FACT FINDING HEARINGS

When are they necessary?
How do you reopen them?
Their proper conduct

Anthony Kirk QC
1 King's Bench Walk
Temple
London EC4Y 7DB

The procedural context and some aspects of case management

1. The Family Procedure Rules 2010 are governed by the 'overriding objective' requiring the court to deal with cases justly, having regard to the welfare issues involved.

2. Rule 1.1(2) provides that dealing with a case justly includes, so far as is practicable:-

   (a) ensuring that it is dealt with expeditiously and fairly;
   (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
   (c) ensuring that the parties are on an equal footing;
   (d) saving expense; and
   (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allocate resources to other cases.

3. The parties are required to help the court to further the overriding objective (r.1.3 FPR 2010), and the court has a duty actively to manage cases in accordance with FPR 2010, r.1.4.

4. Active case management under r.1.4 includes:-

   (a) setting timetables or otherwise controlling the progress of the case;
   (b) identifying at an early stage –
      (i) the issues; and
      (ii) who should be a party to the proceedings;

(c) deciding promptly –

(i) which issues need full investigation and hearing and which do not; and

(ii) the procedure to be followed in the case;

(d) deciding the order in which issues are to be resolved;

(e) controlling the use of expert evidence;

(f) encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

(g) helping the parties to settle the whole or part of the case;

(h) encouraging the parties to co-operate with each other in the conduct of proceedings;

(i) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(j) dealing with as many aspects of the case as it can on the same occasion;

(k) dealing with the case without the parties needing to attend at court;

(l) making use of technology; and

(m) giving directions to ensure that the case proceeds quickly and efficiently.

5. The court has wide general powers of management set out in FPR 2010, Part 4 which can be exercised on an application, or by the court of its own motion.

6. Case management decisions are driven by the statutory 26-week timescale that applies to all care proceedings (following the amendments made to the Children Act 1989 by the Children and Families Act 2014.) Under CA 1989, s 32(1)(a), the court is required to draw up a timetable with a view to disposing of the application:-

- without delay; and
- in any event within 26 weeks beginning with the day on which the application was issued.

7. That statutory requirement is also reflected in r.12.22 FPR 2010.

8. The 26-week time limit for determining the application may be extended only if the court considers that the extension is necessary to enable the court to resolve the proceedings justly. The statute, as amended, requires the court to take account of guidance to the effect that extensions are not to be granted routinely and are to be seen as requiring specific justification.

Each separate extension may be for a maximum of eight weeks. When drawing up the timetable, the court must in particular have regard to:-

- the impact which the timetable would have on the welfare of the child to whom the application relates; and
- the impact which the timetable would have on the conduct of the proceedings.

9. It will probably only be a rare NAI case that can be dealt with within the 26-week timetable. More often than not a separate fact finding will be required, which will be followed by an assessment process. The sequential nature of the proceedings, often combined with the availability of experts to report within the court's timescales, will frequently mean that a longer period is required. Judges are acutely aware of the overall length of proceedings and the need to deal with these cases as swiftly as possible. And so robust case management continues to be the norm.

10. Occasionally, however, the Court of Appeal has found that "robust case management" has been taken several steps too far. A few examples are considered below.

11. In *Re B (Case Management) [2013] 1 FLR 963,* [CA] a judge was found to have erred in holding an unnecessarily truncated hearing and making findings of fact on limited evidence. In that case the 5-year-old child lived with her mother, the mother's new partner and her two half siblings, after the parents separated. Contact arrangements between the child and the father were initially amicable, but after a time there were difficulties. The father brought an application to have contact restored. The local authority became involved and raised concerns relating to a history of domestic violence perpetrated by the mother's partner against his former partner and three older children. The local authority concluded that the history provided a strong indication that the mother's partner might pose a future risk of physical and emotional harm to the child. The father then sought a residence order, and the Guardian recommended that there be a change of residence unless the mother separated from her partner. The mother said that she would and did separate from her partner, upon which basis the father changed his application to a shared residence order. The Guardian supported shared residence arrangements on the basis that the mother would not permit any contact between the child and her partner. However, shortly prior to the final hearing the child mentioned that the partner had been present in the mother's home, and the father then instructed a private investigator who

confirmed the same. The father once more sought a sole residence order. The mother denied that she had permitted contact and wished to call evidence from her partner, her mother and the social worker, and also produce documentary evidence. The court only had two days allocated to the hearing, and the judge determined that there would be a fact finding exercise over those two days and which had to conclude within that timeframe. The judge refused the mother' application to call / produce the evidence that she wished to, concerned that to do so would cause a delay, possibly of months. He also placed a 20-minute limit on the time allocated for the mother's counsel to cross-examine the Guardian, and 10 minutes for submissions from each of the parties. The judge found the mother to be an unreliable witness and accepted the father's evidence of the mother's continuing relationship with her partner. On the basis of the Guardian's recommendations the judge ordered an immediate transfer of residence to the father. The mother appealed, in part upon the basis that the judge's rigorous case management of the hearing resulted in unfairness to her, that the judge deprived himself of relevant and potentially significant evidence, furthermore that his finding was unsafe. In her judgment, allowing the appeal, Black LJ (as she then was) said this:-

