

A matter of fact(s)

Fact-finding hearings in private children proceedings: an overview, by **Kim Beatson** & **Victoria Brown**

IN BRIEF

▶ A fact-finding hearing: a court makes findings of fact on issues identified by the parties or the court.

▶ Domestic abuse and definitions: encompassing, but not limited to, psychological, physical, sexual, financial, or emotional abuse.

▶ The burden of proof: on the party making the allegation.

▶ Evidence and practical issues: statutory guidance.

▶ Following a FFH: the best interests of a child.

▶ Appealing findings of fact: notoriously difficult.

A ‘fact-finding hearing’ (FFH) is the first limb of a split hearing which is a hearing divided in to two parts. In the first half the court makes findings of fact on issues identified by the parties or the court and recorded in a Scott Schedule (precedents available from us if needed). During the second part the court decides the case based on the findings.

Often there will be a clear and stark issue such as sexual or serious physical abuse or serious mental abuse such as controlling or coercive behaviour. However, this is not always the case.

More recently, coercive and controlling behaviour has been deemed suitable for determination at a FFH. However, case law on this is still relatively limited. The CPS guidance gives 25 examples of what the police might investigate as part of coercive control allegations. Controlling and coercive does not fit comfortably within

the format of a Scott Schedule given that it will usually be necessary to establish a pattern of behaviour, which may span a long period of time and involve more subtle behaviours which in isolation may not appear relevant.

Practitioners acting for clients in cases involving allegations of domestic abuse must be familiar with Practice Direction 12J of the Family Procedure Rules 2010. Pursuant to this, the courts are required at the earliest possible stage in proceedings to identify whether there are issues of domestic abuse and to apply the requirements of the practice direction to the management of the case.

Domestic abuse & definitions

For the purposes of PD 12J, domestic abuse is defined as including ‘any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment’.

This is, therefore, a very broad definition and a welcome development in identifying the wide-ranging nature of domestic abuse.

Often domestic abuse will be raised as part of the safeguarding process when the parties are speaking to CAFCASS or as part of CAFCASS’ investigations with police or social services. The party raising the allegation(s) should consider whether the allegation is relevant to deciding whether to make a child arrangements order and, if so, in what terms. If they want a FFH, then this should be argued clearly in their position statement at the earliest opportunity.

Allegations of domestic abuse can be particularly problematic if they are old allegations. The evidence could be poor with little corroborative evidence, eg allegations to the police may have been withdrawn and medical evidence could have been glossed over. There may be cultural reasons for this or immigration advantages. There are also downright lies. It is important to examine what the motive is and to look for evidence whichever side you are on.

Sexual abuse, particularly of a child, is not always mentioned at the start in private law cases and it can be difficult if the local authority is not in the background as there are rarely any physical signs. It is worthwhile reading the Royal College of Paediatricians and Child Health report on physical signs of abuse (2008 and updated 2015: <https://bit.ly/30foLgN>).

PD 12J also sets out further definitions as follows:

▶ ‘Abandonment’ refers to the practice whereby a husband, in England and



Wales, deliberately abandons or 'strands' his foreign national wife abroad, usually without financial resources, in order to prevent her from asserting matrimonial and/or residence rights in England and Wales. It may involve children who are either abandoned with, or separated from, their mother.

- ▶ 'Coercive behaviour' means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim.
- ▶ 'Controlling behaviour' means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.
- ▶ 'Development' means physical, intellectual, emotional, social or behavioural development.
- ▶ 'Harm' means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another, by domestic abuse or otherwise.
- ▶ 'Health' means physical or mental health.
- ▶ 'Ill-treatment' includes sexual abuse and forms of ill-treatment which are not physical.

The burden of proof

The burden of proof lies on the party making the allegation. The standard of proof is the balance of probabilities. The seriousness of the allegation and of the consequences should not make any difference to the standard of proof to be applied. Sometimes this is described as whether the judge considers that the allegation is more likely than not to have occurred. Importantly, findings of fact should be based on evidence not speculation.

The law should operate a binary system and there is no room for the court to say that something might have happened *Re B (children) (sexual abuse: standard of proof)* [2008] UKHL 35, [2008] All ER (D) 134 (Jun). It is open to the court to find, on the balance of probabilities, either that the allegation is true or that it is false. In doing so of course a judge will have an overview of the totality of the evidence and the credibility and reliability of the witnesses and potential perpetrators.

