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*Judgment: approved by the court for handing down  
(subject to editorial corrections)\**

ICOS No: 18/056745

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

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Between:

A FATHER

Applicant

-v-

A MOTHER

Respondent

IN THE MATTER OF FX  
(A 7½ YEAR OLD GIRL)

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Mr M O'Rourke KC with Mr M Mulvenna BL (instructed by McCourt McGlone  
solicitors) appeared for the father

Mrs M-A Dinsmore KC with Ms L Boal BL (instructed by Carson Thompson solicitors)  
appeared for the mother

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**McFARLAND J**

*Introduction*

[1] This is a father's application for a residence order and a contact order in respect of his daughter who is now 7½ years of age. To protect her privacy this judgment has been anonymised. I will call her FX which is a randomly chosen cypher.

[2] The matter came on for hearing before me on 28 and 29 September for the purposes of determining certain facts relating to the conduct of the father. The mother alleges that the father sexually abused FX in or about March 2018.

## *Background*

[3] The mother and father married in 2012. When evidence emerged in 2013 about text messages sent during a period which ended in December 2013 by the father to the mother's niece, despite the mother's misgivings she decided to forgive her husband and the marriage continued with FX being born in 2015. I will call the niece IC, again using a randomly chosen cypher. She is the daughter of the mother's sister and during this period she was 13 - 14 years. The marriage did not last and on 14 February 2016 the father announced to the mother that he had feelings for another woman. The exact details of this conversation are disputed. The couple then separated and have lived apart since.

[4] The father continued to have contact with FX at his parents' home. There is a dispute as to whether that contact was supervised or not.

[5] In the autumn of 2017 the mother met another man, and after becoming engaged in March 2019 they married in 2020. They have a young child and that child, the mother, her new husband and FX now live in the same household.

[6] On 2 March 2018 FX made a disclosure to the mother and when this was repeated in similar terms the next morning the mother brought her to the GP out of hours service. After examination it was recommended by the doctor that the matter be referred to the police.

[7] When the police attended at the family home later that day, the evidence relating to IC was also disclosed. Two criminal investigations followed. The father was returned for trial in the Crown Court in respect of a sexual assault of FX, but after His Honour Judge Lynch KC refused certain applications relating to the admissibility of evidence, the prosecution offered no evidence and the father was acquitted. The father admitted the harassment of IC and accepted a police caution on 16 August 2021.

[8] Contact with the father stopped at the time of the allegations in March 2018 and has not recommenced. On 7 July 2021 the father applied to the Family Proceedings Court for a residence order and a contact order. The case was then transferred to the High Court.

[9] The purpose of this judgment is to set out the court's findings of fact in respect of the alleged sexual assault.

## *Burden and standard of proof*

[10] As the mother brings the allegations, the burden is placed on her to prove them and she must do so on the balance of probabilities. This is, of course, a different standard which is applied in criminal cases when guilt must be proved beyond reasonable doubt.

[11] The court's exercise is a straightforward finding of facts and does not involve the application of the welfare test (see Article 3 of The Children (NI) Order 1995). The application of that test will apply after the determination of the facts when the court is considering the father's application for a residence order and a contact order in light of any findings.

### *The evidence of the text messages*

[12] The criminal offence of harassment is set out in the Protection from Harassment (NI) Order 1997, and involves engaging in a course of conduct causing alarm or distress to another. The father accepted a police caution on 16 August 2021, and by doing so he admitted committing the criminal offence as alleged against him. The surrounding facts relating to the sending of these messages are not a matter of significant dispute.

[13] The nature of the harassment was the sending of text messages to IC. It is not necessary to quote extensively from the text messages. Some of the messages have been preserved. Most of the dates have not been preserved but the time of nearly all the messages has been recorded.

[14] One message sent at 23:23 said "Sry jus me being random lol only u could pull off lookin cute in them jammers lol xxx."

[15] In a series of texts sent after midnight on another occasion the father messaged at 00:57 "Sorry, it's hard to know boundaries with u an what I can say an do xxx" and then later at 01:12 "I know I used to make fun but I don't do that anymore, especially not in front if the rest cuz I'm treatin u more like an adult now, yes I still muck about a bit but that's jus my way of bein close an showin affection 2wards u, I'll let u sleep though it is 18, cya 2moro nanite ly xxx."

