Family Division

F *v* M

[2025] EWHC 1279 (Fam)

2025 April 5; May 22 Hayden J

Practice — Family proceedings — Domestic abuse — Judge making findings of fact and giving extempore judgment in private law children dispute — Father appealing against finding of rape on ground judge erring in approach and analysis of evidence — Whether judge erring — Observations on importance of judicial continuity and case management — Observations on importance of identifying only relevant findings for determination

In private law children proceedings under Part II of the Children Act 1989 a five-day fact-finding hearing took place to determine the copious cross-allegations made by the parties concerning the actions of the other during their relationship. There had been no judicial continuity within the proceedings and limited constructive case management to refine the issues or hone the case into a coherent structure. The father appealed, inter alia, against the judge's finding that he had raped the mother.

On the father's appeal—

Held, allowing the appeal, that while the cross-contamination of criminal and family law in a fact-finding hearing was fundamentally wrong, that did not mean that a judge in a family case was not required to consider whether a victim had been "forced" into sexual intercourse or whether they had "submitted", or indeed whether they had been "raped"; that although the word rape was a word defined by law, it had a separate life in ordinary language where it existed as an everyday word and was not a "concept from the criminal law" as the judge had termed it, but a fact which required determination; that whether the sexual act was "consensual" was an important finding of fact, not of law, which could not logically be avoided, and which had significant consequences one way or the other; that, in the present case, in contrast to the judge's excellent approach to the broader evidence, the analysis relating to the rape allegation was abstruse, inconsistent and ambiguous; and that, accordingly, the finding was rationally unsupportable and would be set aside (post, paras 25, 37, 43).

Comments on the need for efficient and proportional case management, strict adherence to orders and judicial continuity in private law children cases, in particular where the court is addressing allegations of domestic abuse (post, para 13).

Comments on the need for selectivity in the process of identifying those allegations of domestic abuse which are relevant to the welfare of the child so as to require a fact-finding hearing to determine them (post, paras 41, 42).

APPEAL from Recorder Sarah Counsell sitting in the Family Court at Bromley

The mother, M, and father, F, had initially agreed arrangements for their children, A, B and C. After allegations of abuse were made by each party and proceedings initiated under the Children Act 1989, Judge Prevatt made a shared care order on 23 February 2018. Further, extensive and unrestrained allegations followed requiring numerous amendments to the arrangements for the children and ultimately a five-day fact-finding hearing before Recorder Sarah Counsell sitting in the Family Court at Bromley between 21 and 25 March 2022.

By an appellant's notice dated 4 May 2022 the father appealed on various grounds including that the recorder had displayed bias against him and shown procedural fairness; and had fallen into error when making a finding of rape against him. On 7 March 2025 Hayden J refused permission to appeal on all but one of the grounds, namely, that in relation to a finding of rape the judge had used various and inconsistent descriptions for the same finding, which lacked significant clarity and cogent reasoning and did not follow from the remainder of the judgment.

The judgment was delivered in private and is reported with permission of the judge on condition that the anonymity of the children and the parties be strictly preserved.

The facts are stated in the judgment, post, paras 1–11, 14–15.

Harrison Engler and *Joanna Thom* (both acting pro bono) (instructed directly, through *Advocate*) for the father.
Richard Tambling (instructed directly) for the mother.

The court took time for consideration.

22 May 2025. **HAYDEN J** handed down the following judgment.

1 This is an application for permission to appeal findings of fact made by Recorder Sarah Counsell, following a five-day fact-finding hearing in the Bromley Family Court, concluded on 25 March 2022. The appellant's notice was filed on 4 May 2022. The extraordinary delay that has arisen is, as Sir Jonathan Cohen, sitting as a judge of this division, has recorded in the preface to his order of 14 August 2024, largely the responsibility of "the appeals system in the Royal Courts of Justice". As I understand it, the delay centred around identifying the court recording of the judgment. When the recording came to light, there was a further issue about who would be responsible for the transcribing costs. On 18 December 2024, I ordered a transcript to be filed urgently at public expense. The unapproved transcript was sent directly to me and forwarded to the appeals office on 14 January 2025. On 14 February 2025, an approved version of the transcript was returned by the recorder.

