

**What evidence counts and will sway the court over
the necessity for a fact-finding hearing given the
ambiguities of *K v K* (2022) and Practice Direction
12J?**

**Jason Green
Harcourt Chambers**

Starting Point

- PF12J 2A

In this Practice Direction, “domestic abuse” has the same meaning as in the 2021 Act. Sections 1 and 2 of the 2021 Act provide that:

“Definition of “domestic abuse”

1.- (1) This section defines “domestic abuse” for the purposes of this Act.

(2) Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if—

- (a) A and B are each aged 16 or over and are personally connected to each other, and
- (b) the behaviour is abusive.

(3) Behaviour is “abusive” if it consists of any of the following—

- (a) physical or sexual abuse;
- (b) violent or threatening behaviour;
- (c) controlling or coercive behaviour;
- (d) economic abuse (see subsection (4));
- (e) psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

Starting point

- 4) “Economic abuse” means any behaviour that has a substantial adverse effect on B’s ability to—
- (a) acquire, use or maintain money or other property, or
 - (b) obtain goods or services.
- (5) For the purposes of this Act A’s behaviour may be behaviour “towards” B despite the fact that it consists of conduct directed at another person (for example, B’s child).
- (6) References in this Act to being abusive towards another person are to be read in accordance with this section.

Starting point

- PD 12J Paragraph 6

In all cases it is for the court to decide whether a child arrangements order accords with Section 1(1) of the Children Act 1989; any proposed child arrangements order, whether to be made by agreement between the parties or otherwise must be carefully scrutinised by the court accordingly. The court must not make a child arrangements order by consent or give permission for an application for a child arrangements order to be withdrawn, unless the parties are present in court, all initial safeguarding checks have been obtained by the court, and an officer of Cafcass or CAFCASS Cymru has spoken to the parties separately, except where it is satisfied that there is no risk of harm to the child and/or the other parent in so doing.

Starting point

- PD 12J Paragraph 9

Where any information provided to the court before the FHDRA or other first hearing (whether as a result of initial safeguarding enquiries by Cafcass or CAFCASS Cymru or on form C1A or otherwise) indicates that there are issues of domestic abuse which may be relevant to the court's determination, the court must ensure that the issues are addressed at the hearing, and that the parties are not expected to engage in conciliation or other forms of dispute resolution which are not suitable and/or safe.

Starting point

PD12 J paragraph 16

The court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic abuse –

- (a) in order to provide a factual basis for any welfare report or for assessment of the factors set out in paragraphs 36 and 37 below;
- (b) in order to provide a basis for an accurate assessment of risk;
- (c) before it can consider any final welfare-based order(s) in relation to child arrangements; or
- (d) before it considers the need for a domestic abuse-related Activity (such as a Domestic Violence Perpetrator Programme (DVPP)).

PD 12J paragraph 17

In determining whether it is necessary to conduct a fact-finding hearing, the court should consider –

- (a) the views of the parties and of Cafcass or CAFCASS Cymru;
- (b) whether there are admissions by a party which provide a sufficient factual basis on which to proceed;
- (c) if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;
- (d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;
- (e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact-finding hearing;
- (f) the nature of the evidence required to resolve disputed allegations;
- (g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and
- (h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.

Case Law

- *A A v NA (Appeal: Fact Finding)* [2010] EWHC 1282 (Fam)
- *F v M* [2021] EWFC 4 (Fam)
- *Re H-N* [2021] EWCA Civ 448
- *K v K* [2022] EWCA Civ 468

AA v NA

“Thus a fact-finding hearing should only be ordered if the court considering setting one up can discern a real purpose for such a hearing. If the inquiry would not be purposeful then one should not be ordered. The finite resources of the court do not exist simply to provide a free-standing medium for one party to obtain, for no reason other than vindication, findings of matrimonial misconduct against the other. There is a parallel with allegations of conduct in ancillary relief proceedings. Even though there is a statutory imperative to take into account conduct where it would be inequitable to disregard it, the court will strike out allegations of conduct where it can be satisfied that even if proved it would make no material difference to the result...”

