

Neutral citation: [2024] EWFC 132 (B)

Case No: ZE22P00939

IN THE EAST LONDON FAMILY COURT

11, Westferry Circus,
LONDON,
E14 4HD

Date: 30 April 2024

Before :

HER HONOUR JUDGE MADELEINE REARDON

Re Child A and Child B (Paternity: Identical Twins)

Ms Ojutiku, acting *pro bono*, instructed by Sheenal Patel of Paul Robinson Solicitors,
for the applicant
Ms Davis, instructed by Cheryl Cole of Simon Lacey Law Associates,
for the First Respondent
Ms Bassam, instructed by Maria Conesa Gonzalez of Judge and Priestley Solicitors,
for the Second Respondent

Hearing dates: 26 – 29 February 2024, 13 March 2024

JUDGMENT

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

HER HONOUR JUDGE MADELEINE REARDON :

Introduction

1. These private law Children Act proceedings concern two children:
 - a. A, a girl born in 2018;

- b. B, a boy born in 2020.
2. The mother of both children is "M". The father of B is "F1".
3. A's paternity is in dispute. F1 says that he is her father. This is challenged by M and by F1's brother, "F2", who says that he, F2, is A's father. F1 and F2 are identical twins, so it has not been possible to resolve this issue through standard DNA testing. It has, however, been established through such testing that A's biological father is one of the two brothers, and not anyone else.
4. The parties to the proceedings are M, F1 and F2.
5. Both children live with M. They spend time regularly with F2, with whom M has a good relationship. They have very limited contact with F1.
6. The applications before the court are:
 - a. M's application for a "lives with" child arrangements order;
 - b. F1's application for contact with both children.
 - c. F2's application for a declaration of parentage in respect of A, and a child arrangements order.
7. This fact-finding hearing was listed to determine two issues, both of which need to be resolved before the court can go on to decide the substantive applications:
 - a. A's paternity;
 - b. The truth or otherwise of allegations made by M and F1 that the other has perpetrated domestic abuse, including physical abuse of the children.

The hearing

7. All three parties require the assistance of interpreters in order to participate fully in the proceedings.
8. [This part of the judgment has been redacted in order to preserve the anonymity of the family members. The redacted passage explains the difficulties in securing interpreters fluent in the first language of each of the parties, and the consequent delay to the proceedings.]
16. The regular breaks for interpreters meant that there were also regular breaks for the parties and witnesses. M had had an intermediary assessment earlier in the proceedings which suggested that although she did not need an intermediary she would benefit from regular breaks. On the afternoon of the second day, through my error, we sat through without a break. That was clearly far too long, and I have borne this in mind when considering the evidence given by M, who was in the witness box at the time, in the latter part of that day. Otherwise, breaks were taken every 30 - 40 minutes.
17. This is a case where allegations of domestic abuse have been made by two of the parties against each other. Special measures were offered at at least one of the earlier directions hearings but declined. The issue was not raised by any of the legal representatives and so I raised it on the first day of the hearing. The parties reviewed the position overnight, before the evidence commenced, but no further special measures were sought.

Background

18. M grew up in country Y. F1 and F2 grew up in the United Kingdom. English is not the first language of any of the parties.

19. M came to London in 2017 with her then husband. Their relationship ran into difficulties quite soon after the move and on [a date in] 2017, on M's case, her husband pressurised her to have an abortion. I mention this event, which was clearly very distressing to M, only because the date is relevant to the factual issues I have to decide.
20. Later the same month, M met both F1 and F2 at a church. It seems that she formed a friendship initially with F2. In the early days at least, M says, she found it difficult to tell which brother was which. At that point F1 and F2 had a close relationship and spent considerable time together.
21. The nature and duration of M's relationships with each of F1 and F2 is hotly contested. M says that she was in a sexual relationship with F2 for about three months in 2017. During that period she got to know F1, but their sexual relationship did not commence until she was about 4 months pregnant.
22. F1 says that he and M had a sexual relationship which commenced in [a date in] 2017. If it is true that M and F2 were having sex at around the same time, he was not aware of it.
23. F2 supports M's case on the timings of his relationship with her. He accepts that he cannot say definitively when M's relationship with F1 began, but does not believe it was as early as F1 says because, he says, F1 would have told him.
24. M discovered that she was pregnant in [a date in] 2017. Around that time her relationship with her husband broke down and she left their home. At some point (the exact date is disputed) she moved into a flat which F1 owned, although it seems that he was not living there on a permanent basis at the time.
25. In January 2018 F2 married his long-term partner.
26. In 2018 M moved out of F1's flat and into temporary housing provided by the local authority. A was born the following month.
27. M and F1 registered A's birth together. F1 was named as her father on her birth certificate. M says that she agreed to this under pressure from F1 and despite knowing (on her case) that he could not be A's father.
28. Thereafter, M says, she and F1 had an "on/off" relationship. F1 agrees. From 2018 onwards his main home base was in town W, where he had moved to live with his long-term partner and their two children. However, he visited M frequently in London and their sexual relationship continued.
29. B was born in 2020.
30. M did not have any contact with F2 for about two years. In 2020 they got back in touch. In July 2021 F2 took a DNA test which "proved" that he was A's father. Thereafter M introduced him to A and facilitated regular contact between F2 and both children.
31. Meanwhile F1 had continued to spend time with both children, both in London and at his home in town W. It seems that both M and F1 were content for the children, who were then below school age, to spend up to several weeks at a time in the care of each parent separately. Information provided to Cafcass by F1's local authority suggests that the children were living between town W and London. At times the children would spend time individually with each of the parties. F1 says that because B was so young he would sometimes stay with M while A would spend time with F1.
32. It does not seem that F1 was aware, at least initially, that both children had been introduced to his brother F2, and were spending time regularly with him. M says that she hid this information from F1 because he did not want her to remain in touch with F2, and was acting in a controlling manner towards her. The bundle includes an exchange of WhatsApp messages between the brothers in 2020 in which F2 is enquiring about A and F1 asks him to "stay out of it". Although in the messages both are clearly trying hard to express their feelings the conversation deteriorates and ends with F1 accusing F2 of "thinking with heart not head" and F2 responding, "don't stand

in my way ok". Both F1 and F2 said that around this time their relationship, which had been close, cooled and they saw much less of each other than they had done previously.

