To Fact-Find or not to Fact-Find?

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Private Law: Fact-Finds and Coercive and Controlling Behaviour

Re H-N of course introduced / highlighted:

- PD12J
- Coercive and controlling behaviour
- The need for and scope of any fact-finding hearing
- Scott Schedules (and their unhelpfulness)
- The Relevance (?) of Criminal Concepts

Re H-N

37. The court will carefully consider the totality of PD12J, but to summarise, the proper approach to deciding if a fact-finding hearing is necessary is, we suggest, as follows:

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'.

Hayden J in F v M:

" . . . understanding and evaluating coercive and controlling behaviour requires isolating what may sometimes seem to be relatively innocuous incidents and locating them in a context which illuminates their greater significance."

Re B-B:

- ”the benefit of considering the evidence relevant to each different form of alleged domestic abuse in ‘clusters’…it was easier to see whether patterns of behaviour emerged”
- ”focus on the issues necessary to determine/dispose of the case”
- Rigorous testing at case management stage what real value is likely to be brought to the enquiry by the evidence of third parties
- Importance of judicial continuity

K v K (1)

- Use of MIAM
- Identifying issues at FHDRA – reasons to be given for deciding need for fact finding – time to be given where necessary for parties to identify the factual findings they seek to contend should be decided by the court
- Fact finding 'is likely to be relevant to what the court is being asked to do decide in relation to the children's welfare'
- The judge ought to have considered all the allegations in the context of the contention that most fundamentally affected the question of future contact, namely whether the father was demonstrating coercive and controlling behaviour affecting the children's welfare after the separation.

K v K (2)

- para 41 – suggests how Re H-N should be read in terms of the way in which the decision to direct a fact finding hearing should be considered
- Premature decision as to need for fact finding – before the mother had identified allegations she wished to pursue and before disclosure of relevant material
- '…the main things that the court should consider in deciding whether to order a fact finding hearing are: a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of the child arrangements order; b) that the purpose of fact finding is to allow assessment of the 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' [66]

K v K (3)

- Para [53] of Re H-N may inadvertently have been misunderstood (where coercive/controlling behaviour properly arises it is likely to be relevant to assessment of future risk of harm)….
- What is required is 'to consider an overarching issue of coercive or controlling behaviour, where to do so is necessary for the determination of a dispute relating to a child's welfare. It is not a requirement for the court to determine every single subsidiary factual allegation that may also be raised. The court only decides individual factual allegations where it is strictly necessary to do so in addition to determining the wider issue of coercive or controlling behaviour when that itself is necessary' [70]

Proportionality of Fact-Find (1)

- Ms. X v Mr Y [2023] EWHC 3170 (Fam), Lieven J, 11/12/23
  - Headline: Where there are convictions for coercive control, a Fact-Find is unlikely to be required

- TRC v NS [2024] EWHC 80 (Fam), Lieven J, 22/1/24
  - Headline: A decision whether to hold a Fact-Find is a case management decision, there is no formal process and not all disputes require determination. Lieven J comments as to separate Fact-Finds.

- A v K, [2024] EWHC 1981 (Fam), 31 July 2024, Cobb J
  - Headline: Only hold a Fact-Find where necessary for welfare decisions

Proportionality of Fact-Find (2)

- Re: O (Appeal; Duty to Consider Fact-Find) [2024] EWHC 839 (Fam), Henke J, 17/4/24
  - Headline: There is a duty to consider the need for a Fact-Find even where not raised by the parties and despite past determinations on / approaches to the issue

- MZA v FHB, [2024] EWFC 77 (B), HHJ Vincent, 1/3/24
  - Headline: If considering not holding a Fact-Find, consider PD12J paras 35-37 fully and what impact may be of findings, and be procedurally fair in how it is raised

Title: CAFCASS Domestic Abuse Protocol

- Sets out ‘starting points from which departure must be justified;
- When an adult describes a sexual offence or other criminal acts of violence, formal child protection action must be taken in the form of a 16A risk assessment report to the court and a referral to the local authority;
- When there has been a report or disclosure of any form of domestic abuse (including any sexual offence) and a child is living with the accused parent, practitioners must urgently assess the child’s safety and welfare.