[16] Another message at an unstated time said "U didn't need to look so worried when I wanted 2 c u! Lol it's a bad thing Id to sneak u upstairs jus cuz I wanted to give u a hug an kiss lol xxx." This had following an earlier message at 17:58 - "Can u come upstairs a sec nothing bd all gd ☺ xxx." Later in what appeared to be a series of messages, at 00:48 he said "Like I was only appologisin, but u obviously didn't wanna txt back, I dunno what's up with u lately with me, I can't seem 2 win no matter how much effort I make xxx."

[17] A message sent on 18 October 2013 at 09:15 stated "I'm sorry 2 have brought that up its jus kinda stuck with me since then, u know I do love you, thats never changed .. if anything I love you 2 much ... that's y I get hurt easy by us not getting on. My feelins 4 u r mixed & at time that confuses me but that's 4 me 2 deal with. I'm sorry I wasn't making eye contact, that's what u do at times an I was jus doin same but I shouldn't have done." IC was 14½ at the time of this message with the father in his mid-twenties.

[18] On a further occasion on a Friday at 15:31 he stated "I know ur 14. I'm not stupid. I've told u b4 many times that I've thought u r pretty, with u getting an actin more mature my judgement has been clouded at times. Apart from tellin u d truth which I know was wrong thing 2 do. I've done nothin wrong."

[19] The father was interviewed by the police in June 2018 and did admit sending some texts on occasions. The messages were shown to him and he admitted sending some but denied sending others. He stated that at no time was he inappropriate with IC and only thought of her as a niece. He denied sending texts late at night.

[20] When spoken to by the court welfare officer in May 2022 the father said that the first time that he was aware of the concerns about his relationship with IC was when he was interviewed by the police. He said that the communication with his niece was about him supporting her doing her homework, nothing was inappropriate and there was no sexual intent on his part.

[21] In his written statement to the court of 5 August 2022 the father accepted that the mother was aware of the text messages for several years before the marriage ended.

[22] The oral evidence from both the mother and the father was that the father confessed to the mother one evening about his feelings for IC and sending the various text messages. The mother then was able to obtain the messages from her niece. In his oral evidence the father agreed that the messages were inappropriate and that he did have feelings for the child.

[23] The messages are also relevant to another aspect of the case which relates to supervision of contact between the father and FX and I will deal with this later.

[24] The father said that he did not think that the mother really forgave him and his perception was that she continued to hold this against him and was using it as a tool to coerce him, using the word "blackmail" in his evidence.

#### *Consideration of the text message evidence*

[25] On observing and listening to the father I considered that he did not fully regret his conduct with his niece. He was evasive in his answers and this must be seen in the context of his police interview when he lied to police about the messages, and then as late as May 2022 his explanation to the court welfare officer also was a lying account.

[26] I have no real hesitation in finding that the father was engaging in a grooming exercise with a view to sexual exploitation of this girl who was in her early teens. He did acknowledge to this court (but not in May 2022 to the court welfare officer) that his conduct was inappropriate. The only positive aspect to all this is the fact that he

did confess at the time, although it was after a significant period of the grooming of the child. That is evidence of the fact that at least his conscience at that time was operating at a level sufficient to warn him about his conduct. When he was indulging in this messaging he was not restrained in his participation by her age or familial links. On the occasion when sending the text messages referred to at [16] above, the father has acknowledged that there had been a family event at the home and after sending the message to IC, she had left the family gathering and had gone upstairs to see him and, on his evidence, they shared a moment of intimacy by hugging. The mother in her evidence said that at this time she had noticed that IC and the father did appear at times to be overly close in physical terms. This included lounging on a settee with legs intertwined. She was not duly concerned about this at the time.

[27] The relevance of this evidence is that it suggests that the father had an inappropriate sexual interest in a young female family member. He then took steps to engineer a situation of her being separated from adults within the family group so that he could indulge in inappropriate behaviour with her. The hugging of a teenage niece was not platonic in nature and fell well outside the normal boundaries of a caring and loving uncle/niece relationship. His statement to the court welfare officer reflected a reluctance to even now fully acknowledge in 2022 that this is inappropriate conduct. This could suggest that his interest in young girls remained active, notwithstanding his confession back in 2013.

[28] It is also relevant evidence when one moves on to consider the events that are alleged to have occurred in March 2018.

