

[2024] EWFC 420 (B)

Case No.MB21P50045

IN THE FAMILY COURT

Sitting at Middlesbrough

IN THE MATTER OF THE CHILDREN ACT 1989

IN THE MATTER OF A (a boy)

Before: HHJ.G.MATTHEWS KC

BETWEEN:

Father

Applicant

And

Mother

1ST Respondent

And

A

[through his Children's Guardian HELEN HALE]

2nd Respondent

Sarah Phillimore instructed by Mr F Poncia, Solicitor (freelance) for the Father

Dr Charlotte Proudman instructed by Ms M Chhina of Morgan Wiseman Solicitors for the Mother

Julie Richardson instructed by Ms H Simmons of Hewitts Solicitors for the child

GROUND RULES HEARING RULING

1. The Court has been concerned with a Ground Rules Hearing [GRH] in advance of a re-trial of a Fact Finding Hearing [FFH] which is listed to commence on 19.2.24 with a time estimate of 5 days. In advance of the hearing on 26.1.24 an advocates meeting took place on 23.1.24 and a number of matters were agreed. These are the following:

- a) The Mother shall have the benefit of an Intermediary to assist her during the FFH;
 - b) The core bundle must be reduced and extraneous documents will be removed from it, which should include the judgment of DJ.Lindsay which was the subject of a successful appeal, hence the re-trial;
 - c) Within 7 days from the date of the hearing, the parties shall agree what further documents should be removed from the bundle and then lock the bundle for 7 days pre-trial in order that everyone knows what documents form the basis for the hearing;
 - d) Father's most recent statement is to be, at least, pruned of reference to 3rd party evidence which is not the subject of first-hand witness evidence.
2. The following is however, not agreed:
- a) Whether the transcripts of the evidence given by both parties at the original FFH before DJ.Lindsay should be included in the bundle, or a supplementary bundle or whether they should not form part of the documentation at this re-trial;
 - b) The Mother seeks to have the Father's most recent [5th] statement, withdrawn from the bundle on the basis that it exceeds the page restriction applied by the court in its order dated 1.9.23 [updated on 20.10.23] at 130 pages;
 - c) Whether Father should be allowed to rely on the 3,800 pages of Whatsapp evidence which he has now filed;
 - d) More generally whether Father should have permission to ask questions of the Mother with regard to the sexual history of their relationship [not Mother's sexual history], to place in context the allegations of sexual violence and coercive and controlling behaviour which Mother makes against him.
 - e) Whether the "breach proceedings" should be separated from the FFH.
3. Mother also made an interim application for costs against the Father, filing a schedule of costs in a total sum of £95,000. I indicated at the hearing that such an application at this stage, when none of the serious allegations subject of the trial, have been determined was

inappropriate and the application was not further pursued in oral argument. This is no doubt a matter which the Mother will raise again at the conclusion of the FFH, which is the most appropriate time to raise this, dependant upon the court's findings.

4. I reserved my decision on these matters for further reflection and this written judgment sets out my decisions and the reasons for the same.

Analysis and Commentary

5. The dispute between the parents in this matter is highly contentious and the lawyers on both sides appear to have fully adopted the feelings of both sides. The sparring between the lawyers and hyperbolic commentary is unnecessary. A lack of objectivity will not assist the court. Each party seems to feel that they are justified in their stance by the previous behaviour of the other side. I consider that both sides need to take a step back and if the lay parties cannot, then the legal representatives certainly should and resist the impetus toward subjective comment.
6. The court has a wide discretion in determining the admissibility of evidence in family proceedings under FPR 22.1. The court can determine the issues on which it requires evidence, the nature of the evidence which it requires to determine those issues and the way in which the evidence is to be placed before the court. Evidence may also be excluded, even if admissible and the court may permit a party to adduce evidence, or seek to rely upon a document even if the party has failed to comply with procedural requirements. Lastly, the court may limit cross-examination.
7. The subject of the use to which the transcripts of the previous evidence given by the parties should be put, is inextricably linked with the issue of what matters are appropriate to raise during the re-trial of the FFH. The allegations to be tried, as made by the Respondent Mother, are of serious sexual assault on specific occasions. The Mother also raises within her latest statement dated 29.9.24, an allegation of regular forced oral sexual activity. This

behaviour by the Father is said to have occurred with a backdrop of coercive and controlling behaviour [CCB], more generally.

