a potential that he had inadvertently caused the marks when assisting with toileting (by perhaps drying too vigorously) he denied the same. I note the clinicians raised this as a matter for consideration.

34) It is also right to record that none of the issues raised by the mother and recorded at §5(b) and 6 above were mentioned to professionals in this period. When questioned as to this failure the mother repeated her lack of confidence in the professionals' citing errors in the reporting and the social workers perceived frustration when the mother suggested contact needed to be restricted with the father. She told me she 'shut down' as a result.

Subsequent Events

35) Following discharge, the mother told me¹² the child became 'more comfortable talking to me about how her father touched her and on 25 November 2021 she said that "daddy put his fingers in [my] noonie"'.

¹²§16, C8

36) Thereafter the mother kept a note of all reports made by the child and these are attached to the mother's statement as exhibit ND2. So far as I can understand it was not until she spoke to the CAFCASS Officer in August 2022 that the mother brought any of this to the attention of a professional. The exception may be of the mother telling the social worker on 2 December 2021 of the child repeating the complaint [D18].

37) I have already recorded the fact of a meeting with CAFCASS pursuant to the section 7 report (see §§15 and 32 above). For these purposes the relevant paragraph §26 records:

[The child] shook her head and looked down and said, "No. He is not good anymore." I asked why not and she said, "He touched me here" ([the child] pointed to her vaginal area). I said oh what happened? She repeated, "He touched me here. He is not good anymore." (pointing again).

38) As a result of this discussion the Reporter made a referral to Children Services. Pursuant to this on 13 September 2022 the child was spoken to by a social worker and the account of this discussion is available [D25M].

*I explored with [the child] her wishes and feelings...[W]hen asked about her dad [the child] said she doesn't like him and when asked why? [the child] said because **I don't like him**. [the child] reported that **daddy used mummy's towel and mummy doesn't do that when she's on the toilet** . **When mummy see's dad she is sad and when she see's me she becomes more sadder** . Why is that...? **because mummy doesn't like him** . Has daddy done anything to you? **no** or said anything to you [the child] said **no**. [The child] goes on to say her mum is scared of dad and when she's see's him she is sad. [The child] reports she is also scared of her dad and doesn't want to see him. I asked [the child] did daddy say something mean or do something mean to her? [The child] said no. I took out my good touch/ vs bad touch worksheet. [The child] then reported daddy put his finger pointing to her Virginia (sic) when I ask what happened after that [the child] said nothing. I asked [the child] was this over her clothing or under her clothing and [the child] said this was under. [The child] stated this happened in the front room while she was colouring. [The child] advised **I don't want to see him because I don't like him**. [I have emphasised in **bold** the words directly attributed to the child].*

39) Furthermore, as a result there was additional police engagement on 6 October 2022 when a police officer saw the child in company with a teacher at school [D85]. It is clear the child made no further allegation during this meeting.

40) There are a couple of other points which I feel need to be included in this section of the judgment.

41) Whilst I am not enquiring into the generalised behaviour of the parents I note the mother was examined about steps taken by her just prior to the main allegation to remove the father from the contact details at the child's nursery and from an 'app' used by the nursery which I understood updated parents as to their child. The mother explained that she took these steps as the father was not acting as an active parent and had shown no interest. She felt as a consequence the father should not receive information from the nursery or pictures of the child from that source. It was unfair for him to get this if he was not being active in his parenting.

42) The mother also explained that she had been alarmed when the father suggested he might pick up or deliver the child to nursery. This also fed into her seeking to remove him from the contact details. Given her complaint was that he had not been doing this previously I enquired as to why she was alarmed when he suggested he might now do so. The mother expressed a sense of fear that he might be planning to abduct the child.

43) I also note the evidence received from the school in the form of logs. I note the following:

- a. The mother messaged the school about her difficulty in coping with the child's behaviour with the child being aggressive and hitting, kicking and biting. Among other matters the mother linked this to contact with the father. The school [D79] were clear that they were not experiencing any such behaviour from the child and whilst the mother had made mention of issues getting the child to school, in contrast the school noted good attendance with the child always well presented. I note the following observation:

Mum reports [the child] is angry with her and says it is mums fault regarding what has happened to her.