### *Alleged sexual abuse of FX*

[29] The contact regime following the mother's and the father's separation in February 2016 was that FX would go to her paternal grandparents' home on Tuesdays and Wednesdays and then again on Sundays. The Tuesday contact also involved a contact in the mother's home when she was fulfilling her duties as a leader in a youth organisation. The mother said that the paternal grandfather and the father came over, although the father asserted that he was there on his own. With the father working, his contact time was limited during the weekdays. The mother's evidence was that at the time of the separation there was a meeting which involved her parents and the father's parents and it was stipulated that the contact with the father was to be supervised by the paternal grandparents. This was because of the father's involvement with IC. The paternal grandfather gave evidence and denied that he had participated in any such meeting, and that he was not aware of anything about his son and IC until the son was arrested in March 2018 and the son told him.

[30] The mother produced a note which is in her handwriting, is dated 16 February 2016 and signed by her. It states - "I [mother's name] will go to citizens advice to find out what visitors rights [father's Christian name] can have with [FX].

Under no circumstances is [father's Christian name] to be alone with [FX] or bring her near girlfriends." A similar note was also produced of the same date and signed by the father making reference to maintenance payments he would make. He accepts that he signed this document but said that he had no knowledge of the other document signed by the mother or the detail that it sets out.

[31] It is agreed that the last time FX had contact with her father was Wednesday 28 February 2018. On that occasion the mother has stated that when she collected her daughter, FX had urinated and wet her clothes. The paternal grandmother was aware of this. The mother said that FX had basically been toilet-trained from 16 months and this was a rare event.

[32] In relation to the allegations that the father sexually abused his daughter these arose on Friday 2 March 2018 when FX was nearly 3 years old. The mother's evidence was that FX was due to go to her aunt's house for a sleep-over. It was a snowy day and when getting ready to go out to play in the snow and FX uttered words to the effect "I don't like it when daddy hurts my bum." In evidence, the mother said that FX generally referred to her vaginal area as her bum. After playing in the snow FX went to her aunt's house. The mother after reflecting on what had been said rang her sister to ask that she keep an eye on FX.

[33] The next morning when collecting FX the mother noticed an odour around FX and on checking her she noticed that FX's vaginal and anal area were raw and red. The sister confirmed in her evidence that there had been a mal-odour. When asked what had happened FX said that her daddy had hurt her with his finger. Due to her concern the mother contacted the GP out of hours service and attended at hospital where FX was seen by Dr Pinkerton. She diagnosed a mild erythema around the vaginal and anal area which she described as inflamed. A cream was prescribed. Dr Pinkerton asked FX had anyone touched her "down below" and FX replied that her daddy had put his finger inside. FX said that it had hurt her and that she had asked her daddy to stop and that he had not stopped.

[34] After obtaining the medicine, the mother then attended a police station but as it was closed to the public she telephoned the police and officers attended at the mother's home that evening. The mother spoke to the police and the issue of the text messages sent to IC also arose, with IC and her mother also attending at the house.

[35] The mother and FX spent the night of 3/4 March 2018 at FX's aunt's house. The aunt in her evidence said that she had overheard FX speaking to IC saying that "daddy's bum looked like slime."

[36] The mother said that on 4 March 2018 during a normal interaction FX kissed her with her mouth open. When the mother said that "we kiss with our mouths closed" FX responded "Daddy doesn't and he puts his tongue in my mouth and it's yuck" That day when being bathed, the mother said that she asked FX if she could "check her bum" but FX declined saying "daddy hurt me with his finger." The

mother asked if FX asked him to stop and she replied that she did but daddy just laughed. The mother in her evidence said that she then asked FX if she had ever seen daddy's bum and FX replied saying that she had describing her daddy's bum as "grapes, banana and sometimes yoghurt and slime." The aunt was not present in the bathroom but was in an adjacent room at this time and in her evidence she said that she overheard FX saying "banana, grapes and yoghurt" and had heard the exchange when FX was asked if daddy stopped and FX replied that he laughed.

[37] On 5 March 2018 FX attended at the Rowan Centre, a specialist clinic and was seen by Dr Forbes a force medical officer and Dr Livingstone a consultant paediatrician. During the examination the mother was present. FX's pants had a mild yellow staining with a general mal-odour from the genital area. She had a mild erythema around her labia majora and a prominent urethral orifice. No breaks, tears or interruptions were observed to the hymen. No abnormalities were observed to the anal area. Swabs were taken and subsequent analysis revealed nothing of relevance. During the examination of the genital area FX, unprompted, said "Daddy put his fingers there" and when asked was it sore she replied "Yes" and when asked "in where?" she put her hand down and pointed to her pubic area. The mother was present during the examination.

