

Fact Finding:

**The need to Fact Find and Post Fact
Finding Allegations**

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Introduction:

1. What a pleasure to be back with my friends at White Paper. This time I've been asked to speak about a hot topic that will always remain a hot topic. Fact finding. I've been asked to consider what evidence weighs heavily in the balance and might persuade a court not to list a fact finding and to also deal with how to handle post fact finding allegations.
2. Firstly, why does fact finding remain an issue we are asked to speak about at almost every seminar? Fact finding hearings require resources. They require court time, experienced counsel and judges and are emotionally draining for clients. The outcome is also out of one's control as soon as the evidence begins. As a team, fact finding hearings require careful preparation and analysis, and whilst that sounds like a topic of its own it is something I will touch on today. And the important public policy point is that whilst your fact finding hearing is being heard other cases are not.
3. Fact finding hearings are, however, crucial, and not, in my view, something to avoid or fear. With proper preparation they can be cathartic and lead to a fresh phase in litigation and can end sometimes expensive and ongoing unresolved cross allegations which distract from the courts core purpose which is to make a child arrangements order.
4. I have two caveats – the first is that not all bad behaviour requires judicial consideration, only behaviour that has a material bearing on child arrangements and secondly, once the hearing is listed it is for all of us to make that process as smooth as possible.
5. Today I will deal with the following topics:
 - (a) Necessity of a fact finding
 - (b) Post judgment allegations

Necessity of a fact finding

6. Part of the question I have been asked to address is whether a recommendation for a fact finding might be resisted. Obviously, outcome is always case specific and examples of cases where a fact finding has not been deemed as necessary are seldom reported, although I deal with some important recent ones below. I am going to borrow authorities from both the public and private areas of child law.
7. The key point is whether the allegation or allegations that the court is asked to determine if true would impact on child arrangements and welfare.

8. Although a stressful and challenging process fact finding hearings can end or close down significant areas of dispute between parents and as a result can assist in curtailing litigation and provide a book end to conflict.
9. I am always available to discuss case specific queries in chambers in the usual way.
10. Remember this, as per Peter Jackson LJ in ***Re L (Relocation: Second Appeal)*** [2017] ***EWCA Civ 2121*** (paragraph 61), not all bad behaviour is domestic abuse, and nor will it require the court to determine the allegation,
 61. *"The correct approach to allegations of domestic abuse is set out in PD12J. It sets out a clear and helpful framework to ensure that full consideration is given to the grave effects of domestic abuse, and that proper weight is given to abuse where it is proved. At the same time, the framework requires an exercise of judgement by the court in each case where the issue may arise. **Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to "domestic abuse", where "coercive behaviour" is defined as behaviour that is "used to harm, punish, or frighten the victim..." and "controlling behaviour" as behaviour "designed to make a person subordinate..." In cases where the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict.***
 62. *The task of identifying cases where allegations of domestic abuse require findings of fact to be made (either as part of a main hearing or at a separate fact-finding hearing) is the stock-in-trade of judges in the Family Court, who see private law disputes at every point on the spectrum of seriousness and are constantly making evaluations of this kind. In doing so, they will have assistance from Cafcass, from the parties, and on occasion from their representatives.*
 63. *In the present case, there is no doubt that the behaviour of the father had caused great distress to the mother. That remains true, even if the feeling was mutual. It was the responsibility of the court to consider at every stage of the proceedings what the relevance of this distress and its cause was likely to be to the issues that needed to be decided. I am in no doubt that the court did give the necessary consideration to that question at each of the three hearings. It rightly decided at the outset that a separate fact-finding hearing was not*

necessary. It did not give directions for formal schedules, but it insisted on the enhanced police checks being completed.”

11. This was later endorsed in ***JK (A Child) (Domestic Abuse: Finding of Fact Hearing) [2021] EWHC 1367 (fam)*** (please see §§ 17 – 23 including §20))
12. But here, today let’s go back to the core building blocks:

PD12J

13. Practice Direction 12J (“PD12J”) sets out the guidance for the court when determining whether it is necessary to conduct a fact-finding hearing in private law cases concerning allegations of domestic abuse.
14. PD12J.5 advises the court to consider if an allegation of domestic abuse will be relevant to its overall child arrangements decision.
15. PD17.16 urges the court to determine whether a fact-finding hearing is necessary as soon as possible.
16. PD12J.17 indicates that 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.

