

Abuse upon abuse?

Allowing alleged abusers to cross examine their victims is a stain on the reputation of the family justice system. **Jonathan Herring** puts the case for reform

IN BRIEF

- ▶ Mr Justice Hayden expresses strong judicial disapproval that the law permits an alleged abuser to cross examine his victim in family cases.
- ▶ In fact finding hearings judge must rely on proven facts rather than suspicions.

Imagine suffering years of abuse. You finally escape and become involved in a dispute with your abuser over the children. You are not provided legal representation and must represent yourself. Even worse, you must face cross examination at the hands of the very person who has sought to control you for the past years. It sounds like something more from a feminist dystopia but occurs in the English Family Courts today.

The facts of *Re A*

Re A (A Minor (Fact Finding: Unrepresented Party)) [2017] EWHC 1195 (fam), [2017] All ER (D) 49 (Jun) concerned a couple married in Pakistan. The mother arrived in the UK with their child (A) in 2014, but did not return to her husband as agreed. A dispute erupted with the father demanding that A be returned to Pakistan. The mother opposed this on the basis of allegations of violence. Extensive litigation followed.

It was agreed that for the issues to be resolved there needed to be a fact finding hearing to determine whether or not the allegations of violence were true. Relying on *re X (Children)(no 3)* [2015] EWHC 36 Hayden J made a number of key points about fact hearings.

- ▶ The person making an allegation has a burden of proof.
- ▶ The standard of proof is the balance of probabilities.
- ▶ Findings of fact must be based proved facts and the court cannot rely on suspicions or speculation.
- ▶ The court must take into account all the evidence, with the evidence of parents being of the 'upmost importance'.

Hayden J acknowledged that it is common for witnesses in family disputes to tell lies. But 'the fact that someone has lied about something does not prove the reverse of that lie. The lie must be viewed in the context of a wider canvas to determine what inference can legitimately be drawn from it'.



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The facts found in this case

Applying this approach to the case Hayden J found that the husband was 'short tempered, domineering and cold'. He frequently slapped and pushed his wife and fractured her foot. He eroded the mother's 'confidence and self-esteem to such a degree that she found life intolerable for herself and her child'.

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Cross examination

The real interest in this case lies not in those fact findings, but in the way the evidence was provided. Hayden J had to allow the father to cross examine the mother. He put such protections in place as were possible: the examination was by video link and the mother was allowed to face away from the screen so she need not see F.

Hayden J was clearly unhappy at the

situation. He explained that the mother was faced with an 'invidious choice'. She either had to let the husband win the case or submit herself to cross-examination from a man found to have been abusive and controlling towards her. He accepted that the impact of the cross-examination was significant. The experience left her exhausted and 'extremely distressed'.

He concluded: 'It is a stain on the reputation of our Family Justice system that a Judge can still not prevent a victim being cross examined by an alleged perpetrator. ... [T]he process is inherently and profoundly unfair. I would go further it is, in itself, abusive. For my part, I am simply not prepared to hear a case in this way again. I cannot regard it as consistent with my judicial oath and my responsibility to ensure fairness between the parties.'(para [60]).

The cross-examination of an alleged victim by their perpetrator is prohibited by statute but only in higher courts. There has been persistent criticism of this practice from the judiciary (eg *Munby P in Q v Q* [2014] EWFC 31); NGOs, eg Women's Aid, *Nineteen Child Homicides*, 2016) and academics, eg S Choudhry and J Herring, 'A human right to legal aid' (2017) 38 *Journal of Social Welfare and Family Law* 152. Hayden J concludes his damning assessment by saying that the case for permitting cross examination by alleged abusers is 'redundant of any coherent contrary argument'.

Reform

At last reform is on the horizon. Clause 31 of the Prisoners and Courts Bill provided for a prohibition of cross-examination of a victim by an alleged perpetrator and for a legal representative paid for from central funds if necessary to conduct the examination. That Bill was not passed before the (first?) 2017 election, but included within the June Queen's speech was a promise of a Courts Bill, which will 'end direct cross examination of domestic violence victims by their alleged perpetrators in the family courts'.

There is now a growing acceptance among experts on domestic abuse, that at its heart it is about coercive control. It is about one partner using a wide range of meanings to control, manipulate and exploit their partner. Indeed, in this case it was found that the father used violence and threats to dominate the mother. Allowing such an abuser to conduct in a formal public setting a cross examination of his victim is to allow him to perpetuate the abuse. The sooner we have a new law prohibiting such cross examination the better.

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