[38] FX then gave two ABE (achieving best evidence) interviews with the police, the first on 7 March 2018 and the second on 13 March 2018. On 7 March 2018 the interview lasted for 49 minutes, with two breaks. Present were a police officer and a registered intermediary, with a social worker outside the room as a second interviewer. FX indicated that she was aware of the difference between the truth and lies. The initial part of the interview did not yield any direct evidence relating to her father and any sexual assault. With the child becoming distressed, there was a break and the mother entered the room. There was a further break when FX wished to go to the toilet. The mother did not ask any questions when in the room. She did not say anything save for a few words to settle the child. The questioning elicited some relevant evidence. I set out some of the questions and answers:

- A. He didn't stop it  
Q. Who didn't stop it?  
A. Daddy
- Q. What did he do?  
Q. Did you tell the doctor that daddy did something to you?  
A. Yes, I told him not to do that to me
- Q. What do you want mummy to tell?  
A. Him not to do it
- A. He kepted doing it to me  
Q. Doing what to you?

- A. He kepted hitting me
- Q. Hitting you where?
- A. In his bedroom
- Q. In his bedroom, where in his bedroom?
- A. On the sofa
- Q. ... what was he doing on the sofa?
- A. He was hitting me, me on it, and it hurted.
- Q. Can you tell me what he hurt you with?
- A. I don't want to
- A. With his finger
- Q. And what did he do with his finger?
- A. He laughed

[39] Before this last series of questions FX was displaying stress and soon after the interview was terminated.

[40] The next interview was conducted on 13 March 2018. The same interview team were involved and this time the mother was present throughout. The interview lasted 28 minutes with one break. At the start of the interview, the police officer was giving a brief introduction, which included her telling FX that:

"part of my job is that I work with boys and girls and any time if any boys and girls ever want to tell me anything about anything that's maybe made them sad or something they didn't like or if anybody had ever hurt them that boys and girls can talk to me in here and then it's my job to try and stop all that ..."

[41] FX then spontaneously, without being asked, said "Daddy hurt my bum." Later there were the following exchanges:

- Q. Can you tell me, so what did daddy do?
- A. He hurt my bum
- Q. ... How did daddy hurt your bum?
- A. His finger
- Q. ... Do you remember whose house were you in whenever daddy hurt your bum?
- A. My mummy's



[42] Following a break when FX left the room with the mother, the questioning resumed, with another apparent spontaneous response from FX:

- Q. I've got lots of paper to draw on  
A. Daddy hurt my bum

The interview was concluded soon after that with little of relevance added.

[43] The father was arrested later that day and interviewed by the police under caution in the presence of his solicitor. During the interview the father co-operated fully by answering all questions put to him. Included in his responses were the following statements:

- FX never saw him naked;
- The last time he saw FX was 28 February 2018, when FX was at his parents' home and he came home from work and they had their evening meal together;
- He hadn't noticed redness or bad smells;
- The only time he would touch her in the private area would be if there was redness and he was applying cream;
- He admitted that there was a sofa in his bedroom and that FX had been there with him alone but not for long;
- He denied putting his finger in FX's vagina or anus;
- He denied putting his tongue in FX's mouth;
- He believed that the mother was "putting her up to that";

In his concluding remarks he said:

"Just that in all honesty I find the whole thing kind of ridiculous because I swear on my life I love my child, I adore her ... I honestly do think [the mother] is you know coercing her because I know [FX] is afraid of her. She has said as much to my parents too ..."

[44] The father was re-interviewed by the police on 30 May 2018 for 12 minutes, again under caution and with a solicitor present. The father confirmed that he would have been present with FX in his bedroom alone and that he did on occasion take her to the toilet alone, stating that FX would often require two people and would insist that another would wash her hands.

[45] The mother and aunt also gave evidence about incidents relating to FX subsequent to the ABE interviews. On 16 March 2018 FX was sleeping at the aunt's house and on three occasions wet herself by urinating.

[46] On 18 March 2018 FX had a nightmare and spoke to the mother about her daddy kissing her with his tongue in her mouth and how her daddy made her pull his trousers down. The following morning when being bathed FX again spoke about it with the mother recording what FX said on her telephone. There was a reference to daddy pulling FX's trousers up quickly when the paternal grandfather came into the room.

