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THE NAMES OF ANY AND ALL CHILDREN AND LAY PARTIES HAVE BEEN CHANGED TO MAINTAIN BOTH ANONYMITY AND READABILITY.

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Neutral Citation Number: [2022] EWFC 138

Ref. Re C

**IN THE FAMILY COURT AT CARLISLE
IN THE MATTER OF C**

Earl Street
Carlisle

28 September 2022

B e f o r e :

HIS HONOUR JUDGE CLIVE BAKER

John J

(Applicant)

- and -

(1) Abby A

(Respondents)

(2) Christina J (through her Children's Guardian

**Transcribed from the official recording by eScribers
Central Court, 25 Southampton Buildings, London WC2A 1AL
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**THE APPLICANT appeared in person
MISS C BOOTH, instructed by Bendles Solicitors, appeared on behalf of the First Respondent
MS S HARGREAVES, instructed by GKM Solicitors, appeared on behalf of the Second Respondent (through her Children's Guardian, Ms Deborah Turner)**

HTML VERSION OF JUDGMENT

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HIS HONOUR JUDGE C BAKER:

1. This case concerns allegations of sexually inappropriate behaviour alleged to have been perpetrated by a father against his daughter. No findings have been made and the Court considers it appropriate to put on public record the circumstances that gave rise to the conclusion that has been reached in these proceedings. This judgment was given orally at the conclusion of the case.
2. This case concerns a child by the name of Christina J (as set out above, not the child's real name), who was born in 2017. She is the first child of Abby A, who was born in 1996, and she is the only child of John J, who was born in 1994. It can be seen therefore that they are relatively young parents. Since Christina's birth, Abby has had another child with a different father, whom I shall refer to briefly in a moment.
3. This case has been listed before me and by me, for a Finding of Fact Hearing to determine an allegation that in essence that John has in some way sexually abused his daughter. Throughout this hearing, on and off, I have referred to mum and dad by their given names. That is not in any sense a sign of disrespect on my part. It is to try and engender a little less formality in what are very difficult and potentially emotionally heightened circumstances where we are discussing matters of the utmost seriousness.
4. The case has recently taken a dramatic, but in my view wholly appropriate, turn. This morning Ms Booth, who appears on behalf of Abby, sent to me, Ms Hargreaves, who represents Christina and to John, who appears on his own behalf, a position statement. The statement made clear that having considered the evidence that we have heard thus far, which I will refer to briefly in a moment, and having thought about matters, no doubt in discussion with Ms Booth overnight, Abby was no longer pursuing the findings against John vis-à-vis his daughter. That will mean that this judgment can be a lot

shorter. Indeed, it is potentially not necessary at all, but for reasons that will become plain, I think it only right and proper that I put on record and in due course on public record some observations I make in my role as the Designated Family Judge for Cumbria.

5. My involvement in this case began when the matter was transferred to me and I undertook an Issues Resolution Hearing on 16 August 2022. That Issues Resolution Hearing was my first involvement with this case. It is fair to say at that point there were a number of evidential matters that needed, to put it colloquially, tidying up. There were various items that had still not been disclosed, but I was anxious that the matter should be listed for a Finding of Fact Hearing as soon as possible and I listed it before me beginning on 26 September, Monday gone – it is now Wednesday – for a four day finding of fact hearing. Fortunately, the evidence that was outstanding was obtained and the Finding of Fact Hearing went ahead.
6. The circumstances and the background leading to the need for the Finding of Fact Hearing are as follows.
7. John and Abby have had a somewhat on and off relationship, but the huge benefit of their relationship was the birth of Christina in 2017. Their relationship did not survive for any length of time post the birth, although there have been periods where they have resumed their relationship since the birth. The most recent being a period in about early to mid-2021, there having been an occasion where for about a week Abby and John resumed living together. It is fair to say that without any animosity at all, both parents described their relationship with each other as not particularly having the 'spark' that was necessary for it to continue, and they have gone their separate ways. In the meantime, both of the parents have had other relationships of varying degrees of seriousness. The most serious relationship for Abby has been with an individual whom I shall simply refer to as Ben for the purposes of this judgment, with whom she has had another child by the name of Jane, who is of course Christina's sister.
8. The separation did not, despite some initial teething problems, give rise to a breakdown in the relationship between Christina and her father, and in fact it is apparent and there has been no complaint made by either party that John and Christina spent a considerable amount of time together during the period until October 2021. There have been various incidents that pre-date October 2021 which initially, and during the course of the formulation of this case, had taken on a suggestion of being what might be regarded as harbinger signs of there having been some form of sexual abuse of Christina, although as I will make clear in a moment, there are ample and certainly more likely explanations for some of those few and not particularly significant behaviours that were observed prior to October of 2021.
9. In 2021, following a period of trying again to rekindle their relationship, John rented a two-bedroom flat. He told me in evidence he specifically rented the two-bedroom flat so that there would be a bedroom for Christina. I have in fact seen that flat because I have seen body-worn video footage, from a police officer when John was arrested after the allegations of sexually inappropriate behaviour towards his daughter were made. That flat was very close to Christina's school, very close to where mum lives, very close, as it happens, to where mum goes to play Bingo, and as a consequence there were times when John picked Christina up from school, although my understanding is that generally speaking he and Christina would spend the weekends together. Christina would stay overnight and she has always had, until October of 2021, a persisting and positive relationship with her father.
10. In evidence, and if I may say so impressively, Abby readily volunteered that leaving aside an allegation of sexually inappropriate behaviour, John was a good father. In all other regards he had always, and this is my phrase, stepped up to the plate and she had no other concerns about the way in which John looks after Christina. In his evidence, and I accept it entirely and it was not suggested any different, John told me that he always paid his child support. I do not doubt that at all. John came across as a stoic, honest and impressive individual who has a commendable work ethic and a considerable love and devotion to his daughter, which makes what happened subsequent to October 2021 even more tragic.