2 The grounds of appeal were drafted by counsel in 2022 (they are undated). The essence of the complaint, in four of the five grounds of appeal, was that the recorder had displayed bias against the father and shown procedural unfairness. The fifth ground of appeal criticised the recorder's finding that the father (F) had raped the mother (M) "on at least one occasion when she slept in the marital bed".

3 On 7 March 2025, I considered the appellant's notice and accompanying documents. I dismissed four grounds as unarguable but considered that in respect of ground 5, the finding of rape, it was arguable that the recorder had failed to give sufficiently cogent reasons.

Background

4 The parties married in 2008 and separated in July 2017, after which time they have been involved in almost continuous Children Act 1989 litigation. F's first application sought shared care of the children (dated 21 September 2017). An order, which I note was made by consent in October 2017, restricted F to unsupervised contact with the three children. Those children, A, B and C are now aged 15 yrs, 12 yrs, and 10 yrs.

5 Thereafter, M sought to stop contact and filed her own application, dated 8 December 2017. She subsequently responded to a schedule filed by F which had set out his allegations against her (dated 18 January 2018). F responded to M's counter allegations in a Schedule, dated 2 February 2018. Essentially, M claimed F had verbally, physically and sexually abused her. F's case was the reverse, namely that the mother was verbally and physically abusive towards him.

6 At the first substantial hearing of the matter, on 23 February 2018, DJ Prevatt made a shared care order, pending a final hearing in the following pattern:

> "Week 1 — from after school on Wednesday to Monday morning at the commencement of school; and Week 2 — from after school on Wednesday to Friday morning at the commencement of school. At such further or other times as may be agreed."

7 After a number of specific issue and enforcement applications, the matter came before Judge Lazarus on 13 June 2018, who, effectively, held the parties to the shared care arrangements set out in the order of DJ Prevatt of 23 February 2018. It is notable that the Oorder made by Judge Lazarus records the following:

> "both parties agreeing that they will not pursue any findings in respect of allegations made against each other in Scott Schedules filed within CA proceedings (the allegations being made in the context of an acrimonious marriage breakdown in July 2017)."

8 For the avoidance of any ambiguity, Judge Lazarus made the following further recording: "The court making no findings on those allegations and the allegations are not proven."

9 F lodged a further application on 24 October 2019. Several orders and enforcement applications followed, and following receipt of a Section 7 CAFCASS Report, on 22 November 2019 DJ Prevatt ordered that the child arrangements set out in the previous orders should be

suspended and that contact should be restricted to telephone contact twice per week and two hours supervised contact each Saturday at a contact centre.

10 In August 2020, following further order, F was permitted to take the children to the local park during contact, albeit that the contact was subject to supervision by the contact centre workers. The reports relating to the contact were all positive.

11 A fact-finding hearing was listed for three days from 29 to 31 March 2021. This was adjourned as M raised further allegations against F, including allegations of marital rape (first raised in 2017). The litigation had begun to drift from its mooring. By the time of the hearing, there were in excess of seventy allegations and counter-allegations, clustered around various incidents and dates.

12 I regret to say that there was a striking lack of constructive case management or any real endeavour to marshal or hone the case into a coherent structure. Nor does there appear to have been, at any stage, focus on evaluating the proportionality of what actually needed to be determined in order to identify where the best interests of the children lay. At times, both parties had been unrepresented and there had also been an absence of judicial continuity. Nine judges had heard the case. The recorder allocated to the fact-finding hearing faced an unenviable task. There was little scope, at that stage, to pare down the maelstrom of allegations and focus the litigation more efficiently. In *In re B-B (Domestic Abuse: Fact-Finding)* [2022] EWHC 108 (Fam); [2022] 2 FLR 725, Cobb J noted how, in that case, which involved allegations of domestic abuse, "continuity of judicial involvement would have enhanced the efficient and sympathetic management of the process". He also emphasised that "strict adherence to orders, and efficient management of family hearings, particularly given the current pressures on the system, is essential if the work of the court is to be done effectively".