CAFCASS Domestic Abuse Protocol (2)

- In considering recommendations for family time when there has been domestic abuse, practitioners cannot reliably predict what will be safe for a child. However, they can and must assess the child's safety and welfare, grounding this in the child's experience and the evidence and information that is provided … example, a parent being investigated by the police for a sexual offence, has a conviction for a sexual offence and/or has served a prison sentence for a sexual offence, provides a clear starting point to inform a recommendation for a child not to spend time with that parent …;

CAFCASS Domestic Abuse Protocol (3)

- Practitioners must not dismiss or minimise domestic abuse as 'historical' or as a one-off incident because this not only reveals a lack of understanding of the ongoing and long-term trauma of domestic abuse for victims but also perpetuates it. It may also increase the risk of harm or further harm to the adult or child victim…;

- Practitioners must not use language such as 'claims or alleges' when a person reports domestic abuse… While it is for the court to determine the facts, it is important that practitioners set out exactly what has been said by a child and an adult …;

CAFCASS Domestic Abuse Protocol (4)

- Practitioners must provide a clear, unequivocal, and compelling rationale in their reports to court for discounting domestic abuse as a risk to a child when recommending 'time with' or 'live with' arrangements when such abuse and harm has been shared with the practitioner by the child or by one or both parents…;
- If a fact-finding hearing is being recommended, along with a 16a risk assessment report and a referral to a local authority children's social care service, consideration must also be given as whether it is in the child's interests to continue any 'direct time with' arrangements that are already in place, between the child and the parent said to have perpetrated the abuse until the fact-finding hearing. Practitioners must make reference to paragraphs 25 to 27 of Practice Direction 12J which must inform recommendations made to the court about the safety of any interim 'time with' arrangements. Following any such hearing, the child's views about contact must still be fully and wholly considered with rationales provided to the court in any subsequent report about the regard that has been given to their views in the advice.

CAFCASS Domestic Abuse Protocol (5)

- Practitioners must not support or recommend any contact (direct or otherwise) or spending time arrangements, where the resident parent and child are currently living in a refuge…;
- When assessing the reasons why a child does not want to see a parent following separation, especially when a non-resident parent alleges 'parental alienation', practitioners must first consider whether the cause of this refusal is because the child is a victim of domestic abuse and harmful parenting;

CAFCASS Domestic Abuse Protocol (6)

When assessing those who have been domestically abusive, practitioners must assess the life-long harm caused by domestic abuse and not recommend that a child spends time with a parent who has inflicted this harm on a child and their other parent, without clear evidence that the perpetrator:

a) Recognises the harm their behaviour has caused their victims.

b) Has taken responsibility for the harm they have caused.

c) Has taken action to sustain change in their attitude and to stop their harmful behaviour, which has been demonstrated over time, and

d) These changes have resulted in an assessment that the risk of them perpetrating that behaviour has been removed to the point of enabling a recommendation that family time is now in the child's best interests.

In protecting victims of domestic abuse, any departure from this starting point must be supported by a compelling rationale, discussed with a manager, and recorded contemporaneously on the child's case record.;

CAFCASS Domestic Abuse Protocol (7)

In considering recommendations for family time when there has been a report of a

sexual offence …

a) If there is a report of sexual offending, such as rape, the starting point must be to consider the risk of harm to a child as significant and the need for a fact-finding hearing and suspension of any pre-existing direct spending time arrangements with specific reference to PD12J paragraphs 25-27 until the court makes its findings.

b) If a fact-finding hearing is already scheduled, the starting point must be that there should be an evidence-based recommendation for no direct time with the accused parent, again with reference to PD12J paragraphs 25-27, until the court makes its findings.

c) If there is a disclosure of a sexual offence and this has resulted in a police investigation or a charging decision, the starting point must be a recommendation for the child to spend no direct time with that parent until the police have concluded the investigation or the criminal process has run its course. If the outcome of the police investigation is 'no further action' (based on likelihood of successful prosecution) (a) then applies.

d) If a parent has a conviction for a sexual offence, the starting point is that the risk of harm to a child of contact with that adult is significant and with reference to paragraphs 35-37 of Practice Direction 12J, there should be a recommendation for no time with that parent.

