

Private children fact-finding hearings (Part 1)

When is it necessary?

What will the court consider?

What advice should I give?

30 March 2022

Essential law

- **Family Procedure Rules 2010, Practice Direction 12J**
 - Paragraph 16 – why a FFH may be necessary.
 - Paragraph 17 – matters that the court should consider in determining whether a FFH is necessary.
 - Paragraph 19 – matters that the court should consider if it determines that a FFH is necessary.
- **Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448**
 - Paragraphs 35 – 40.
- N.B. Guidance expected from Macur LJ and Knowles J in Easter 2022.

Other key principles

- Definition of domestic abuse for purpose of PD12J
 - Physical or sexual abuse.
 - Violent or threatening behaviour.
 - Controlling or coercive behaviour.
 - Economic abuse.
 - Psychological, emotional or other abuse.
- The harm that may be caused by domestic abuse
 - Directly (e.g. witnessing or experiencing).
 - Indirectly (i.e. through impaired parenting capacity).

At what stage does the court consider whether to hold a FFH?

- Short answer: immediately.
- Long answer: at the earliest opportunity, depending on
 - cafcass' initial recommendations;
 - whether the scope of the fact finding hearing can be considered;
 - whether there is any relevant third-party evidence that may be obtained at the initial stage;
 - the ascertainable risk of harm immediately and in the short term.

When is a FFH necessary?

1. Are the disputed allegations relevant in deciding whether to make a child arrangements order?
2. If the disputed allegations are relevant, how does the truth or falsity of those allegations impact on the court's ability to assess risk?
3. Is a FFH necessary or can the court use other evidence to carry out that assessment?
4. Is a separate FFH both necessary and proportionate in all the circumstances of the case?

Relevance of allegations

- Past impact on child and either/both parents
- Future impact on child and either/both parents. For example in terms of
 - any risk of future abusive behaviour;
 - the child's current and future relationship with the alleged abuser;
 - the parenting provided by the primary carer.
- Case specific and will vary depending on the proposed/likely contact arrangements in the future.

Other evidence

- *“Whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed”* – PD12J, para 17/Re H-N, para 38(iii).
- Safeguarding checks may indicate:
 - Previous convictions.
 - Previous local authority involvement.
- Previous proceedings/judgments.
- Whole or partial admissions.
 - Act vs impact.

What next – case management

- Witness statements (2 weeks)
 - C1A.
 - In sequence or by exchange?
- Police disclosure (approximately 4-6 weeks).
 - Police protocol if at least one party is represented.
- GP letter or other medical records.
- Local Authority records.
- Previous/related proceedings.
- List for short pre-trial review hearing (4 weeks before trial date).
 - ‘Special measures’ (e.g. screens in court).
 - Interpreters.

Points for advice

- Burden and standard of proof
 - Wider context of social, emotional, ethical and moral factors
 - Police evidence is not determinative
- Likelihood of some expense and delay
- Impact of findings

Next week – Part 2

Making the FFH maximally effective

Drafting witness statements and/or Scott schedules

Other evidential issues