Evidence & practical issues

Where allegations of physical or sexual abuse have been made and the police are involved, there is statutory guidance for Achieving Best Evidence in Criminal Proceedings (March 2011) known as ABE Guidelines. Always consider video evidence which should involve:

- ▶ listening;
- ▶ free recall of events; and
- ▶ asking open ended questions not leading or multiple questions.

Obtaining evidence from the police can be difficult and slow. If you are seeking police disclosure for use within family proceedings, ensure that you ask early and give as much information as possible regarding dates, names, addresses and crime references. It is important to obtain contact details for the disclosure officer and consider which documents you might need—which might not necessarily be produced straight away—such as probation reports, notebooks, transcripts of ABE interviews with children.

If medical records are an issue then social services could get an order for disclosure but otherwise you may need to pursue the GP or the health visitor. Health visitors keep family records and individual children records and these are not always the same. The difference can be important.

Social media evidence has also become increasingly important. Obviously we try to discourage our clients from using social media. However, judges tend to be quite tolerant of screenshots etc. It will be necessary to obtain an order if you need it, particularly for Facebook evidence. Often clients think that social media evidence paints them in a positive light, when it usually does not and certainly not when the whole thing is read. Therefore, social media evidence should be disclosed with caution.

When considering witnesses, independent ones are best which will not necessarily be family and, indeed, employees may not be partisan. Limited corroboration is always helpful.

A Scott Schedule would typically have five allegations and not more than ten, perhaps more for coercive control cases, but it would not normally be necessary. The allegations must be specific in terms of date and time, and thought should be given to whether they need to be determined by a judge or whether they are welfare type concerns of a more general nature. The content of the Scott Schedule should be resolved at the case management hearing as early on as

possible, so that the parties are clear what the judge is being asked to decide. In cases of coercion and controlling behaviour the judge will often allow more than five examples to consider whether there is a genuine pattern or course of conduct.

Caution should also be applied to the disclosure of diary entries. Diaries must be contemporary and legible (or typed up), although this can backfire. For example, the court might query why a parent would keep a diary for so long and the motivation behind doing so.

Following a FFH

At the conclusion of a FFH the court must consider, notwithstanding any earlier direction for a Section 7 Report, whether it is in the best interests of the child for the court to give further directions about the preparation, addendum, scope of any report and proceedings may be adjourned to allow this to be dealt with. After any positive findings, the court will consider whether the perpetrator should attend any programme of treatment such as a DVIP/DAPP course and review the case after the course has been completed.

Finally, it is possible to obtain costs orders for FFHs unlike any other cases for children, but there may be some judicial reluctance.

Appealing findings of fact

Appeals against FFHs are notoriously difficult.

The case of *F v M (appeal: finding of fact)* [2019] EWHC 3177 (Fam), [2019] All ER (D) 137 (Nov) concerned an appeal brought by a father against a finding of fact that he had raped the mother. The proceedings concerning the parties' two-year-old child, who was conceived as a result of the sexual intercourse which was at the centre of the judge's finding. During the FFH in the lower court, which itself was a re-hearing, the judge heard evidence from the parties, read numerous text and WhatsApp messages sent by the parties and watched and listened to the parties' police interviews.

The mother's case was that after a short time engaged in sexual intercourse with the father, she told him that she did not want to continue, had told him to stop and, when he continued undeterred, told him that she did not want him to ejaculate inside her. The father denied that she had ever asked him to stop, although stated that before they had intercourse they had agreed that he would not ejaculate inside her, and that him doing so was an accident. The mother then told the court that they

went on to engage in penetrative sex at least once more, something that the father denied.

After they parted ways the parties exchanged messages, which the judge reviewed, including messages from the mother confirming that she had asked him to stop but he had not listened to her. The trial judge found that the parents had engaged in consensual intercourse, but that part-way through the sexual act the mother had withdrawn her consent and the father failed to stop and failed to withdraw before ejaculation such that the intercourse was no longer consensual and the father had raped her.

In his appeal, the father said that the judge had not properly considered all the evidence and the inconsistencies in the mother's evidence. Further, he said that the ejaculation was an accident on his part and the judge made no determination of whether he had accidentally or intentionally done so.

The appellate judge, Mr Justice Cobb, noted that appeals against findings of fact are notoriously difficult. He referred to the case of *NG & SG* [2011] EWHC 3270 (Fam), [2011] All ER (D) 180 (Dec) where Mr Justice Mostyn said that an appellate court would only be able to say that a fact-finder has plainly got the wrong answer if:

- (i) His conclusion was demonstrably contrary to the weight of the evidence; or
- (ii) The decision making process can be identified as being plainly defective so that it can be said that the findings in question are unsafe.

