FACT FINDING HEARINGS IN PRIVATE LAW CHILDREN ACT PROCEEDINGS

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No talk on Fact Finding hearings could even begin to do justice to the topic without making it clear at the outset that the starting point has to be the case of Re L (Contact: Domestic Violence) where the Court of Appeal considered 4 appeals together relating to issues of contact and domestic violence. There can be no excuse whatsoever for having no regard to this case in any case where there is an issue of domestic violence. The Court of Appeal, with a panel that included Butler Sloss P who gave the lead judgment considered very carefully the recommendations of the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law in respect of contact where there has been a history of domestic violence. The Court of Appeal held that:

- 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.

Furthermore, where the Court has taken the view that its orders are likely to be affected if allegations of domestic violence are proved, then the court has to

- Consider what evidence will be required to make findings of fact;
- Make appropriate directions under the Children Act 1989, s 11 (1) at an early stage so that the matter can be heard as speedily as possible;
- Consider the question of interim contact;
- Seek a Children Act 1989 section 7 welfare report unless satisfied that it is unnecessary to do so in order to safeguard the child's interests; and
- (subject to the seriousness of the allegations) consider the separate representation of the child.

What is the purpose of Fact Finding hearings?

Thorpe LJ says this:

"I would wish to emphasise that the judge was conducting a preliminary fact finding hearing, the purpose of which is to make essential preparation for what will be the subsequent determination of child welfare issues, classically here the nature and extent of the father's contact or, alternatively, with which parent the child should be primarily resident. The judicial exercise is vital, not only to lay the foundation for the subsequent hearings but in the interim to inform professionals who have to make assessments and reports to the court. It is to be emphasised that the judge in that function, as in all family proceedings, sits in a quasi-inquisitorial role. His function is the pursuit of child welfare. He is not adjudicating rights and wrongs as between adults who may

have grievances, embattled positions as between themselves that overhang and encumber the determination of the child welfare issues."

To be Avoided!

Hughes LJ in a recent article in Family Law entitled "The Children Act 1989: A Different Sort of Litigation" has given an interesting perspective on Fact Finding hearings from a Judge's point of view. He puts much emphasis on the fact finding hearings being about "relevant facts"

". . . getting the facts straight does not mean, of course, that in every case where tempers have become frayed in the pain of breakdown, and have got the better of one or both parents, sometimes repeatedly and sometimes with physical results, there will have to be a trial of what happened before you fix up the contact for the children. Still less does it mean that, where the issue is what the arrangements for contact should be, the competing 25-page statements cataloguing conflicting histories of late arrivals, snide comments, inappropriate treats or uncooperative making of alternative commitments for the children will demand adjudication seriatim. Of course they will not"

Proceed with Caution!

It is always difficult, both for solicitors when the lay client first comes to the office to complete their statement and indeed for counsel on the day of the hearing to be able to make clear to an often very emotional client, the importance of standing back from the list of allegations and counter allegations made through the course of an often messy breakdown to took a practical look of "Where will these allegations, if found proven, take the case?" In a case I

cannot recommend highly enough Mrs Justice Black in Re A (Contact: Risk of Violence) [2006] 1 FLR 283 gives this advice:

"When a finding of fact is sought, the court expects and requires the best possible evidence on which to make its decision. Where this is not made available, or is made available only far too late, the decision making process may be impaired. It may even be necessary for the judge to refuse to hear the matter until there has been proper preparation. It is impossible to provide a blueprint for preparation that will serve in all domestic violence cases. It is the obligation of the lawyers to do whatever is necessary in the particular case. This will involve them in reviewing, at an early stage, what it is that they seek to establish (or to cast doubt upon) and by what means, what evidence, they can best do so. Case management by judges does not transfer the responsibility for the preparation of the case to the judge; it remains with the parties' legal representatives, whose obligation it is to gather together and present the evidence, seeking specific directions when problems are encountered. When it is necessary to seek such directions, the judge should be presented by the party applying with a precise draft of the order sought by way of a solution for the particular problem, not simply with the problem and an invitation to solve it."

This is perhaps the most important and yet most overlooked aspect of fact finding hearings – to ask what is the purpose of the findings we seek? It is especially important, if for instance, you are for a parent who has been accused of a myriad of crimes within the context of a marital breakdown to ask the other side, armed with the comments of Black J perhaps, of what the other side how to achieve in seeking findings on X.Y and Z. It is of course normal to have a directions hearing proceeding a Fact Finding hearing to review the

evidence and on a practical point its at that stage important to "knock out" those allegations that do not take the case any further forward – this is not just important if you are for the father in my example but even if you are for the accuser, the reason being that you do not, as with Black J in Re A, wish to alienate the Judge and loose his or her sympathy.