11. On 6 October 2021, as a consequence, I think as I understand it, of Abby's father, that is to say Christina's paternal grandfather, being perturbed by the fact that he had not seen a lot of Abby because Abby had been spending time with her new boyfriend, an individual by the name of Mark, Abby went and spent some time at the Bingo with her dad and asked John to look after Christina by picking her up from school. As I have already said, he lived very close to the school. He agreed to do so. I have seen the text message exchange. He did pick her up and it is also the case that Christina had spent tea-time with her father the previous day as well. The 6th October was a Wednesday.
12. Having picked Christina up it got a bit late. There is a text exchange between John and Abby. During the course of that text exchange Abby suggests to John that he could have Christina overnight. John says no because he has work early the next morning. He works a varying shift pattern and he told me in evidence he was on probation so he was very concerned about not turning up for work. Unfortunately, as it happened, he did not in any event. Abby suggested that he 'pulled a sickie'. John did not like that idea and in the end Abby agreed to pick Christina up at 9 o'clock in the evening. By universal consent, Christina's standard bedtime was 8 o'clock both when with mum or dad, so Christina was tired by the time mum turned up a little after 9. It matters not, but Abby told me in evidence that she had drunk about three pints – I certainly do not say that critically – whilst she was having fun at the Bingo. She walked the short distance from the Bingo to John's to pick Christina up.
13. During the course of the walk away from dad's, Christina made a comment. The comment was to the effect that daddy touched me. She then indicated by pointing, having been asked by her mum where daddy had touched her. She indicated her chest area, somewhere in between her chest and her lower body and also, according to mum, held her hands over her genital area. Mum was alarmed by this, and I am not for the sake of this judgment going to relate the entirety of what mum says Christina said to her because there is some confusion about whether she mentioned being in bed or not. Abby and Christina happened, as she wandered round the corner, upon two police officers who were dealing with something else. One of the officers had the presence of mind to turn on their body-worn camera, and almost all, although not entirely all, of the exchange between Abby, Christina and the police officer was captured on the body-worn camera. We have all seen it and there is a transcript.
14. As a consequence of Abby being concerned that Christina had been touched in some inappropriate and indeed potentially sexual way by her father, the police begin an investigation. The following morning two plain clothes police officers visited Abby and Christina and they conducted what is often referred to as a first account of complaint. I have a handwritten copy of the questions and answers for that, which I will refer to in a moment, and it is decided as a consequence that Christina should be what is called ABE interviewed. That ABE interview did not in fact take place until I think 21 December 2021. For a four-year-old that was too long. I will return to that in a moment. Social Services became directly and then tangentially involved and in the meantime contact between Christina and her father was restricted.
15. The contact was initially restricted by bail conditions, although by way of an undated letter John was informed that the police would be taking no further action. This doubtless was contributed to by the fact that during the ABE interview that was undertaken, albeit far too late, Christina had, putting it in very summarised form, nothing but good things to say about the time that she had been spending with her father.
16. Importantly in that interview though, and I will note this, Christina tells the police officer asking the questions that her daddy is away working and Abby told me in evidence that that is what she told Christina. It is right to say that there were other indications when Abby gave evidence that she had not taken any particular opportunities to be overly negative about John in the intervening period, and of course it is obvious from the fact that I have related that the ABE interview produced nothing but positive comments from Christina about the time she spent with her father that it can be readily assumed that the period of time in between October and December 2021 was not spent by Abby reinforcing or repeating questions or asking about what Abby thought Christina had alleged.