PD12J is guidance to which weight must be given but is not legally binding unlike Court of Appeal authorities (***TRC v NS [2024] EWHC 80 (Fam) at §32.*** (And please see Lieven J in various authorities below on this point also).

17. The court of appeal in *Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448* considered the guidance in PD12J and summarised the approach at §37:

“The court will carefully consider the totality of PD12J, but to summarise, the proper approach to deciding if a fact-finding hearing is necessary is, we suggest, 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 (PD12J.5).

(ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.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.

(iii) Careful consideration must be given to PD12J.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 PD12J.17 (b) 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’.”

18. The President’s guidance, ‘Fact-finding hearings and domestic abuse in Private Law children proceedings- Guidance for Judges and Magistrates’ published on 5 May 2022 issued further directions on the necessity of fact-finding hearings to the judiciary at §12-17:

“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. Consider FPR PD 12J [14] and [17].

Allegations that require the assessment of a pattern of behaviour, such as controlling and coercive behaviour, do not justify a different approach. The court only needs to determine allegations of such behaviour to the extent that it is relevant and necessary to determine issues as to a child’s future welfare. Even then, the court is only required to assess the overarching issue, rather than every single subsidiary factual allegation that may also be raised.

Always consider whether the allegations (at their highest) go to safeguarding in general or to particular circumstances that could be mitigated by supervision of contact or some other measures. If the latter and mitigations are available, why is it said that a fact-finding hearing is required? If your conclusion is that the allegations, if proved and however serious, would not be relevant to the decision, then no fact-finding hearing is required. Record brief reasons for your decision whether or not a fact-finding hearing is necessary on the face of the order.”

19. ***K v K [2022] EWCA Civ 468***, reiterated that the duty of the court was limited to determining only those factual matters which are likely to affect or be relevant to the final child arrangement order. It is not a requirement for the court to determine every subsidiary factual allegation instead live primary issues relating to a child’s welfare mean a fact-finding hearing is necessary. Sir Geoffrey Vos at §65 -70 indicated:

“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.*

In Re H-N at [50]-[59], the court explained the correct approach where an allegation of coercive or controlling behaviour is made. The message in those paragraphs was plain. Where coercive or controlling behaviour is alleged in this context, it is likely to be the primary matter requiring determination, provided that it is likely to be relevant to a live issue relating to a child's welfare. Re H-N at [56] made clear that

the focus on coercive or controlling behaviour as the primary issue should make it generally unnecessary to determine other subsidiary date-specific factual allegations.

Re H-N at [53] included the following sentence which may inadvertently have been misunderstood. It read: Where however an issue properly arises as to whether there has been a pattern of coercive and/or controlling abusive behaviour within a family, and the determination of that issue is likely to be relevant to the assessment of the risk of future harm, a judge who fails expressly to consider the issue may be held on appeal to have fallen into error.

That sentence is a requirement to consider an overarching issue of coercive or controlling behaviour, where to do so is necessary for the determination of a dispute relating to a child's welfare. It is not a requirement for the court to determine every single subsidiary factual allegation that may also be raised. The court only decides individual factual allegations where it is strictly necessary to do so in addition to determining the wider issue of coercive or controlling behaviour when that itself is necessary."

Some points from public law authorities

20. You will have heard about the Oxfordshire argument. It is important to bear in mind that the same judges you are before are making similar decisions in the public law forum. I have used these authorities as useful guidance when looking at the need for fact finding.
21. Why is this line of authority important? Because again the factors that are highlighted refer back constantly to the overriding objective and the interests of justice and I will take you to a few highlighted passages below.
22. Again, the watchwords are proportionality, necessity and relevance.
23. The principles for determining whether to conduct a fact-finding hearing were established by McFarlane J (as he then was) in **Oxfordshire County Council v DP, RS and BS [2005] EWHC1593 (Fam)**. McFarlane J emphasised at §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.”*

24. Note here the focus on necessity of any investigations into the facts. Where will it take the case, how will this promote the interests of the child and where does the justice of the case lie?