13 I would echo Cobb J's observations above, with perhaps even greater force. Efficient and proportional case management, strict adherence to Orders, and judicial continuity should not be regarded as merely aspirational, they are essential. This is true generally, but it falls into particularly stark relief when the Court is addressing allegations of domestic abuse. Judicial continuity in this sphere is not only necessary to achieve more effective hearings and, accordingly, better-informed decision-taking, it is, in itself, a facet of child protection. It is the subject children who sustain the scars of protracted, vituperative and intractable litigation of this kind. Ineffective case management invariably leads to delayed decision-making and sows fertile ground for error. Case management requires a case manager; a judge who can deliver consistency and commitment to the case, recognising that the decisions relating to the evidence are taken in a continuum and not in a vacuum. Like Cobb J, I have had occasion recently to express concern arising from case management which lacks robustness and resilience: see *F v M* [2024] EWHC 3190 (Fam) at [4]:

> "The challenges faced by the Family Justice System, at present, are well known and understood. It is not necessary to comment upon them here but great as they are, they cannot be permitted to eclipse the central principle of the Children Act 1989 which obligates the avoidance of delay, recognising this is intrinsic to fair and balanced welfare outcomes for children. Further, in the Family Justice System, judicial continuity has been the touchstone of case management for more than two decades. It is not a luxury; it is a necessity. It may be more challenging to achieve in the present climate, but its importance must not be lost sight of. Further, it has been emphasised cross jurisdictionally. One of the clearest expressions of its importance is in the judgment of Hughes LJ, Vice President of the Criminal Division (as he then was) in I & Others [2009] EWCA Crim 1793: 'Judicial continuity is an essential feature of good case management. Case management is a continuous process and demands consistency of approach. Successive decisions are likely to impact one upon the other. In order to give case management of upcoming cases the close attention it needs, at the same time as coping with current trials, the judge needs to be committed to the case. It is a waste of resources for more than one judge to have to read properly into a large volume of papers; the heavier the case the more this is so.'"

14 The copious cross-allegations required a fact-finding hearing (subject of this appeal), of five days, which was heard by the recorder between 21 and 25 March 2022. Both parties were represented by counsel, and they each called several witnesses to give evidence.

15 At this hearing, the applicant father is represented by Mr Engler and Ms Thom. They appear pro bono. The father is very fortunate to have their services. They described themselves as co-counsel, dividing submissions between them, which were presented succinctly and

effectively. In this area of work, where legal aid is no longer broadly available, the bar makes a critical contribution to access to justice, through its pro bono work. This hearing is an example of the importance of that contribution. Mr Engler and Ms Thom have filleted F's own discursive and frequently misconceived written arguments and recrafted them skilfully. I have found their help to be invaluable.

16 It is submitted, on behalf of the applicant, that ground 5 (the finding of rape) can be refined as follows:

> "(a) 5(a): The Learned Judge's findings lack sufficient clarity. Various and inconsistent descriptions are used for the same finding. The finding cannot be clearly ascertained and necessarily lacks cogent reasoning.
>
> "(b) 5(b): The Learned Judge's specific finding of rape 'at least once' lacks cogent reasoning and does not follow from the remainder of the judgment.
>
> "(c) 5(c): The Learned Judge erred in her approach to the sexual allegations by failing to take a step back and consider the evidence as a whole, including F's case."