> ***[35]*** *It is always difficult for a judge faced, as this judge was, with an urgent decision to take and insufficient time in which to take it. It is a dilemma which family judges regularly have to confront. How they resolve it will depend upon the precise circumstances of the individual case. As this court has often observed, a judge making case management decisions has a very wide discretion and anyone seeking to appeal against such a decision has an uphill task.*
>
> ***[36]*** *However, in this case, I am very clearly of the view that the judge's case management decisions not only deprived the mother of the opportunity to answer the case against her but also deprived the court of evidence that was necessary to enable it to make reliable findings of fact. ...*
>
> ***[40]*** *... when it comes to making findings of fact, the court's focus should be firmly on an analysis of what evidence is necessary to enable proper findings to be made. Of course, the urgency of the court's decision can sometimes make it imperative that there be limitations on the evidence that is called, however relevant it would be. Similarly, the judge may find himself unable to permit a witness's evidence to be adduced because it has been produced too late in the day or without regard to earlier case management directions or he may determine that it is disproportionate to the*

issues to permit reliance on it. However, matters such as those are different from a decision to decline to hear evidence from a material witness ... for some reason not related to their evidence ...; such a decision is much more difficult to justify. ...

[48] *I should say in conclusion that this appeal turns very much upon its own facts. Rule 22 of the Family Procedure Rules 2010 entitles the court to control the evidence in a case by giving directions. This is a wide power and can be used to exclude evidence which would otherwise be admissible. Robust case management, therefore, very much has its place in family proceedings but it also has its limits."*

12. *In* Re S-W (Care Proceedings: Case Management Hearing) [2015] 2 FLR 136 Munby P said this:-

'52. Vigorous and robust case management has a vital role to play in all family cases, but as a rule 1.1 of the Family Procedure Rules 2010 makes clear, the duty of the court is to "deal with cases justly, having regard to any welfare issues involved." So, as my Lord has emphasised, robustness cannot trump fairness.

54. … An unseemly rush to judgment can too easily lead to injustice. As Pauffley J warned in Re NL (A Child) (Appeal: Interim Care Order: Facts and Reasons) [2014] EWHC 270 (Fam.), [2014] 1 FLR 1384, para 40, "Justice must never be sacrificed on the altar of speed."

56. … a parent facing the removal of their child must be entitled to put their case to the court, however seemingly forlorn … no-one is to be condemned unheard … A parent who wishes to give evidence in answer to a local authority's care application must surely be allowed to do so.

57. … there is the right to confront one's accusers. So, a parent who wishes to cross-examine an important witness whose evidence is being relied upon by the local authority must surely be permitted to do so.

…

60. I agree with my Lady that there can, in principle, be care cases where the final order is made at the case management hearing. But, unless the decision goes by concession or consent, it will only be exceptionally, in unusual circumstances and on rare occasions, that this can ever be appropriate.'

13. The judge also has an inquisitorial role. In *Re R (Family Proceedings: No Case to Answer)* [2009] 1 FLR 349 the Court of Appeal held that the concept of 'no case to answer' had no place in family proceedings. In *Re F (A Child) [2007] EWCA Civ 810* the judge had determined, "that the local authority's evidence… fell short, by a substantial margin, from that required to substantiate the allegations against the father." The Court of Appeal allowed the subsequent appeal by the local authority, Wall LJ (as then) saying in his conclusion:-

> "I also have to say that, in my judgment, a circuit judge is not necessarily obliged simply to try the case which is put in front of him. He is entitled --indeed obliged -- to consider whether or not the case presented to him is being presented as it should be -- and that the relief sought is genuinely in the interests of the child. However, I think it is unfortunate that the judge appears to have introduced the concept of 'no case to answer' which in my judgment has little or no place in care proceedings under the 1989 Act."

When are they necessary? Separate fact finding or not?

14. At an early stage the court will need to consider whether there needs to be a separate fact finding hearing. Simply because there are allegations of non-accidental injuries does not mean that it will always be necessary to hold a separate fact finding hearing.

15. In *Re S (Care Proceedings: Split Hearing) [1996] 3 2FLR 773*, Bracewell J noted that the committee which compiled the *Children Act Advisory Committee Annual Report 1994/95*, 'felt that consideration could usefully be given to whether there are questions of fact within a case which need to be determined at a preliminary stage, such as an allegation of physical or sexual abuse. In such instances, the committee felt that the early resolution of those issues would enable the substantive hearing to proceed more speedily and to focus on the child's welfare with greater clarity'. She gave guidance, saying:-

> 'Courts and practitioners need to be alert to identify those cases which are suited to a split hearing. In general, they are likely to be cases in which there is a clear and stark issue, such as sexual abuse or physical abuse. Local authorities and guardians ad litem can and should give assistance to the court in identifying such cases in order to prevent delay and the ill-focused use of scarce expert resources.'