25. MacFarlane J’s approach was later considered and approved by Peter-Jackson J in **Re H-D-H(Children) [2021] EWCA Civ 1192**. The appellate court at §20- 23 emphasised that the factors in Oxfordshire should be applied flexibly in light of the overriding objective to ensure justice was applied efficiently.

“It is unnecessary to cite other authority. Although the approach outlined in Oxfordshire predates the incorporation of the overriding objective into the Family Procedure Rules and the 26-week requirement, in my judgement it remains valid when read alongside the statutory framework. It helps judges to reach well-reasoned decisions and counsel appearing in the present appeals were content to frame their submissions by reference to it... Clearly, the necessity or otherwise of the investigation will always be a key issue, particularly in current circumstances. Every fact-finding hearing must produce something of importance for the welfare decision. But the shorthand of necessity does not translate into an obligation to conclude every case as quickly as possible, regardless of other factors, and that is clearly not the intention of the administrative guidance. There will be cases in which the welfare outcome for the child is not confined to the resulting order. Not infrequently, a finding in relation to one child will have implications for the welfare of other children. Sometimes, findings that cross the threshold at a minimum level will not reflect the reality. The court's broad obligation is to deal with the case justly, having regard to the welfare issues involved. McFarlane J put it well in paragraph 21 of Oxfordshire when he identified the question as being whether, on the individual facts of each case, it is "right and necessary" to conduct a fact-finding exercise. The factors identified in Oxfordshire should therefore be approached flexibly in the light of the overriding objective in order to do justice efficiently in the individual case....For example:

- (i) *When considering the welfare of the child, the significance to the individual child of knowing the truth can be considered, as can the effect on the child's welfare of an allegation being investigated or not.*
- (ii) *The likely cost to public funds can extend to the expenditure of court resources and their diversion from other cases.*
- (iii) *The time that the investigation will take allows the court to take account of the nature of the evidence. For example, an incident that has been recorded electronically may be swifter to prove than one that relies on contested witness evidence or circumstantial argument.*

(iv) *The evidential result may relate not only to the case before the court but also to other existing or likely future cases in which a finding one way or the other is likely to be of importance. The public interest in the identification of perpetrators of child abuse can also be considered.*

(v) *The relevance of the potential result of the investigation to the future care plans for the child should be seen in the light of the s. 31(3B) obligation on the court to consider the impact of harm on the child and the way in which his or her resulting needs are to be met.*

(vi) *The impact of any fact finding process upon the other parties can also take account of the opportunity costs for the local authority, even if it is the party seeking the investigation, in terms of resources and professional time that might be devoted to other children.*

(vii) *The prospects of a fair trial may also encompass the advantages of a trial now over a trial at a possibly distant and unpredictable future date.*

(viii) ***The justice of the case gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account.*** *One such matter is whether the contested allegation may be investigated within criminal proceedings. Another is the extent of any gulf between the factual basis for the court's decision with or without a fact finding hearing. The level of seriousness of the disputed allegation may inform this assessment. As I have said, the court must ask itself whether its process will do justice to the reality of the case. These are not always easy decisions and the factors typically do not all point the same way: most decisions will have their downsides. However, the court should be able to make its ruling quite concisely by referring to the main factors that bear on the individual case, and identifying where the balance falls and why. The reasoned case management choice of a judge who approaches the law correctly and takes all relevant factors into account will be upheld on appeal unless it has been shown that something has gone badly wrong with the balancing exercise."*

26. Please note here that the justice of the case is defined directly in relation to the overriding objective.

27. Finally, I refer you briefly to Baker J in ***H-W (Care Proceedings: Further Fact-Finding Hearing) [2023] EWCA Civ 149*** at §24 who held that when deciding whether to hold a fact-finding hearing courts should turn to the statement of principles summarised in the Oxfordshire and in Re H-D-H cases to make their decision.

Necessity of fact finding hearings: key judgments from private law proceedings

28. ***Re and another (children) (summary return: non-Convention State) [2022] EWCA Civ 1664***

Facts: The appellant mother appealed against the first instance court’s decision to make a return order.

Held: The court of appeal dismissed M’s appeal and emphasised that a fact-finding hearing is not appropriate in every case involving allegations of domestic abuse as the court must consider whether the hearing is necessary and proportionate.