33. The relationship between F1 and M broke down in early 2022 after M accused F1 of hitting B on the knuckles with a hairbrush. This was reported to the police who investigated but decided on 9 February 2022 to take no further action. In March M made a further allegation to the police of physical abuse, and the children were removed from F1 under police protection and returned to her care. On 8.4.22 F1 accepted a caution. Although this appears to have been for an assault on B it is not clear what incident it related to.
34. On 12 April 2022 the children again went to stay with F1 in town W. The circumstances in which this took place are disputed, but it is common ground that there was no fixed date agreed for their return: M says that she expected them home at some point between 25 April and 31 May. However, she says that she became worried when F1 blocked her phone and she was unable to contact him. On 19 May 2022, when the children had been away for about five weeks, she contacted the police, but they declined to become involved. On 13 June 2022 she made an application to the court. F1 was named as the sole respondent but M included F2 as a person who should be given notice, identifying him as the biological father of A.
35. On 29 June 2022 an order was made requiring F1 to return both children to M's care and to lodge their passports with M's solicitors. The children were returned, pursuant to the order, on 1 July 2022. A prohibited steps order was made preventing F1 from removing the children from M's care.
36. On 17 April 2023 F2 applied for a declaration of parentage and a child arrangements order, and to be joined to the proceedings. Joinder was granted on 17 July 2023.
37. No contact took place between the children and F1 for over a year after proceedings were issued. It appears that this issue was not dealt with by the court for a combination of reasons including the absence of safeguarding information in the early stages of the proceedings and the lack of interpreters at most if not all of the interim hearings. Eventually on 17 July 2023 an effective hearing took place at which all three parties were represented and (remote) interpreters were available. An order was made for M to make both children available for contact with F1 on a monthly basis, supported by his (and F2's) sister.
38. Contact between F2 and both children has continued on a frequent and flexible basis, arranged directly between M and F2. In August 2023 F2 took both children away on holiday to Majorca.

The law: fact-finding

39. The purpose of a fact-finding hearing is to determine the truth or otherwise of allegations, in order to establish a firm factual basis for welfare decisions. The approach to these hearings has been set out in a number of authorities. The following summary is my own, drawn from the case law.
40. The burden of proving an allegation is on the party who makes it. The standard of proof is the balance of probabilities. That means that the court can only find an allegation proved if it considers it is more likely than not to be true.
41. Findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence, and not on suspicion or speculation. The court can and should have regard to the inherent probabilities.
42. The court must take into account all of the evidence and furthermore consider each piece of evidence in the context of all the other evidence.
43. In private law cases, the court must be alert to the fact that the findings are not being sought by a neutral and expert local authority but by one parent against the other; this does not mean that

the allegations are false but it does increase the risk of misinterpretation, exaggeration or fabrication.

44. It is common for lay witnesses to tell lies, and a witness may lie for many reasons. The fact that a witness has lied about some matters does not mean that he or she has lied about everything, and the fact that a lie is established does not prove the reverse of that lie: *R v Lucas* [1981] QB 720. The approach to the Lucas direction within family proceedings was considered in *Re A, B and C (Children)* [2021] EWCA Civ 451. The court is required to consider how and when the witness's lack of credibility should be factored into the equation when determining an issue of fact. In order to do so the court should ask itself the following questions, tailored as necessary to the circumstances of the case. First, whether the witness has told a deliberate untruth, i.e. the lie did not arise from confusion or mistake; secondly, whether the lie related to a significant issue; and thirdly, whether there is any other reason which could explain the lie such as the witness's shame, misplaced loyalty, fear, or distress.
45. In cases where domestic abuse is alleged, the court must follow the approach set out in FPR 2010, PD12J. Only those allegations which are relevant to the child's welfare will fall to be determined. The leading case on the approach to the fact-finding process where domestic abuse is alleged is *Re: H-N and Others (Children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448. *Re: H-N* is now well-known. It requires the court in cases where domestic abuse is alleged to consider first whether there is evidence of a pattern of coercive and controlling behaviour. If so, such evidence should take centre stage and the court must take care not to limit its consideration of the evidence to allegations of separate incidents, but to review the evidence as a whole and to make such findings as it considers appropriate as to the dynamics of the parental relationship and in particular any coercive or controlling behaviour by one party towards the other.
46. The Court of Appeal endorsed the observations of Peter Jackson LJ in *Re L* [2017] EWCA Civ 2121 to the effect that few relationships lack instances of bad behaviour by at least one of the parties towards the other, and not all instances of directive, assertive, stubborn or selfish behaviour will amount to domestic abuse. What is relevant is the intention of the perpetrator of the alleged abuse, and the harmful impact of the behaviour.
47. In *F v M* [2021] EWFC 4 Hayden J offered the following description of coercive and controlling behaviour:

"The term is unambiguous and needs no embellishment. Understanding the scope and ambit of the behaviour, however, requires a recognition that 'coercion' will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. 'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation."
48. Hayden J went on at paragraph 60 in the same case to identify features common to many cases of domestic abuse, as set out in statutory guidance published by the Home Office. These include (amongst many others) isolating a person from friends and family; monitoring their time; enforcing rules and activity which humiliate, degrade or dehumanise; threatening to hurt or kill the person, or their child; and financial abuse/ limiting access to finances.

The evidence

DNA testing

49. Both putative fathers have, at different times, undergone standard DNA testing. This confirms, because both tests produced a "positive" result, that one of the brothers is A's father.