17. John was interviewed. I have read that interview. The police decided to take no further action. Social Services became involved. They indicated that until a risk assessment was conducted with respect to John, he should not have any contact with Christina. Quite who or how that risk assessment was going to be undertaken, I do not know. Certainly I have seen no record whereby either Abby or John are told who is going to undertake a risk assessment or how. Ultimately John was obliged to issue proceedings in the family court in order to try and re-establish a relationship with Christina. He made his application on 4 February 2022. That has culminated in this Finding of Fact Hearing.
18. During this hearing I was due to hear evidence from a number of people, but they were gradually whittled down by disclosure being produced that answered certain questions and indeed reconsideration of the relevance of some of the evidence, and ultimately I heard evidence only from Abby, John and a Dr Knight. Dr Knight, who gave evidence remotely, was the paediatrician who examined Christina on 7 October as part of the police investigation. That examination was undertaken in accordance with the Royal College of Paediatricians' guidance and it revealed reddening in relation to the external genitalia of Christina and led Dr Knight to the conclusion, as is recorded in his documentation, that Christina's presentation was consistent with something potentially having happened, although it was not probative of the Abby because of course, and I am paraphrasing here, there are many potential differential diagnoses when it comes to a child presenting in such a manner.
19. During his evidence, which was compelling and reflected his many years of experience of undertaking such examinations, he told us that there were other potential explanations for the reddening. His evidence accords with the Royal College of Paediatricians' analysis of the data as set out in their guidance in relation to such observations of reddening. It was, as he put in his report, consistent with touching but could be caused by other things.
20. He did take swabs. Those swabs were given to the police for any forensic examination. Latterly, I think yesterday during the course of this hearing, through the good offices of those who instruct Ms Booth and I think Ms Booth herself, a response came back from the police indicating that those swabs have not been tested because the officer decided that there was not much point because of what was due to be tested was the father's DNA and perhaps, and if I may say so this is the fundamental problem underlining the entirety of this case, it had occurred to the officer that John being the child's father, it was probably fairly obvious that there may well be DNA belonging to the father on the child in any event because of course during the police interview the father had explained that he had undertaken various activities with the child, including toileting her. That of course could lead, to DNA being present on the child's intimate area. Accordingly, the swabs would reveal nothing of any use.
21. It might have been reasonably thought that they could have also tested for sexually transmitted diseases, infection, other potential causes of the redness. That clearly was not done either. That is the evidence as it stands.
22. During the course of Abby's evidence and as a result of careful, and if I may say so very well-prepared cross-examination by Ms Hargreaves, which was not undertaken in the spirit of hostility and indeed was not responded to by Abby and anything other than an open and, in my view, generally honest way, it became highly apparent that there were many potential explanations for some of the things that had caused Abby concern previously about Christina's behaviour. By way of example, and I do not need to go into a huge amount of detail, there had been a previous occasion when Christina had said, "show me your dick" That of course is, to an adult, an overtly sexual comment although of course it may also be part of adult conversation or 'banter'. Christina was two at the time and it concerned Abby, as well it might, and there was also at about this time there were occasions when Christina was sticking her hands, as two-year olds sometimes do, down the front of her nappy or pants. Clearly this happened because Abby text John about it and asked him if he knew why Christina was doing this. He responded that he did not know and the issue passed. I have seen those texts.
23. It became clear during evidence, again by way of example, that in fact the individual Ben, who Abby was living with at this time and therefore Christina was living with and who is the father of Christina's sister, had a number of characteristics that make him a much greater and more likely candidate for

adverse influence on Christina. By Abby's own admission he was not particularly parentally orientated. He did not undertake a particular parental role with either of the children. He would not take them out. More concerning, and I am conscious that I have not heard from him, but I have no doubt whatsoever that Abby believed what she told me, he was an individual who could be loud, aggressive, threatening and certainly Abby perceived him to have on a number of occasions forced her to have sex with him when she was not consenting. She also said that he was the sort of person who would not think twice about swearing in front of the children. John had a wholly different attitude to swearing and denied using swear words much and never in front of children. He said his family were strict with respect to these attitudes. His evidence on this was not challenged.