The school response was that the mother should not be asking the child if she's sad/angry because of what has happened and if she thinks it is her fault. The school cautioned the mother against leading question simply providing a confirmatory response rather than the truth

- b. The child did engage with a piece of safety work around good and bad touching. This appears to have been relatively early on following the allegation. The mother led me to understand that she carried out the work with the child due to some issue of the social worker doing it. The papers would suggest the work was done by the professional although the mother may have been present.
- c. There is a record of the school speaking to the child's previous nursery [D83] and that organisation confirming they had experienced no troubling behaviour from the child whether at the time of the allegation or otherwise.
- d. Within the logs [D85] the school record the police officer stating the hospital had '*diagnosed a UTI (urinary tract infection)*'.
- e. Over the course of the year the mother has reported the child claiming to have been bullied by boys at school; commenting that 'boys might touch her', and claiming, when asked about bruises on her legs, that S (a child presumably in her class) had been '*punching her on the carpet*'.

- 44) This is a reasonably full summary of the evidence on which I am asked to make a decision.

Discussion

- 45) Having heard the parties, it is clear to me the mother believes the father has abused the child. In principle she does not agree with contact. Whilst this is a case in which all alleged events took place outside of her sight she promotes the complaint from the child as being genuine and truthful. The father is in her mind a sex abuser. In contrast the father entirely disputes the allegations and makes clear he has at no point inappropriately touched his daughter.
- 46) I make clear that there are multiple circumstances in which a child of this age may be touched in intimate areas without the same being inappropriate. Obvious examples would be cleaning during bathing and after toileting. Such touching has no sexual motivation and is appropriate and necessary for purposes of hygiene. On other occasions topical medication may need to be applied to intimate areas. Indeed, on the facts as I understand it this has been the case for the child, although not at the material times.
- 47) This case is about whether the father has inappropriately touched the child and with a presumed sexual motive.
- 48) I made mention of the inherent probability of an event earlier in this judgment. It might be said it is inherently improbable that a parent would sexually abuse their child. Of course, on a population wide basis this is thankfully fundamentally true. However sadly one is aware of many occasions on which such abuse does arise. In such a specific case it is a fact whether inherently improbable or not.
- 49) A different sense of inherent improbability does though attach to the circumstances in which such an event (if true) may occur. It is of course far more likely that an abusive adult would seek out an opportunity to abuse when the chances of being caught are low. Such abuse by its very nature is likely to occur when the individual is on their own with the child or if in company with liked minded individuals. It is improbable that such actions would take place in plain sight of other individuals who would be likely to object or take action to prevent the behaviour.
- 50) In this case the actions in question took place in the mother's home when she was present within the home and, presuming the truth of the allegation, might have returned to the room in which the child was present and being abused. At all times she was little more than a few steps away from the room in question. Further I can assume, if true, the father would not know how the child would respond to such behaviour. The risk would be of her crying or making a declaration stating what the father had done. This would be a highly risky course of conduct to undertake in such

circumstances and has to be considered when determining whether such behaviour took place.

51) I must have regard to the wide canvas of evidence when considering these points. The wide canvas assists in an understanding but must give way to the evidence where the two are found to conflict.

52) However, it is right to note the following:

- a. The father has no history of such offending / behaviour. Of course, every offender must offend for the first time at some point and many offenders are not caught. However, with regard to the points above it might be felt an individual who would take such risks would likely be caught.
- b. The evidence from the contact logs is very positive as to the engagement between the child and father. It certainly conflicts with the mothers account of the child not wanting to go to contact. However, perhaps more importantly there seems to be a significant mismatch between how the child appears to experience contact with the father and how she is reported in her approach to contact.
- c. The information from the school and nursery also paints a picture of a broadly settled child. This might be thought to fit poorly with a child subject to abuse.
- d. Whilst points are made against the mother's approach to contact it is undeniable that she was permitting contact up until November 2021. At face value this calls for an explanation as to why, but for the allegation, she would have changed in her approach at that time. If she was seeking to alienate the child from the father then why then and not earlier?