Moylan LJ at §69 and 70 indicated:

“The observations in Re H-N, and indeed PD 12J itself, make clear the established understanding that domestic abuse is “pernicious”. They also make clear that this does not mean the court must undertake a finding of fact hearing in every case in which domestic abuse is alleged. The approach set out in Re H-N is consistent with that set out by Lord Wilson in Re NY, at [50], namely that, when the court is considering whether to make a summary order, “it will initially examine whether, in order sufficiently to identify what the child’s welfare requires, it should, in the light of the practice direction, conduct an inquiry into the allegations and, if so, how extensive that inquiry should be.”

20. ***B (A Child: Allegations of Domestic Abuse in Private Law Proceedings) [2022]***
EWCA Civ 1439

Facts: the appellant mother appealed against a case management order which set out that her allegations of domestic abuse would not be determined or investigated at a final hearing. The appellant mother sought a combined fact-finding and welfare hearing. The district judge’s order (subject to the appeal) set out that the final hearing could determine welfare issues without making findings of fact.

Held: the appeal was allowed in part and the court remitted the case to the lower court for reconsideration. The President identified at §29 that the case turned on *‘whether the allegations made by the mother and Ms A are relevant to the issue between the parties and capable of having an impact on the final decision.’*

29. *In this case the decision about whether there should be fact-finding turns on the question of whether the allegations made by the mother and Ms A are relevant to the issue between the parties and capable of*

having an impact on the final decision. As the Guidance of May 2022 puts it, "The fundamentals are relevance, purpose, and proportionality".

30. We make full allowance for the fact that the Recorder was dealing with a series of applications of which this was just one and that he was rightly giving his reasons there and then. Even so, we are not satisfied that the mother's application received the analysis required by PD12J. The order, from which this is an appeal, provides that there is to be no fact-finding into the allegations made by the mother and Ms A. However, the recital to the order, having stated that findings of fact are not required on the allegations, states that there is other evidence available to the court. This must be a reference to Para 17(d) ("other evidence available to the court that provides a sufficient factual basis on which to proceed"), but in our view this is intended to relate to other evidence on the question of risk arising from abuse and not to evidence about other matters. The recital then goes on to say that "matters regarding how the final hearing should be conducted should be considered by the Judge at the PTR/DRA". This somewhat reflects the approach found in the judgment, which is that, while the admission of Ms A's statement would be disproportionate, the mother's allegations "will, no doubt, need to be taken into account by the Court as part of its final assessment". The Recorder's reference to the court taking the allegations into account does not appear to be a slip as it is repeated shortly thereafter: "the allegations of the abuse ... would be far more directly relevant to the welfare interests of [V] because her allegations span the period of both before [V] was born and afterwards and those would be the relevant issues that the Court should look at in the final hearing." It is not, however, clear how the relevance of the allegations could be assessed without the court making findings of fact.

21. **A v K (Appeal: Fact Finding: PD 12 J) [2024] 1981 (Fam)**

Facts: The appellant mother appealed the first instance judge's decision not to hold a fact-finding hearing.

Held: Cobb J upheld the court's decision not to hold a fact-finding hearing and outlined further guidance that the court should consider when determining whether a fact-finding hearing is appropriate at §46.

i) Not every case requires a fact-finding hearing even where domestic abuse is alleged (Re H-N at [8]);

ii) It is important for judges to hold firm to the notion that "[e]very fact-finding hearing must produce something of importance for the welfare decision" (Re H-D-H at [21]);

iii) *There is a "need for advocates to focus on those issues which it is necessary to determine to dispose of the case, and for oral evidence and/or oral submissions to be cut down only to that which is necessary for the court to hear"* (Re B-B at [6](iv)); iv) *"Decisions about the scope of fact-finding are core case management decisions with particular consequences for the length and cost of proceedings, the impact of the litigation on parties and others, and the allocation of court time"* (Re H-D-H [2021] EWCA Civ 1192 at [3]);

v) *The function of the family court judge in resolving issues of fact is different from that of the criminal court judge: see Re R [2018] EWCA Civ 198 at [62] and Re H-N at [66]-[74].*

22. **Re G and another (children) (return order return to Ghana) [2024] EWHC 1453**

Facts: The court was concerned with F's application to return two children to Ghana under the court's inherent jurisdiction. M renewed her application for a fact-finding hearing on the first day of the final hearing.