24. In that context it was obvious from whom Cristina was more likely to have picked up and heard inappropriate and sexualised language.
25. In January 2020 Ben was imprisoned first on remand and then as a consequence of being sentenced, for the supply of cocaine. He is currently serving a prison sentence and has no contact with his daughter. Abby, perhaps wisely, ended her relationship with him. It can be seen therefore that Christina has had a chequered experience, certainly up until Ben was removed from the family by the Criminal Justice System, and in the circumstances it became clear during the evidence that any suggestion that John might be responsible for previous concerning behaviour displayed by Christina did not in fact particularly hold water.
26. The account that was given and can be viewed on the 6 October body-worn camera footage is an example of how not have a discussion with a child about an allegation of sexual abuse. Almost everything that is said in front of Christina during the course of that brief conversation is either suggestive, leading, or in some other way in breach of the guidance given with respect to speaking to children about such allegations. That is not Abby's fault. I also have some sympathy for the police officer being caught somewhat off guard by what he was being told. Abby was a concerned parent and I accept entirely that she was not doing anything deliberately. It would have been better if she had been shut down immediately and the allegation, for want of a better way of putting it, handed over to more experienced officers but I accept that is with the benefit of hindsight.
27. More experienced officers did attend Abby and Christina's property the following morning. Two plain clothes officers undertook a first account of complaint with Christina. Of course, that is in the context of Christina having already seen her mum upset, emotional, retelling a somewhat confusing and, in places I think it is fair to say, potentially not entirely accurate account of what Christina may or may not have said to her mum on the evening of 6 October to the police officer wearing the body-worn camera. In that context on the morning of 7 October Christina tells the two police officers according to the handwritten note that is at G124 of the bundle – that her dad had 'hit me and touched me down there'. When asked did he do anything else, she responds, "He put shampoo in my eyes." "When did this happen?" "Yesterday." "Where were you?" "At the park." "Did you go anywhere else?" "Just the park and to my dad's." "What did he use to touch you?" "He used his hands." "What could you feel when he touched you?" "Hard." "What were you wearing?" "My unicorn outfit, my unicorn t-shirt, unicorn jumper and unicorn trousers." "He touched you more than once or once?" "More than once." "He touched you on top of your trousers or underneath?" "Underneath." "Where were you when this happened?" "In the park on the big slide." "Did anything else happen when you were with your dad?" "Yes. He let me fall, but a unicorn caught me with its magic powers." That account, if I may say so, is the only recording of an account from the child's own mouth where the child says something about her father touching her. It is an account given in the presence of Abby and, of course, it is an account that cannot be analysed in context because it is not recorded either via audio or on video. It is only recorded in writing.
28. There is a later occasion when Christina speaks to a social worker. What she says to the social worker contains nothing that could in any way be interpreted as sexual abuse.

29. Almost everything else that is contained within that first account of complaint at G124 that is recorded as Christina saying on 7 October is demonstrably inaccurate. Because of the investigation that the police undertook, the father's account of his and Christina's movements on 6 October was verified by the police looking at the local CCTV in shops et cetera, to see where dad and Christina went the previous day. She did not go to the park, she was not wearing her unicorn t-shirt, her unicorn jumper or her unicorn trousers. She was wearing her school uniform because that is where dad had picked her up from and almost certainly, I think I can say, a unicorn did not stop her falling with its magic powers.
30. That account of course gave rise to the need for an ABE video interview. I have watched the interview and I have the transcript and, as I have already related, Christina is given every opportunity but produces nothing negative about the time that Christina spent with her dad. In fact, everything she says about her father is positive.
31. Subsequent to the police indicating that they would take no further action, as I understand it, the local authority's involvement effectively ceased, although they do make a referral to an organisation called SafetyNet UK, which is an organisation which according to its letterhead has the function of "supporting the recovery of those affected by rape, exploitation, sexual and domestic abuse". The referral to SafetyNet is contained within the bundle and I have read it, as indeed are the other Social Services documents. Of course, by implication the referral itself implies that somebody has suffered from rape, exploitation, sexual or domestic abuse, a fact that had been by no means established, but leaving that aside, SafetyNet support amounted to, as I understand it, a single telephone conversation with mum which questions were asked about Christina.
32. There is a letter from SafetyNet dated 31 March 2022 and in it, it purports to diagnose Christina with suffering from post-traumatic symptoms that include hypervigilance and increased anger and indeed displaying sexualised behaviour, all of which it is suggested is consistent with her having been sexually abused, ultimately of course by her father. It is to be noted that I have not heard any evidence from SafetyNet and that that letter was not prepared for court purposes. It was in fact prepared, as it says at the very top, in support of Abby's request for a third bedroom to the Housing Association so that Christina and her sister did not have to continue sharing a room. Notwithstanding those caveats the conclusion that are set out in the letter, which are not expressed at all equivocally, are to say the least highly speculative and untenable in the context of one phone call.
33. The reason the children needed not to share a room is because of an occasion when Christina had been observed by Abby to in effect be suggesting some sort of contact between a hairclip and her sister's genitalia, saying to her sister, "Don't worry, it won't hurt." This happened after the examination of Christina by Dr Knight. It transpired, and for this reason it was very helpful that Dr Knight gave evidence, that Dr Knight's standard procedure, which doubtless he adopted during his examination of Christina, was to say to children when he was about to examine them intimately that certain procedures may or may not be uncomfortable or may hurt or may not hurt, and of course as the evidence transpired it became plainly obvious that there was a parallel between what Christina was or had said to her sister and indeed the experience that she had had during the intimate examination that had taken place on 7 October. Thus, the evidential foundation for the assertion or conclusion that Christina was displaying sexualised behaviour towards her sister was, to put it mildly, highly suspect.
34. That is a relatively brief summary of the background of this matter. This morning Ms Booth, on behalf of Abby, provided myself and the other parties with a position statement. That position statement says as follows:
 - a. "The mother remains resolute that the words she heard from Christina on the evening of 6 October 2021 were, 'Daddy touched me'. The mother does not resile from the observations of Christina's behaviour as described at court. The mother considered that it was both necessary and appropriate to safeguard her daughter, to withdraw until there was a risk assessment. It is submitted that this was an appropriate and proportionate response. A risk assessment was clearly never going to be undertaken unless and

