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Case No: TA18P00358

IN THE CENTRAL FAMILY COURT

First Avenue House
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Before:

HIS HONOUR JUDGE TOLSON QC

Between:

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- and -
H

Applicant

Respondent

THE APPLICANT in person assisted by his McKenzie friend

MS CATHERINE PISKOLTI for the **Respondent**

APPROVED JUDGMENT

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HIS HONOUR JUDGE TOLSON QC:

1. I am today hearing an application made by father for a child arrangements order which began some while ago, in October 2018. It is a matter of regret to me that now, in August 2019, we have only reached the stage of a fact-finding hearing. The case started out in the Family Court at X and its transfer to London has accounted for some of the delay.

2. The child the subject of the proceedings was born in January 2015, and is a boy called C. He lives with his mother and has seen nothing of his father since a date in 2016 when the parents separated in the late August of that year. It is events surrounding their separation and the state of the relationship, going back to 2014 when they met, that has been the subject of my examination today at what was set up as only a fact-finding hearing. In other words, I am trying to decide what happened, and not what should happen in future, so far as young C is concerned.

3. But I have heard enough today to know that this is going to be quite a difficult case going forward, in which it will be necessary to build some bridges between C and his father, and if possible between these two parents whose split now is absolute. Steps will also have to be taken to cope with what I perceive to be a high level of anxiety being displayed by C's mother at the present time. I sense that this is how she is. That this is a part of her personality. She tells me herself that she had a troubled childhood involving some kind of abuse. I have not gone into the details, and I want to re-assure her I think it is highly unlikely that we will have to investigate that within these proceedings. I say that at the outset of this judgement because I do not

want what I have to say to in any way make life more difficult in future. And I hope we can all, from this moment, put today behind us and move on to look solely at what is best for C in future.

4. I am investigating a series of allegations, in reality none of which would, in my judgment, in the ordinary course, have had very much to say for the future in terms of C's welfare. They would certainly not be somehow prohibitive, if findings were made, of C having a relationship with his father. But I can see that clarity on these allegations is important because of the anxiety that I detect on the part of the mother. Moreover, and much more practically, CAFCASS's view, as expressed to me at an earlier hearing, was that CAFCASS did not feel able to move forward in the case unless and until findings of fact had been made. I now know enough about this matter to appreciate that it is a case in which undoubtedly in future I will be needing the assistance of CAFCASS. So that is really why we are here.

5. The schedule of allegations and the mother's statement begins with an allegation that the whole relationship between father and mother was one of what these days goes under the name of coercive control. Within that allegation a number of examples are given. In the schedule before me the general allegation is really at number two, and items numbers one, three, four are examples of the general picture. Item number five is an allegation of domestic violence, as opposed to more general domestic abuse. It is, as I understand the mother's case, the only example of actual physical violence. Beyond that case, however, there are two other allegations which are of a different character. Item number six on the schedule is phrased as follows:

"On two separate occasions, the father had non-consensual sexual intercourse with the mother"

-- an allegation which is today styled by the mother herself, and by her counsel, Ms Piskolti, as an allegation of rape.

6. Then the final allegation on the schedule concerns C himself, and so is, it might be said, of particular importance. The mother says:

"On a number of occasions the father purposefully harmed the parties' child. The father would pinch and squeeze the child, leaving marks on the child."

It is right to say that at the start of this hearing this allegation was qualified by the mother making a correction to the wording to remove the idea that C was pinched. More of that in a little while.

7. The other striking feature of this case, as with so many cases, is that the outcome turns, in effect, entirely on the evidence of the two parents themselves. This is not a case in which there is any direct, independent, witness evidence of any particular occasion of domestic abuse or violence. Two friends of the mother, one of whom was also (I believe) a neighbour, made statements to the police. These may shed some light on the earlier occasions on which the mother claimed she had been the victim of non-consensual sex, but I find that I find those witness statements do not amount to evidence in support of the idea of a coercive, controlling relationship, nor as direct evidence in support of any particular allegation. I briefly flesh that out by saying that in the statement of Ms S there are sentences such as: "at first the father was nice, but then he became quite controlling." In the other statement of Ms P there is evidence of text messages which she has seen. But none of this evidence can be said to be supportive exclusively of the mother's case that

this was coercive control, but not also of the father's: his position being that he accepts that the relationship was (his word) "toxic". There is also no medical evidence in support of the mother's case or other forensic evidence.

8. Equally, the father has produced statements from his own mother and grandmother which are generally supportive and talk of the state of the relationship; but in reality, only at a distance. I, similarly, do not find that they are of any great assistance to me.