16. In *Re O and N (Care: Preliminary Hearing) [2002] 2 FLR 116* (a decision reversed by the House of Lords, but not on this point), Ward LJ doubted that there should have been a separate fact finding in circumstances where the father had admitted causing some of the injuries and the question was whether the mother and/or the father were responsible for any of the remaining injuries, and whether the mother had failed to protect. He took the view that those matters should have been considered at a final hearing where both the remaining factual issues and the welfare issues would be considered.

17. In *A County Council -V- DP & Others [2005] 2 FLR 1031* McFarlane J (as he then was), recognising that the court has a discretion whether to order a separate fact finding, said this at paragraph 24:-

> *"The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular, fact finding exercise:*
>
> *a) The interests of the child (which are relevant but not paramount)*
>
> *b) The time that the investigation will take;*
>
> *c) The likely cost to public funds;*
>
> *d) The evidential result;*
>
> *e) The necessity or otherwise of the investigation;*
>
> *f) The relevance of the potential result of the investigation to the future care plans for the child;*
>
> *g) The impact of any fact finding process upon the other parties;*
>
> *h) The prospects of a fair trial on the issue;*
>
> *i) The justice of the case."*

18. In May 2010 Sir Nicholas Wall, the then President, issued "Guidance in Relation to Split Hearings [2010] 2 FLR 1897". He was concerned that there were split hearings taking place when it was not necessary and it was thought to be taking up a disproportionate amount of the court's time and resources. His "Guidance" set out the following:-

> ***[5]*** *Judges and magistrates should always remember that the decision to direct a split hearing or to conduct a fact-finding hearing is a judicial decision. ... Thus the court should not direct a fact-finding hearing simply because the parties agree that one is necessary...*

[6] *Judges and magistrates should always remember that a fact-finding hearing is a working tool designed to assist them to decide the case. Thus a fact-finding hearing should only be ordered if the court takes the view that the case cannot properly be decided without such a hearing.*

[7] *Even when the court comes to the conclusion that a fact-finding hearing is necessary, it by no means follows that such a hearing needs to be separate from the substantive hearing. In nearly every case, the court's findings of fact inform its conclusions. In my judgment, it will be a rare case in which a separate fact-finding hearing is necessary (Emphasis supplied).*

[8] *...*

[9] *... in cases in which the court concludes that a fact-finding hearing is necessary, the Practice Direction requires the court to give directions designed to ensure that 'the matters in issue are determined expeditiously and fairly' (Emphasis supplied).*

[10] *None of the foregoing is designed to minimise or trivialise domestic abuse or its effects on children and upon its other victims, or to discourage victims from coming forward with abuse allegations. I repeat that the aim of the guidance is to enable magistrates and judges fully to address their minds to the need for a separate fact-finding hearing.*

[11] *The rationale for split hearings in care proceedings was enunciated by Bracewell J in Re S (Care Proceedings: Split Hearing) [1996] 2 FLR 773 ...*

19. In *A Local Authority v K and N* [2011] 2 FLR 1165 Sir Nicholas Wall P, applying his own *Guidance* declined to order a separate fact-finding into the death of a previous child on the ground that such a process was neither necessary for determining the present case or protecting the child, nor proportionate within the structure of the overriding objective. He said this:-

"[16] *... bearing always in mind that I must apply the* Guidance *to the facts of the case before me:*

(1) do I take the view that I cannot properly decide this case without a fact finding hearing?

(2) following the decision of Bracewell J in Re S (Care Proceedings: *Split Hearing) [1996] 2 FLR 773 is the cause of MY's death a fact the early resolution of which will enable the substantive hearing to proceed more quickly? and*

(3) is there here a clear and stark issue the resolution of which will prevent delay and the ill-focused use of scare expert resources?

[17] *... I am exercising a judicial discretion which requires me to take a number of factors into account, including the timetable for N. In this context, I remind myself, and will do so again later in this judgment, that the issue I am being asked to decide discretely concerns the death of a non-ambulant child, and is thus a matter of the utmost seriousness. This is a factor which I need to bear in mind throughout. ...*

[51] *Having now read all the papers and heard argument, I have come to the view (whether one is talking of a preliminary paper inquiry or a full blown finding of fact hearing) that the answers to the questions posed in para [16] above are all 'no'. In the exercise of my discretion, accordingly, I decline to order a 'fact finding' hearing...*

[52] *In my judgment, a finding of fact about what happened to MY:*

(1) is not necessary for the proper resolution of N's case;

(2) would not be 'proportionate' within the structure of the overriding objective; and

(3) might well, in my event, be inconclusive. ...

[54] *Applying the overriding objective, I must, of course, deal with the application justly. I am clear, however, that the application for a split hearing ... does not sit easily with any of the five objectives set out in para [2.1] of the PLO. In particular, I take the view that a fact finding hearing – however set up – would not be a proportionate way of dealing with the case. It would not save expense and would, in my judgment, allot an inappropriate share of the court's resources to the case....*

[56] *... it may simply not be possible to decide what happened to MY. If that were the outcome, NAHI would not be established. A great deal of time, money and emotional energy would have been expended achieving very little.*

[57] *I recognise and repeat, of course, that MY's death was extremely serious, and that if he was the victim of inflicted injury the threshold would be crossed in relation to N. I also recognise that it would be of assistance to the local authority to have a finding, one way or the other, about MY's injuries.*

[58] *The local authority's care plan is, if possible, to keep N and his parents together. This, in my judgment, is right. N and his parents have not been separated since his birth, and N is now some 5 months old. A final decision must not be unduly delayed, and even if there were a hearing in the autumn, N would then be in the order of 10 months old. I accept that the priority must be to protect him from the risk of significant*

harm. However, in my judgment, the timetable for N is important, and would be adversely affected by a fact finding hearing.