until proceedings were commenced. The safeguarding letter advises that a finding of fact is necessary and that no interim contact advice could be offered prior to a robust risk assessment.

b. "The mother has listened to Dr Knight and the evidence of [John], and has reflected upon the evidence which she has given orally over the course of the hearing. The mother accepts that some of Christina's behaviour is likely to be attributable to observing domestic violence and criminal activity perpetrated by Ben, her former partner. This has only become apparent to the mother during the cross-examination by counsel for the guardian. The mother accepts that some of the behaviour described previously to be sexualised may be due to the child protection medical. Dr Knight recounts that during intimate examinations he tells children generally that this is not going to hurt. Christina is said to recount that to her sister. The mother accepts that Christina could have been playing doctors and nurses as a result of her experience of the child protection medical examination. This realisation has only become apparent to the mother during the cross-examination by counsel for the guardian.

c. "The mother accepts Dr Knight's explanation that erythema of the child's vagina may have multiple causes and the mother notes that the hymen was intact although understands per Dr Knight's evidence that it is known for the hymen to remain intact post penetration."

35. I add as an aside there that Dr Knight's evidence, and indeed all of the literature, indicates that damage to the hymen can indicate penetration. An intact hymen does not confirm that penetration has not taken place, but it makes it less likely to have taken place, and Dr Knight confirmed that in evidence.

d. "The mother accepts that Christina has experienced some issues toileting and on occasion may have not been sufficiently clean to avoid infection post-evacuation or urination. The mother accepts following counsel for the guardian's cross-examination that her very first account to the police may have not given Christina an authentic voice. She asserts she was doing the very best that she could do to try and protect Christina. The mother accepts that in her panic she may have not heard that Christina was in bed."

36. Again, I pause to indicate that it became clear during evidence that Abby was not certain as to whether Christina had said she had been asleep or whether she had been in bed. That was significant because John's explanation was that it being late and Abby picking Christina up past her bedtime of 8 o'clock meant that Christina was in fact falling asleep and in order to wake her up he had tickled her, tapped her on the shoulder, et cetera, because he did not want her falling asleep, as is set out in his statement, because that would make it more difficult for her to go to sleep when she did eventually return to her mother's care.

37. The position statement goes on:

e. "The mother accepts that John J was an excellent father up until his separation from Christina, that is to say up until October 2021. The mother accepts upon hearing father's evidence and that of Dr Knight, that Christina has not been touched by her father on the evening of 6 October and/or on other occasions prior to that date in a sexually inappropriate manner. The mother accepts upon hearing the father's evidence and that of Dr Knight that the father or another person with whom he has allowed the child to spend time has not exposed the child to sexualised or inappropriate behaviour in comments..."

f. "Conclusion: The mother has found the hearing and cross-examination to be a reflective experience. She asserts that she has not been able to, in the absence of a risk assessment or a neutral third-party evaluation of the events of 6 October 2021 and prior,

understand the meaning, if any, of Christina's statement, 'My daddy touched me.' Upon reflection, the mother can see that there may be explanations for Christina's presentation and behaviour that does not have nefarious or casual links to the father. The mother hopes the court will understand that she has exercised non-contact as a safeguarding measure until she was satisfied for Christina's safety."