53) I reflect on my assessment of the parents as witnesses:

- a. In the case of the mother, I was concerned as to her willingness to adopt a negative attitude to the father even when the same was not warranted. Her evidence as to fearing abduction was not justified. Although the father comes from another European country his suggestion of picking up the child was suggested openly and did not reasonably justify a fear of abduction. Equally I was concerned as to her disproportionate response to the father not being an 'active parent' (a point which he does not accept) by attempting to cut him out from communication with the nursery. I was left with the sense there was an underlying level of negativity towards him on the part of the mother prior to any allegations being made.
- b. A similar point (and this is said to be relevant by the mother) is the enquiries made by the father on 17 November 2021. The mother argues in asking whether the child was 'ok' twice this signals his understanding that he had done something to her. However, and as I pointed out to the mother it is far more likely that the father asked a second time because the mother did not in fact give an answer as to how the child was feeling following her dental appointment. In her first reply she only indicated the procedure had gone okay. But even then the mother could not see there was a different and logical

way to read the communications. This does suggest she is willing to see the least favourable interpretation for the father even when this requires her to stretch interpretation to breaking point.

- c. I am also concerned as what appears to be a level of over protection on her part. The evidence of random checks on her daughter required a justification which was not given. Of course, all parents will be mindful of their children suffering harm, but I found it difficult to understand why it was that the mother was actively behaving in this way without evidence of actual injuries. It is difficult to understand what the child might have made of this process, how it was presented to her or how it might have caused her to subsequently act or speak. I note subsequent reporting to the school of injuries suffered and blamed on third party children. My reading of the school notes is that they felt these concerns were not justified. The impression is of an overly anxious parent. The danger is that this anxiety may be transferred to the child (whether intended or not) and may have the potential to skew reporting.
- d. Finally, I am concerned as to the manner in which reporting has 'dripped' out in this case. I did not find the mother's evidence as to 'shutting down' easy to accept. In reality she was taking her daughter to hospital to investigate concerns. In the initial stages I can see no basis for forming the view her concerns were not being taken seriously. I cannot understand why at that time she did not mention the earlier marks in October 2021. They were proximate in time and plainly relevant to any complaint. To a lesser extent I do not understand why the other matters raised with the CAFCASS Officer months later were not discussed given the heart of the complaint was a concern and uncertainty as to what the father had done. I could see the force in the suggestion made to the mother that the case has developed in line with the case management of the proceedings with the Court determining there is limited evidence only for the mother to make further reports. There is an active question as to whether the mother has developed the allegations to support her case.
- e. As to demeanour the mother presented as genuine and worried. She struggled with some of the points raised above but did not appear evasive.
- f. In the case of the father, I have the difficulty that almost of the mother's reporting is entirely denied as happening. As such there are no subtle conflicts on which I can carry out a forensic analysis. I was a little cautious in accepting his evidence of a complete denial of all the complaints. Objectively a number of the points raised by the mother might have been adequately explained whilst broadly accepting the mother's case. In the case of the documentary, it seemed to me entirely possible that the father might have promoted the mother watching the same without this suggesting improper motive on his behalf. This was a documentary on a mainstream provider, and I can assume it was appropriate. It would not be wrong for a parent to suggest to another parent that they might want to watch the same. There is no suggestion the father pressed the point when the mother chose not to view the programme. Yet the father entirely denied the same. In the case of the toilet contact again

it is entirely plausible that a young female child might follow a male parent into a toilet and be curious as to the anatomical differences between her father and herself/her mother. It is very easy to imagine a child innocently grabbing at the father or attempting to touch him. The child would have no sense of particular privacy associated with her father's intimate parts. Yet again the father denied the same. For my part there was very little in this allegation (if accepted) that could really have led to a negative finding against the father. My worry was that the father might be denying such matters out of a fear that others might see it as being supportive of the more serious allegations made against him. I could make a similar point as to the 'hello sexy' observation. Generally, the father gave evidence in what appeared to be a genuine manner. But I am wary as to whether he has to an extent shaped his evidence in the way I describe above. Of course, this might be indicative of an attempt to protect himself rather than to hide the truth of himself as abuser.

- 54) In my assessment the allegations as to 'hello sexy'; the documentary and the toilet touching are questionable as to fact finding even if proved. At best it seems to me if established they might provide a limited level of support for the more serious allegation. Of course, a parent who is sexualising a young child may have a sexual motive. However, albeit denied it is possible for parents to choose language poorly and such words may not be indicative of sexualisation. It is noteworthy these words were said to be used openly and in the presence of the mother. Further it seems they did not continue for any material period of time even if proven. In the case of the toilet incident the child followed the father to the toilet, and it is alleged touched at the father rather than the other way around. There is no evidence of encouragement on his part, and he told the mother what had happened when asked. This does not give a sense of a secret act carried out in an abusive manner in the absence of the mother. As to the documentary it is quite difficult to draw anything meaningful beyond pure speculation even if established.
- 55) In my judgment this analysis must focus in on the key allegation from November 2021 and to the extent it is supported by the same, the allegation with respect to October 2021. There are two key questions to be considered:
- a. Taken alone what do the physical marks tell me about the likelihood of sexual abuse?
 - b. To what extent does the surrounding detail of words spoken fill in any gap or uncertainty remaining having answered the question at §55(a).

