

Fact-Findings

In the light of recent cases, how do you evidence the necessity for a fact-finding hearing and what evidence will sway the Court's decision?

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Points to be addressed:

1. The starting point, PD12J and PD12B;
2. Case Law;
3. Practical issues;
4. Practical tips in evidencing the necessity of a fact-finding hearing; and
5. Case Studies.

The Question to be Answered:

How do you evidence the necessity for a fact-finding hearing and what evidence will sway the Court's decision?

The starting point

- Allegations are raised in the C1A and C100 form.
- Safeguarding to be completed by Cafcass before the FHDRA
- **PD12J, para 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make a child arrangements order by consent or give permission for an application for a child arrangements order to be withdrawn, unless the parties are present **in court, all initial safeguarding checks have been obtained by the court, and an officer of Cafcass or CAFCASS Cymru** has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.’

The starting point – PD12J

- **PD12J, para 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.

- Problem, safeguarding not complete resulting in an adjournment.
- Another problem, safeguarding raises issues / allegations not apparent in the C100 / C1A (often can occur, where respondents do not make a counter application / file any evidence before the FHDRA)

When should a fact-finding be considered?

PRACTICE DIRECTION 12B – CHILD ARRANGEMENTS PROGRAMME

13.1:

Where an application is made for a child arrangements order (but not necessarily for specific issue or prohibited steps orders), before the FHDRA (see paragraph 14 below) Cafcass / CAFCASS Cymru shall identify any safety issues by the steps outlined below.

14.13

The FHDRA will be conducted in the most appropriate way in the interests of the child. In particular the court shall consider the following matters –

Safeguarding, in this respect –

(b) The nature and extent of any factual issues and whether a fact-finding hearing is needed to determine allegations which are not accepted, and whose resolution is likely to affect the decision of the court.

(c) Risk identification followed by active case management including risk assessment, and compliance with the Practice Direction 12J.

Interplay between PD 12B and 12J

- **PD12B** sets out the requirements for a safeguarding letter and what it should contain.
- **PD12J** is the practice direction to consider the necessity of the fact-finding hearing.

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.

Problems with para 17 in practice

- It should be a guarantee that at the FHDRA we have the safeguarding letter;
- There is no guarantee, nor court directions to ensure that PD12J, para 17 b, c, d can be assessed where there is no initial evidence / response to the allegations.

How do you evidence the necessity?

B-B, Re (Domestic Abuse: Fact-Finding) (Rev1)
[2022] EWHC 108 (Fam) (20 January 2022):,,
para 6:

‘in abusive relationship is invariably a complex one in which the abused partner often becomes caught up in the whorl of abuse, losing objective sense of what was/is acceptable and unacceptable in a relationship. Like many abused partners, the mother in this case became immunised to the emotional volatility of the damaging relationship which she saw as normal and acceptable; like many abused partners, she clung to what she knew’

Practical Points in respect of evidencing necessity:

- By the time you are at a FHDRA, the only meaningful pieces of evidence you are likely to have is: the C100, the C1A from the applicant and the safeguarding letter (sometimes only available at the day of the hearing).
- As an applicant, you may be in a position at that hearing to advance the necessity of a fact-finding hearing, but as a respondent you may not.
- A common practice seems to be, to adjourn the FHDRA, to enable the party raising allegations to file evidence in the form of a witness statement.

Re K [2022] EWCA Civ 468 (08 April 2022)

The Court of Appeal commented in respect of the FHDRA:

'The basic facts are that the father and mother married in 2005 and separated in August 2017. They have three children: a girl (A) born on 31 May 2009 (aged 12), and twins (both now 9) born on 29 March 2013 (a boy, B, and a girl, C). The father had regular unsupervised contact with the children for some time before the logistical arrangements for that contact led to disagreements between the parents. In early 2018, A refused to see her father, but the twins continued to do so. In December 2019, the father issued his C100 application complaining of parental alienation and seeking to formalise the weekends and holidays at which he could see the children. He used the urgency of the situation as Christmas approached to claim exemption from a Mediation Information and Assessment Meeting (MIAM). There followed a C1A form (the C1A) filed by the mother on 12 February 2020 and subsequently a safeguarding letter from Cafcass produced just before the FHDRA (First Hearing and Dispute Resolution Appointment) that took place before the judge on 26 February 2020. The C1A was completed by the mother's then solicitor on her behalf and made a number of relatively minor allegations against the father, but not the main ones of controlling behaviour and rape with which the case is now concerned. The mother's C1A did not object to the father spending unsupervised time with the children. The safeguarding letter raised the alleged rape as an issue and advised the court to consider a fact-finding hearing.'

Continuation ... Comments in the judgment:

'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.

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.

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.'

Further comments from the Court of Appeal about the FHDRA

'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. Ms Lee, as we have pointed out, expressly reserved her position on the allegation of rape and, sensibly suggested that the court should await receipt of disclosure from the police and social services before deciding to hold any fact-finding process at all.

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.'**

- The Court of Appeal made numerous references also to mediation being embarked upon before the FHDRA (para 37 – 40)

Embarking upon a fact-finding hearing

- Paragraphs 65 - 68:

‘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.

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.

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’

Some thoughts / hurdles

- Cafcass often invite the court to ‘consider a fact-finding hearing’, rarely do they state there ‘must be a fact-finding hearing’
- The reason for this, is that it is the courts duty to assess the initial evidence, the impact upon welfare arrangements and whether a fact-finding is necessary.
- Makes sense, for judges to direct evidence, perhaps limited to start off with in order to ascertain the question of necessity.
- Can be difficult, when before Lay Justices or District Judges with various cases in their list.

Solutions?

Practical Points – how to evidence the *necessity* of a fact-finding hearing?