38. The mother's conclusions are entirely reasonable and accord wholly with the evidence and the case law that I put into a document and gave to all of the parties yesterday and will be appended to this judgment. It also accords entirely with my now final view in respect of this matter. I accept that as a consequence of the process that started in October 2021 and as a consequence of the advice and observations that the mother was given by professionals, and if I may put it in as ill-defined way as this - 'the system' - the approach that the mother took of not allowing contact between Christina and John was consistent with both the process and indeed the message that was being conveyed by various professionals as the wheels of justice, both criminal and family, crept into motion on and after 6 October 2021.
39. The reason I have given such a lengthy judgment is that I have been reflecting during the course of this hearing on that process and whilst I do not have any particular solutions to offer (other than those I analysed six years ago in the case of *Re V (A Child) (Rev 1)* [2016] EWFC 58), it seems to me only right that I put in the public domain my concerns in respect of this case and the process in general. Reading the police evidence, the Social Services' notes, and for example, the letter from SafetyNet, it seems to me that everyone failed to remind themselves of one important fact: an important fact that should have been put in the balance when considering the risk presented by John. That fact is that John was Christina's father.
40. Parents touch their children. In particular, parents touch young children. Parents touch their children in intimate areas, be that their genitals or their anal area. They do so of necessity, and they are often entirely justified in doing so. They touch their children when they toilet them, when they clean them and when they bath or shower them. They may do so to deal with medical issues or complaints of difficulty or soreness. They may do so accidentally when dressing them or playing. An assertion by a child, certainly a child of four as in this case, or indeed younger, that *a parent* has touched them 'down there' or in their 'special area' or in an intimate area on one occasion does not automatically equate to sexual abuse.
41. For such a touch or touches to be abuse, it seems to me that such action must have the quality of abusive behaviour. It seems to me that it must be of a nature, a type or a frequency that is neither justified, necessary nor reasonably explained, in particular *by a parent*. That of course may be physical abuse or a physical assault. If the person acting towards a child in such a way subjectively derives sexual gratification or arousal or anticipates or desires such gratification or arousal, then the actions are sexually abusive. Sometimes the latter can be inferred from the nature of the former. In other words, sometimes the suggestion of subjective sexual gratification or arousal can be derived from the nature of the actions taken towards the child.
42. I pose this question: if the roles were reversed, if John had collected Christina for contact on 6 October and walked from her mother's, having picked her up at 9 o'clock, he having had three pints having just been to the Bingo, and Christina had said to him "Mummy touched me" and indicated her chest and her stomach and her genital area, and had John walked round the corner to a police officer and related that accurately (or inaccurately) in detail (or vaguely) to a police officer, how likely is it that Abby would not have not have any contact with her daughter for almost a year as a consequence of what was set in place as a result of that allegation being made?
43. I find it almost impossible to conclude that the answer to that question would be anything other than 'unlikely'. I find it difficult to understand without a considerable degree of speculation why the answer with respect to John appeared to be different. Further, it is lamentable that it took two and a half months for an ABE interview to be undertaken with a four-year-old, rendering that process potentially both contaminated and of less evidential value, although in fact as it turned it did have the value of showing the child's positive view of the time she spent with her father.

44. I regret, as the recently appointed Designated Family Judge for this area, that it has taken almost an entire year for the family justice procedure to be concluded such that John can walk from this court rightly without a stain on his, up until now, unblemished character. I regret that only a year later the injustice of this case, whereby Christina and John have forgone a year of their lives together, can now be put right. It stems from the fact that no professional during this process appears to have taken a step back and thought to themselves this is a case about *a father* and the suggestion that a father has sexually abused his daughter. No one seems to have asked the question - what is the actual evidence for *sexual abuse* having taken place? Had that question been properly and appropriately analysed at a much earlier stage a more sober view and advice could have been given. Certainly, if professionals suggest that a relationship between a child and a parent should completely cease to await a risk assessment taking place, I do not understand why one is not then undertaken as a matter of some urgency.
45. I make those comments without any criticism whatsoever of Abby. I have no doubt whatsoever that she was acting in a protective capacity in circumstances where, if I can put it this way, once the wheels had started rolling, pushed along as it was by various safety-first approaches that ignore the weight of evidence, that she was acting in what she considered to be a protective capacity. It struck me that she was a caring, honest and loving mother trying to do the best for her daughter. However, I return to the question I asked at the beginning of this passage. If the roles had been reversed, would Abby really have been separated from her daughter for an entire year? Why should that have happened to John? I do not have answers to that question, but it may be that asking such a question in the right circumstances may temper an otherwise unjustified rush to conclusions that will ultimately not withstand scrutiny and might lead to the wrong advice being given in circumstances where the relationship between child and a parent is at stake.
46. Furthermore, every effort should be made in such circumstances to ensure that the family justice system does not take 11 months to resolve such issues.

POSTSCRIPT:

Subsequently by way of a consent order the parties agreed and the court endorsed a Child Arrangements Order that has Abby living with her mother and spending every and all weekend with her father as well as extended periods of time with her father during school holidays.