17 In the light of what I have said about the diffuse nature of the allegations and the absence of any effective effort to bring some forensic case management discipline to bear, it was, in my judgement, ambitious on the recorder's part to deliver an ex-tempore judgment at the conclusion of this five-day hearing. It is important to state that the recorder was able to focus her analysis effectively on the allegations of coercive and controlling behaviour, which findings have weathered this appeal. However, allegations of rape are, manifestly, ones of the utmost gravity, requiring careful, detailed evaluation and analysis. Further, it must be noted that one of the allegations contended that a child of the family had been conceived in consequence of marital rape. The recorder did not address that allegation at all in the judgment. However, in her finding that F had raped M, "on at least one occasion", there is a clear inference that there may, at least, have been more than one rape.

18 An appellate court will not interfere with findings of fact made by the trial judge unless it is constrained to do so; this applies not only to primary facts but extends to the evaluation of those facts and inferences reasonably to be drawn from them. The correct approach is set out in the frequently cited *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, per Lewison LJ. Later, in *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48, para 2, per Lewison LJ who characterised the approach to an appeal on a pure question of fact as a "well-trodden path" signposted by the following principles:

> "2.(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> "(ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> "(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> "(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> "(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> "(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

19 Self-evidently, these principles shield the findings of a first instance judge with a robust and durable armour, though not, ultimately, an impregnable one.

The judgment

20 The judgment itself is some 85 paragraphs. Para 77 begins "turning then to the allegations of rape and sexual assault". At para 83, the recorder turns to a different issue and does not return to the allegations of rape. These key findings are analysed in short compass and require scrutiny. The first three paragraphs read as follows:

> "77. Turning then to the allegations of rape and sexual assault, it was the mother's evidence that the father was demanding sexually, that she did not want sex, that he prevented her from using contraception and that she twice became pregnant as a result of unwanted sexual intercourse and on one more than one of those occasions, she was forced into having an abortion. She says that this was why she was sleeping in [C]'s room on the floor.
>
> "78. The father denies all of this. He points to the timeline and suggests that Mother makes these allegations when it is necessary for her to control the narrative. She explains that she has begun to open up about her experiences and she was discussing matters with her solicitor and that is why the allegation was made. There is, of course, no corroborating evidence in the traditional sense; no complaints to family or friends or to the police, for example. Mr [D]'s evidence undermines the father's account that the mother was staying in the marital bed when he stayed but equally undermines the mother's account that she was forced into sleeping on the floor. The father has sought to rely on two witnesses to show he was upset about the abortion. I am not sure what value they have since they are only reporting what he told them at the time. This is equally consistent with someone who is manipulating the narrative as much as someone troubled by a difficult decision.
>
> "79. On the issue of contraception, I have seen mention that the mother is now using oral contraception. This is more consistent with her account that she was pressured into not using it during the marriage than the father's account that she chose not to take it because she was concerned about taking hormones. The father's behaviour in reporting to the police is odd. As Ms Edginton asks, 'Who does that?'. The conclusion I reach after considering his actions and the interview transcript is that he is attempting to control the narrative, getting in his account, before the mother gives hers, I note that he continues to explain to the police all the difficulties he has with Mother's behaviour and his concerns for the children. Further, once the report is closed, he asks the police to reopen it, to fully investigate and to prove that he was innocent. He reports matters again and undergoes an interview with a solicitor and under caution."

21 I have read the above paragraphs several times and have been taken through them by both Ms Thom and Mr Tambling, who appears on behalf of the respondent. They contain a good deal of reportage of the parties' positions, but they do not reveal any qualitative analysis of the information set out. Nor do they provide any reasoning which underpins the recorder's ultimate conclusion.