PUBLIC LAW

PLO Relaunch - making every hearing count

- On 16 January 2023, the PLO was relaunched, with the aim of resetting the Family Justice system so that it 'reconnects with the strictures of the PLO and, once again, aims to meet the statutory requirement of completing each public law case within 26 weeks'.
- The principal aims are to have no more than 2 or 3 hearings per care proceedings and to conclude the proceedings (where it can be done justly) within 26 weeks.
- At the IRH or Final Hearing the court is only required to evaluate and decide upon the following issues:
  – Are the s 31 threshold criteria satisfied?
  – If so, what are the 'permanence provisions' of the care plan [CA 1989, s 31(3A)+(3B)]; and
  – What are the contact arrangements [CA 1989, s 34(11)]?
  – By affording paramount consideration to the welfare of the child, what final order(s), if any, should be made.
- The court is not required to consider any aspect of the care plan other than the permanence provisions;

Where does this leave fact-finding hearings?

‘Split hearings, including fact finding hearings, cause unacceptable delay. They should be reserved for truly single issue cases, or where welfare planning cannot be concluded without a determination of the core disputed facts’: Keehan J, Re- Launch of Public Law Outline, FPR PD12A

How are courts approaching the decision of whether to list fact-finding hearings in response?

A Local Authority v X and Y (Need for Finding of Fact Hearing) [2023] EWFC 121, [2024] 1 FLR 225

Mr Justice MacDonald

Proceedings concerned an 11 year old child, Z. Z had 2 sisters including M, an intervenor in the proceedings, whose first child died in August 2015 and whose second child, C, died in 2022 aged 6 months. Prior to the commencement of proceedings, Z lived with his mother and sisters and their children. A psychological assessment of Z concluded that he suffered multiple adverse childhood experiences and required therapy within a secure placement. He was currently well-settled in a placement and attached to his female foster carer. The parents, whose issues were long-standing, sought his return to their care.

- Although the cause of death of M's first child had not been ascertainable, the police were opening an investigation into it following the death of C. The mother and M were arrested on suspicion of the murder of C and cruelty/neglect in respect of both C and Z. The post-mortem report on C remained outstanding. The court now had to determine whether it was necessary to hold a fact-finding hearing into the cause of death in order to determine the proceedings in respect of Z. The local authority, the father and M invited the court to adjourn the determination of that question until receipt of the post-mortem report. The mother invited the court to determine the issue now and the guardian submitted that the court should determine that it was not necessary to hold a fact-finding hearing into C's death.

Held, refusing to adjourn the hearing and finding that a fact-finding hearing on the cause of C's death was not necessary for the ultimate welfare decision in respect of Z:

- Whilst it is a matter for the local authority to determine whether to bring proceedings under Part IV of the Children Act 1989 , once those proceedings are before the court, it is for the court to decide which issues require determination: In Re W (Care Proceedings: Functions of Court and Local Authority) [2014] 2 FLR 431.
- The court has broad powers of case management pursuant to FPR 2010 r. 4.1. including the power to direct a separate hearing of any issue (FPR 2010 r 4.1(3)(j)) to exclude an issue from consideration (r 4.1(3)(l)) and to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective (r 4.1(3)(o)).