8. Dr.Proudman submits that, as the appeal against the judgment of DJ.Lindsay was successful on all grounds, including that cross-examination was allowed by the judge of the Mother in relation to the parents' sexual history without a GRH taking place, that no such similar cross-examination should take place during the course of this trial. I am afraid that the matter is rather more nuanced than that. I allowed the appeal on the basis that the judge had failed to hold a GRH and determine whether such cross-examination was appropriate. The questions were therefore unexpected by the Mother.
9. The judgment on the appeal was not a GRH for this re-trial. It was a review of the way that DJ.Lindsay dealt with the case. An assumption seems to have been made that this court would simply adopt all of Mother's arguments cited in the appeal and apply them to the new hearing. The GRH for the re-trial has only just taken place. The Father is alleging that Mother's allegations of sexual impropriety are false, or if they have some basis are exaggerated. The Mother's credibility, as well as that of the Father is in issue.
10. It is correct to observe that the fact that someone is willing to have sex with their partner on one occasion does not indicate that they are always prepared to consent to sexual activity or indeed did so on one occasion. In this case the Mother now alleges, "upon reflection" as she says in her most recent statement, that the Father was "quite overly sexual, demanding and forceful when it came to sex". She reports that he was "sexually coercive and sexually violent. He never sought consent for things he decided to do." The sexual allegations are made in the context of an allegation of coercive and controlling behaviour by the Father.
11. The situation has changed somewhat in that at the time of the original FFH the sexual allegations related to specific incidents. The Mother's more recent statement indicates that there was an overall pattern of sexual violence and sexually controlling behaviour. Evidence which points towards or indeed away from such a pattern is therefore very relevant. As per

Knowles J in *A & Another v B & Others [2022] EWHC 3089* “communications between the parties of a sexual nature may well be relevant as may communications between them either before or after the relevant incident or time period. That approach is in keeping with the court’s obligation to consider the wide canvass of evidence and its duty to have regard to patterns of behaviour.

12. This does not of course, give the alleged perpetrator permission to produce any material that they wish, if it is irrelevant and, if it is relevant where it fails to meet the approach articulated in para 23 of *Dunn v Durham County Council*
13. In my judgment it is relevant and appropriate to admit and consider evidence from Father’s whatsapp messages which discloses contemporary evidence of their sexual relationship which the parties did not anticipate would be later disclosed. The court must consider a wide canvas of evidence in its quest to determine the truth as between the parties in this very difficult case. The Mother can be asked questions about relevant messages in an attempt to contextualise the allegations which she is making against the Father.
14. It will not be relevant to simply show that on a specific occasion the Mother was willing to have sex with the Father, rather the potential relevance is what the evidence may indicate about the nature of their relationship. The questioning that was put to Mother at the original FFH about their first night together was not relevant nor did it assist the court and should not have occurred. However, the whatsapp evidence which has now been produced independently, may assist the court with important contemporary background.
15. Father denies the allegations and in respect of the admissions which he has made considers that the behaviour which he has admitted does not fall within the definition of coercive control set out in PD12J. The Father alleges that the Mother’s allegations of sexual violence against him have developed over time. I consider that it is important to see the history of what Mother said in her initial written evidence, then her oral testimony to the court at the first FFH, followed by her further statement in 9.23 and lastly her live evidence at the re-

trial. The transcript of her evidence in 2.23 before DJ.Lindsay will form part of the bundle and may be used in cross-examination.

16. I will require schedules to be filed by Miss Phillimore on behalf of Father as to the entries in the Whatsapp messages and the transcript which she asks to be the subject of questioning. These must be served and filed no later than 7 days in advance of the FFH to enable instructions to be taken in a proportionate manner. They must be no longer than 3 pages each as I would have thought that there should be enough references to demonstrate the points which are sought to be made on 3 pages. The content of such schedules will be scrutinised in advance of the Mother's evidence and if the matters are irrelevant or inappropriate, they will not be allowed to be put to the Mother. I will of course make allowances for the vulnerability of the Respondent Mother. I will not hesitate to use my power to limit cross-examination should I consider that the issues raised are irrelevant or inappropriate.
17. However, the court is enjoined with achieving fairness as between the parties in terms of its management of the case. The court needs the best evidence before it to make a fair and just determination. The court has made and will continue to make directions and decisions which ensure that both parties have access to justice and a fair trial. To that end as the Mother has requested an intermediary, the court is prepared to grant the same.
18. I do not consider that this is a situation akin to that referred to in **M (A Child : Private Law Children Proceedings: Case Management intimate Images [2022] EWHC 986 (Fam) Knowles J.** I do consider that the transcript may have evidence to offer the re-trial, if this is carefully controlled. I do not consider that the quality of all of the Mother's evidence has been vitiated by the flaws in the management of the case by the District Judge. I will make appropriate allowances, if necessary to ensure that the evidence is given in context. In my judgment it will not be unjust and wrong to include the transcript of the Mother in the material to which the court can have regard. Such decisions must be made on a case by case