50. It is reasonably clear from the evidence that until both DNA tests were available (which was not until after these proceedings had commenced) none of these parties were aware that standard DNA testing could not distinguish between putative fathers who were identical twins.
51. Earlier in the proceedings the parties' solicitors made enquiries to establish whether there was a form of testing that could be carried out to establish paternity in these circumstances. Enquiries were initially made of a specialist forensic DNA service at King's College London. The outcome of those enquiries was that it might be possible to carry out testing of the entire genome to establish whether there were sufficient differentiating markers to establish paternity. A conclusive result could not, however, be guaranteed, and KCL ultimately declined to accept an instruction.
52. The parties received a positive response from DNA Legal, who quoted a price of £75,000 plus VAT (£90,000) for a full genome sequencing. This cost, even split three ways, was well beyond the reach of the parties. An approach was made to Cafcass, who can in some circumstances be directed to arrange and fund (standard) DNA testing when paternity needs to be established in a private law case. The response from Cafcass was that they would not be in a position to fund the much more complex and expensive testing which would be required in this case.
53. Shortly before the hearing, the Cafcass Service Manager who had been handling this case informed the court that there was a possibility that discretionary funding for testing might be available from the Ministry of Justice. However, the test offered by DNA Legal was said to offer around a 95% confidence level, in contrast to a confidence level of above 99.8 for standard DNA testing. The test would take three months to complete. The Service Manager asked whether, in the light of this information, the court would want the MOJ to consider a funding request.
54. This information was provided to the parties and considered at the outset of this hearing. I decided that the appropriate course would be to carry out the fact-finding process and then to review the issue of scientific paternity testing in the light of the findings made.

The police and local authority evidence

55. As set out above, there has been some police involvement with M and F1 in 2022. There is no direct evidence from the police in the bundle but the safeguarding letter includes the following information:
 - a. On 9 February 2022 town W Police took no further action on an allegation that F1 had hit B with a wooden brush;
 - b. A police investigation took place in March 2022, said to be in connection with photographs of bruising to a child's genitals (this information was provided to Cafcass not directly by the police but by the local authority in town W. There has been no suggestion in these proceedings of genital bruising, and therefore the reliability of this particular piece of information must be in question. The records of M's local authority – see below – suggest a later incident in August 2022 when M became concerned about a rash around A's genitals.)
 - c. F1 accepted a caution on 8 April 2022; the offence for which he was cautioned is not recorded.
56. There has been some quite low-level involvement by a number of different local authorities. Another London local authority provided M with support through its No Recourse to Public Funds team in 2019 when she was pregnant with B. Between about 2019 and 2022 both F1's local authority and M's were involved from time to time in providing support to the family (and to F1's other children).
57. The involvement of M's local authority is summarised in a s7 report filed by that local authority on 12 July 2023. It received a police referral in March 2022 after M's allegations of physical abuse against F1. A single assessment was commenced, but as the children were in town W from

April 2022 onwards the case was then closed to the London local authority and transferred to town W. I have no information about the outcome of that assessment.

58. A further assessment was commenced in August 2022 after M raised concerns about a rash around A's genitals and told the GP she was worried about sexual abuse. A strategy meeting took place and A underwent a child protection medical which was inconclusive; the case was not progressed to a s47 investigation, the local authority noting that A had not been in F1's care since 1 July 2022.
59. On 14 September 2022 the children were made subject to child in need plans by the London local authority. The concerns identified included the allegations made by M and F1 against each other, the volatility of the historic child arrangements and M's need for support. The local authority's records indicate that M engaged well with the support and advice provided and the case was closed on 24 April 2023.

The parties

60. I am conscious that all three parties in this case have faced challenges in putting their evidence before the court. They have each filed several written witness statements and their solicitors have clearly found it difficult, no doubt as a result of the scarcity of interpreters, to obtain their full and clear instructions on the complex and detailed history that forms the background to the issues before the court. I have borne this in mind when considering the inconsistencies and gaps in the written evidence, and have not drawn any conclusion adverse to any party unless I can be satisfied that these cannot be explained as the product of miscommunication or misinterpretation.
61. Despite the communication barriers that all three parties faced at this hearing, I am satisfied that by the time the hearing concluded I had managed to gain a thorough and accurate understanding of the evidence which each wished to give. That was largely due to the commitment and professionalism of all of the in-court interpreters, who ensured that each party fully understood each question and that each answer was accurately interpreted. It often took several minutes to clarify an answer, and where there was any scope for ambiguity the interpreters would consult with each other and the witness before conveying the answer to the court. It occurred to me that in some ways this process afforded the parties a better experience than many witnesses have, because the process of interpretation was so careful and painstaking that they had more opportunity than usual to reflect on the questions, and to clarify and correct their answers.
62. All three parties struggled with some aspects of their recollection, because of the significant lapse in time since the events with which this hearing was concerned. This was exacerbated by the nature of some of the events they were being asked to remember: personal relationships tend to develop incrementally, and very few people are able to remember the exact dates when their relationships stopped and started. In the litigation context problems with memory are compounded by the process of having to re-tell a story several times, a process which can distort the original memory and then reinforce the distorted one; and by the fact that parties often have strong incentives to shape their memories in a particular direction.
63. I have given no weight in this case to the demeanour of the parties when giving evidence. Demeanour is often (but not always) an unreliable indicator of credibility; I thought it was particularly so in this case as all three parties were using interpreters.
64. Therefore the main value in the parties' oral evidence lay in the opportunity it gave to test their accounts against each other's evidence and the written documentation. Where I have relied on a party's uncorroborated oral evidence my reliance has been based on the content of the evidence, and not in the way in which it was given.

65. With all of those caveats taken into account, I reached the following preliminary conclusions in respect of each party's evidence:
- a. M's evidence suffered from a number of internal inconsistencies that could not, in my judgment, be explained solely by difficulties with communication and interpretation. Her evidence was also inconsistent with a large body of documentary evidence that I have found to be reliable.
 - b. In contrast, both F2 and F1 gave accounts that were coherent overall and, for the most part, could be reconciled not only with the bulk of the documentary evidence but with each other's accounts.