Pursuant to s 32(5) of the Children Act 1989, the court may only extend the 26-week time limit if to do so is necessary to resolve the proceedings justly. In this regard, only fair process or the child's welfare will suffice (Re M-F (Children) (Care Proceedings: Extension of Time Limit) [2014] EWCA Civ 991, [2015] 1 WLR 909).

- Within the foregoing context, the law governing the case management question of whether or not to conduct a particular fact-finding exercise is now well settled. The question falls to be resolved by reference to the factors identified in the Oxfordshire case, as considered and expanded upon in Re H-D-H (Children)

Back to Basics…

Oxfordshire County Council v DP, RS and BS [2005] EWHC 1593 (Fam):
Macfarlane J set out the factors most relevant in deciding whether to order a FFH, as follows:
(a) The interests of the child (which are relevant but not paramount)
(b) The time that the investigation will take
(c) The likely cost to public funds
(d) The evidential result
(e) The necessity or otherwise of the investigation
(f) The relevance of the potential result of the investigation to the future care plans for the child
(g) The impact of any fact finding process upon the other parties
(h) The prospects of a fair trial on the issue
(i) The justice of the case

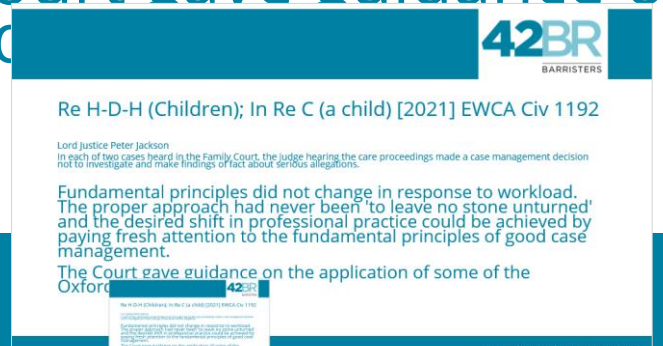
Re H-D-H (Children); In Re C (a child) [2021] EWCA Civ 1192

Lord Justice Peter Jackson

In each of two cases heard in the Family Court, the judge hearing the care proceedings made a case management decision not to investigate and make findings of fact about serious allegations.

Fundamental principles did not change in response to workload. The proper approach had never been 'to leave no stone unturned' and the desired shift in professional practice could be achieved by paying fresh attention to the fundamental principles of good case management.

The Court gave guidance on the application of some of the Oxford



- ‘ [21] Many of the factors identified in A County Council v DP, RS, BS overlap with each other and the weight to be given to them will vary from case to case. Clearly, the necessity or otherwise of the investigation will always be a key issue, particularly in current circumstances. Every fact-finding hearing must produce something of importance for the welfare decision. But the shorthand of necessity does not translate into an obligation to conclude every case as quickly as possible, regardless of other factors, and that is clearly not the intention of the administrative guidance. There will be cases in which the welfare outcome for the child is not confined to the resulting order. Not infrequently, a finding in relation to one child will have implications for the welfare of other children. Sometimes, findings that cross the threshold at a minimum level will not reflect the reality.
- The court's broad obligation is to deal with the case justly, having regard to the welfare issues involved. McFarlane J put it well in para [21] of A County Council v DP, RS, BS when he identified the question as being whether, on the individual facts of each case, it is 'right and necessary' to conduct a fact-finding exercise.’

- The factors identified in A County Council v DP, RS, BS should therefore be approached flexibly in the light of the overriding objective in order to do justice efficiently in the individual case. For example:

(i) When considering the welfare of the child, the significance to the individual child of knowing the truth can be considered, as can the effect on the child's welfare of an allegation being investigated or not.

(ii) The likely cost to public funds can extend to the expenditure of court resources and their diversion from other cases.

(iii) The time that the investigation will take allows the court to take account of the nature of the evidence. For example, an incident that has been recorded electronically may be swifter to prove than one that relies on contested witness evidence or circumstantial argument.

