

Fact Finding Hearings and Domestic Abuse in Private Law Children Proceedings

Guidance for Judges and Magistrates

Introduction

In March 2022 I invited Lady Justice Macur to form a small group with the task of producing short, clear and practical guidance for judges and magistrates concerning fact finding hearings and domestic abuse in Private Law children proceedings in the Family Court. I am extremely grateful to Macur LJ and her team who have, in the short time available, conducted a useful survey of salaried and fee-paid judges before producing this guidance, which I now approve and publish.

Sir Andrew McFarlane

President of the Family Division

5th May 2022

General

1. Make every hearing count. Do not sanction short hearings or agree to insufficient preparation time for the first or other case management hearings on the basis that things can be 'sorted out' next time. Seize the opportunity to probe. Remain 'in control' throughout. Strive to achieve judicial continuity and take ownership of the case. Remember delay is inimical to child welfare.
2. As the judge or magistrate, you have the relevant expertise and competence to analyse and determine the necessity for a fact-finding hearing, and if so, the extent of the hearing and the evidence that will be required. The views of the parties, the CAFCASS officer or the advocates may be persuasive, but they are not determinative; interrogate their reasoning.
3. There is a time and a place to determine allegations of domestic abuse, but it may not be in your court. Unless it will be relevant to, and necessary for, your decision regarding the welfare of the child, do not allow the court to be used to litigate such allegations.

At the FHDRA / first directions appointment/ to be considered at gatekeeping

4. Non-court dispute resolution and MIAMs:
 - a. Has a MIAM taken place? If not, why not? Should it now be required? The court has a duty to consider non-court dispute resolution: FPR r3.3.
 - b. If a MIAM exemption has been claimed on the ground of domestic abuse, check that evidence exists as specified at FPR PD3A [20]. Is the exemption valid? FPR r.3.10.
 - c. If appropriate, invite an authorised family mediator to advise whether mediation is possible with adaptations such as shuttle diplomacy or protective measures.
5. Identify the real issues in the case. Is one parent denying contact per se or seeking to add conditions for or in relation to contact arrangements? What are the questions pertaining to the child's welfare?
6. What exactly is alleged in terms of domestic abuse and by whom? Consider the definitions at FPR PD 12J [2A] and [3] in addition to PD 12J [14].

7. Has a Form C1A been completed? Is there a response?
 - a. If so, ensure the forms are considered in their entirety. Are there admissions? Does the form and/or response suggest a possible way forward to the satisfaction of the court that will permit safe continuation of relationships with the child and avoid conflict with other adults?
 - b. If not, why not? Is it appropriate to obtain a verbal summary of any allegations and/or response during the hearing in order for progress to be made?
8. Collectively, does the information already before the court (for example, the C100, C1A and any safeguarding report) contain sufficient detail to avoid the necessity of directing further evidence/documentation to determine the issue?
9. If further evidence/documentation is required to determine the issue, what is necessary in the fact specific circumstances of the case? The judgment in *Re H-N* [2021] EWCA Civ 448 (paras 41-49) cautioned against allowing a Scott Schedule to distort the fact finding process (by becoming the sole focus of a hearing), but the Court of Appeal did not rule out the use of a schedule as a structure to assist in analysing specific allegations.
10. 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.
11. Ensure that you obtain the essential information in respect of any allegation at an early stage. What, when, where? What was the effect on the child and the parent? Were there witnesses? What other evidence might be available? Is the behaviour complained of because of the breakdown of the relationship rather than a/the cause of the breakdown?

Is a fact-finding hearing required?

12. When determining whether to order a fact-finding hearing, consider:
 - a. the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of a child arrangements order;
 - b. that the purpose of a fact finding is to allow assessment of the future risk to the child and the impact of any abuse on the child;
 - c. whether fact-finding is necessary or whether other evidence suffices; and,
 - d. whether fact-finding is proportionate.
13. The fundamentals are relevance, purpose, and proportionality. Consider FPR PD 12J [14] and [17].
14. 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.

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.
17. Record brief reasons for your decision whether or not a fact-finding hearing is necessary on the face of the order.

Case management if a fact-finding hearing is required

18. When determining the specific allegations to be tried, consider relevance, purpose, and proportionality.
19. Robust case management is required from the outset. Remember your case management responsibilities and powers: FPR r1.1, r1.4, r.4.4.
20. It is the court that controls the evidence in the case: FPR r.22.1.
21. Only order third party disclosure where it is necessary and proportionate to do so. Require justification for any requests and refuse fishing exercises. In what respect is it said the proposed evidence supports or undermines an allegation? Ensure that any orders are targeted and precise. For example, is it possible to direct specific disclosure from the police, as opposed to a 'catch all' order? Will a GP summary suffice instead of a party's full GP records?
22. If a party seeks to rely on a witness of fact, only allow evidence that goes to an issue to be determined. Test with the parties and decide what, if any, real value is likely to be brought to your enquiry by the evidence of third parties.
23. No case should be timetabled to a fact-finding hearing without a properly completed witness template. This will assist the parties and manage their expectations.
24. Consider participation directions. Section 63 Domestic Abuse Act 2021 establishes a presumption that where a party or witness is or at risk of being a victim of domestic abuse from a party to the proceedings, the quality of their evidence and / or their participation as a party is likely to be diminished by reason of vulnerability. Consideration of FPR r.3A and PD 3AA are mandatory and the obligation to consider vulnerability is the court's, regardless of whether a party is represented or if participation directions are sought.

25. At the fact-finding hearing itself, control the hearing and keep the parties and advocates on point. Keep in mind the issues / previously identified allegations. Do not permit irrelevant diversions.
26. Always ensure that any summary of findings you have made is fairly and accurately recorded in the order or a document attached to it.

Re-visiting a decision not to have a fact-finding hearing

27. The court must, at all stages in the proceedings, consider whether domestic abuse is raised as an issue: FPR PD 12J [5]. However, guard against attempts to re-argue the question once a decision has been made. What is said to have changed to undermine the original analysis? Proceedings should have judicial continuity, wherever possible, and a consistent approach.
28. If 'new' evidence relating to past events is presented, ask why it was not available or disclosed before. If no good reason is advanced, then you may refuse to admit it. The more significant the evidence is said to be, the more compelling the explanation needs to be for its late receipt.