9. So I am left with the evidence of the parties; not just of course oral evidence in court, but also summaries of statements which they have made to the police on past occasions -- and their own written statements for the Family Court. Again, as with so many cases of this kind, this makes this particularly difficult territory for a judge. How do I find out precisely what happened behind the closed doors of a family home years after the event, based only on the evidence of the parties, neither of whom can be said to be independent? And each of whom was involved, not just in a dispassionate observation of individual incidents, but in a complex, close, personal relationship which lasted over more than two years, and which they have had to revisit since in the context of disputed court hearings, and conflict over their future relationships with their young son. It is easy to see how their own recollections of the past will have been framed, and perhaps warped, by the position in which they find themselves, and events since. So it is easy to see that they will have become, without any conscious intention to mislead the court, wedded to a truth in their own mind which may not accurately reflect the reality at the time.

10. There are further difficulties. This is a case in which the standard of proof is the simple balance of probabilities -- what is more likely to have happened than not. So, if I find myself in respect of a particular allegation 51 percent favouring the evidence of one party and only 49 percent the evidence of the other, if in other words it is finely balanced, there is a grave risk that I get it wrong – but thereafter would have to treat my findings as being absolutely correct. Even if, overall, I reach an approximation that is a reasonably accurate reflection of the state of the mother and father’s relationship, the danger is the precise findings on particular events will in themselves be wrong and so risk, in future, alienating one or other of the parents from the future court process. “The judge got it wrong in respects abc”, the father might say, or “xyz”, might say the mother and resentment would grow. In short, whilst it is the court’s duty to investigate and make findings, as best it can, in accordance with the evidence, there is very often only so far that the court can safely go before the benefits of a fact-finding exercise begin to diminish.
11. It is also relevant to bear in mind that the burden of proof in cases of this kind is on the person who makes the allegations. In respect of the schedule of allegations in this case, that is the mother. But that is not to say that the father does not advance a contrary case. I have already hinted at it. He says they started off well. Things became toxic, but at the very least the mother gave as good as she got. She has a temper on her. There was never an occasion of physical violence. She positively consented on the occasions of sex that are being described. He has the burden of proof so far as his positive case is concerned.

12. So with those warnings, I venture my conclusions in the case.
13. I have concluded that the father has the better of the argument here. He was, I record at the outset, the more convincing witness, giving his evidence in a straight-forward, forthright manner in the face of highly professional cross-examination from Ms Piskolti, who is experienced in this kind of case and knows how to cross-examine.
14. One difficulty in this case was that the father represents himself. So he was not able to cross-examine the mother, not simply because of a lack of professional experience, but because the very act of cross-examining itself risks doing more harm than good in these cases. Perhaps a victim might be further traumatised and in this case on any view we are facing a mother who is highly anxious - for whatever reason. So it was arranged during the hearing that in effect I would be asking the mother the questions. But of course I, as a judge, cannot even seek to replicate the cross-examination which would be undertaken by a professional advocate for the father. If I were to return to my former life and attempt to do so, then I would simply risk alienating the mother further from the tribunal. As Ms Piskolti pointed out at the start of this hearing, really the ideas to be put in cross-examination had to come from the father; and whilst going to some of the detail in the case that a professional lawyer would undoubtedly have done, I have tried, in a relatively brief questioning of the mother, to stick to that rule. I hope I have succeeded.
15. By contrast, the mother's evidence did have its difficulties. She was highly anxious. The effect of that was that she was very quiet. I suspect that, despite everyone's best efforts, whole areas of her evidence have not appeared on

tape. I seem to have missed a couple of passages that were picked up by Ms Piskolti. Ms Piskolti was sitting next to the mother, who was giving her evidence from behind a screen. But above and beyond the sheer question of volume, certain aspects of the mother's evidence gave me cause for concern, and it is best I think, probably, to analyse that by reference to the schedule.

16. The first problem was that although during her evidence-in-chief the mother was able to describe that she had been, she felt, controlled during the relationship, she was not able, even in response to Ms Piskolti's questions, to give much in the way of detail on that rather bald allegation. When she did so it was to turn purely to the allegations in the schedule, together with the suggestion that the father had been cruel towards the mother's dog.
17. The problem is that the items in the schedule are very isolated. Items three and four turn largely on questions of language. They do not seem to me to establish a controlling relationship.
18. Item number one is a little more direct because it alleges the father was extremely aggressive and intimidating, throwing things to scare the mother, as the allegation frames it. The problem here was that when the mother went to the detail there was conflict internally, within her oral evidence, and indeed conflict with the summary of her evidence to the police in an ABE interview which I have not seen and of which there is no full transcript. I have only the summary. The mother, in her oral evidence, suggested that the items had been thrown with an intention to hit her. But in the police summary the description is of her saying they were not even thrown "at her feet". This also is an isolated incident.