The physical marks

- 56) I accept what appears to be the medical conclusion, namely that the marks and blood are equivocal as to abuse or non-abuse. On their own they do not tell a sufficiently clear story on which to build a case. For my part this position appears clear and compelling. The Court is more than familiar with certain injuries to this part of the body which may be suggestive or strongly suggestive of improper touching

/penetration. However here the marks may be readily associated with a range of possibilities short of abuse.

57) One possibility would be that the child was suffering with an infection such as a UTI and that the associated irritation caused her to worry (rub/scratch) this area of her body leading to the limited abrasion (referred to by the mother as being like a carpet burn) and the modest bleeding. Another is that in cleaning after toileting a little too much force or effort was used, again leading to irritation of the skin surface. In this regard I note the evidence of the child being able to self-toilet on occasions. A third possibility might relate to sensitivity to detergents with consequential scratching/rubbing and abrasion. All of the above may lead to innocent rubbing and abrasion.

58) It was undoubtedly for these reasons and perhaps others that the specialist Haven could not determine inappropriate behaviour. I note with interest mention in the papers of the marking perhaps occurring out of toileting and mention of a UTI.

59) I make clear and I am confident that were this case simply based on the physical presentation (with the mother as neutral) then this would not justify any finding and in my assessment would not have come anywhere near this far. It would plainly be unsafe to presume there had been sexual abuse purely on these marks.

The supporting evidence

60) I have an initial concern as to what to make of the October 'incident'. I have noted this was not mentioned until August 2022 and at any time to the police, hospital or Children Services. I find this inexplicable. I am not satisfied with the mother's explanation.

61) However, the difficulty is not solely limited to the late revelation. Due to this I have nothing in the way of contemporaneous independent information surrounding the incident. I have no account given closer to the time of the event and nothing from the child. I have to consider whether this is a truthful account or whether it has been added late to bolster the November incident.

62) But I also have to consider the potential for the events of October (if broadly correct) to shape the November event. I also have to consider to what extent other 'random checks' which took place on the mother's evidence but are not detailed anywhere may have played into what was said in November. It is a concern to me that there is so much unknown detail which may be significant to my understanding. The 'random checks' were only revealed in the course of cross examination and even then the explanation was somewhat vague.

63) I am told in October 2021 the child was asked questions by the mother about the marks and said 'daddy did it' before changing her answer and saying she had fallen over. I have to question to what extent this process may have left her more likely to

identify her father on the second occasion and stick to this whether or not it was true. On the evidence it is far from clear the child could at any point see the marks in question (they are obviously somewhat obscured by their relative positioning on the child's body), and I am left to wonder as to the possibility of the child associating the questions in November with the questioning in October. Might she have been referring back to the earlier occasion and referencing the cause then as being the cause in November. All of this is highly relevant but has now been lost in the mists of time given the manner in which it all came to light. I have heard no evidence or accounts or meetings in October or the potential for an innocent explanation relating to that time period.

- 64) Essentially I have real doubts as to what significance can be properly attached to the alleged words 'daddy did it' when there is doubt in my mind as to what the child was actually referring to when questioned.
- 65) But that might be put to one side when one considers the allegation around the father's use of his 'finger'. Again, though there are problems in identifying the actual circumstances in which this was said to have occurred. There are also issues in the reporting as to whether the child said he 'put his fingers in' suggesting penetration or something less than that in the form of touching or rubbing.
- 66) Having heard all the evidence I am satisfied the child came to the hospital having had some level of conversation with the mother as to the mechanism that took place to cause the marks and that the mother shared this information with the hospital. I reach this conclusion in the light of the medical documents which point to the mother as the source of the information. It is common sense and logical that the mother would have enquired what 'daddy did' if she was told 'daddy did it' and that if so this would be part of the history given to the hospital. For obvious reasons the likely first history would be taken from the mother rather than the child. The clinicians identify the mother as providing this information and I accept this is correct.
- 67) Yet the mother does not appear to accept this, and I am left to wonder why this is the case. In my assessment the possible likely reasons would be because the mother understands what happened during this period was such as to undermine the allegation (which she believes in) or more worryingly because she understands the information has been exaggerated on her part and is unwilling to accept the same. Otherwise, it would be the simplest thing to have agreed that the child told her this and she told the hospital. Of course, it may seem to appear more credible if coming firstly from the child to a professional.
- 68) In my assessment I consider it likely it is the former of the two explanations above that apply.
- 69) In assessing this case as a whole I have been particularly drawn to the suggested evidence of the child making repeated disclosures to the mother that 'the father has not touched her nooni today'. I have also borne in mind my assessment of the mother