(iv) The evidential result may relate not only to the case before the court but also to other existing or likely future cases in which a finding one way or the other is likely to be of importance. The public interest in the identification of perpetrators of child abuse can also be considered.[2022] 1 FLR 454 at 462

(v) The relevance of the potential result of the investigation to the future care plans for the child should be seen in the light of the s 31(3B) obligation on the court to consider the impact of harm on the child and the way in which his or her resulting needs are to be met.

(vi) The impact of any fact-finding process upon the other parties can also take account of the costs for the local authority, even if it is the party seeking the investigation, in terms of resources and professional time that might be devoted to other children.

(vii) The prospects of a fair trial may also encompass the advantages of a trial now over a trial at a possibly distant and unpredictable future date.

(viii) The justice of the case gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account. One such matter is whether the contested allegation may be investigated within criminal proceedings. Another is the extent of any gulf between the factual basis for the court's decision with or without a fact-finding hearing. The level of seriousness of the disputed allegation may inform this assessment. As I have said, the court must ask itself whether its process will do justice to the reality of the case.

These are not always easy decisions and the factors typically do not all point the same way: most decisions will have their downsides. However, the court should be able to make its ruling quite concisely by referring to the main factors that bear on the individual case, and identifying where the balance falls and why. The reasoned case management choice of a judge who approaches the law correctly and takes all relevant factors into account will be upheld on appeal unless it has been shown that something has gone badly wrong with the balancing exercise

Re H-W (Care Proceedings: Further Fact-finding Hearing) [2023] EWCA Civ 149, [2023] 2 FLR 171

- This was an appeal by the LA against the judge's refusal to hold a further fact-finding hearing in proceedings concerning 4 children which had been ongoing for some time and had already involved a fact-finding hearing, and an appeal all the way up to the UKSC. When the matter returned to the family court a non-subject child, Y, made certain allegations against one of the fathers.

- The local authority subsequently applied for a further fact-finding hearing. They filed a schedule, based on Y's allegations, of the further findings they were seeking, not only against F3 but also against Y's parents, who were not parties to the instant proceedings. Following a hearing in November 2022, the judge concluded that, in the circumstances, it would not be appropriate to give the local authority permission to pursue the further allegations within the proceedings. Delivering an ex tempore judgment the judge noted, among other things, that the allegations related to events which had occurred when Y was between 2 and 6 years old on which there appeared to be no medical evidence, and that on the current information the chances of the local authority proving the allegations was low. The local authority appealed against the judge's refusal to order a further fact-finding hearing.

The Court of Appeal allowed the appeal: 'In deciding whether to hold a fact-finding hearing, it was imperative that judges conducted a proportionality analysis by reference to the factors identified in the Oxfordshire case as approved and developed by the Court of Appeal in Re H-D-H (Children), Re C (A Child)

- The judge had not been referred to either of those cases; had he been, the Court of Appeal held, he would have conducted an analysis by reference to the principles in the case-law which should have identified that the magnetic factors in deciding whether or not to allow a further fact-finding hearing were the necessity or otherwise of the investigation and the relevance of the potential result of the investigation to the future care plans for the children.

- Whether F3 could play an effective protective role was a crucial question.

- Whilst each decision would depend upon the circumstances of the case, the apparent quality of the evidence was unlikely to be a powerful factor in the overall decision unless it was clear without the need for detailed assessment that the evidence appeared to be particularly strong or particularly weak.

- It was also wrong for the judge to take into account the apparent absence of medical evidence.

- Equally the fact that Y's allegations were historic was not a matter which should have carried any significant weight in the judge's analysis at that stage.

- Accordingly, the judge had taken into account irrelevant matters and failed to take proper account of relevant matters. As a result, he had come to a decision that was outside the generous ambit of his discretion and plainly wrong.