[59] *I must, I think, bear in mind that not only is there an acute medical dispute about the causation of MY's injuries, but that the causation of such injuries is, itself, the subject of medial controversy. Were the issue critical to my conclusions about N, this would not, of course, be a reason for not embarking on a fact finding hearing. It remains my view, however, that it is not the function of the judge to become involved in medical controversy except in the very rare case where such a controversy is itself an issue in the case and a judicial assessment of it becomes necessary for the proper resolution of the proceedings. This, in my judgment, is not such a case.*

[60] *I also bear in mind that MY died nearly 3 years ago – ... Once again, the mere passage of time would not prevent a fact finding investigation were such an investigation crucial. As it is, however, I have to bear in mind the passage of time and the fixing of attitudes. ...*

[62] *In summary, therefore, I think it at best doubtful and at worst unlikely that I will be able to reach a conclusion on MY's injuries. I fear that I am unlikely to be better informed at the conclusion of a fact finding hearing. ...*

[64] *None of this would, however, be conclusive were I to be of the view that I needed the answer in order to decide N's case. But as I have already said, I do not think I do. I think it perfectly possible to decide N's case, and to protect him, on our current state of knowledge. ...*

[65] *I do not accept the submission made by Ms Phillips that to leave matters as they currently stand is to achieve the worst of all worlds. ... A finding one way or the other should only be made, in my judgment, if it is necessary to protect N ...."*

20. In *Re S (Split Hearing) [2014] EWCA Civ 25, [2014] 1 FCR 477*, Ryder LJ said:

[27] *It is by no means clear why it was thought appropriate to have a 'split hearing' where discrete facts are severed off from their welfare context. Unless the basis for such a decision is reasoned so that the inevitable delay is justified it will be wrong in principle in public law children proceedings. Even where it is asserted that delay will not be occasioned, the use of split hearings must be confined to those cases where there is a stark or discrete issue to be determined and an early conclusion on that issue will enable the substantive determination (i.e. whether a statutory order is necessary) to be made more expeditiously. The reasons for this are obvious: to remove*

consideration by the court of the background and contextual circumstances including factors that are relevant to the credibility of witnesses, the reliability of evidence and the s 1(3) 1989 Act welfare factors such as capability and risk, deprives the court of the very material (i.e. secondary facts) upon which findings as to primary fact and social welfare context are often based and tends to undermine the safety of the findings thereby made. It may also adversely impinge on the subsequent welfare and proportionality evaluations by the court as circumstances change and memories fade of the detail and nuances of the evidence that was given weeks or months before. ...

[29] *It ought to be recollected that split hearings became fashionable as a means of expediting the most simple cases where there was only one factual issue to be decided and where the threshold for jurisdiction in s 31 of the 1989 Act would not be satisfied if a finding could not be made thereby concluding the proceedings (see* Re S (Care Order: Split Hearing) *[1996] 3 FCR 578n at 580, [1996] 2 FLR 773 at 775 per Bracewell J). Over time, they also came to be used for the most complex medical causation cases where death or very serious medical issues had arisen and where an accurate medical diagnosis was integral to the future care of the child concerned. For almost all other cases, the procedure is inappropriate. The oft repeated but erroneous justification for them that a split hearing enables a social care assessment to be undertaken is simply poor social work and forensic practice. The justification comes from an era before the present Rules and Practice Directions came into force and can safely be discounted in public law children proceedings save in the most exceptional case.*

[30] *Social work assessments are not contingent on facts being identified and found to the civil standard (see, for example* Oldham Metropolitan BC v GW *[2007] EWHC 136 (Fam), [2008] 1 FCR 331, [2007] 2 FLR 597 and* R (on the application of S) v Swindon BC *[2001] EWHC Admin 334, [2001] 3 FCR 702, [2001] 2 FLR 776 per Scott Baker J at [34] and [35]). That is the function of the court not a social worker (*Dingley v Chief Constable of Strathclyde Police *[2000] UKHL 14 per Lord Hope of Craighead). Social work assessments are based upon their own professional methodology like any other form of professional risk assessment. In care cases, an appropriate social work assessment and a CAFCASS analysis should be undertaken at the earliest possible opportunity to identify relevant background circumstances and context. In so far as it is necessary to express a risk formulation as a precursor to an analysis or a recommendation to the court, that can be done by basing the same on each of the*

alternative factual scenarios that the court is being asked to consider (see, for example, Re SW v Portsmouth City Council, Re W (children) (concurrent care and criminal proceedings) *[2009] EWCA Civ 644 at [33], [2009] 3 FCR 1 at [33], [2009] 2 FLR 1106).*