22 The recorder continues, at paras 80–81:

> "80. The mother tells police she does not want to report his behaviour or make a statement. She is asked for an account by the police. She tells them: 'Most of the time, we're sleeping separately, and that night, don't know date, I went in to sleep in the room with him. We go to bed and he wants a physical relationship. I obviously turn him down but he just kept going and going and I said "No". It's not the first time but he just carried on. I raised it this time as I got pregnant and had to have an abortion. I said "No" but he continued. I said "Just don't ejaculate" as I was not on the pill but he did anyway. I got pregnant.'
>
> "81. The police characterised as a consensual sexual encounter because the mother told them that she reluctantly gave in. I am not to be too troubled by concepts from the criminal law. Was it rape or sexual assault or sexual violence? *Was she forced? Did she submit? I am not sure that it matters what words were ascribed to the actions.* What is important is whether I can make findings on the evidence, on the balance of probabilities. I am reminded that these are serious allegations. I am reminded that really, it is one person's evidence against the other's." (Emphasis added.)

23 The recorder clearly had in mind the dicta in *In re R (Children) (Care Proceedings: Fact-Finding Hearing)* [2018] EWCA Civ 198; [2018] 1 WLR 1821, per McFarlane LJ (as he then was). I set out the relevant passage from his judgment at para 62 here:

> "The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to those applicable to the prosecution by the state of an individual before a criminal court. The latter is concerned with the culpability and, if guilty, punishment for a specific criminal offence, whereas the former involves the determination facts, across a wide canvas, relating to past events in order to evaluate which of a range of options for the future care of a child best meets the requirements of his or her welfare. … Reduced to simple basics, in both criminal and civil proceedings the ultimate outcome of the litigation will be binary, either 'guilty' or 'not guilty', or 'liable' or 'not liable'. In family proceedings, the outcome of a fact-finding hearing will normally be a narrative account of what the court has determined (on the balance of probabilities) has happened in the lives of a number of people and, often, over a significant period of time. The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established."

24 McFarlane LJ continued, at para 65:

> "criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court. Given the wider range of evidence that is admissible in family proceedings and, importantly, the lower standard of proof, it is at best meaningless for the Family Court to make a finding of 'murder' or 'manslaughter' or 'unlawful killing'. How is such a finding to be understood, both by the professionals and the individual family members in the case itself, and by those outside who may be told of it, for example the Police? The potential for such a finding to be misunderstood and to cause profound upset and harm is, to me, all too clear …"

25 Whilst the cross-contamination of criminal and family law in a fact-finding hearing is "fundamentally wrong", this cannot mean that a judge in a Family case is not required to consider whether a victim was "forced" into sexual intercourse or whether they "submitted", or indeed whether they were "raped". Whilst the word rape is a word defined by law, it must be remembered that it has a separate life in ordinary language where it exists as an everyday word. These are not "concepts from the criminal law" as the recorder termed it, but facts which required determination. Whether the sexual act is "consensual" is an important finding of fact (ie not law) which cannot logically be avoided, and which has significant consequences one way or the other. Indeed, it is central to the evidence on this particular allegation.

26 In the following paragraph, the recorder makes these further observations:

> "Taking into account the evidence of the parties, my impression of them as witnesses, my other findings or all of the other evidence and the way in which the allegations have been made, my finding is as follows: there were times in the relationship when the mother felt pressured into sex. She began to sleep in the children's room to avoid this. On at least one occasion when she slept in the marital bed, the father had sex with her either knowing she did not consent or not caring that she said 'No'. She submitted to his actions because she did not want to wake the children by shouting and crying out."

27 It is, at very least, difficult to reconcile this paragraph with the one that preceded it (see para 22 above). Having stated that "submitting" was a word that did not help in analysing the facts, and which she plainly considered was importing a criminal law concept, the recorder has nonetheless gone on to use that word in her finding above. However, her conclusion that M "submitted to his actions because she did not want to wake the children…" is, at very best, ambivalent in identifying whether the sex was consensual. This paragraph concluded the recorder's analysis of the evidence.

