

1GC | Family Law

**FACT FINDINGS:
HOW MARKED IS THE SHIFT IN APPROACH TO
FACT FINDINGS FOLLOWING H-N AND OTHERS
AND K AND K, AND WHAT ARE THE
ALTERNATIVES?**

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**THE MODERN CONTEXT:
RE L (CONTACT:DOMESTIC VIOLENCE)
*[2001] 2 FLR 865***

- 4 conjoined appeals;
- OS appointed for each child
- Informed by Sturge/Glaser;
- Informed by LC Advisory Board report.

Re L (2001)

- there needs to be a heightened awareness of the existence of, and consequences on children of, exposure to domestic violence between parents or other partners;
- where an allegation of domestic violence was made which might have an effect on the outcome then it should be adjudicated on and found proved or not;
- as a matter of principle, domestic violence is not a bar to contact but is one factor in a delicate balancing exercise of discretion;
- in the interim, where the issue of domestic violence has not been adjudicated on, the court should give particular consideration to the likelihood of harm to the child if contact were granted or refused. The court should ensure, as far as it can, that the safety of the child and residential parent is secured before, during and after such contact.

Re L (2001)

- Where the court forms a view that its order is likely to be affected if allegations of domestic violence are proved the court must:
 - (a) consider what evidence will be required to make findings of fact;
 - (b) make appropriate directions under CA 1989, s 11(1) at an early stage so that the matter can be heard as speedily as possible;
 - (c) consider the question of interim contact;
 - (d) seek a CA 1989, s 7 welfare report unless satisfied that it is unnecessary to do so in order to safeguard the child's interests; and
 - (e) (subject to the seriousness of the allegations) consider the separate representation of the child.
 - (f) If the hearing is 'split' in this manner, then the same justices or judge should deal with both parts of the hearing.

PD 12 J

- Been through more than one iterations
- Most recent review 2017 Sir Stephen Cobb
- Most recent incorporates the definitions of domestic abuse in the 2021 Domestic Abuse Act
- Focus on the process of fact-finding given modern understanding of impact of domestic abuse

PD 12 J

- [§ 1] Domestic abuse is defined as ‘abusive behaviour’:
- *A and B are 16 and connected to each other*
- *Behaviour is “abusive” if it consists of any of the following -(a) physical or sexual abuse; (b)violent or threatening behaviour;(c) controlling or coercive behaviour;(d)economic abuse; (e) psychological, emotional or other abuse;*
- *and it does not matter whether the behaviour consists of a single incident or a course of conduct”.*

PD 12 J

- [§ 4] “*Domestic abuse is harmful to children, and/or puts children at risk of harm, including where they are victims of domestic abuse for example by witnessing one of their parents being violent or abusive to the other parent, or living in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with and being victims of domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents*”.
- [§5] “

[5] The court must.....

- 1. identify at the earliest opportunity (usually at the FHDRA) the factual and welfare issues involved;*
 - 2. consider the nature of any allegation, admission or evidence of domestic abuse, and the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order and, if so, in what terms;*
 - 3. give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly;*
 - 4. ensure that where domestic abuse is admitted or proven, any child arrangements order in place protects the safety and wellbeing of the child and the parent with whom the child is living, and does not expose either of them to the risk of further harm; and*
 - 5. ensure that any interim child arrangements order (i.e. †considered by the court before determination of the facts, and in the absence of admission) is only made having followed the guidance in paragraphs †25–27 below.*
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- In particular, the court must be satisfied that any contact ordered with a parent who has perpetrated domestic abuse does not expose the child and/or other parent to the risk of harm and is in the best interests of the child.*

The court must also

- **35** When deciding the issue of child arrangements, the court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.
- **36** (1) In the light of – (a) any findings of fact, (b) admissions; or (c) domestic abuse having otherwise been established, the court should apply the individual matters in the welfare checklist with reference to the domestic abuse which has occurred, and any expert risk assessment obtained.
- (2) In particular, the court should in every case consider any harm – (a) which the child as a victim of domestic abuse, and the parent with whom the child is living, has suffered as a consequence of that domestic abuse; and (b) which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made. (3) The court should make an order for contact only if it is satisfied – (a) that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during and after contact; and (b) that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent

The court must also...