[31] *It may be helpful to highlight the fact that a decision to undertake a split hearing is a case management decision to which Pt 1 of the Family Procedure Rules 2010, SI 2010/2955 (FPR 2010) and Pilot Practice Direction 12A 'Care, Supervision and Other Pt 4 Proceedings: Guide to Case Management (the PLO)' apply. A split hearing is only justifiable where the delay occasioned is in furtherance of the overriding objective in r 1 of the FPR 2010...*

[32] *On the alleged facts of this case, there was no discrete issue which was appropriate for trial without its social or welfare context and delay was the inevitable consequence of the decision to have a split hearing. Given that by r 1.3 FPR 2010 the parties have a duty to help the court to further the overriding objective, it is all the more surprising that one of the submissions made to this court was that a split hearing was inappropriate. That professional analysis should have been offered to the court below. The benefits and detriments of such a course, if proposed, should be analysed by the children's guardian. In future, a decision to undertake a split hearing should be reasoned in court at the case management hearing and the reasons should be recorded on the face of the case management order alongside what has always been the good practice of the court which is to settle the issue to be tried on the face of the order.*

21. In *Re BK-S (Children) (Expert Evidence and Probability)* [2015] EWCA Civ 442, the Court of Appeal, again in the form of Ryder LJ held that following the guidance in *Re S*, a split hearing should not have been ordered where the issue was who had perpetrated the harm, rather than whether the harm had occurred. In such a case the social work assessments of the potential perpetrators might inform the court's findings as to by whom the harm had been perpetrated.

22. Where there is to be a split hearing, however, it is important to bear 2 particular matters in mind:-

(i) Directions should clearly state whether the hearing is to determine whether the threshold criteria are satisfied, or simply to determine one or more of the factual issues; and

(ii) It should always be ensured that the same judge who hears the fact finding part, also deals with the welfare/final hearing stage, as was made plain in *Re B (Care Proceedings: Standard of Proof [2008] 2 FLR 141* by the House of Lords. Baroness Hale said this:-

> *"A fact-finding hearing is merely one of the case management possibilities contemplated by the new Public Law Outline. It is not a necessary pre-condition for the core professional assessment, which the Public Law Outline now expects should normally be done before the proceedings even begin (Judiciary of England and Wales and Ministry of Justice,* The Public Law Outline, Guide to Case Management in Public Law Proceedings*, President's Practice Direction, April 2008, para 9.2, pre-proceedings checklist and Flowchart). There is no point in splitting the issues if the facts cannot be determined relatively quickly, still less if it is unlikely to result in clear cut findings to help the professionals in their work. But the finding of those facts is merely part of the whole process of trying the case. It is not a separate exercise. And once it is done the case is part heard. The trial should not resume before a different judge, any more than any other part heard case should do so."*

How do you re-open them?

23. Obligingly, the Court of Appeal on 14 August 2019 handed down judgment in the case of *Re E (Children : Reopening Findings of Fact) [2019] EWCA Civ. 1447*, the leading judgment being given by Peter Jackson LJ. He prefaced his judgment in this way:-

> "1. Welfare decisions made by the family court are based on an assessment of the relevant facts. In care proceedings, facts establishing the threshold are a precondition to making any order at all. Depending on their gravity, findings of fact may be highly relevant to, or even determinative of, the welfare decision, not only in the proceedings in which they were made, but also in other proceedings about the same child or proceedings about different children. An incorrect finding one way or another can have lasting consequences. Consequently, the court goes to great lengths to ensure that its findings of fact are reliable, and the normal process of appeal should ensure that unjustified findings are not allowed to stand. At the same time, the public interest in justice must be balanced against the public interest in the finality of litigation and there

are proper limits on the extent to which the court will allow its findings of fact to be revisited.

2. This appeal calls for consideration of the options open to someone wishing to challenge findings of fact in family proceedings on the basis of further evidence that was not available at the trial. Do they have to appeal? Or can they apply to the trial court? And if they can do both, which is the better course? "

Later he paused to consider the circumstances in which applications and appeals based on further evidence might come about:-

"Applications and appeals based on further evidence

15. Applications and appeals involving further evidence in family proceedings are perhaps more common than they were; one reason is that the proceedings are shorter, which means that they are commonly completed before the criminal trials from which the further evidence may originate. Another scenario involves a party giving further information after an adverse finding has been made, something that the court encourages. The challenge may then arise in a range of circumstances:

(1) On an appeal on the basis of further evidence, usually an appeal out of time.
(2) On an application within continuing proceedings – for example, between a fact-finding hearing and a welfare hearing.
(3) In proceedings concerning the previous order – for example an application to discharge a care order or an application for contact.
(4) In proceedings about another child.
(5) By a free-standing application brought after the end of the proceedings.

16. The merits of such appeals and applications will of course vary widely. Some may raise real issues while others will be no more than attempts to reargue lost causes or escape sound findings. The court's decision will be case-specific. But insofar as it is always required to balance the competing public interests, it is clearly desirable that it should do so with a consistency of approach that does not unduly differ depending upon the particular procedure that has been followed or because of chance matters arising from when and how the further evidence has arisen.