28 Mr Engler and Ms Thom also emphasise, in the supplemental skeleton argument that they prepared, that there was a wider canvass of evidence relevant to the evaluation of the complaint, which the recorder did not analyse at all:

> "36. … (a) On 04.10.2017 M applied for an ex parte non-molestation order without mention of rape (the NMO was discharged on 19.10.2017 upon F giving undertakings); (b) M made an allegation of rape for the first time in her C1A of 08.12.2017; (c) On 06.02.2018 the court directed both parties to file a schedule of allegations. M failed to file a schedule; (d) On 15.05.2018 F applied for an order for M to produce a schedule as previously ordered or for the allegations to stand dismissed; (e) In the schedule eventually filed M did not include any allegation of rape or sexual abuse, despite making wide-ranging allegations of abuse."

29 Following the compromise of the proceedings before Judge Lazarus, both parties, as I have mentioned above, returned to litigation. Mr Engler and Ms Thom make the following observations about the second tranche of litigation, which they again suggest might have illuminated M's credibility in the rape allegations:

> "(g) During 2019, both parties made applications. On 16.08.2019 DJ Coffey ordered a section 7 report from CAFCASS without mentioning any allegation of rape or listing any fact-finding.
>
> "(h) On 22.11.2019 DJ Prevatt directed schedules of allegations and ordered a fact-finding of disputed allegations, but there is no mention of a rape allegation.
>
> "(i) M's next schedule is dated 20.07.2020. M again makes wide-ranging allegations but no mention of sexual abuse. There were several applications/hearings throughout 2020–2021.
>
> "(j) M's schedule was supported by a statement dated 10.03.2021. M again did not pursue or detail a rape allegation, but takes issue with F self-reporting to police and accuses him of manipulating the narrative.
>
> "(k) Hearings on 11.02.2021 and 29.03.2021 considered the issue of the allegations to be considered at a fact-finding; rape was not raised."

30 Mr Tambling has presented a strong defence of the findings made by the recorder. He emphasises that the judgment has to be read as a whole, having regard to its context and structure. He adopts the observations of Sir James Munby (P) in *In re F (Children)* [2016] EWCA Civ 546; [2016] 3 FCR 255, para 22 that "the task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard". No one would argue against that proposition, but it is also important to note that the passage continues thus:

> "Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable."

31 It is the "detail and analysis" that is the focus of this appeal. Mr Tambling submits that the analysis of the rape allegations requires to be carefully cross-referenced with the recorder's other findings. This, he contends, is a judgment in which key pieces of supportive analysis are "woven" into its structure in various places. He has taken me to an earlier reference by the recorder to the rape allegations. It is important and fair that those earlier references are set out in full:

> "32. The third area is rape and sexual assault. Mother's case is that throughout the latter stages of the marriage, the father would not take 'No' for an answer. She would position herself and use body language on the marital bed, to indicate as best she could that she was not interested. However, he would pull her over and even though she said 'No', he had sexual intercourse with her. He would not allow her to take contraception during the marriage and she became pregnant twice as a result of his sexual violence so that she ended up sleeping in [C]'s bedroom to avoid the Father's inappropriate sexual behaviour.
>
> "33. This is denied in its entirety. It is the father's case that the couple had a normal sexual relationship. He says that he never forced himself on her, not even once, and he finds the whole idea of it abhorrent. I am invited to find that the allegation has been

fabricated, when analysing the evidence and the timeline of the proceedings as against the timeline of allegations."

32 I do not consider that this adds anything to the findings of rape.

33 When it comes to judgment writing, it is important to recognise and encourage the great variety of differing styles and approach: "let a thousand flowers bloom!". However, as Jackson LJ said in *In re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407; [2022] 4 WLR 42, at para 57:

> "The court's task is not accomplished by handing down a decision that happens to be correct if it is not also properly explained. Fairness to the losing party demands no less."