basis and the decision in **M above** was not intended to create a blanket ban on the use of such material. The Father's transcript will also be part of the material to which the parties can refer. Therefore, any previous inconsistent statements of the parties can potentially be explored.

Father's 5th Statement

19. On the 8.8.23 I made an order that the Mother was granted permission to file a narrative statement by 4pm on the 1.9.23. The purpose of this order was to allow the Mother to set out her case clearly on the basis that it was being submitted that she had not been able to do so during the fact finding hearing. The Father was also given leave to file and serve a "comprehensive witness statement" addressing his response to Mother's allegations and any allegations he makes against the Mother and any supporting evidence he seeks to rely upon including third party evidence. Both statements were directed to be limited to 20 pages, size 12 font, Times font, 1.5 spacing.
20. The Mother failed to comply with the court's direction in terms of time, on a number of occasions, which eventually resulted in the court making an "Unless Order" on 22.9.23 that the Mother must file her statement by 26.9.23, or the re-trial of the FFH would proceed on the date fixed on 30.10.23 on the basis of the already filed witness statement evidence and the transcripts of the evidence already given to the court.
21. Both parties ignored this direction of the court, although they were both aware of this, which resulted in the FFH in October being adjourned to 19.2.23 by agreement. The Mother eventually filed her statement on the 29.9.23, which although the body of the statement was 20 pages long, had numerous exhibits, comprising a total of 292 pages. The court's timetabling and directions were amended by agreement on 20.10.23 [B323]. It is noticeable that the direction with regard to Father's statement at para 3 of that order does not contain

the page count limit. The direction is to respond to the Mother's schedule of allegations and file any relevant evidence.

22. The Father subsequently filed a statement on the 31.12.23, having been granted extra time to do so, in the light of his health issues, which runs to some 130 pages, which is far too long. In addition there are approximately 300 pages of exhibits to the statement, which contains third party hearsay comment which is totally inappropriate. The statement is excessive and there are a number of issues raised therein which are totally irrelevant and look like an attempt at character assassination.
23. The Father must withdraw and re-submit his statement. All the detail of the Mother's allegations should be taken out and just a heading with commentary replacing this. All reference to Lee Smart and commentary about Mother's elder children should be taken out as not relevant. A general denial can be given at the beginning of the statement with regard to the allegations of sexual violence, instead of continually repeating this in relation to each allegation. A great deal of the commentary and repetition, which could be classed as cross-examination or submissions points can be left out.
24. The following paragraphs shall be removed: 5-7; 16; 22-28; references to cash in Paras 40-41 shall be taken out; 42-45; 48-50; 57-59; remove mention of Mother's son from para 62; all alleged comment and text or whatsapp messages from 3rd parties should be removed; 89-91; 119 save for the denial; 124 second half referring to 2018 to be withdrawn; 126; references to the parties sexual relationship must only be included if they are at the relevant time when the allegations of sexual violence are said to have taken place; 132-133; 145; 163;
25. I have taken into account both the written and oral submissions advanced by both sides in reaching my decisions. I have also determined that the issue of alleged breach of contact arrangements shall be dealt with separately from the issues of sexual violence and CCB. The Father may put to the Mother in general terms that she has been unwilling to co-operate

with contact. His case is that she has manufactured these allegations to prevent him having a relationship with A. That is clear.

26. I do not consider it necessary or helpful in the light of the serious and complex allegations which are to be determined to deal with specific allegations of breach at this stage. It would be preferable to resolve the factual substratum in relation to the parental relationship firstly and then the court can determine, what if any other matters it is proportionate to try. I will take a view on the breach issue, after I have given judgment on the sexual violence and CCB.

HHJ.G.Matthews KC

29.1.24.