[47] The mother has also spoken in general terms about incidents of enuresis and encopresis during this period.

[48] A further incident is reported when FX started school (September 2019) and for her first homework when drawing her family she drew the father with a penis saying that that "is where the slime and yoghurt comes out."

[49] FX currently refers to her father as "bad dad" and in March 2022 refused to accept his birthday presents (and those of her paternal grandparents) explaining to her mother - "why would I accept presents from someone who has hurt me?"

[50] The criminal trial did not proceed after His Honour Judge Lynch KC rejected a prosecution application to admit the ABE interviews as examination in chief and to admit the evidence of the mother and the GP when they recounted what FX told them. In his judgment, the judge noted that there had been breaches of the guidance for ABE interviews when the mother had been present for part of the first interview and for the entirety of the second interview. The mother was a significant witness in the case and her presence was described by the judge as a gross breach of the guidance, however the breaches alone were not sufficient to exclude the evidence. His Honour Judge Lynch KC referred to the prosecutorial delay in the case and, in particular, the 17 months between the final interview of the defendant in May 2018 and the defendant being committed for trial in October 2019. That delay had not been properly explained. There then followed the Covid-19 pandemic delay. Given the age of FX there could have been no meaningful cross-examination of her, and in particular a jury could never be sure whether she would have had a memory of the events at the time of the scheduled trial date in June 2021 when she was six years and it was over three years from the incident.

[51] The hearsay evidence was also considered to be inadmissible due to vagueness, lack of corroboration, and a lack of opportunity to effectively challenge it.

[52] Two potential and probably inter-related events were also occurring at the end of 2017 and into 2018. The mother had met the man who is now her husband. The relationship started in the autumn of 2017 and FX had met him, although it is

uncertain as to what relationship FX had with him at this stage. He was not living in the same household at that time. He became engaged with the mother in March 2019 and they married in 2020. At that stage the evidence is that he came to live with the mother and FX.

[53] The ability of the mother to re-marry came about after divorce proceedings. There appears to have been tension between the mother and the father in the early months of 2018. There had been a general agreement that the parties would divorce because of the irretrievable breakdown of the marriage evidenced by two years separation with the other party consenting. The mother wished the father to commence proceedings as the petitioner but he had declined to do so. His motive is unclear but his evidence was that he was not in any particular hurry. This was important to the mother as she had apparent difficulty with her church community who, notwithstanding the conduct of the father within the marriage, were indicating that if the mother instigated divorce proceedings she would have to give up her leadership role in one of the youth organisations. The refusal of the father to initiate the proceedings forced the hand of the mother who on petitioning for divorce had to resign as a leader. This in turn appears to have resulted in the mother and her wider family leaving the church with which they had a particularly strong connection.

#### *Consideration of the sexual abuse evidence*

[54] The words uttered by FX have been remembered and in some instances recorded by the various parties who heard them. Obviously, the mother and her sister could not be regarded as independent, but having heard and seen both give evidence I am satisfied that they are both honest and accurate witnesses. There would have been turmoil within the household at the time FX made the disclosures and it is perfectly understandable that the full dialogue or the sequencing was not remembered and then re-told in exact detail. For similar reasons it would explain why when matters had been reported to the police and then recorded into police statements that some words were overlooked and there were discrepancies between the statements given to police and what is remembered now. That in no way undermines the overall accuracy of the evidence from both the mother and the aunt.

[55] The child made disclosures in similar terms to three doctors, a police officer and a social worker and her words were written down by the doctors and recorded by the police so there is no doubt about the accuracy of what had been said by FX to them.

[56] The key question for consideration is whether or not FX was giving an accurate report of what she said happened to her. The court is mindful of the age of the child at the time. Had these events occurred then it is probable that they occurred in a period close to the date of the first disclosure on 2 March 2018. A court must look very carefully at statements made by a child of that age, as children of three years can have vivid imaginations, have short attention spans, and have limited cognitive ability to process what they see and what happens to them.

[57] It appears that FX was brought up by her mother within a reasonably strict religious household and no doubt received appropriate teaching about what is right and what is wrong and about the need to tell the truth. The exchange with the police during the first ABE interview when the police told the story of the boy kicking a ball and breaking a window and then telling his mother that he did not break the window and FX then telling the police that that was a lie would indicate that those lessons had been absorbed by FX.