F v M

- Hayden J - Allegations of coercive and controlling behaviour
- Reliance on similar fact evidence
- Limitations of Scott Schedules

Re H-N

8. Not every case requires a fact-finding hearing even where domestic abuse is alleged. As we emphasise later, it is of critical importance to identify at an early stage the real issue in the case in particular with regard to the welfare of the child before a court is able to assess if a fact-finding hearing is necessary and if so, what form it should take.

139. Domestic abuse is often rightly described as pernicious. In recent years, the greatly improved understanding both of the various forms of abuse, and also of the devastating impact it has upon the victims and any children of the family, described in the main section of this judgment, have been most significant and positive developments. The modern approach and understanding is reflected in the General principles section of PD 12J, para 4. As discussed at paras 36—41 above that does not, however, mean that in every case where there is an allegation of, even very serious, domestic abuse it will be either appropriate or necessary for there to be a finding of fact hearing, so much is clear from the detailed guidance set out in paras 16—20 of PD 12J and, in particular, at para 17: (g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and (h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case

37. [Suggesting the correct approach as follows:]

(i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD 12J, para 5).

(ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD 12J, para 16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children

Re H-N ctd

(iii) Careful consideration must be given to PD 12J, para 17 as to whether it is ‘necessary’ to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.

(iv) Under PD 12J, para 17(h) the court has to consider whether a separate fact-finding hearing is ‘necessary’ and proportionate. The court and the parties should have in mind as part of its analysis both the overriding objective and the President’s Guidance as set out in *The Road Ahead*

K v K

- [6] ‘First, it was unfortunate that the parties in this case did not take advantage of the MIAM. Had they done so, the issues between the father and mother that concerned the logistics of the father's contact might have been speedily resolved before the inevitable trauma caused to the family by the fact-finding process. The mother had agreed to unsupervised contact and did not, at that stage, see the alleged rape or generalised allegations of controlling behaviour, bullying and physical abuse of the children as central to the resolution of the issues between them.
- [7] Secondly, the FHDRA is, as its name suggests, primarily an opportunity for judicially led dispute resolution. Had the mother confirmed her C1A at the hearing to the effect that she did not object to contact, the logistics might have been sorted out by agreement. This was a possibility that should have been explored.
- [8] Thirdly, it is important that a judge considering ordering a fact-finding hearing identifies "at an early stage the real issue in the case in particular with regard to the welfare of the child" (see [8] and [139] in *Re H-N*). As [14] of FPR PD12J provides, "[t]he court must ascertain at the earliest opportunity ... whether domestic abuse is raised as an issue which is likely to be relevant to any decision of the court relating to the welfare of the child". [17(g)] of FPR PD12J is to the same effect. Fact-finding is only needed if the alleged abuse is likely to be relevant to what the court is being asked to decide relating to the children's welfare.’

K v K ctd

- [43] ‘In the present case, the judge commenced the FHDRA by referring to Cafcass's alleged recommendation for a fact-finding hearing. In fact, as has already been explained, Cafcass made no such recommendation. The Cafcass officer simply suggested that the court should consider whether such a fact-finding hearing was required. The issues concerning welfare were neither identified nor analysed at the FHDRA. Most significantly, at no stage did the court consider how such facts as might be found were relevant either to the welfare of the children or the issues that the court was being asked to resolve. We would also observe that it was not even clear at the FHDRA what factual allegations were to be litigated...
- [44]The judge's decision to hold a fact-finding hearing was therefore, in our judgment, at least premature. Rather than making that decision at the FHDRA, the court should have (a) identified the issues between the parents as to the children's welfare, and (b) given the mother time to decide, with the benefit of legal advice, what factual findings she wanted to contend required to be decided by the court, because they were "likely to be relevant to any decision of the court relating to the welfare of the child", always bearing closely in mind that she was not seeking to prevent contact between the children and their father.’