17. The principles and procedures governing appeals based on fresh evidence are well-established. So are the principles and procedures governing challenges to findings of fact within existing proceedings or in proceedings concerning the previous order or in proceedings concerning another child. What has so far been less clearly demonstrated is the basis for making a freestanding application to the trial court after the proceedings have ended and where there are no other proceedings on foot. In my view, the family court has the statutory power under s. 31F(6) Matrimonial and Family Proceedings Act 1984 to review its findings of fact in all of these circumstances. I also consider that it will generally be more appropriate for the significance of the further evidence to be considered by the trial court rather than by way of an appeal. To explain these conclusions, I shall consider the principles applying to appeals and to applications to the trial court". (Emphasis supplied)

24. I am not going burden to this already long paper nor test your patience with fresh evidence, appeals and Ladd v. Marshall - See paras. 18-27.

Instead, I turn to consider two matters:-

(i) Extant proceedings and re-litigating past findings made, most usually in respect of other children.

25. At paragraph 28 he said this:-

"Applications in the first instance court on the basis of further evidence

28. The starting-point is an appreciation of the status of findings of fact in children cases. There is no strict rule of issue estoppel. However, a decision to allow past findings to be relitigated must be a reasoned one. *Re B (Children Act Proceedings: Issue Estoppel)* [1997] Fam 117 concerned the status of findings of fact made in proceedings concerning other children. It is an influential decision and deserves full citation."

26. *Re B* is well established jurisprudence: he drew the threads together in paragraph 29:-

"29. This analysis, which has been followed ever since, again points up the need for a principled flexibility in cases concerning children. As was noted by McFarlane J in *Re W (Care Proceedings)* [2010] 1 FLR 1176 at 1183, it shows that when deciding whether findings made in other proceedings should be reopened, the court will "above all" be influenced by the question of whether there is any reason to think that a rehearing of the issue will result in a different finding."

27. And this at paragraph 31:-

"31.The same principles apply where a challenge arises within the course of continuing proceedings. Here, of course, it is not a question of issue estoppel, strict or otherwise, but of findings made in the very proceedings themselves. In these circumstances, as the following authorities show, it is well settled that the trial court can revisit its findings of fact if further evidence warrants it."

28. But whether the court is prepared to entertain an application to re-open a finding will depend on whether it has actual or potential legal significance: in other words, is it likely to make a significant legal or practical difference to arrangements for these or other children?

(ii) The second scenario is this, and the Lord Justice himself posed the question in paragraph 35:-

"What then of the situation where the proceedings have concluded and where there are no other proceedings within which a finding of fact might be challenged? It might of

course be possible for a party to issue an application (for example, to discharge a care order or for contact) as a vehicle for the challenge. But there may be circumstances in which this would not be the chosen route, for example because (while the findings may have other legal or practical consequences) there is no immediate challenge to the underlying order – in the present case, the mother does not seek to challenge the care order at this stage and contact is not subject to any order, though it is only supervised because of the findings – or because the findings may significantly affect future decisions concerning other children."

29. At paragraph 40 he referred to s.31F of the 1984 Act as follows:-

"……. the statutory landscape changed with the establishment of the family court. The court came into existence on 22 April 2014 by virtue of Part 4A of the Matrimonial and Family Proceedings Act 1984. This includes section 31F ('Proceedings and Decisions'), comprising nine subsections of which two are relevant:

"…
(3) Every judgment and order of the family court is, except as provided by this or any other Act or by rules of court, final and conclusive between the parties.
…
(6) The family court has power to vary, suspend, rescind or revive any order made by it, including—
(a) power to rescind an order and re-list the application on which it was made,
(b) power to replace an order which for any reason appears to be invalid by another which the court has power to make, and
(c) power to vary an order with effect from when it was originally made."

30. And this by way of conclusion at paragraph 45:-

"I would…… hold that the family court has the statutory power to review its own decisions and that challenges to findings of fact on the basis of further evidence do not have to be by way of appeal only. I would further suggest that, other things being equal, an application to the trial court is likely to be a more suitable course than an appeal. The trial court is likely to be in a better position than this court to assess the true significance of the further evidence, its advantage being all the greater if the findings are relatively recent, and if the matter can be considered by the judge who made them, as should always be the case if possible. Another reason for preferring an application to an appeal is that it is likely to be dealt with more quickly and at less expense. There will, however, be circumstances in which a return to the trial court will not be appropriate. That will certainly be the case where the applicant is alleging an error by the trial judge, regardless of the further evidence. Judges cannot hear appeals from themselves. There may be other situations, which it would not be possible or helpful to try to list, in which an appeal would be more appropriate than an application, but otherwise, an application should be the first port of call".

31. The court's proper approach to the task he examined in paragraphs 47-49:-

"47. Having established that the family court has jurisdiction to review its findings of fact, the next question concerns the proper approach to the task. As with the approach of an appeal court to the admission of further evidence, the family court will give particular weight to the importance of getting it right for the sake of the child. As was said in *Re L and B* at [41]:

> "In this respect, children cases may be different from other civil proceedings, because the consequences are so momentous for the child and for the whole family. Once made, a care order is indeed final unless and until it is discharged. When making the order, the welfare of the child is the court's paramount consideration. The court has to get it right for the child. This is greatly helped if the judge is able to make findings as to who was responsible for any injuries which the child has suffered. It would be difficult for any judge to get his final decision right for the child, if, after careful reflection, he was no longer satisfied that his earlier findings of fact were correct."