being overly sensitive to risks (see the random checks). I have been left with the real concern that the child is directly responding to what she perceives as the mother's fears rather than any particular desire on her part to inform the mother as to what is happening or not happening. At face value the child has become close to fixated on updating the mother as to a lack of inappropriate touching. This may be because she is aware the mother is worried. Support for this comes from the professional reporting which indicates the child is inappropriately aware of the mother's feelings. It may be to ensure contact (which is observed as being positive) continues despite the mother's worries. In this regard the child would be seeking to confirm there is nothing for mother to worry about. Of course, it is entirely possible the mother has simply made enquiries of the child and simply reported the response. Of course, if this is the case then the child will have internalised a sense of risk around the father, and this will have likely coloured her responses.

70) For these reasons I have found it very difficult to place any material weight on the contents of exhibit **ND2**. Given the nature of the allegation and the dating to Autumn 2021 I am most doubtful the child would be so repetitively repeating this point unless there was some outside input. I am not satisfied these reports in fact support the material allegation. Furthermore, my concerns are such that I consider they undermine any weight that can be placed upon the child's communications with both the CAFCASS Officer and the social worker in September 2022. There are very good reasons why there are firm rules around obtaining evidence from children. A common concern is that a child's account may be deliberately or inadvertently contaminated by interaction with a third party discussing the same. This is why an early account is sought. Delay will often undermine the probative value of the account. In this case I consider it highly likely there has been ongoing conversation on this topic during the period in question.

71) Here I also bear in mind my sense of the mother as negative to the father and if the October account is correct then I really struggle to see how the mother would not have factored that into her assessment of the father from that point forward. It would not be a great step for her to jump to conclusions on 17 November 2021 and act in a manner which fed the child's account in a leading and inappropriate fashion.

72) A curious feature is that the mother took no steps in October 2021. This decision does not sit at all comfortably with the evidence generally given. But it maybe she felt what she saw was sufficiently unclear to leave her unperturbed. However, come November 2021 it seems to me this would have become central to her thinking.

73) My assessment is that the mother likely formed an immediate view when she observed the marks in November 2021 and immediately jumped to the conclusion this was to do with the father. I consider it likely her questioning at this point was far more focused, likely leading and from the perspective of believing the worst. In my assessment a confirmatory response from the child would have been readily identified and adopted by the mother however ambiguous it was. I consider by the

time the mother attended hospital with the child there was an understood narrative in place which was that the marks were caused by 'daddy' and in some way he had 'touched the child with his finger'. I have reached the conclusion the limited response of the child at hospital simply parroted this account. I note her direct account to the clinicians suffers in being entirely led from her rather than in a free flow.

74) It should be noted I am not finding the mother simply concocted a story. This is not my view. Rather, coming from the position she did she has too readily ignored innocent explanations and grabbed at the explanation that fitted with her view of the father. Thereafter the narrative has been the mother's narrative. In a somewhat cyclical manner, which is sadly all too common, the child's subsequent observations (derived from the mother) have been taken by the mother as support for her view without realising her role in the shaping of the narrative.

75) I note for instance the broad evidence of this child suffering to a degree with UTI or similar around this time both before and after the incident. For my part I would have expected the mother to take a far more cautious and objective approach to the marks given the potential for irritation and consequent rubbing by the child herself.