This leads me onto another point in terms of the Judge and that is the importance of properly drawn up schedules prior to the hearing, such schedules to include page references and paragraph numbers – the best way seems to be having 3 columns, what M alleges, how F responds, and a third left blank for the Judge's comments. Indeed as Black J stated:

"Full statements by the parties will identify which facts are in issue between them, and, therefore, need proof, and which are accepted. Schedules of the allegations made and the responses to them, almost akin to a pleading and most useful in tabular form, will assist in achieving clarity"

It will of course be vital for the legal team, prior to the Fact Finding hearing itself to have a mind to the evidence that is required to prove to allegations sought and to have an eye long term, to the evidence required and the sources from which that evidence can best be obtained

"Attention must always be given to the issue of evidence that may be corroborative or alternatively give rise to doubt about important allegations. It is normally sensible to give some thought to whether the police have records of reports of domestic incidents and whether there may be material police witnesses, just as consideration should be given to whether there may be medical evidence to corroborate an assertion that a particular assault took place and caused injuries."

No case to answer?

We know from experience that a parent who feels strongly enough to not only bring the matter before the Court, whether it be out of genuine fear or, regrettably in some circumstances, sheer spite, to pursue findings to a Fact Finding hearing despite the lack of evidence in support that there is a great temptation to ask a Judge to deal with the matter as a "no case to answer". The temptation to this is particularly great when there is so little evidence in support of various allegations. It is not difficult to imagine the scenario where for example you are for a privately paying father who has not seen his children for 8 months or so and the matter is proceeding to a very expensive fact finding hearing and the respondent mother, legally aided is insistent on proceeding to a very expensive fact finding hearing where the accusations are outrageous and the evidence at best, scant. Should there be an application to the Judge to say that a fact finding hearing would be futile, and that as in the criminal division, it ought be struck out, well now we have had the answer from the Court of Appeal- which is a resounding No! Thorpe LJ in

"So long as the applicant sails on into the gunfire I think the Judge has the obligation to hear the case out. His obligation derives from his responsibilities to the child; and there are many obvious instances in which what may seem to be a frail case at the conclusion of the applicant's evidence, nonetheless at the conclusion of all the evidence would be seen to be one that is not without substance or foundation."

Later in the Judgment Wall LJ goes even further . . .

“. . . I entirely agree with my Lord in finding it impossible to envisage circumstances in which a judge, hearing what I will in shorthand describe as a Re L, V, M, H fact finding within private law proceedings involving domestic violence, should entertain an application that there is no case to answer. The reasons for that I think are self-evident.” The enquiry is quasi-inquisitorial. The objective is to identify and resolve issues of fact which are relevant to the ultimate question for the court, namely what is in the best interests of a particular child.”

This was a message he emphasised first in the case of Re F (A Child) 2007 EWCA Civ 810

“...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.”

After the Fact Finding Hearing?

Since the case of Re L in 2000 there had been justifiable emphasis on the ability of the perpetrator who has been found to have caused certain injuries to the other parent for instance, to come to terms with and face up to what they have done. This goes back to what I was saying earlier in relation to Black J’s decision of Re A that it is not simply enough to seek findings, - the question of what purpose do they serve has to be asked. Fact Finding hearings do not occur in a vacuum but within the larger context of a Contact or Residence application for example. Accordingly, in the case of Re H (Contact:Domestic Violence) [2006] 1 FLR 943 Wall LJ rightly criticises the Judge at first instance who made an order for direct supervised contact even though, in the context

of finding that the father had been the perpetrator of domestic violence against the mother, some of that violence being witnessed by the child, father had deluded himself that he had been exonerated at the fact finding hearing and simply did not recognise that he had harmed the mother: Wall LJ had this to say in relation to the Circuit Judge's failure to consider the Guidelines in respect of the capacity of the parent seeking contact to appreciate the effect of the violence on both the parent and the child:

"It is, I think, plain beyond peradventure that the judge in making the order of 9th May 2005 took the view that the father's violence was irrelevant, and ignored the father's attitude to the violence which the judge had found. As a consequence, the judge simply did not apply his mind to the father's capacity to appreciate the effect of his violence on the mother and H. In that approach, in my judgment, he was plainly wrong."