- 1. Identify the behaviour / actions:** Online, there is the Cafcass' [‘Assessment of Coercive Control’](#) toolkit and the CPS's [Guidance](#) on controlling and coercive behaviour. As lawyers, we need to have a thorough understanding of the client and their experiences. They may not identify certain actions as coercive controlling / abusive.
- 2. Evidence what you have identified:** Has there been involvement with DV agencies, GP, medical professionals, social work, or police involvement. Flag up in the C100. Permission is not granted to file statements with the C100, but sometimes there are appendixes attached akin to a C100. Remember, C100 has to be signed off by a statement of truth (Section 16 of the C100).
- 3. Position Statements:** Not statements of fact. Limited to 3-pages. Address the fact-finding process, + why the allegations are directly relevant for interim / long term contact arrangements? Could there be a composite final hearing? What are the allegations? Set them out in a table (cross referring to the evidence) / chronology.
- 4. Demonstrate the relevance of the allegations:** What is the causal link between the allegations and the position of the party making them? How will this impact the courts ability to make welfare decision? Outline why the facts you assert justify a fact-finding being considered?

Practical points continued....

- Do the allegations raised, go directly towards the guidance in PD12J and 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;

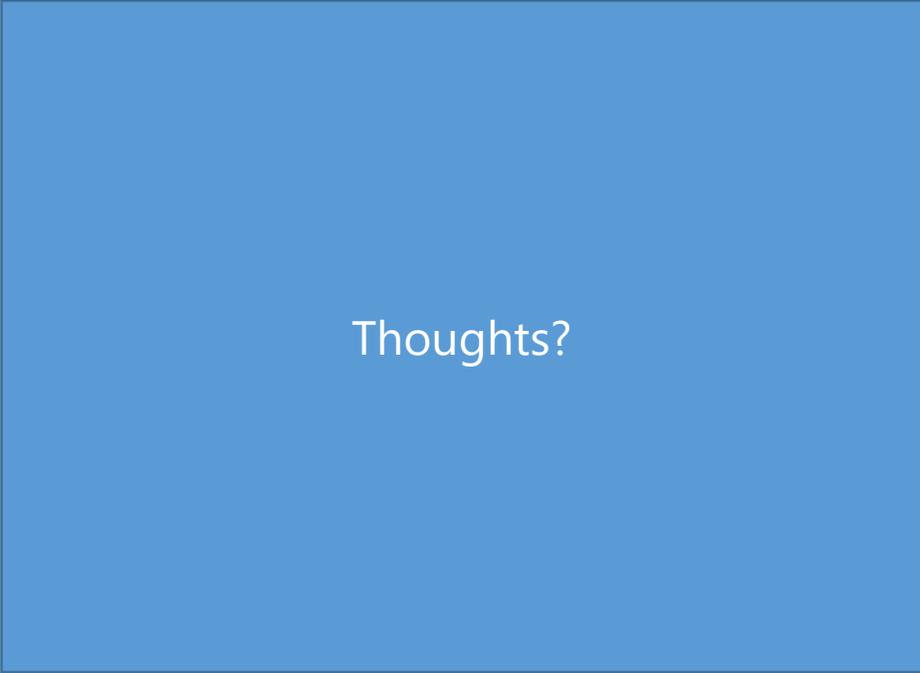
ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;

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’

Case Study - 1

- M and F married for 14 years.
- Two children, one aged 18 months and the second child 11 years old.
- Relationship ended 12 months ago. M and F remained living together for 10 months before M obtained an occupation order 2-months ago and F has been staying elsewhere since.
- M raises financial control (F had all her bank cards throughout the marriage and her salary was paid into his account) + domestic abuse (physical and emotional). The last incident of physical abuse was 10 months ago, resulting in M obtaining a black eye.
- Until F left the home (2 months ago) he regularly cared for the children whilst M was at work. He had no restrictions on his contact (they lived in the same home)
- Since the occupation order, there has been no contact (either direct or physical)
- F issues an application. The matter is listed for a 1-hour FHDRA before Lay Justices



Thoughts?

Case Study – 2

- M and F were in a short term relationship 3 and a half years ago. They have a 3 year old. M and F have never lived together before.
- Since the birth of the child, F has only ever had contact in M's supervision. He has never had overnight contact.
- F issues an application to court. He seeks formalised contact arrangements, including Friday – Sunday every fortnight and a weekday overnight contact one week.
- M is in agreement with contact, on the basis that she is present at all times. She does not propose overnight contact. In the alternative, contact should take place at a contact centre.
- In the safeguarding letter, M raised that during the short-term relationship, F punched her and jammed her fingers in the car door. She says she has witnessed his temper to his friends / family members and is aware that over the last 3-years he has been charged with ABH after a fight in a club.



Thoughts?

Case Study – 3

- M and F were married for 26 years. They have a 14 year old child.
- F left the relationship 2 years ago after he had an affair with another woman. Since that date, the 14 year old has had varying degrees of contact of contact until 4 months ago. At this time, M states that the child reported to her that F shouted at him and was aggressive, consequently will have contact with him.
- M states the child does not want any physical contact. Secondly, she files a C1A form alleging risk of abduction (F has ties in another jurisdiction and his new partner lives there too). She also states, F demonstrated coercive controlling behaviour throughout the marriage which included him punching walls / doors and as a result, the child is fearful of him (as he witnessed it) but in any event, does not want contact as a result of the incident M raises above. F made his application as soon as M told him the child will not see him but it has taken 6 months until the FHDRA.
- Cafcass recommends the court considers a fact-finding hearing. F has not responded to these allegations. M's counter C100 and C1A was served the day before the hearing and the safeguarding letter was available on the morning of the hearing.
- F raises in the safeguarding letter concerns of alienation.

Thoughts?