Contemporaneous messages exchanged between the parties

66. All of the parties have produced WhatsApp/ text messages and emails which they say were exchanged between them at relevant dates. There are perhaps fewer such messages than is sometimes the case in hearings of this nature: all the parties explained that they would generally communicate by videocall, rather than by text message. It is clear from the text messages that they do not form complete conversations, and that often in the gaps between written messages the conversation has continued in a different medium, usually, I assume, by videocall.
67. When considering the written messages I have therefore borne in mind that (a) in their written messages, all three parties are communicating in a second language, and (b) the written communications that have been recorded form quite a limited part of the parties' overall communications.
68. The authenticity of most of the emails and text messages in the bundle is not in dispute. M however challenges the authenticity of some of the messages produced by F1 which he says were sent by her. She accuses F1 of fabricating these messages, and denies ever having sent them.
69. M says, first, that F1 has not produced evidence of the phone number from which these (mostly WhatsApp) messages were sent. That is correct, but I regard it as a neutral piece of evidence rather than one pointing in a particular direction. F1 says that he no longer has the phone which received the original messages (some of which are nearly seven years old) but he has been able to download the messages from WhatsApp Web to google drive, and to send them from there to his solicitor. The phone number does not appear on the downloaded version. His account is, at least on the face of it, credible.
70. The messages which M disputes are displayed in F1's WhatsApp account as having been sent by a contact to whom F1 has given the name "Other X" (M's first name is Z). F1 explained that he first knew M as X, rather than Z, and that he saved her contact details as "Other X" because this was the second number belonging to M which he had saved. So "Other X" did not mean "another person called X", but "X's other phone".
71. M denied that she had used the name X when introducing herself to F1. Initially she denied using that name at all. Much later in her evidence, after she was shown documents in the bundle evidencing her use of an email address containing the name "X" to communicate with health professionals, M admitted that she had been known as "X" when living in country Y but said that in the UK she was "strictly Z". It was difficult to reconcile that admission with her earlier, emphatic denial of the name X.
72. The messages in question were first produced by F1 as exhibits to a witness statement as long ago as July 2022. They were clearly an important piece of evidence, because they purported to be, and were produced as, direct evidence of M admitting that she had caused physical harm to A.

73. Three¹ of M's witness statements were filed after these exhibits were produced. In one of those she responded directly to F1's allegation of physical abuse but did not refer at all to the WhatsApp message. Nowhere in M's written evidence was there any suggestion that the authenticity of the "Other X" WhatsApp messages was challenged. The allegation that they were fabricated was made for the first time in M's oral evidence.
74. F1 therefore had no idea that the authenticity of these messages would be challenged until M gave oral evidence during the course of this hearing. During the course of the hearing he produced, again from his google drive, electronic versions of the downloads which were in colour and much clearer than the photocopied versions in the bundle. These were sent to me in electronic form and F1 was recalled to explain the process by which he had downloaded them and shared them with his solicitor.
75. As to the messages themselves, I observe as follows:
- a. I cannot see why, if F1 were fabricating a string of messages for the purposes of these proceedings, he would give his invented contact the name "Other X". It would make much more sense, and be less likely to confuse, if he had simply used the name by which M is usually known, Z.
 - a. In my view, the content and format of the "Other X" messages have the ring of truth. Some of the messages on the chain are difficult to make sense of, as one would expect if indeed they are part of a genuine conversation which took place many years ago and included discussion of matters long since forgotten. If the conversation were fabricated, I would expect it to display more superficial plausibility.
 - b. One of the original downloaded message chains has the date, "17th August 2020" handwritten across the photocopy. If, as M alleged, the messages were fabricated it would have been more plausible for F1 to add the date electronically, in the way that dates intermittently appear on a WhatsApp message chain. The fact that this date was handwritten suggests that F1 copied it from where it had appeared earlier in the chain; and also that it did not occur to him that anyone would raise doubts about the authenticity of this evidence.
76. It was put on F1's behalf during submissions that if he were minded to fabricate WhatsApp messages he "would have done a far better job of it". Broadly speaking, I agree. The messages produced do not form a coherent conversation; some of them are unlinked and unintelligible; and, perhaps most tellingly of all, they do not provide F1 with incontrovertible evidence in support of his case. The messages in [a date in] 2017, for example, suggest the beginnings of an intimate relationship but do not explicitly refer to sexual intercourse. If F1 were engaged in fabricating this evidence, the temptation to bolster his case on the paternity issue would surely have been irresistible.
77. For those reasons I reject M's allegation that the "Other X" WhatsApp messages are fabricated and I find that they are authentic.

A's paternity

78. *Note: the dates in this section have been extensively redacted. This makes the reasoning more difficult to follow, but is necessary in order to avoid inadvertent disclosure of A's approximate date of birth.*

¹ Technically all four were produced later, but M's first statement is dated just a few days after F1's so she may well not have seen his when she prepared hers.