Appendix:

John J v Abby A

Law

1. In considering the factual disputes in this matter I have had particular regard to the following matters:
 - a. The burden of proof lies with the party who seeks to assert that a disputed fact occurred.
 - b. That burden must be fulfilled to the civil standard of proof. That is to say on the balance of probabilities. If I determine that something is more likely than not to have happened, then that fact is established. If I determine that something is more likely not to have happened, then the fact is not established. It is not open to me to conclude that something 'may' have happened and mere suspicion does not establish a fact.

- c. In some circumstances the 'burden' of proof may provide the answer in that a conclusion that a fact is equally as likely as it is unlikely – the 50/50 scenario - means that the person asserting the fact has not proved that it took place and therefore it did not happen.
- d. The person responding to the allegation being asserted against them does not need to 'prove' that it did not happen although of course their response to any allegation is relevant to my overall evaluation of the evidence as is the exploration of alternative scenarios.
- e. It is dangerous to speculate and findings of fact must be based on evidence – although in family proceedings 'evidence' can mean a wide variety of things including oral testimony of someone who was present to proper inferences drawn from circumstances and surrounding established facts as well as corroborative evidence.
- f. A court can and indeed should take into account and weigh both the 'micro' and the 'macro' – that is to say the individual detailed evidential building blocks relating to a fact being determined *and* the wider picture relating to the general factors, background and context. The interrelationship between all the evidence available to the court must be considered and weighed carefully.
- g. Oral testimony is important however a judge must always be careful to ensure that full account is taken of all the circumstances. The Court must consider what corroborative or indeed contradictory evidence exists that relates to the fact being asserted.
- h. Oral testimony can be misleading – a truthful person may be a 'bad' witness in terms of, for example, their ability to speak coherently and certainly, calm their nerves, the ease with which they are confused or the illogicality of their thought processes. Conversely a dishonest person may be a good witness. On a more complex level, 'dishonesty' in the context of relating past events must be carefully considered. Someone can relate something that is wholly untrue whilst entirely believing it to be factually correct. Human memory is fallible – the brain does not make a video recording that is indelibly stored forevermore, rather it recalls snap shots that are dependent for their accuracy not only upon the circumstances and influences that applied at the time but can also be altered convincingly by subsequent events, perceptions and emotions. Those memories will still be 'true' to the person relating them despite the fact that they may bear little or no resemblance to what actually happened.
- i. Likewise, I remind myself that the considerations related at (h) above also mean that I must guard against 'trivial persuasion' i.e. the notion that evidence related in meticulous detail is in some way more reliable because of that detail. It is not necessarily so.
- j. With respect to dishonesty, a conclusion that a witness has lied about a particular event does not automatically mean that everything they say is tainted by that dishonesty. A more intricate consideration of the reasons for and motivations behind dishonesty (deliberate or mistaken) must be considered when evaluating the effect of a 'lie' on the veracity of their other evidence (*R v Lucas* [1998] QB 720).

2. It strikes me that in circumstances where the backdrop is a dispute between parents, the words of Baroness Hale in *Re B* [\[2010\] UKSC 12](#) at [29] should be at the forefront of the Court's mind:

"...there are specific risks to which the court must be alive. Allegations of abuse are not being made by a neutral and expert Local Authority which has nothing to gain by making them, but by a parent who is seeking to gain an advantage in the battle against the other parent. This does not mean that they are false but it does increase the risk of misinterpretation, exaggeration or downright fabrication."
3. The Court of Appeal have considered the circumstances and law surrounding issues pertaining to allegations of sexual abuse in the case of *Re Y and E (Children: Sexual Abuse Allegations)* [\(2019\) EWCA Civ 206](#).
4. The opening observations of Baker LJ resonate wholly with the issues in this case:

"This is a very troubling case. The findings made against the appellant are of the utmost seriousness and, if upheld, will affect the whole family for the rest of their lives."^[1]
5. Baker LJ highlights the guidance provided by the following cases:
 - i. *TW v A City Council* [\[2011\] EWCA Civ 17](#)
 - ii. *Re W, Re F* [\[2015\] EWCA Civ 1300](#)
 - iii. *Re E (A Child)* [\[2016\] EWCA Civ 473](#)
 - iv. *AS v TH and others* [\[2016\] EWHC 532 \(Fam\)](#)
6. I have also read the Court of Appeal decision in *Re K (Children)* [\(2019\) EWCA Civ 184](#). At paragraph 22 Jackson LJ summarises with approval general principles with respect to allegations of sexual abuse:
 - a) No case of sexual abuse without probative medical or direct physical evidence is to be regarded as straightforward.
 - b) Children are poor historians and many are suggestible. The greatest care must be taken to minimise the risk of obtaining unreliable evidence from a child.
 - c) The ABE guidance should be followed.
 - d) The need to analyse and acknowledge deviations in ABE practice and consider whether the flaws are so fundamental as to render the interviews unreliable. Material can be cogent despite deviations in the interview process.
 - e) The need for careful assessment of hearsay evidence of what a child has said, particularly where it is the only evidence.

f) The need for additional caution when relying on a statement made outside an ABE interview or following earlier unrecorded questioning.