Held: Poole J summarised at §7 why a fact-finding hearing was unnecessary as the allegations were historic and were unnecessary for the court's determination of the children's welfare.

"(iii) In Re A and B [2022] EWCA Civ 1664 [...] Moylan LJ held that a "judge has a discretion when deciding the extent of any welfare inquiry including the extent to which allegations of domestic abuse require investigation and determination" And later:

"As Lord Wilson said in Re NY, part of that exercise will include the court determining, in respect of all relevant matters, but in particular in respect of the matters set out in section 1(3) of the Children Act 1989 and any allegations of domestic abuse, whether, in order sufficiently to identify what the child's welfare requires, the court should conduct an inquiry into any or all of those matters and, if so, how extensive that inquiry should be."

(iv) I have regard to the guidance within FPR PD12J, and within the Court of Appeal decisions of Re HN[2021] EWCA Civ 478 and K v K [2022] EWCA Civ 468, and within the Fact Finding Hearings and Domestic Abuse in Private Law Children Proceedings – Guidance for Judges and Magistrates, from Macur LJ dated 5 May 2022."

23. **TRC v NS [2024] EWHC 80 (Fam)**

Facts: the appellant mother, appealed against the Magistrates' decision to vacate a factfinding hearing. The Magistrates changed their mind and later decided that a fact-finding hearing was no longer necessary. The grounds of appeal included that (i) the Magistrates failed in making their decision follow a formal process as suggested by PD12J, (ii) the Magistrates failed to follow a formal process in making a decision as set out by PD12J, and (iii) whether the Magistrates had been entitled to change their mind. **Held:** Lieven J held: (i) that PD12J was guidance rather than binding legal precedent; (ii) Following PD12J was not a formal 'tick box' exercise instead "the duty on the court is to consider whether a fact find is necessary and proportionate, and to have regards to PD12J, including the matters in paragraph 5, and apply the relevant caselaw" (at §36). (iii) "There was sufficient material upon which the Magistrates were entitled to reach a different decision... as to whether a fact-finding hearing was necessary and proportionate" (at §42).

Lieven J also made wider comments as to the necessity of fact-finding hearings in private children cases and distinguished them from their public law counterparts at §45- 47:

"This case is a good example of why separate facts finds will often be neither necessary, nor indeed helpful in a private law dispute such as this. There is a very strong overlap here between the "facts" and the welfare analysis of what is in the children's best interests. The holding of separate fact finding hearings, and the concept of findings of fact being "binary" emerged from public law cases. In public law cases under Part IV of the Children Act 1989 , it will often be necessary to make findings of fact before threshold is crossed, see (inter alia) Re H (Minors) (Sexual Abuse) 1996 AC 563 . Threshold must be crossed before intervention by the public authority is lawful.

However, in private law there are no "threshold" findings and it may well be that issues of the factual matrix and welfare interests are closely bound up, and best considered together. The jurisdictional basis for private law orders are the considerations under s.1 of the Children Act 1989 , and the welfare checklist. This encompasses matters of fact, but also welfare issues. It is both difficult, and often unhelpful to try to compartmentalise these matters.

In many private law cases with allegations of domestic abuse, where the court is focusing on the relevance of such allegations to the best interests of the children, it is much less clear that separating fact finding from welfare is a helpful way to proceed. The welfare checklist focuses the court in considering the case in a holistic manner. The neat categorisation of truth and untruth and hard binary facts, often sits uneasily with the reality of failed relationships. It may be much

more useful for a court to consider the evidence, including that of the FCA, in a holistic way rather than trying to separate facts from welfare.”

23. Lieven J identified the Magistrates discretions as very wide, and quoted at length from *K v K* in this judgment.

24. Please note the distinction between public and private law here but see also Lieven J in *Derbyshire County Council v AA, BA, X (a child, through his Children's Guardian) v University Hospitals of Derby & Burton NHS Foundation Trust* [2022] EWHC 3404 (Fam)

Facts: the local authority issued care proceedings after X sustained rib fractures after being in the care of M and F. X was subsequently made subject to an agreed complex supervision plan. M and F alleged that X's injuries were birth related and all parties agreed that there were no risk factors concerning the parents. The court considered whether it should order a fact-finding hearing.