19. This was not the kind of evidence that could support an assertion of coercive control. That is the kind of allegation which CAFCASS takes very seriously in terms of future child arrangements. It is important to state that, here, even on the mother's case the allegations go back some years and do not extend, in any way, beyond the end of the relationship, which I find in itself to be important.
20. The mother's description goes no further really, in my view, on analysis, than saying that the relationship had its difficulties, a point the father accepts. Quite where the balance lay is very difficult to determine, although some light might be shed on it by item number five in the schedule, the only allegation of violence. The suggestion is that on one occasion father first pushed the mother, then as she turned away kned her from behind, causing her legs to buckle under her. Then the suggestion is that father pulled the mother's arm behind her back. It was a feature of the mother's evidence, both in writing for this court and in her oral evidence, that she fell to the ground in the course of this incident. The difficulty there is that three different sources indicate that in earlier accounts she had said merely that she was pinned to the wall. Those three separate accounts are first, the police summary of her own evidence:

"The father had pinned her up against a wall ..."

Secondly, mentioning being pinned against a wall in the statement of Ms S, one of the mother's friends. Ms Piskolti's contention is that this may refer to a separate occasion. But the difficulty there is that the mother is clear in her account to the police that there was actual violence between them only on one occasion:

"When asked if the father was violent, the mother said 'only ever once', and he had also chucked stuff, but not at her."

Then, in a further police record, the police record that a neighbour relating the incident in question had heard from the mother that:

"The father had gripped her arm and held her against the wall."

21. Now, of course, it is common in written records and even in statements to see mistakes made and differences in accounts; and in a case in which there was evidence from other sources, then such mistakes might carry little weight. But I emphasise that this is a case in which I am left to choose between the evidence of the two protagonists alone. It becomes very difficult to accept the evidence of one of them - the witness making the lesser impression in her oral evidence - when that kind of discrepancy arises.
22. All of these concerns about the mother's evidence acquire greater emphasis when it comes to the question of the allegation of rape. That is plainly a very serious allegation, but I emphasise that the seriousness of it does not change the standard of proof which I have to apply. It is the simple balance of probabilities. The difficulty here is that, on any view, as I have said, the mother's case is poised, it might be said, exquisitely poised, on a point between non-consensual sexual intercourse and consensual sexual intercourse which was not, at the time, towards the mother's taste or inclination. Let me try to describe what I mean.
23. The two occasions in question are said to have happened around the middle of May and the middle of July in 2016, both taking place in the bedroom which the couple shared at the time. On the first occasion it is the mother's own case that sexual intercourse began with her consent, and consent was only removed

during intercourse when the mother told the father to stop -- but he failed to do so. The difficulties do not end there because this is a mother who very often, and for all I know, always, found that she had difficulties in taking physical enjoyment from sex. She would, she tells me, often tell the father to stop during the times when intercourse between them was more frequent than it was in 2016. The difficulties arose, apparently, because of events in her past, to which I have already alluded. So, I hope it can be seen how the enquiry into this allegation of rape is fraught with difficulty.

24. I turn to a description of the rival cases. The mother says that in the middle of May 2016, the father asked her to have sex with him and although initially resistant to the idea, eventually she agreed. The sex in question took place with the mother kneeling on the bed and the father standing behind her. During intercourse she told him to stop, but he did not, and carried on at least for "a couple of minutes", which is a description given, I think, to the police. It is part of the mother's case that she took no physical step to encourage the father to desist. The father's contention is that the sex between them on this occasion, which he recognises because it was one of very few occasions when the parties had sex during the year in question, was entirely consensual from beginning to end, and he was not told to stop. If the mother was upset afterwards, which the father recognises, this was nothing unusual because of the difficulties which I have mentioned.
25. My concern about this occasion centres on the idea that the mother did nothing physically to stop the father. In particular, given the position in which intercourse was occurring, because the mother was not in any sense pinned

down on this occasion, but could easily, physically, have made life harder for the father. She did not do so. I do not find that the father was in any way on this occasion so physically forcing her as to cause her not to be able to take preventative measures, nor, in fact, is that case alleged. Following the event, as I have already said, the mother took no immediate action to report the matter to the police, or indeed to anyone else. Her description, of course, does not indicate that the circumstances were such that she might in any way have been thought wise to seek medical advice.