34 In that judgment, Jackson LJ also took the opportunity to set out the essential framework required of any judgment at para 59. It repays repetition here:

> "Judgments reflect the thinking of the individual judge and there is no room for dogma, but in my view a good judgment will in its own way, at some point and as concisely as possible: (1) state the background facts; (2) identify the issue(s) that must be decided; (3) articulate the legal test(s) that must be applied; (4) note the key features of the written and oral evidence, bearing in mind that a judgment is not a summing-up in which every possibly relevant piece of evidence must be mentioned; (5) record each party's core case on the issues; (6) make findings of fact about any disputed matters that are significant for the decision; (7) evaluate the evidence as a whole, making clear why more or less weight is to be given to key features relied on by the parties; (8) give the court's decision, explaining why one outcome has been selected in preference to other possible outcomes."

35 Significantly, to my mind, Jackson LJ adds a rider to this list, at para 60 as follows:

> "The last two processes—evaluation and explanation—are the critical elements of any judgment. As the culmination of a process of reasoning, they tend to come at the end, but they are the engine that drives the decision, and as such they need the most attention. A judgment that is weighed down with superfluous citation of authority or lengthy recitation of inessential evidence at the expense of this essential reasoning may well be flawed. At the same time, a judgment that does not fairly set out a party's case and give adequate reasons for rejecting it is bound to be vulnerable."

36 So many of the characteristics of Jackson LJ's "good judgment" are not only present but abundant in the recorder's judgment. The controlling behaviour which the recorder has found reveals a relationship in which F was verbally and physically abusive and, most particularly, at the end of the relationship. The recorder also found that F had been "spiteful" in his attitude to M and that he had undermined, harassed, and controlled her. She further found that he had manipulated the professionals by the sheer volume of referrals which overwhelmed her and corroded her autonomy (this is my phrase, summarising her more extensive findings). It is, I consider, significant, that having made these findings, the recorder noted that they were an indicator of the hollowness of the father's assertion that he "[was] just doing what is in the best interests of the children".

37 In contrast to what I have said about the broader evidence, the analysis relating to the rape allegations in the recorder's judgment is, I regret to say, abstruse, inconsistent, and ambiguous. In this context, it is worth revisiting the observations of Sir Andrew McFarlane (P) in *In re H-N (Practice Note)* [2021] EWCA Civ 448; [2022] 1 WLR 2681, para 71:

> "Behaviour which falls short of establishing 'rape', for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to 'not guilty' in the family context."

38 As I read the recorder's judgment, I am left with a feeling that this was the territory that she truly felt she was in, rather than that which she perceived as preordained by the prescriptive schedules (and orders) which she found herself faced with. Whilst Sir Andrew McFarlane's observations (above) are important in themselves, they are also reinforced by what is, in my

view, an extremely pertinent illustration of how best to identify the parameters of a fact-finding hearing where allegations of rape are made:

> "For example in the context of the Family Court considering whether there has been a pattern of abusive behaviour, the border line as between 'consent' and 'submission' may be less significant than it would be in the criminal trial of an allegation of rape or sexual assault."

39 This echoes Hickinbottom LJ's observations during the hearing in *In re R (Children) (Care Proceedings: Fact-finding Hearing)* [2018] EWCA Civ 198; [2018] 1 WLR 1821, reprised by the President in *In re H-N* (supra) at para 71 that:

> "The Family Court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not, come within the strict definition of 'rape', 'murder', 'manslaughter' or other serious crimes."

Though the recorder made a finding of rape, I am left with an impression that she was striving to identify F using sex as a facet of his coercive and controlling behaviour. However, the recorder did not make such a finding, nor would it be right for me to substitute one.

40 All this sits comfortably, perhaps even seamlessly, alongside the observations of Sir Geoffrey Vos (MR) in *In re K (Children)* [2022] EWCA Civ 468; [2022] 1 WLR 3713, para 8:

> "Thirdly, it is important that a judge considering ordering a fact-finding hearing identifies 'at an early stage the real issue in the case in particular with regard to the welfare of the child" (see paras 8 and 139 in *In re H-N*). As para 14 of FPR PD 12J provides, '[t]he court must ascertain at the earliest opportunity … whether domestic abuse is raised as an issue which is likely to be relevant to any decision of the court relating to the welfare of the child'. Para 17(g) of FPR PD 12J is to the same effect. Fact-finding is only needed if the alleged abuse is likely to be relevant to what the court is being asked to decide relating to the children's welfare."