Held: a fact-finding hearing would not be ordered. There was no evidence that X's injury was deliberately inflicted. The overwhelming evidence pointed towards a single act of inappropriate handling by the parents. Further, it would be a disproportionate use of the court's time to use a nine-day fact-finding hearing to determine whether a legally binding supervision plan was appropriate.

25. Lieven J endorsed the private law guidance in *K v K* and indicated at §13 that ***“the principles as to whether a fact-finding is necessary and proportionate.. are equally relevant to public law.”***

26. The court also addressed ***Re H-D-H's*** contention (at §22(i) of that judgment) that parties need to understand the ‘truth’ of what has happened. In the present case, Lieven J indicated at §27 *“the benefit of finding out what happened is largely illusory. X is too young to know (or care) what happened. I think it highly unlikely that the parents would accept findings even if I made them. I cannot see any justification for a 9-day finding of fact hearing so that at some point in the future X can know "the truth".”*

25. The fact that Lieven J uses ***K v K*** here I have used as a basis for generalised application of the points I set out above in respect of the necessity of a fact finding.

Post judgment allegations

29. The fact finding hearing has taken place and there is a judgment.

30. That judgment should form the basis for as swift a possible determination of how the children's welfare interests will be best met.
31. Any issues with that judgment should be flushed out in an immediate post judgment conference.
32. What if new allegations are made?
33. A number of issues arise. In my experience allegations arise post fact finding for a variety of reasons; a parent who has failed to appeal bolstering a case, another incident of domestic abuse or perhaps as a result of handover arrangements not being properly arranged. Where the behaviour complained of forms part of a pattern of abuse already identified within the judgment the judgment probably already provides a basis for safe child arrangements moving forward.
34. What is important to ascertain is whether the new allegation, if true goes to welfare and then all of the principals set out above engage again. Is it proportionate and necessary for there to be further factual investigations? The answer is unlikely to be yes.
35. What if fresh information emerges, unknown at the time of the hearing which undermines findings made? Well, this will need to be carefully considered on advice and is a scenario unlikely to arise within the private law context, however, should there need to be an application to reopen then the law is settled as set out by Peter Jackson LJ in ***Re J (children) (reopening findings of fact) [2023] EWCA Civ 465.***

“The legal framework

The law in relation to reopening findings of fact in children's cases is settled. It is to be found in the decisions of this court in Re E (Children: Reopening Findings of Fact) [2019] EWCA Civ 1447, [2019] 1 WLR 6765 and Re CTD (A Child) (Rehearing) [2020] EWCA Civ 1316, [2020] 4 WLR 140. These authorities endorse the decisions of Hale J in re B (Minors)(Care Proceedings: Evidence) [1997] 2 All ER 29, [1997] Fam 117, [1997] 1 FLR 285, [1997] 3 WLR 1 and Munby P in Re Z (Children) (Care Proceedings: Review of Findings), [2014] EWFC 9, [2015] 1 WLR 95, [2014] All ER (D) 143.

In summary, the test to be applied upon an application to reopen a previous finding of fact has 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.

In relation to the first stage: (i) the court should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other; (ii) it should weigh up all relevant matters, including the

need to put scarce resources to good use, the effect of delay on the child, the importance of establishing the truth, the nature and significance of the findings themselves and the quality and relevance of the further evidence; and (iii) above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any a different finding from that in the earlier trial. There must be solid grounds for believing that the earlier findings require revisiting.

As Mr Aidan Vine KC rightly submitted, the requirement for ‘solid grounds’ is a part of the evaluation that the court must carry out. It is not a shorthand substitute for it.

In Re W (Children: Reopening: Recusal) [\[2020\] EWCA Civ 1685](#), [2021] 2 FCR 793 at [28], I said this:

“It is rare for findings of fact to be varied. It should be emphasised that the process of reopening is only to be embarked upon where the application presents genuine new information. It is not a vehicle for litigants to cast doubt on findings that they do not like or a substitute for an appeal that should have been pursued at the time of the original decision. In Re E at [16] I noted that some applications will be no more than attempts to reargue lost causes or escape sound findings. The court will readily recognise applications that are said to be based on fresh evidence but are in reality old arguments dressed up in new ways, and it should deal with these applications swiftly and firmly.”