26. The second occasion, occurring some two months later, began with the parties watching television whilst in bed. The father suggested the television should be turned off. As I understand it, it is common ground that it was, and then the father, again, requested sex of the mother. This time the mother's case is that she refused, and when intercourse began it was not with her consent. She says that she was wearing pyjamas. The father took the pyjamas off and had intercourse with her, again from behind. This was at no point, the mother says, with her consent. The father maintains to the contrary -- that intercourse was initiated by both of the parties and was entirely consensual throughout. Again, he recalls the occasion of which the mother speaks. Here, my difficulty with the mother's account centres on the removal of her pyjama bottoms. I should emphasise that father's account is that in fact she was wearing a nightie. I do not see why the mother could not, should not, have made life difficult for the father in the circumstances in which she found herself by preventing the removal of the pyjama bottoms. There is no evidence of any kind that a struggle pursued, nor again is a case advanced that

the father was being physically coercive on this occasion. Insistent in his requests, yes, but physically coercive, no.

27. Mother was to report these events to the police at the end of August. But there may be some significance in the circumstances in which she did so because one of her friends, Ms P, in her written statement, appears to imply that the purpose of the visit to the police station at the end of August was to report father's threats made to her (Ms P), and that it was almost incidental that the question of the mother being forced to have sex (the expression used in Ms P's police statement) came to be revealed. Moreover, the terms of Ms P's statement, again, can hardly be said to be heavily supportive of mother's case as to the terms in which the mother was reporting what happened to her. Ms P's account contains the following sentence:

"I asked her what had then happened and she told me that she had let the father have sex with her as it was easier than to keep saying no."

That can hardly be said to support a coherent account of rape.

28. My findings on this occasion, as to both these occasions, is that the sex between the parties carried the consent of both. This was not rape. It may have been that at a point during both occasions of intercourse the mother became both upset and averse to the idea of the intercourse continuing. But if she did so, I emphasise this was something which was usual for her, the product of events in her past and her psychological state in not being able to take physical pleasure from sex. It was not a consequence of any action on the part of the father. Moreover, at no point during these occasions do I find that the mother withdrew consent or conveyed to the father any discomfort

that she was feeling about the intercourse continuing. I cannot even, on this evidence, find that the father was somehow insensitive to the mother's position. I can accept that he would have asked for sex perhaps on a number of occasions before sex commenced, but that is as far as it goes. Given the nature of these allegations I have felt it necessary to set out these detailed findings in respect of it.

29. I then turn to the seventh allegation, which concerns C. Here I am concerned by the late amendments of the mother's statement to remove the question of pinching. Her case now is a long way from the suggestion that father purposefully harmed the parties' child, as set out in the schedule. I note her statement to the police at page 159, which immediately follows on from the passage I have already related. It clearly comes from a part of the statement where the police were asking the mother about the generalities of the state of the relationship and in particular about the father's relationship with the child. The mother is reported as saying this:

"The father can be a bit rough with C, but has never hit him."

There is no mention of the occasion which now finds its way into the schedule. This is said to have occurred when the father became frustrated when changing the child's nappy. There is a difficulty there because the mother's case is that she did everything for the child in terms of childcare, leaving scope only for the occasional nappy change. And yet some of the mother's present descriptions would seem to give the impression that this roughness happened on regular occasions. I can of course find that the father changed C's nappy regularly. I believe he did. I can accept that on occasions

that would have been a more frustrating experience than usual because of the condition of the child -- that is just the common experience of everyday parenting. I can accept that on occasions it would have required more force than normal to keep the child still for the purposes of changing the nappy. But I cannot, in any way, accept that the father purposefully harmed C. That just does not seem to be consistent, even with the description which the mother now gives, which is limited, really, to increased pressure on the arms of the child. That is as far as I care to go with that allegation.

30. I return then finally to the state of the relationship between these parents. Yes, of course, the father will have used bad language on occasions. That is inevitable in the toxic relationship which he describes. I suspect there may have been an occasion on which something was thrown, but I do not think it was thrown in such a way as even to cause the mother to be fearful of harm to herself. If it happened I suspect it had happened in the context of what I find to be the one occasion on which the relationship can, in a true sense, be said to have broken up before being re-formed in future. That, really, is enough to dispose of items one to four on the schedule. I do not find that the father was coercively controlling. I believe that the mother was guilty of aggressive behaviour herself, on occasions. So, too, I am sure was the father. But it does not go further than that, and in my view it has no implications, now, for the father's future relationship with C.

31. That concludes what I have to say about the fact-finding exercise.

32. I go one step further and say that it will be necessary in this case to continue to bear in mind the mother's anxieties. I am left, having heard from her today,

with some slight anxieties as to how things are for her and for C in her care at the present time. I think what I should do in the case is immediately commission a section 7 report from CAFCASS. This will be with a view to their considering whether a CAFCASS contact intervention would be appropriate in this case. That concludes this judgment.

(For proceedings after judgment, see separate transcript)