K v K ctd

- [65] ‘A fact-finding hearing is not free-standing litigation. It always takes place within proceedings to protect a child from abuse or regarding the child's future welfare. It is not to be allowed to become an opportunity for the parties to air their grievances. Nor is it a chance for parents to seek the court's validation of their perception of what went wrong in their relationship. If fact-finding is to be justified in the first place or continued thereafter, the court must be able to identify how any alleged abusive behaviour is, or may be, relevant to the determination of the issues between the parties as to the future arrangements for the children.
- [66] At the risk of repeating what has been said at [37] in *Re H-N* and at [41] above, the main things that the court should consider in deciding whether to order a fact-finding hearing are: (a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of the child arrangements order, (b) that the purpose of fact-finding is to allow assessment of the risk to the child and the impact of any abuse on the child, (c) whether fact-finding is necessary or whether other evidence suffices, and (d) whether fact-finding is proportionate.
- [67] It seems that a misunderstanding of the court's role has developed. There is a perception that the Court of Appeal has somehow made it a requirement that in every case, in which allegations of domestic abuse are made, it is incumbent upon the court to undertake fact-finding, involving a detailed analysis of each specific allegation made. That is not the case. As *Re H-N* explained and we reiterate here, the duty on the court is limited to determining only those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, in what terms’

At the FHDRA

- 'essential purpose is as an opportunity for judicially led dispute resolution' (*Re H-N*)
- Allegations are raised in the C1A and C100 form.
- Safeguarding to be completed by Cafcass before the FHDRA
- Has a MIAM taken place? (See *K v K* and President's Guidance on Fact Finding Hearings and Domestic Abuse in Private Law Children Proceedings Guidance for Judges and Magistrate May 2022)
- What exactly is alleged in terms of domestic abuse and by whom? Consider the definitions at FPR PD 12J [2A] and [3] in addition to PD 12J [14].
- Has a Form C1A been completed? Is there a response?
- Collectively, does the information already before the court (C100, C1A and any safeguarding report) contain sufficient detail to avoid the necessity of directing further evidence/documentation to determine the issue?
- If not, what further evidence is required and how should it be obtained?

At the FHDRA

President's Guidance for Judges/Magistrates:

- If further evidence/documentation is required to determine the issue, what is necessary in the fact specific circumstances of the case? The judgment in *Re H-N* [2021] EWCA Civ 448 (paras 41- 49) cautioned against allowing a Scott Schedule to distort the fact-finding process (by becoming the sole focus of a hearing), but the Court of Appeal did not rule out the use of a schedule as a structure to assist in analysing specific allegations.
- In determining what further evidence/documentation is needed, the nature of the allegations will be important. Allegations that can be clearly defined (such as specific incidents of physical abuse) may be suitable for reduction to a schedule. Other allegations that require the court to take a broad overview and look at patterns of behaviour (such as coercive and controlling behaviour) are likely to require a statement. A hybrid of the two, dividing types of abuse into clusters to provide an overview akin to a threshold document in public law proceedings might be appropriate. However, do not consider only the nature of the allegations, but also practicality and expediency bearing in mind the parties before you. Require a like for like document in response from the alleged perpetrator.
- Ensure that you obtain the essential information in respect of any allegation at an early stage. What, when, where? What was the effect on the child and the parent? Were there witnesses? What other evidence might be available? Is the behaviour complained of because of the breakdown of the relationship rather than a/the cause of the breakdown?

Is a fact-finding hearing required?

President's Guidance (paragraph 12)

12. When determining whether to order a fact-finding hearing, consider:

- a. the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of a child arrangements order;
- b. that the purpose of a fact finding is to allow assessment of the future risk to the child and the impact of any abuse on the child;
- c. whether fact-finding is necessary or whether other evidence suffices; and
- d. whether fact-finding is proportionate.

The fundamentals are relevance, purpose, and proportionality.

Practical suggestions

- Identify the behaviour
 - Definitions in PD12J
 - Cafcass 'Assessment of Coercive Control' toolkit
 - CPS Guidance on controlling and coercive behaviour.
- Evidence
 - DV agencies
 - GP
 - medical professionals, social work, police involvement.
- **Demonstration of relevance of the behaviour**

Practical suggestions

Consider guidance in *Re H-N* (para 31):

‘It follows that the harm to a child in an abusive household is not limited to cases of actual violence to the child or to the parent. A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:

- i) Is directed against, or witnessed by, the child;
- ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;
- iii) Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;
- iv) Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men’