79. The key building blocks of the evidence on this issue are as follows.
80. The date of M's abortion was in [a date in] 2017. M's evidence is that she did not have sex with her former husband after that date. He had insisted that she have the abortion, and she was traumatised by it; the relationship broke down as a consequence.
81. A was born at term on [a date in] 2018 (two days after the estimated delivery date). The pregnancy was dated at M's booking-in appointment. The gestation period of a pregnancy is counted from the first day of the woman's last menstrual period, which M gave as [a date in] 2017 (in the notes the word "certain" is written next to this date). The gestational age of the pregnancy was confirmed at a dating scan in [a date three months into M's pregnancy], so it is likely that the date of M's last menstrual period is accurate. I prefer this evidence to M's oral evidence that her last menstrual period before she conceived was in [a date in] 2017.
82. That means that A is very likely to have been conceived after [a date in] 2017. Conception will have taken place around the time of ovulation; this is not an exact science, but the most likely window for conception is [a period in] 2017.
83. Most pregnancy tests will show a positive result around the time that the woman's next period is due. F2, who seems to have access to quite detailed records of his schedule for the relevant period (he has produced printouts of his calendar), says that M told him she was pregnant on [a date about 4 weeks into M's pregnancy].
84. M and F2 say that they had sex for the first time on [a date approximately nine months before A's birth]. Prior to that they had met online in a business context through F2's social media, and then in person at church. As it happens this first sexual encounter was at F1's flat, although F1 was not present. The date [redacted] is likely to be accurate. F2 has a much better recollection of the date than M, and I formed the view that her account had been informed by the discussions both accept they have had about A's conception date. F2's recollection is corroborated by a contemporaneous exchange of texts between F2 and F1 about a film F2 and M were watching together at F1's flat on [date redacted]. I accept that F2 and M were together at F1's flat on this occasion, and that they had sex, although it is not clear whether F1 knew who F2 was with (in the texts F2 referred to M only as "my woman").
85. Thereafter M and F2 say that they spent time together, and had sex, on various dates between [dates five days apart, approximately nine months before A's birth]. Again I consider this evidence likely to be accurate. The dates are corroborated by messages exchanged a little later between F1 and F2. That F2 and M knew each other and were spending time together is corroborated by photographs, including one which was taken of them together at church on [date redacted] (of which more later).
86. F1 accepts that, although he says he did not have direct knowledge of the relationship at the time, he is not in a position to challenge the evidence of M and F2 about when it commenced.
87. I have no difficulty in finding that M and F2 were in a sexual relationship from [date about 10 months before A's birth] onwards, and that they had sex on [a specific date, approximately nine months prior to A's birth] and probably other dates around that time. It is therefore possible that F2 is Child A's biological father.
88. The evidence in relation to the timeframe for F1's sexual relationship with M is more problematic.
89. In M's first witness statement she said that she met F2 in [date about 10 months before A's birth], and that she also met F1 "a few times" at this point, although at first she thought he was F2 when she saw him at church. In her fourth statement (produced in response to a specific direction to all parties to provide more detail of their respective cases on this issue) she said:
- "I had attended church a few times with a female friend and had spotted F2 there, however at that point in time I thought it was F2 but I later realized that he was in fact F1. This was

around two weeks of me initially meeting F2 in person. I did not know F2 had a brother until two weeks after I had met him. One day I attended church and F1 arrived who I thought was F2. I waved at him but he did not wave back.”

90. M went on to say that she did not meet F1 “formally” until [a date three months into M’s pregnancy], although from [a date two months into the pregnancy] she was living in a flat that he owned and used as a place to work (she said that when he was there she would stay in her bedroom) and that they did not have sex until [a date four months into M’s pregnancy]. She maintained this position in her oral evidence.
91. F1’s account in his written evidence was as follows. He first met M on [a date approximately nine months before A’s birth, and four days before the specific date in paragraph 39 above], when he booked her as an escort through an agency, she came to his flat and they had sex. Initially I struggled to make sense of what seemed to be an extraordinary coincidence, namely that F1 had booked an escort and by chance the person who arrived was someone he had already met – or at least seen in the distance – at church. However, in oral evidence F1 explained that M had got in touch with him through social media and set up a videocall, during the course of which she told him that if he wanted to have sex with her he would have to book her through an agency. He did that and M came to his flat.
92. F1’s account is backed up, in part, by the WhatsApp messages produced by F1, which M denied but which I have found to be authentic. On [a date two weeks before the date in paragraph 42] there was a missed call followed by a message from M to F1 which reads, “come on video”; it seems likely that a videocall between M and F1 took place shortly afterwards. Later that evening F1 sent M a text message about a (training?) course, the meaning of which, without any context, is impossible to decipher.
93. About two weeks later, on [the date in paragraph 42] at 17.46, M sent two text messages to F1. The first was “Hey are u signal [sc: single]” and this was followed immediately by “let’s date”.
94. About a week later M texted F1, “Can I move in your place”. A few days after that F1 replied, “ok sure”. M pointed out (when denying having sent this text) that it was apparently sent shortly after the photograph of her and F2 was taken at church. I do not consider that to be inherently unlikely, nor do I consider that M was acting deceptively or in any other way inappropriately. M would not be far the first person to be exploring or engaged in intimate relationships with two people at the same time; her relationships with both brothers were in their early stages; and in any case it is accepted by both F1 and F2 that throughout the entirety of the relevant period both were also in sexual relationships with other people.
95. It is also, perhaps, of some relevance that M’s marriage had broken down in traumatic circumstances and that she was grieving the loss of a pregnancy she had not wanted to terminate. F1 said in his written evidence that M had wanted a baby when she was in country Y but had been unable to conceive, and that when they met she very much wanted to get pregnant.
96. If M’s messages to F1 in [period approximately nine months before A’s birth] are authentic, her account of having met F1 “formally” for the first time only in [date four months into M’s pregnancy] cannot be true. This account was, in any event, implausible: it is highly unlikely that M could have lived in a flat which F1 used regularly for any period of time without meeting him. I wondered if M’s account as to the date when she first met F1 was an invention intended to create as much distance as possible between A’s conception and the start of her sexual relationship with F1.
97. The bundle includes an exchange of messages between F1 and F2 on [date three months into M’s pregnancy], about a week after M’s dating scan. I consider this a significant piece of evidence. The messages read as follows:

“F1: Either [date 1: approximately nine months before A’s birth] or [date 2: about 2 weeks later] you was at my place

F2: [date 2] I know for sure.

F1: Doctor said she is on how many week?