*As I noted in Re E at [50], the approach to applications to reopen is now well understood and there is no reason to change it. During the hearing of this appeal, counsel agreed that the judge in the case, Her Honour Judge Skellorn KC, directed herself correctly and they confirmed that in their experience the courts are having no difficulty in applying the guidance that has been given. That is also the experience of this court: applications for permission to appeal give no indication that the practice of the last 25 years needs revision. I mention this because it has been necessary on this appeal to consider a first-instance decision – *RL v Nottinghamshire County Council* [\[2022\] EWFC 13](#), [2022] 2 FLR 1012, [2022] 4 WLR 103 – that takes a different approach. That decision should not be followed for reasons given at the end of this judgment.”*

24. Re-opening findings is not a vehicle for litigants to cast doubts on finding they do not like or substitute for an appeal (Jackson J in *Re W (Children: Reopening: Recusal)* [2020] EWCA Civ 1685 at §28).
25. Black J in *Re B (A Child)* [2012] EWCA at 1742 emphasised the high threshold to reopen fact-findings and indicated at §41 ‘*it will take powerful evidence to persuade the judge to permit a party to reopen the findings.*’

26. The test was clearly reiterated in *Re J(above)* as a three-stage test (at §6):

1. Firstly, the court considers whether it will permit any reconsideration of the earlier finding.
2. Secondly, the extent of the investigations and evidence that will be considered.
3. The third stage is the hearing itself.

27. In considering the first stage at §7 Jackson J outlined that “(i) the court should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other; (ii) it should weigh up all relevant matters, including the need to put scarce resources to good use, the effect of delay on the child, the importance of establishing the truth, the nature and significance of the findings themselves and the quality and relevance of the further evidence; and (iii) above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any a different finding from that in the earlier trial. There must be solid grounds for believing that the earlier findings require revisiting.”

28. In *Re J* the court also clarified that the previous *RL v Nottinghamshire County Council* [2022] EWFC 13 should not be followed at §48 and 49.

*“A judge’s main responsibility is to decide the case in hand. The High Court and the appeal courts may also give rulings on matters of law to ensure that the law is correct, accessible to litigants and the public, and expressed in a way that is helpful to trial judges. This additional responsibility is not a vehicle to pursue a legal theory or to run the rule over binding decisions of higher courts, all the more so where the issue does not arise in the individual case. The analysis in *Re RL* was, and could be, of no legal effect: see *Rochdale Metropolitan Borough Council v KW* [2015] EWCA Civ 1054, [2015] WLR(D) 425. Decisions that reformulate a binding legal test or set up a different test are bound to be cited to trial judges and operate as a distraction and a drain on resources, as exemplified by the need for this appeal.*

*More fundamentally, it is a misconception that the time-tested approach to reopening findings of fact in children’s cases has been arrived at in ignorance or defiance of the principles of res judicata in civil proceedings. There is rightly considerable consistency in the response of all courts to attempts to relitigate (see for example *Re W* at [28], cited at paragraph 9 above) but formulations cannot be cloned from one context to another without regard to their effect. Proceedings about children take place in the context of a statutory welfare imperative and, as the present appeal shows, reopening*

applications may arise in a very wide range of circumstances. In order to achieve just, welfare-based outcomes in these cases, the law operates a test that differs for good reason from a test identified in another context. The formulation in Re RL originates in the decision in Phosphate Sewage Co Ltd v Molleson (1879) 4 App Cas 801, which arose from efforts to relitigate a claim in bankruptcy, but Re RL and the present case required the court to evaluate the very different considerations that arise in cases of child welfare. The applicable law is clear and there is no need to unsettle it for the sake of theoretical conformity by transposing a test devised in a different legal context.”

Concluding points:

29. It is always important to plan within proceedings from an early stage and part of that planning process will include care full consideration of the pros and cons of a fact finding hearing. One of the huge pros of a fact finding hearing is that they can actually serve to end a cycle of cross allegations and allow the parties to move on and forward to consider welfare and move matters out of court proceedings.

30. As ever, I am always happy to discuss any of the above in Chambers in the usual way.

Cleo Perry KC
9.12.24