48. The test to be applied to applications for reopening has been established in a series of cases: *Birmingham City Council v H (No. 1)* [2005] EWHC 2885 (Fam) (Charles J); *Birmingham City Council v H (No. 2)* [2006] EWHC 3062 (Fam) (McFarlane J); and *Re ZZ* [2014] EWFC 9 (Sir James Munby P).

49. These decisions establish that there are three stages. Firstly, the court considers whether it will permit any reconsideration of the earlier finding. If it is willing to do so, the second stage determines the extent of the investigations and evidence that will be considered, while the third stage is the hearing of the review itself."

Their proper conduct?

32. I have already referred to this in some detail above to include proper conduct as well as "misconduct", to which I would only add the following:-

(a) Drafting and Responding to Findings of Fact

33. At the commencement of proceedings the Local Authority must set out its initial threshold document within the application. In a NAI case, that should include direct reference to:-

(i) The injuries suffered (early medical evidence from the treating doctors should have been obtained);

(ii) Why the injuries are alleged to be non-accidental; and

(iii) Who caused / was likely to have caused the injuries

34. These cases often come before the court on an urgent basis; it is not uncommon that there may have been little time to gather much evidence at that initial stage, and the threshold document

may well have been drafted under pressure of time. It is often the case that the document will need refining at a later date, and a specific Schedule of Findings will need to be drafted.

35. The following matters must be borne in mind as set out by Munby P, in *In the matter of A (A Child) [2015] EWFC 11*:-

    (i) It is for the local authority to prove, on a balance of probabilities, the facts upon which it seeks to rely.

    (ii) Findings of fact must be based on evidence (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation.

    (iii) The schedule of findings should not contain the following types of phrases: "he appears to have" lied or colluded, that various people have "stated" or "reported" things, and that "there is an allegation". It confuses the crucial distinction between an assertion of fact and the evidence needed to prove the assertion. The relevant allegation is not that "he appears to have lied" or "X reports"; the relevant allegation, if there is evidence to support it, is surely that "he lied" or "he did Y".

    (iv) If its case is challenged on some factual point, the Local Authority must adduce proper evidence to establish what it seeks to prove.

    (v) Much material to be found in local authority case records or social work chronologies is hearsay, often second- or third-hand hearsay. Hearsay evidence is admissible in family proceedings. But, a local authority which is unwilling or unable to produce the witnesses who can speak of such matters first-hand, may find itself in great, or indeed insuperable, difficulties if a parent not merely puts the matter in issue but goes into the witness-box to deny it.

    (vi) Direct evidence from those who can speak to what they have themselves seen and heard is more compelling and less open to cross-examination.

    (vii) Failure to understand these principles and to analyse the case accordingly can lead, as here, to the unwelcome realisation that a seemingly impressive case is, in truth, a tottering edifice built on inadequate foundations.

(b) Intervenors

36. Thought will need to be given as to who the Local Authority are asserting caused an injury; it may be a parent who has PR, other family member, new partner, nanny or friend. In the event that it is being alleged that an injury was caused, or may have been caused, by someone who is not an automatic respondent, it is likely that individual will need to be invited to intervene within

the proceedings to respond to allegations made against them. The earlier consideration is given to that the better.

37. Provision will need to be made within the order for the alleged perpetrator of the injuries to be given notice and particulars of the allegations made against him/her, so that they may be invited to respond. Careful thought and advice will need to be given to those thus invited …

38. The FPR 2010 does not provide any right for an intervenor to see documents filed within the proceedings. Further thought will need to be given as to:-

    (i) What documents the intervenor should see;

    (ii) What hearings or part of hearings the intervenor should attend, pending their role within the proceedings being clarified and finalised.

39. A cautionary tale was told earlier this year by the Court of Appeal in relation to judges jumping into fact finding hearings without a full and proper understanding of the relevant law and, afterwards a proper assessment of the evidence. I refer to *Re P (A Child) [2019] EWCA Civ. 1346.*

40. In giving the judgment of the court, King LJ set out the background facts as follows:-

1. "This appeal arises out of an order made by HHJ Oliver on 13 February 2019 by which the judge made findings of fact against the appellant intervenor (the intervenor) in care proceedings concerning a child, P, who was born on 12 October 2015. The intervenor is the former fiancé of P's mother (the mother). The intervenor seeks an order whereby the challenged findings are substituted by an amended threshold document limited in its terms to matters in respect of which he has, consistently throughout the proceedings, made admissions.

2. Neither the local authority nor the children's guardian seek to uphold the judgment and therefore neither oppose the appeal being allowed. They each accept that the threshold is crossed in the terms of the intervenor's proposed amended threshold and they do not invite the court to remit the case for a fact-finding hearing in respect of the findings which are the subject of this appeal.