F2: On [date of scan] – 13 week and 1 day

F1: Baby is not yours!! I demand DNA

F2: Yes still in theory and I would need DNA after birth. She will need to face the consequence

F1: You can take DNA while pregnant no risk to unborn child

F2: There are risk for miscarriage”

98. It was suggested to F1 that when he sent the message, “I demand DNA” he was simply trying to protect his brother’s interests by suggesting that he – F2 – should ask M for a DNA test. I do not think the messages can bear that interpretation. This exchanges of messages strongly suggests that at this point each brother believed that there was at least a real possibility that he was the father of M’s unborn child.
99. In [date about three months into M’s pregnancy], as these and subsequent messages show, the brothers’ relationship was still friendly. There was no baby yet born; neither had an established relationship with M and both in fact were in longterm relationships (which are still continuing) with other people. I can think of no other reason why either F1 or F2 would be keen to assert paternity in relation to the unborn baby of a woman whom neither at that point knew very well, unless in fact they had had sex with her within the relevant time period.
100. In [date in] 2020 M sent a text to F1 referring to them having been in a sexual relationship for “more than three years”. This suggests that the sexual relationship between them started in [period eight to nine months before A’s birth], not [date four months into M’s pregnancy].
101. In August 2020 there was an exchange of messages between F2 and F1 about A. The messages are not explicit about the issue of paternity; they seem to show F2 showing an interest in A and expressing views about the importance of him playing a role in her life as her father. The conversation however quickly broke down, with each brother accusing the other of throwing his weight around, and interfering where this was not wanted.
102. In 2021 F2 took a DNA test. In M’s written evidence she said that she required a DNA test “to confirm that F2 was the father”. I asked her in oral evidence why she felt the need to have A’s paternity confirmed if, as on her case, the only person she had had sex with between [date ten months before A’s birth] and [date four months into M’s pregnancy] was F2. She replied that F2 had asked for the test. But:
- a. the impression given by the WhatsApp messages passing between the parties at the time is that it was M who organised the DNA test, and that until the results were received she was not sure about F2’s paternity;
 - b. M is [ethnicity redacted]. F1 and F2 are [ethnicity redacted]. M’s ex-husband is also [same ethnicity as M]. A’s ethnicity is mixed. If M was uncertain about A’s paternity, there must have been more than one putative father [of the same ethnicity as F1 and F2].
103. Throughout these proceedings, and for a period of time beforehand, both F1 and F2 have consistently behaved in a way that suggests that each believes himself to be the father of A. They have both claimed her; and they are both pursuing this claim at considerable financial and personal cost, including a cost to their own relationship which, before this issue arose, was close. I struggle to accept that either would have behaved in this way if he knew there was no possibility that he could be A’s biological father. F1 perhaps has even less reason to press a paternity case than F2, because on any view he has acted as A’s stepfather and he is the

biological father of her brother; the door is therefore very much open to him having an ongoing relationship with her.

104. Drawing all of this evidence together, I prefer F1's account of his relationship with M to M's, as being more closely integrated with the other evidence and more plausible overall. I find that M and F1 had sex on [date approximately nine months before A's birth] (and on other dates that it is not necessary to identify). It is therefore possible that F1 is the father of A.
105. It follows that, with real regret, I am unable to determine on the facts currently ascertainable which of F2 and F1 is A's biological father. I have found that both men had sex with M within the likely window for A's conception.
106. I will return at the end of this judgment to the issue of whether there is anything further that can be done to resolve this issue for the parties and A.

Child B

107. It is convenient to deal at this point with a curious feature of the evidence.
108. The bundle contains an exchange of messages between M and F2 in January 2021, shortly after they had resumed communicating. The messages are as follows:
"F2: If your son is not his then nothing connection. What do you really need him for? Is he the father of your son?"
M: He is focus on A like own child. Because he care since A born and now. No all I connect him for A needed like nursery, child benefit and her needed.
M [responding specifically to F2's question², "Is he the father of your son?"]: "Nope"
109. It is clear from these messages that there had been a prior discussion between M and F1 – presumably by videocall – in which the suggestion that F1 was not B's father had been raised.
110. Later, in June 2021, the following exchange took place between M and F2 ("he" in this exchange is F1):
"F2: what if I take her for weekend or week what he can do? You would let me right? He will focus on other child your son? Need to have a clear arrangement.
M: He is more focus is A and not my son.. because not his."
111. I observe in passing that this final message provides further support for the proposition that F1 believed that A was his biological child.
112. Within these proceedings both M and F1 have been clear that F1 is B's father. M has explained that she sent the messages above to F2 because F1 was very keen on preserving his privacy, was living with someone else and did not want her to speak to anyone about his relationship with her or his role in the children's lives. I did not find that explanation very satisfactory, not least because in the exchanges above, which took place some months apart, M was speaking to F2 who already knew all about F1's role.
113. However, no one has suggested within these proceedings that there should be DNA testing of B and so, while I feel uncomfortable about this aspect of the evidence, I am unable to take this issue any further.

M and F1's relationship: allegations of controlling behaviour

114. Both M and F1 have alleged that the other perpetrated domestic abuse during their relationship in the form, primarily, of coercive and controlling behaviour. Consideration of their

² M used the function in Whatsapp that allows a person to respond to a particular message by "quoting" it in the response.

respective cases involves an analysis of the dynamics of the relationship overall. In conducting this analysis I have considered the evidence as a whole and have taken into account also my findings on the parties' allegations of physically abusive behaviour towards the children.