[58] There are some discrepancies in what FX has said, particularly when she refers to it happening in “my mummy’s [house].” There is also an element of vagueness. Although I have quoted elements of what FX said to the police in the ABE interviews (see [38]–[42] above) I have not considered these extracts in isolation. In addition to these rather specific statements, FX also said a lot more to the police much of which was vague and tangential to the topic that was being probed by the police.

[59] I have considered the background circumstances relating to the breakdown of the marriage followed by FX living alone with her mother with contact with her father. FX was born in Spring 2015 but only lived with both parents for less than a year. The parents separated in February 2016. Contact appears to have been reasonably well managed after that with FX enjoying good contact on a regular basis of three times a week when in her father’s and paternal grandparent’s company.

[60] One issue arose during the evidence and that related to whether or not there was a requirement that the father’s contact with FX needed to be supervised by his parents. It was the evidence of the mother that it was, but the father said it was not. The mother referred to a meeting with the paternal grandparents at which it was agreed. The paternal grandfather gave evidence and said that he was not at any such meeting, and in fact he knew nothing about the IC matter until March 2018. I do not think much turns on this dispute. I consider that the paternal grandfather is a genuine and honest witness, and I would have expected him to have remembered the IC matter had he been told about it, even in the vaguest of terms.

[61] The mother’s firm view is that supervision was a requirement of contact but accepted that for a period on Tuesdays there was a period of unsupervised contact in her home. I have referred to her note of 16 February 2016 which states that contact was to be supervised, and in a M4 form bearing the date 3 March 2018 (see [62] below) she stated – “The respondent [the father] has supervised contact ...” I believe that the mother did genuinely believe that contact was to be supervised but in a loose sort of way. I consider that she was somewhat naïve concerning the father’s conduct with IC and whilst motivated with the best of intentions to preserve her marriage, failed to fully appreciate the nature of the grooming and the actual motivation of her husband. She wanted some sort of supervision but was mistaken about what was actually happening on the ground.

[62] There was the potential for tension from the autumn of 2017. The mother was seeing another man, although he was not living with her and FX. The father was aware of this. Moving into 2018 there was a growing frustration on the mother's part that the father was not going to instigate divorce proceedings and that she would have to do so. The court does not know the exact dates relating to the divorce petition. It has seen a form M4 (statement as to arrangements for children) which is signed by the mother and bears the date of 2 March 2018. The mother in her evidence stated that she had signed that document earlier when in her solicitor's office and the hand-written date was not her writing. I accept this evidence and in all probability the date was completed by the solicitor on the 2 March 2018 when the petition and related documents were being prepared for lodging with the court. The fact that the M4 bears the date when FX made her disclosure is most likely a coincidence.

[63] The father's case is that the mother has "put her daughter up" to making these statements. The father has referred to the bitterness over the business with IC and the mother using this to 'blackmail' him, to the arrival of the new boyfriend and his suggestions that he might want some over-night contact, and then to the mother's frustration with his refusal to initiate the divorce proceedings. He suggests that this is sufficient motivation.

[64] I have considered this case carefully. It must always be recognised that it is not for the father to disprove the allegations and it is not for him to come up with reasons why his daughter may be saying these things about him. His case is simply that he did not commit the acts that are alleged against him. He is putting forward excuses and reasons why his daughter is wrong but it is largely speculation on his part.

[65] I recognise that the three factors the father mentions did exist and will have had an impact on the mother's thinking. I also accept that there is certain evidence that would suggest that the mother, if not coaching the child, was pressing the child to reveal information. Having seen and heard the mother I do not consider that she was being in any way malevolent in her approach. Once the initial disclosure was made, and I accept that this was spontaneous and without prompting from the mother, her questioning of FX may well have involved what lawyers would describe as leading questions. The mother was obviously acutely concerned for her child's welfare and would have been motivated by the best of intentions. She had no training about the use of 'open questions' (questions that leave the answer open for the child when responding) and in what must have been a period of panic and high emotion the use of leading questions would be a natural approach by any parent – When did daddy touch you on the bum? Did it hurt when daddy put his finger in your bum? and so on. As the child was not particularly specific and forthcoming, one can also see why leading questions could well have been resorted to.