7. Paragraphs 22 to 51 of *AS v TH and others* provides a comprehensive analysis of the case law and guidance with respect to allegations of sexual abuse. Paragraphs 33 to 42 of *Re W, Re F* (above) provides a helpful summary of the elements of the ABE Guidance that are most pertinent to family proceedings, although I also have a copy of the full Guidance and am familiar with it and its previous iteration's contents.
8. I have reminded myself of the above case law prior to this hearing commencing and again before preparing this judgment.
9. For reasons that will become apparent there are some aspects of the case law that engage directly with the issues in this case, both in terms of the formal, professional discussions that took place and the informal discussions that took place between the child and non-professionals (primarily her mother):
 - a. In accordance with the foregoing general principles, when assessing whether or not allegations of sexual abuse are proved to the requisite standard, the court should focus on all of the relevant evidence in the case, including that from the alleged perpetrator and family members (see *Re I-A (Allegations of Sexual Abuse)* [2012] 2 FLR 837).^[2]
 - b. "As we have already pointed out, the [ABE] Guidance makes it clear that the interviewer has to keep an open mind and that the object of the exercise is *not* simply to get the child to repeat on camera what she has said earlier to somebody else. We regret to say that we are left with the clear impression from the interview that the officer was using it purely for what she perceived to be an evidence gathering exercise and, in particular, to make LR repeat on camera what she had said to her mother. That emphatically is not what ABE interviews are about and we have come to the view that we can place no evidential weight on it." [Emphasis in original]^[3]
 - c. When social workers or other professionals are speaking to children who have made allegations they must be very careful to consider the purpose of the exchange and whether it is being conducted with a view to taking proceedings to protect the child or for separate therapeutic purposes where the restrictions upon prompting would not apply but the interview would not be for the purposes of court proceedings (*Re D (Child Abuse: Interviews)* [1998] 2 FLR 10).
 - d. The courts have further endorsed a number of the general principles set out in the ABE Guidelines:
 - i. It is desirable that interviews with young children should be conducted as soon as possible after any allegations are made (*Re M (Minors)(Sexual Abuse: Evidence)* [1993] 1 FLR 822).
 - ii. Where a child has been interviewed on a number of occasions the court *may* attach diminishing weight to what is said in the later interviews (*Re D (Child Abuse: Interviews)* [1998] 2 FLR 10).
 - iii. The court will wish to see responses from the child which are neither forced nor led (*Re X (A Minor) (Child Abuse: Evidence)* [1989] 1 FLR 30).

iv. It is normally undesirable for a parent to be present in an interview with the child (*Re N (Child Abuse: Evidence)* 1996 2 FLR 214 and see the Cleveland Report para 12.35).

v. In *Re S (A Child)* [2013] EWCA Civ 1254 Ryder LJ confirmed that the guidance set out in the Cleveland Report at paragraph 12.34 with respect to interviewing children remain good practice.

e. Where there has been a failure to follow the interviewing guidelines, the court is not compelled to disregard altogether the evidence obtained in interview but may rely on it together with other independent material to form a conclusion (*Re B (Allegations of Sexual Abuse: Child's Evidence)* [2006] 2 FLR 1071). However, where the court finds that no evidential weight can be attached to the interviews the court may only come to a conclusion that relies on the content of those interviews where it has comprehensively reviewed all of the other evidence (*TW v A City Council* [2011] 1 FLR 1597). See also *Re C (A Child) (Fact-Finding)* [2022] EWCA Civ 584.

10. The criminal law often deals with allegations of sexual abuse. The *Crown Court Compendium Part I: Jury and Trial Management and Summing Up* – updated in July 2019, published by the Judicial College, perhaps provides the most relevant and balanced approach to issues surrounding the offence sexual abuse, specifically section 20: "Sexual Offences". Those matters that a jury must, in appropriate circumstances be directed upon, are also relevant for this court's consideration, appropriately adapted to the context of the burden and standard of proof in these proceedings.

HHJ C Baker

27th September 2022

Note 1 *Re Y and E*, Para 2 [\[Back\]](#)

Note 2 *AS v TH and others* [2016] EWHC 532 (Fam), para 30 [\[Back\]](#)

Note 3 *TW v A City Council* [2011] EWCA Civ 17; [2011] 1 FLR 1597 at para 52 [\[Back\]](#)

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