76) In reaching these conclusions I have borne in mind the following:

- a. I do consider the home circumstances on the day do not sit easily with the allegation. In my judgment these were not circumstances which gave obvious opportunity for an act of abuse to be perpetrated. Of course, it could have happened in such circumstances, but this is less than likely
- b. I have borne in mind the clear mismatch between how the mother experiences contact between the child and father and how the child is said to relate the same to the mother and the way in which other objective observers view the same. There is a clear potential for the child to be fitting her experiences within her mother's expectations. This may appear to be a sophisticated assessment to expect of a child of this age but in reality it is no more than saying the child is telling the mother what the mother wants to hear. Children are in fact adept at doing this to make their lives more liveable.
- c. I have placed weight on the mother's clear negative attitude to the father.
- d. I have placed weight (albeit limited) on the absence of observable impact on the child viewed from the perspective of the nursery.
- e. I have formed the view the continued reporting set out in the exhibit **ND2** is not probative of abuse but rather probative of a home environment in which the fact of abuse is taken as a given.
- f. I have borne in mind the child's approach to all of this will have been part shaped by the work undertaken around appropriate touching. I consider it likely the effect of this has been shaped by the mother's fears of the father as a risk. The child has adopted this and therefore uses this narrative when asked to talk about the father but when she is unconsciously engaging with the father at contact loses sight of a narrative which is not her lived experience.

- g. I have not been assisted in my final analysis by the ancillary allegations. For my part they simply do not give cogency to the central allegation whether essentially true or not and do not on the evidence justify a finding of fact against the father. As I have made clear the father may in fact have talked about the documentary, but I cannot see how this informs me. He may have spoken inappropriately several years before but I do not find this of great assistance in considering the key allegation. He may have been approached by his daughter when using the toilet. None of these paint him as a sexual abuser of his daughter in any event in my assessment.

77) To the extent the parents disagree about events I have reached the view that fundamentally little turns upon the same. On my assessment of the evidence my view of this case would not turn on whether or not the father discussed a documentary. Neither, and more importantly, would it change if I concluded the mother did pray on the day in question etc. In reality these details shed little if any light on the key issues. I do not question the presence of the 'carpet burn' like injuries but on my assessment the mother's case, taken at its highest as to the disputed events that day does not meet the test to show the father abused the child when taken with my assessment of the evidence set out above.

78) My ultimate assessment is that the mother was overly watchful in this case and disproportionately worried about risk. She additionally viewed the father negatively in general terms. On balance I accept some level of marking was seen in both October and November. I am reluctant to form a clear assessment of the October marking on the evidence I have but will accept there was some reddening. I accept the mother questioned the child and I doubt this was unusual. I am doubtful the child would have had a clear understanding of what she was being asked to talk about and her mixed answer which may have included reference to the father was not reliable information for my purposes. However, whilst it did not cause the mother to act (and this is good evidence as to the limited probative value of the marks) it entered her consciousness. In November the child was effectively placed in a position where it was both natural and likely she would return to her father as cause in similar circumstances. She knows her mother has a negative attitude to him, and he was an easy person to latch onto and particularly so given the previous occasion. I consider thereafter the whole matter has effectively 'snow balled' led by the mother's worries rather than the reality of events. I consider the child was likely led by her mother and supplied an answer that fitted with the questions. This was then reported to the hospital and noted by them but only confirmed by the child when again led either by the doctor (November 2021) or the social worker (in September 2022). Post-hospital the mother closed her eyes to other potentials such as UTI but a narrative of abuse was fixed and the child's repeated observations both fed and justified the narrative.

79) I am however not satisfied there is truth in the essential allegation. I do not find the father has inappropriately touched his child as alleged.

80) At this point I would view the mother's position as I do above rather than a deliberate act to alienate the child from father. My assessment in this regard will of course now be shaped by her response to this judgment. Having now had the case fully examined I expect her to work with these findings. If she nonetheless continues to hold to her narrative then an issue may arise as to whether she has other motives.

81) I will copy this judgment to Ms Ganser to assist her in completing her section 7 work. I will hand this decision down on 26 January 2023. As I have given all material directions to the next hearing I do not require the parties to attend that hearing unless they wish to. It will have a time estimate of 15 minutes at 10am. If the parties wish to attend they should notify my clerk 48 hours before the hearing. It will be conducted remotely, and they should provide appropriate contact details on which to be joined to the hearing. I do not need a draft order. If there are any suggested corrections or requests for clarification then they should be sent to me by 4pm on 24 January 2023.

His Honour Judge Willans