115. It is relevant, in my view, that on both parties' cases this was never an exclusive cohabiting or committed relationship. M stayed in F1's flat for a period of time during her pregnancy, but moved out shortly before the birth. At around the same time F1 moved to town W to live permanently there with his partner and their children. From then onwards, until the parties' intimate relationship came to an end in February 2022, they saw each other only when F1 was visiting London. The pattern seems to have been that he would visit about once a month. He would either stay in M's home, or they would use F1's London flat which he had retained.
116. I am not clear about F1's partner's knowledge of the relationship. Certainly at some point she became aware of A and B, because by 2021 (if not before) the children were spending time with F1 at his home and she was playing a role in their care.
117. I have looked carefully at both parties' allegations of controlling behaviour on the part of the other. M says that F1 was emotionally abusive towards her. In particular he:
- a. Wanted to engage in sexual activity when she was too tired, and insisted on this even when B was present in the room;
 - b. Told her that her body was his, and insisted on her having cosmetic surgery to change her physical appearance in a way that he preferred;
 - c. Controlled her phone and her finances; opened up bank accounts in her name without her consent.
118. F1 denies these allegations. He denies putting pressure on M to have sex, and says that although he paid for her to have cosmetic surgery this was her choice. He says that he never controlled her phone or her finances in any way.
119. I give limited weight to a letter produced by M from an IDVA working for a charity which confirms that they have supported her since 2022 as a victim of domestic abuse. The information in the letter is already available to the court and concerns the events of May 2022, when F1 did not return the children to M's care. This evidence in my view is not independent evidence capable of corroborating M's account.
120. In my judgement, M's evidence in relation to controlling behaviour generally lacked detail and clarity. She gave few specific examples of such behaviour. When asked in oral evidence she said that on one occasion in 2018 F1 had told her that she should delete some of F2's messages to her, because of F2's forthcoming marriage. Her evidence that F1 had then deleted F2's contact details from her phone to prevent her from contacting him was hard to reconcile with messages evidencing that it was M who initiated contact with F2 in 2020.
121. M's evidence in relation to financial control was similarly limited. She alleged that F1 had applied for child benefit after A's birth; F1 accepted this was the case, but said that he had passed the money directly to M. M's immigration status at the time (no recourse to public funds) may well be the reason she could not apply herself.
122. As to the allegation of sexual abuse, this appears for the first time in M's second statement and is denied by F1. There is no corroborative evidence. The evidence suggests that both parties were keen to conceive another child, and were paying attention to M's fertility (in her oral evidence M said "we would calculate the fertilisation period"); this would provide a possible explanation for why F1 wanted to have sex at a particular time. M said herself in evidence she was "torn between the need for the milk [to feed B] and the pressure of sexual intercourse". Overall the evidence is not sufficient for me to find that F1 forced or pressurised M into sex on these occasions.

123. Finally, the evidence in relation to M's cosmetic surgery is also limited and there is nothing in M's extensive medical notes or elsewhere to support her allegation that she agreed to this under pressure from F1, or that F1 told her that she needed to have the surgery because her body belonged to him.
124. F1's allegations against M of coercive and controlling behaviour are limited to financial issues. He says that she put pressure on him to sponsor her visa application and to provide her with financial support; that he eventually agreed to become her sponsor and shortly after she was granted permanent leave to remain, the parties separated. Again, there is limited evidence in support of F1's allegations; and given the parties' ongoing relationship and the existence of the children, it was not on the face of it unreasonable for M to ask him for support.
125. I have reviewed the evidence as a whole, bearing in mind that the parties did not live together over the course of their relationship and for quite lengthy periods – on M's case, sometimes for months at a time – they did not spend time together, and lived largely separate and independent lives. I do not find that this relationship had any of the characteristics of a coercive or controlling relationship and I do not make the findings sought by either party.

Allegations of physical abuse of the children

126. Both M and F1 allege that the other has perpetrated physical abuse towards the children.
127. M says that F1 physically chastised both children in a way that was over-harsh and on occasion left bruising or other marks on them. She relies on the following evidence:
- a. Photos of marks to B's hands, stomach and lower back. M says the marks to the hands were caused when F1 hit B with a wooden hairbrush in February 2022;
 - b. The fact that F1 accepted a caution in April 2022 for (according to F1; there is no direct evidence from the police and M was not sure) slapping B on the bottom when he spat out his food;
 - c. Local authority records of things said by the children about F1's behaviour towards them.
128. F1 denies excessive chastisement. He admits slapping B. In oral evidence he said that this did not cause a mark, but in his written evidence he accepted that his slap had caused a bruise. B was two years old at the time.
129. F1 says that M would frequently hit both children, including with implements. He relies in particular on a text sent by M to him in August 2020 in which she said she had "hit A hard and now my one finger bruise because hit her hard and hit by her bone eish... so now bruise".
130. M denies all of F1's allegations of physical chastisement and says she has never hit either of the children.
131. There is evidence to support each party's allegations. M's allegation that F1 used a wooden hairbrush to hit B has been repeated consistently in most (not quite all) of M's accounts to professionals and within these proceedings, since February 2022. It is the one allegation of physical harm that is set out in her C1A. In February 2022 M had much less incentive to fabricate or exaggerate allegations against F1 than she does now.
132. F1's acceptance of a caution, and the admission in his written evidence that this caused a bruise, is evidence of inappropriate and excessive physical chastisement.
133. M denies sending the text to F1 in which she admitted hitting A and bruising her own finger. I have already rejected M's case that F1 fabricated the messages he has produced. The fuller message string produced by F1 after this evidence was challenged includes a message from F1 ("please look after the carpet Snow White") which was sent 20 minutes after M's original text,

and M's reply ("yes I do it's hard to watching while I cooking and washing lol I keep A with me but she keep hiding and poo on pant so that why I hit..."). F1 explained that there was a videocall or other direct communication between the parties in between M's first message and F1's message about the carpet, in which M explained about A's poo, and that this led to his message about the carpet.