37 In every case where a finding or admission of domestic abuse is made, or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other and towards the child and the impact of the same. In particular, the court should consider—

- (a) the effect of the domestic abuse on the child and on the arrangements for where the child is living (b) the effect of the domestic abuse on the child and its effect on the child's relationship with the parents; (c) whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent; (d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and (e) the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse.

COERCIVE AND CONTROLLING BEHAVIOUR

- **Hayden J in F v M [2021] EWFC 4**
- *“The nature of the allegations included in support of the application can succinctly and accurately be summarised as involving complaints of 'coercive and controlling behaviour' on F's part. In the Family Court, that expression is given no legal definition. In my judgement, it requires none. The term is unambiguous and needs no embellishment. Understanding the scope and ambit of the behaviour however, requires a recognition that 'coercion' will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. 'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation”.*

Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearing) [2021] EWCA Civ 448

RELEVANCE AND NECESSITY:

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 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in "The Road Ahead".'

WHY RELEVANT ?

- **§ 31 H-N** *“A pattern of coercive and/ or controlling behaviour is as relevant to the child as to the adult victim. The child may be harmed by directly experiencing or witnessing the behaviour; because the adult victim is so frightened that she/he is unable to give priority to the needs of the child; because the behaviour creates as atmosphere of fear and anxiety in the home; or because the behaviour risks inculcating a set of values which involve treating women as being inferior to men”.*

Threshold

- L v F [2017] EWCA Civ 2121

‘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.’

- H-N: [§32]

“It is important to be clear that not all directive, assertive, stubborn or selfish behaviour will be ‘abuse’ in the context of proceedings concerning a child: much will turn on the intention of the perpetrator, and the impact of the behaviour on the victim”.

K v K [2022] EWCA Civ 428

- A refocus on the purpose of the FF exercise.
- *“A decision to hold a fact-finding hearing is a major judicial determination within the course of family proceedings. The process will inevitably introduce delay and postpone anything other than an interim determination of issues relating to the child’s welfare, which is contrary to the statutorily identified general principle that any delay in resolving issues is likely to be prejudicial to a child’s welfare (section 1(2) of the CA 1989). Further, the litigation of factual issues between parents is likely to be adversarial and, **whatever the outcome, to have a negative impact on their ongoing relationship and ability to cooperate with each other as parents. It is therefore important for the court, in every case where fact-finding is being considered, to take time to identify the welfare issues, to understand the nature of the allegations, and then to consider whether the facts alleged are relevant to those issues and whether it is, therefore, necessary for the factual dispute to be determined**”.*

K v K

- *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.*
- No MIAM
- No consideration of alternatives at FDHRA.

Fact Finding Hearings and Domestic Abuse in Private Law Children Proceedings Guidance for Judges and Magistrates 5.5.22 **Relevance**

15. *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?*
16. *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.*

Guidance – form of schedule

- In determining what further evidence/documentation is needed, the nature of the allegations will be important. **Allegations that can be clearly defined (such as specific incidents of physical abuse) may be suitable for reduction to a schedule. Other allegations that require the court to take a broad overview and look at patterns of behaviour (such as coercive and controlling behaviour) are likely to require a statement.** A hybrid of the two, dividing types of abuse into clusters to provide an overview akin to a threshold document in public law proceedings might be appropriate. However, do not consider only the nature of the allegations, but also practicality and expediency bearing in mind the parties before you. Require a like for like document in response from the alleged perpetrator.

Form of schedule

- ***Re BB (Domestic Abuse Fact-Finding)*** [2022] 2 FLR 725 Cobb J suggested that it may be helpful to group together allegations of similar behaviour in 'clusters' in order to build up a picture of the nature of the relationship, and see whether patterns of behaviour emerge.
- In ***Re JK (A Child) (Domestic Abuse: Finding of Fact Hearing)*** [2021] Poole J suggested that, in addition to witness evidence, each party should file: (a) a summary of the nature of the relationship; (b) a list of the forms of domestic abuse that the evidence is said to establish; (c) a list of key specific incidents said to be probative of a pattern of coercion and/or control; (d) a list of any other specific incidents so serious that they justify determination irrespective of any alleged pattern of coercive or controlling behaviour.

Closing Summary

- Not so much of a shifts as a continuum over the past 20 years;
- H-N emphasises the incorporation of coercive and controlling behaviour within an understanding of domestic abuse.
- K v K and subsequent guidance a re-focus on relevance and proportionality.
- Alternatives: none where serious and relevant allegations made.

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Thank you for listening!

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