41 It follows, to my mind, that when the court has decided that domestic abuse allegations are relevant to determining the welfare of the child, it must then consider and sift out *which* of the allegations are likely to be relevant and, it follows, which are not. The question is a specific, not a generic one. The decision to conduct a fact-finding hearing, in respect of domestic abuse, does not automatically open a floodgate to a litany of allegations which may be years old. That is simply not the purpose of the Children Act proceedings. The investigations require to be linked, inextricably and exclusively, to those matters which are required to determine the children's welfare. As Sir Geoffrey Vos said later in his judgment, at para 44:

> "Rather than making that decision at the FHDRA, the court should have (a) identified the issues between the parents as to the children's welfare, and (b) given the mother time to decide, with the benefit of legal advice, what factual findings she wanted to contend required to be decided by the court, because they were "likely to be relevant to any decision of the court relating to the welfare of the child …"

42 In summary and, I recognise, at risk of repetition, the decision as to what findings are sought needs to be taken with reference to the key criteria, namely how the findings are "likely to be relevant to any decision of the court relating to the welfare of the child". The process of identifying those findings is therefore a selective one. Perhaps counter intuitively to family practitioners, this process may result in a conclusion that a serious allegation by one of the parties does not need to be tried because it is simply not going to have a bearing on the ultimate welfare outcome. Further, the case law shows that litigating allegations which have become uncoupled from any link with the welfare of the child, can sometimes be both counterproductive and contrary to the child's best interests.

43 Mr Tambling has made staunch efforts to support the recorder's findings in relation to the rape allegations. There are few, if any, judgments which are not capable of further refinement or more effective expression. An appellate court must not allow itself to be hijacked by a seductive narrow textual analysis. The process, as discussed above, is far broader, emphasising the assumption that the trial judge had taken the whole of the evidence into consideration even

where specific pieces of evidence may have been overlooked. As Lewison LJ emphasised, at the end of the day, it is a judgment and therefore not to be picked over or construed as though it were a piece of legislation or a contract. All this said, I have had no difficulty in concluding that the recorder's findings, for all the reasons set out, are rationally unsupportable in respect of ground 5 and must be set aside.

44 As I understand the chronology, the final welfare hearing was not heard by the recorder but restored to District Judge Prevatt. I do not know what factors led to this yet further departure from the important objective of judicial continuity, but it is, in principle, to be deprecated. It is also important that I signal that in the light of the recorder's wider findings, which are unimpeachable, I do not consider that overturning her finding on the allegation of rape is likely to have any fundamental bearing on the ultimate welfare outcome, reflected in DJ Prevatt's final order. I also note that the welfare decision was made over two years after the fact-finding judgment was delivered.

45 As it happens therefore, all this serves, conveniently, to illustrate the importance of identifying, clearly, those issues which must be tried at a fact-finding hearing and those which do not need to be. On the facts of this case, it was not necessary to explore the challenging terrain between "consent" and "submission" to sexual intercourse. This was a marriage characterised by the wider controlling behaviour of F, in the manner described by the recorder. This, it seems to me, is the essence of the identified harm on which the analysis of the children's future welfare was predicated. If it requires to be said, which I hope, in the light of my reasoning above, it does not, this is not, in any way, to diminish the gravity of an allegation of rape. It does, however, serve to highlight and illustrate the separate and distinct functions of the Family Court and the Crown Court.

46 For the reasons that I have discussed above, Ihave very considerable sympathy for the position the recorder found herself faced with in this case.

Appeal allowed.

THOMAS BARNES, Solicitor