This was something that Wall J (as he then was) had been at pains to emphasis in Re M (Contact: Violent Parent) where he said (per curium)

"Often in these cases where domestic violence has been found, too little weight in my judgment is given to the need for the father to change. It is often said that, notwithstanding the violence, the mother must none the less bring up the children with full knowledge and a positive image of their natural father and arrange for the children to be available for contact. Too often it seems to me the courts neglect the other side of that equation, which is that a father, . . must demonstrate that he is a fit person to exercise contact; that he is not going to destabilise the family, that he is not going to upset the children and harm them emotionally"

Where is it is the case that the findings made by the judge at the fact finding hearing are such that direct contact is not appropriate then consideration must be given to indirect contact taking place. Re S (Violent Parent: Indirect Contact [2000] 1 FLR 481

See also Re G (Domestic Violence: Direct Contact) [2000] 2 FLR 865

Re H (Contact: Domestic Violence) [1998] 2 FLR 42

The other type of circumstance which can arise is where a fact finding hearing is listed for a certain date and for one of a myriad of reasons, collapses at the last moment. This happened in the case which went on appeal to the Court of Appeal in Re F (Restrictions on Applications) [2005] 2 FLR 950. In this case, the mother had sought and obtained an injunction under Part IV of the Family Law Act 1996 restraining the father from violence or harassment. Soon after this was made, the father made an application for contact which was followed by, after another incident, a further Part IV application by the mother. The mother was granted her further order and protection given for a period of 3 years. Significantly, the father did not seek at any point to either set aside or vary that order. CAFCASS became involved and recommended that whilst direct contact would be unsettling for the children, indirect contact would be appropriate. The day prior to the contact hearing the father sought to withdraw his application for direct contact and for parental responsibility. The Judge refused permission to withdraw the application for parental responsibility but the contact application was withdrawn. The case went to the Court of Appeal mainly in respect of the appropriateness of a section 91 (14) order but the Court did make valuable comments in respect of what needs to occur when a fact finding hearing disintegrates at the last minute. Thorpe LJ had this to say on the matter:

“. . it seems to me that the disintegration of an intended *Re L* investigation at the last moment is likely to result from one of two possible developments. The first is the development seen in this case. The applicant withdraws the applications which have obliged the respondent to deploy the history which the court has then arranged to determine. In that event, the consequence is, it seems to me as a matter of principle, straightforward. Once the applications are withdrawn then there is no need for the defensive case, there is no need for the investigation of that case, and the court can with an easy mind accept the compromise, since the acceptance of the compromise does not at that stage risk the welfare of the children or require any proactive steps for their protection. Plainly, the regime for indirect contact agreed in this case does not expose the children to any measurable risk of harm.
[15] The other possibility is not that which confronted His Honour Judge Platt on 6 December, but it is one that is easy to posit, given the events before the justices. The resolute applicant may outface the defensive wall raised by the respondent who succumbs to the pressure of complex emotions. The respondent may in the abandonment of the defence endanger the welfare of the children and engage the court’s obligation to protect. The judge may well in those circumstances determine to proceed with the investigation despite the absence of the principal defence evidence. There may be evidence from some other source; there may be material within the history; there may be a CAFCASS report, any one of which may heighten the need for investigation and form the basis for conclusions adverse to the applicant. Of course the court may always also engage child protective procedures by requesting an investigation and report from the local authority.”

It is vital of course where there is a fact finding hearing before any Final Hearing, that the same bench or Judge deals with both M v A (Contact: Domestic Violence) [2002] 2 FLR 921

Equally, it whilst many of the cases I have talked about today are Appeal cases I would wish to emphasise that the Judge or Bench who make the findings or not at the conclusion of the hearing have a great benefit over any Appeal Court and accordingly, as was stated by the Court of Appeal in Re S (children) (contact: fact-finding hearing):

"If counsel at the end of a judgment by a judge take the view that the judge has not dealt with a material part of the case or in the particular instance has failed to make findings of fact or has not dealt with the evidence of a particular witness, the responsibility of counsel at that point is to point the alleged deficiency out to the judge and invite him to give a supplemental judgment dealing with the point raised. It is not appropriate immediately to ask for permission to appeal on the ground that the judge has not dealt with the issues in question".

In Re K (Contact: Mother's Anxiety) Wall J held that the mother was so traumatised by the past behaviour of the father that she was incapable of concealing her loathing of him to the extent that to permit direct contact between him and the child would place unmanageable stress on the child.

See also Re M and B (Children) (Contact: Domestic Violence) [2001] 1 FCR 116

In Re F (Indirect Contact) [2007] 1 FLR 1015 the risk from domestic violence was such as to justify elaborate arrangements for indirect contact designed to ensure that the mother's address remained confidential.

The other important point to address is that once a fact finding hearing has been concluded