3. The mother, whilst accepting that the judge's judgment contains what Miss Hayford, on behalf of the mother, described as "gaps", seeks to persuade the court that the judgment should be upheld and the findings, at least to some extent, remain.

4. In order to avoid any further delay in the making of decisions for P, the parties were informed at the hearing that the appeal would be allowed and that no further fact-finding hearing would be necessary. What follows are my reasons for allowing the appeal."

41. She later continued as follows:-

"The order for a fact-finding hearing

29. The judge decided that a finding of fact hearing was necessary on the basis that the concessions made by the intervenor were "not enough to satisfy the mother". In my judgment, this in itself raises some issues. It is for the judge to decide whether it is appropriate to have a finding of fact hearing, notwithstanding that certain parties may wish to peruse certain issues for their own reasons. There is often a tension between the local authority and parents in cases where it inevitable that the threshold criteria will be established. Parents will, for entirely understandable reasons, wish to make concessions which will 'just' satisfy the threshold criteria, whilst local authorities may feel the need to insist on concessions/findings which they believe more properly reflects the harm they perceive the child to have suffered or is likely to suffer.

……..

32. At the hearing on the 20th December 2019 the court was informed that there was an outstanding connected persons assessment and therefore the case was not ready for final hearing and the local authority sought to adjourn the final hearing but proposed using the time listed for the fact-finding hearing. None of the advocates appearing in court today appeared at the hearing on 20 December 2018, when the court decided to list a separate fact-finding hearing, but it appears that none of the relevant case law was brought to the attention of the judge and the question of whether there should be a finding of fact hearing was not considered in any substantive way, let alone as a stand-alone preliminary point. As a consequence, the judge did not have the opportunity to consider the factors identified by McFarlane J as part of a structured analysis before deciding in his discretion, whether or not to conduct a fact finding exercise".

42. And then this:-

"46 Finally, at the conclusion of his short judgment, the judge summarised his conclusions as follows:

> "70. [having found that [the intervenor] did do what was alleged, what happens next is a matter for the police, but I do bear in mind and say that this decision was reached on the balance of probabilities…..I think I find all the allegations that are in dispute proved because I do not think there is anything else that is there which I have not already touched upon.
> 71. I have not gone into the minute detail of the evidence I heard. It is so difficult to do that without taking several hours to give judgment. What I did was take the broad brush approach and put it all together…. and to rely upon the credibility of the witnesses. I am afraid once you start the credibility on one element of it the credibility becomes clearer as one come through."

47. I completely agree that the judge cannot be expected to comb through every piece of evidence and deal with every submission. I am also conscious of the considerable pressure judges hearing care cases are under to hear an ever increasing volume of cases and to make their decisions in relation to children within a reasonable time scale. However, where a judge is making a finding he must still demonstrate that he has taken into account all the relevant evidence in relation to that aspect of the case".

43. It adds nothing to existing jurisprudence, but really only seeks to confirm that with which we should already be aware.

44. A yet further reminder (if needed) of the importance of judges engaging with the expert evidence and delivering clear and reasoned judgments for accepting or discounting the same can be found in the case of *Re F [2019] EWCA Civ. 1244* and in the judgment of the court delivered by Moylan LJ. I need refer only to paragraph 127:-

"127. Further, however, I agree that the judge did not sufficiently engage with the evidence that did not support her conclusion of inflicted injuries. It is not clear from the judgment why she discounted the evidence which pointed against inflicted injuries. These features included the absence of sparing on the back of F's head; the absence of any other injuries; the speed with which F appears to have recovered from what would have been a life threatening event; and, if this was the mechanism, the considerable difficulty of applying pressure to the face at the same time as applying compressive pressure elsewhere. In my view, in this case, the judge needed to explain, as submitted by Mr Stonor, how these features were outweighed by the other evidence".

Finally: Some Tips and Advice on Fact-finding Case Management

45. This would more accurately be entitled "lessons learnt over the course of the last 35 years of practice!"

(i) If representing a parent, press the Local Authority to nail its colours to the mast at the earliest possible point in time – what findings are they seeking?

(ii) If acting for a Local Authority – don't finalise your Schedule of Findings until you have all the expert medical evidence in;

(iii) Start to obtain details of experts likely to be needed, and their availability as early as possible – they are becoming an ever more scarce resource;

(iv) Ask your colleagues which experts they would recommend you seek to instruct;

(v) Check whether there is anything adverse reported in respect of any proposed expert (or indeed anything adverse known by colleagues);

(vi) Ensure that the court has before it the best primary evidence that you can obtain;

(vii) Make sure that an expert is not only aware of the dates for the hearing when they may need to give evidence, but also have a specific date marked in their diary;

(viii) As a general rule when acting for a parent (and if there is split hearing), don't seek to instruct a psychiatrist / psychologist to assess your client until after the fact finding hearing;

(ix) Use technology as much as possible when instructing experts; ensure that they are aware what technology the court may be using during the hearing; and

(x) If you have a split hearing – start planning for the disposal stage early; don't wait until the conclusion of the fact finding.

Anthony Kirk QC
1 King's Bench Walk

October 2019