Cobb J also pointed out that the fact finding judge has a considerable advantage over the appellate judge by seeing and hearing the parties giving evidence. He concluded that the trial judge had found both parties had not been entirely honest in their evidence and had given herself an appropriate Lucas direction. Further, she had properly considered the burden and standard of proof, carefully evaluated the evidence and written a thorough judgment.

Cobb J stated that the conclusion that the mother had been raped did not depend on a finding that she had given conditional consent on the basis that he would not ejaculate inside her. The conclusion was founded on the fact that part way through the sexual act, the mother ceased to consent to the act and made this known to the father by requesting that he stop. The continued penetration became a serious sexual assault which, in criminal law, was

More specific definitions and examples:

Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capabilities for personal gain, depriving them of the means needed for independence, resistance and escape, and regulating their everyday behaviour. This can include using children to make the victim feel guilty or controlled.

Coercive behaviour is an 'act or pattern or acts of assaults, threats, humiliation and intimidation or other abuse that is used to harm, punish or frighten their victim'. Examples of coercive control can include: isolation; threats; humiliation; and undermining the victim. Victims are no longer allowed to make their own decisions, are stopped from seeing their friends, and their movements are closely monitored. Increasingly, the victim will become accepting of the behaviour and feel trapped in the situation they are in. The perpetrator may take control of the finances, accuse the victim of lying, cheating and control or bully the victim into submission.

Examples of **psychological and emotional abuse** can include threats to harm the sufferer's family or children. Often a potential respondent will attempt to isolate the applicant from family or friends and maintain control over the applicant. The respondent will often not allow the applicant to speak or meet with family and friends. It would be typical for the respondent to

mock or insult family and friends. Abuse can include threats to harm pets or even to self-harm. Respondents may seek to demean the applicant by frequent insults, eg calling the applicant abusive sexual terms, or calling them stupid in order to lower their self-esteem.

Sexual abuse clearly includes rape, but also indecent touching or penetration of the body with objects. It can include requiring the applicant to participate in sexual activity that the applicant is not comfortable with. In particular circumstances abuse can include withholding sex.

Abuse may also include a respondent who unreasonably controls finances preventing the applicant from having money to be able to live with reasonable independence in terms of travel and activity. **Financial abuse** can occur in conjunction with physical or psychological abuse or as a stand-alone form of abuse. Financial abuse can include discouraging or preventing the victim from obtaining or maintaining employment. Financial abuse usually involves a pattern of behaviour but one incident may be sufficient to amount to financial abuse. Financial abuse is different, both in purpose and effect, from the steps that may be taken within a relationship to set a reasonable limit on expenditure or when there is a dispute between parties about finances following or during relationship breakdown. Financial abuse usually has the intention to gain or maintain power and control over the victim.

classed as rape. The appeal was therefore dismissed.

The case of *JH v MF* [2020] EWHC 86 (Fam), [2020] All ER (D) 94 (Jan) concerned an appeal from the Central Family Court following a fact-finding trial before His Honour Judge Tolson QC in proceedings for a child arrangements order. The appellant mother had alleged domestic abuse, including two allegations of rape, which were not found proven at the conclusion of the fact finding. In considering the mother's appeal, Ms Justice Russell identified a number of criticisms of the trial judge, including that:

- ▶ The trial judge ignored special measures.
- ▶ The trial judge failed to bear definitions in mind.
- ▶ The judge placed insufficient/no weight on corroborative evidence and undue weight on irrelevant matters.
- ▶ The judge gave insufficient reasons for not finding the allegations proved, particularly in relation to controlling and coercive behaviour.
- ▶ The judge placed undue weight on

the demeanour of the parties in court when assessing their evidence.

- ▶ The judge failed to take into consideration that the father had previously, and repeatedly, been involved with the police in domestic violence and harassment incidents.
- ▶ The judge was wrong to make findings on matters that were not put to the mother.
- ▶ The judge was wrong to find that the mother had not been subjected to sexual penetration without consent (raped) by the father.

Accordingly, the appeal was allowed and a retrial was ordered. Russell J finalised her judgment by stating that she had made an urgent request to the president who is going to make a formal request to the Judicial College for those judges who may hear cases involving allegations of serious sexual assault in family proceedings to be given training based on that which is already provided to criminal judges. **NLJ**

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