[66] In addition it is clear that on two occasions during the second ABE interview, the child, after a break when she was out of the room with her mother,

spontaneously without questioning made specific statements about her father (see [40]–[43] above). I accept that this could well have been in response to either a specific request by the mother or, more probably, a conversation with the mother with the mother explaining to her that she had to tell the police about what her father did to her.

[67] During all but one of the significant disclosures and statements to third parties the mother was present. The other one was when FX was talking to IC saying that her daddy’s bum looked like slime.

[68] I reject the suggestion that the mother has deliberately coached the child to invent these accusations against the father. The number and nature of the disclosures made over a period of time to many different people, and the consistent thread that runs through these disclosures, would make it unlikely that the mother has, to adopt the words of the father, put FX up to making up these allegations.

[69] I have considered that the child may have invented these allegations in an effort to please her mother. I reject this possibility for a number of reasons. First, the age of the child is such that it could be difficult for the child to first invent and then maintain these stories. Second, although tense, the relationship between the parents was reasonably stable with good contact arrangements with which the mother was co-operating. It is unlikely that there would be an atmosphere within the home for FX to feel the need to make up stories against a father with whom she had a close relationship, to please her mother. Third, the onset of enuresis and encopresis supplemented by nightmares during this period would suggest something more than FX inventing some stories about her father.

[70] There is absolutely no suggestion in any form that the child has been exposed to pornography either in her mother’s home or her parental grandparents’ home. The father has denied ever being naked in FX’s presence, and there is no suggestion that any other male would have been naked in her presence. She was able to give a reasonably accurate description of the adult male genitalia to her mother in March 2018 and was able to draw her father with a penis in September 2019 for class-work when in P1. Her reference to slime to both IC and her mother may have been a reference to urine (notwithstanding the fact that the father denies such a possibility). I find it difficult to consider any rational explanation for the reference to yoghurt and its obvious connotations with ejaculate, other than FX recounting what she had observed.

[71] One final factor for consideration is the father’s conduct in respect of IC. My conclusions about this evidence are set out above at paragraph [26]–[28] (above). The use of what the criminal law describes as ‘bad character evidence’ can assist in the assessment of a criminal allegation. It may, for example in a case involving circumstantial evidence, provide an explanation for what appeared to be incomprehensible explanations offered by an accused. It could also be used to rebut an innocent explanation offered by an accused to the allegations against the accused.

The criminal law is also very alert to bad character evidence being treated in an unfair way invoking prejudice against an accused. It can only be used as background evidence to supplement a case against an accused which itself must be based on credible evidence of the commission of the offence.

[72] A similar approach is adopted in the consideration of bad character evidence in civil proceedings. In *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534 the House of Lords indicated that similar fact bad character evidence is admissible if it was potentially probative of an issue in the action, allowing judges to use their discretion to exclude otherwise admissible evidence or limit cross examination. The Court of Appeal in *Re R-L* [2020] EWCA Civ 1088 said that *O'Brien* applied in family proceedings. *Phipson on Evidence* (20th edition) at [22-07] suggests that judges are required to balance “probative value to the promoting party against oppression and unfairness to the other side, rather than probative value against prejudicial effect.”

[73] I consider that this is properly admissible evidence. No issue was taken on this point. It shows an interest on the part of the father in young female members of his wider family. It also shows an ability to sustain this interest over a period of time and to pursue it in private even to the extent of intimate hugging. It is evidence that he was undertaking what could be described as grooming, in other words he was building a relationship, trust and emotional connection with IC so that he could manipulate and exploit her. There is evidence to suggest that at some stage his conscience acted as a barrier to his conduct, but he did not undertake any therapeutic intervention to address his inappropriate interest in a young female family member, and his subsequent statements range from denial to attempted justification.

[74] I do not consider that it is unfair to the father to consider this evidence. He has been given an opportunity to explain his conduct to the court welfare officer and in his evidence to the court.

[75] The relevance of the evidence is that it not only shows a propensity to act in a risk-taking way in private with a female family member but also assists the mother in rebutting the father’s suggestion that he is the victim of what are either false allegations or innocent, but grossly misinterpreted, actions on his part.

### ***Conclusion***

[76] In all the circumstances, for the reasons that I have set out above, I am satisfied that more likely than not the father sexually touched his daughter FX with his finger to the vaginal area for the purposes of his sexual gratification.

[77] I will hear the parties about the future direction of this case and will deal with the question of costs when it has concluded.