134. F1's allegation that M hit A with a mobile phone is detailed and I note that in his oral evidence he corrected a phrase used in his Schedule of Allegations ("in a stabbing motion") to say that it was not like a stabbing, M had only hit A once with the phone. I thought that if he had fabricated this allegation, as M says, he would have allowed the misinterpretation to go unchallenged. Similarly, when describing an incident when M threatened A with a wooden spoon, F1 was clear that M had threatened but had not in fact hit. F1's allegations have remained consistent and I have detected no tendency to embellish or exaggerate.
135. F1 alleges only that M hit A from time to time, in frustration at her behaviour. He does not suggest that she ever hit B. Conversely, M's allegations of excessive chastisement perpetrated by F1 are for the most part allegations that concern B. There is a suggestion in F1's evidence that he would often take A with him and B would stay with M. There is a sense that F1 found B's behaviour more challenging, while M struggled from time to time with A's.
136. The children were seen at school in June 2023 by the social worker who prepared the s7 report. By that time they had not seen F1 for over a year. They referred to him as "sad" and "scary", and both said that F1 had hit them (A on the bottom and B on the head). They made no allegations against their mother. I need to approach this evidence with some caution: the recording is not as clear as it might be (there is no record of what the children were asked), and it is possible that the children were influenced by either M or F2, both of whom by that point were engaged in contested litigation with F1. However the other evidence of physical chastisement of B by F1 makes it more likely that there is at least some truth in the children's description of their experiences.
137. I take into account also the social work evidence that suggests, more broadly, that M has a warm and affectionate relationship with both children and that no concerns have been raised about her care by school or nursery staff.
138. The evidence suggests that the allegations made by each parent against the other commenced in February 2022, which is when their relationship came to an end. Despite this, for some time thereafter the parties continued an arrangement in which the children spent substantial periods of time with both of them. In April 2022, when the children went to stay with F1, M did not take steps to secure their return for several weeks, until they had stayed beyond the time when she expected them home. Her application to the court was not issued until 13 June 2022, and in her first statement in these proceedings, dated 2 August 2022, she set out contact proposals which included B spending up to three weeks at a time with F1 in holiday periods, on an unsupervised basis. I note also – although, given M's communication difficulties, I give this only limited weight – that in her C1A M's allegations of abuse perpetrated by F1 against both M herself and the children were much less extensive than the allegations she later made in these proceedings.
139. All of this evidence suggests that despite their allegations, until these proceedings were well underway and the differences between them had become entrenched, neither party was seriously concerned about the children's safety in the other's care.
140. I find as follows:
 - a. Over the course of the parties' relationship F1 hit both children. His physical chastisement was directed at B more than at A. On at least one occasion in early 2022 he

hit B hard enough to cause a bruise. On one occasion (I cannot determine whether it was the same occasion) he hit B with a wooden hairbrush.

- b. M hit A in August 2020 after she did a poo in her pants. She hit her hard enough to cause a bruise to her own finger. On separate occasions M hit A with a mobile phone, shook her and threatened her with a wooden spoon.
- c. I make no finding on M's allegation that F1 showered the children in cold water. This allegation has varied: M's initial account in her Schedule of Allegations was that this happened once, but she said in her oral evidence that it happened frequently; F1 says that on one occasion he showered the children with lukewarm, not cold, water because there was no hot water in the flat. If this did happen, I am satisfied that it was a one-off event and not relevant to welfare issues.

141. In each case, I am clear that the parents acted as they did out of frustration and not malice. Overall, I find that both parents struggled from time to time to manage the children's behaviour, and resorted to over-harsh physical chastisement.
142. Despite my findings, I recognise that the evidence suggests that M has taken on board parenting support and advice that she has received and that her relationship with the children is now good.
143. Although this will be an issue for the welfare stage of these proceedings, I consider it likely on the basis of the evidence currently available to me that F1 also has the capacity and motivation to learn skills that will enable him to parent the children safely and without resorting to physical methods of discipline.

Next steps

144. I am setting out in this judgment a suggested way forward for the parties to consider. I am hopeful that in doing so I may be able to save them the costs of attending a further directions hearing. If there is no agreement as to the way forward I will of course list a hearing to determine the issue.
145. My findings in relation to the circumstances of A's conception mean that her paternity is still not established, and that there is now no further means of determining this issue without scientific testing, which is expensive and which may not be conclusive.
146. It seems to me that the appropriate way to deal with this may be to send a copy of this judgment to Cafcass, for onward disclosure to the MOJ, so that the MOJ can consider whether discretionary funding for the test offered by DNA Legal should be made available. It is clearly not my role to express any view about whether this would be an appropriate use of public funds. However it is important that whoever takes this decision should be made aware that the court has not been able to make a finding on the issue of paternity on the evidence available to it at this hearing.
147. I am very concerned about how the issue of paternity can be managed for A, particularly if the uncertainty over this issue cannot be resolved. When F2 filed his first statement in these proceedings he said that A was unable to differentiate between the two brothers, one of whom is her father and the other her uncle. By the time the s7 report was prepared, A had clearly been told that F2, whom she sees regularly, was her father. Her views about F1, whom she believes to be her uncle but who may be her father, and whom she sees infrequently, were negative. Meanwhile B, who is F1's son, is spending very little time with his father and extensive time with his uncle, who may be his sister's father.

148. Now that these proceedings move on to the welfare stage, the time has come for the children's interests to be front and centre. In my view the court needs to consider the option of joining the children as parties so that they can be separately represented through an experienced children's guardian who can advise the court in these difficult, and possibly unique, circumstances.
149. The parties are requested to give thought to these issues, and to any other directions they think may be required to progress this case. In consultation with the parties I will fix a date for handing down this judgment and giving directions. That hearing may be vacated if agreement is reached.

Publication

150. After this judgment was handed down the parties jointly asked me to consider publishing it in anonymised form, and provided me with a redacted version.
151. It is the responsibility of the court to ensure that both the decision to publish and the contents of the published judgment reflect a proper balance between the parties' and the children's Article 8 rights to privacy, and the public interest in transparency within the Family Justice System.
152. I agree that the judgment should be published. The open justice principle applies and the Family Court is currently taking steps to increase transparency in accordance with this principle. This particular judgment concerns issues which are of general public interest, especially those concerning A's paternity and the difficulties of establishing this via DNA analysis. It is relevant also that all three adult parties not only agree that the judgment should be published, but have positively requested it.
153. However, the redactions proposed by the parties in the draft submitted to me were not sufficient, in my view, to protect the children from the risks of jigsaw identification. The fact that the putative fathers are identical twins is an unusual and distinctive feature, and may well lead to some reporting of this judgment. If the children were to be identified by those in their local community (who are not already aware of their family circumstances) this would amount to a breach of their Article 8 rights which could not be justified by any Article 10 public interest arguments.
154. I have therefore carried out a further process of redaction myself, during the course of which I have removed information which I consider could lead to the identification of the family. The information I have removed includes, amongst other identifying information, material which could enable the reader to identify the day or month of either child's birth, and details of the communities to which the members of this family belong.