- Given the relevance of the potential result of the investigation to the future care plans for the children, there had to be a further fact-finding hearing of Y's allegations against F3

Derbyshire County Council v AA and others (University Hospitals of Derby and Burton NHS Foundation Trust intervening)
[2022] EWHC 3404 (Fam)

Decision of Lieven J that a finding of fact hearing should not be undertaken unless it is going to make a material difference to the welfare outcome and the orders which may be made.

Care proceedings had been started in respect of a very young infant, X, who, during a routine standard operation for a tongue tie, was found to be suffering from healing fractures to three adjacent ribs. An application for an interim care or supervision order made at the start of the proceedings was refused and the child remained at home under a complex and very full supervision plan. Throughout the period of supervision over the following sixteen months, no doubts or concerns arose about the parents' care of the child. The general view of the experts instructed in the proceedings was that the injuries were more likely to have been inflicted non-accidentally although the time window for the injuries included the child's birth. It was agreed by all parties, however, that there were no risk factors or red flags concerning either parent.

The starting point for the Court was the principles in Family Procedure Rules 2010 and the overriding objective at FPR r1.1, which includes ensuring that the case is dealt with expeditiously and fairly, proportionately, and with fair allocation of resources.

Next, she considered the judgment in a private law case, K v K [2022] EWCA Civ 468 and, specifically, para 66 where the Master of the Rolls says: "the main things that the Court should consider in deciding whether to order a fact-finding hearing are: (a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of the child arrangements order, (b) that the purpose of fact-finding is to allow assessment of the 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."

Lieven J considered that although K v K is a private law case, the principles as to whether a fact-finding is necessary and proportionate (to determine what, if any, welfare orders should be made) are equally relevant to public law

Lieven J went on to consider the Oxfordshire factors, as expanded upon in Re H-D-H

Having gone through that exercise, the judge concluded that 'In applying those tests to the facts of this case I have decided that it is neither necessary nor proportionate to hold a finding of fact hearing. The fundamental purpose of public law proceedings is to determine what public law orders are needed for the welfare of the child and to protect the child from future risk. Understanding the facts and circumstances of an alleged non-accidental injury is often critical to the determination of future risk. But here I do not find that is necessary, and even if I made all the findings it would be unlikely to have any material impact on the ultimate orders for X'.

Ultimately, it was a question of whether it was justifiable to hold a 9 day finding of fact hearing in order to determine whether it was appropriate to make a legally binding supervision plan as opposed to an agreed supervision plan. Lieven J held that it would be a disproportionate use of court time to proceed with the hearing.

The judge also observed in her conclusion that: 'It is sometimes argued in these circumstances that the parties and child need to know "the truth" of what has happened. Peter Jackson LJ refers to this at paragraph 22(i) in Re H-D-H. In this case the benefit of finding out what happened is largely illusory. X is too young to know (or care) what happened. I think it highly unlikely that the parents would accept findings even if I made them. I cannot see any justification for a 9-day finding of fact hearing so that at some point in the future X can know "the truth".

P and E (Care Proceedings: whether to hold Fact-Finding Hearing) [2024] EWCA Civ 403

Lord Justice Baker

Appeal against decision not to hold fact-finding hearing concerning injuries sustained by very young child

- The trial judge had relied on the decision of Mrs Justice Lieven in the Derbyshire case, in reaching her decision, finding a number of similarities between the two cases.

- The Court of Appeal held that the judge was right to give careful consideration to the question whether a fact-finding hearing was necessary but that she took the wrong approach in reaching her decision by comparing the facts with those in the Derbyshire case:

‘It was not correct to say that the facts of this case “very closely mirror” those in the Derbyshire case. There are plainly some similarities. In both cases, a young child sustained injuries in the care of his or her parents. The parents have been unable to provide an explanation as to how the injuries occurred. In other respects, social workers have formed a positive view of the quality of the parents' care of their children. The children are suffering harm as a result of the delay in concluding these proceedings which have already continued beyond the 26 week period in which such proceedings are expected to be concluded.’

- In other respects, however, there are material differences between the two cases.

For example:

- In the *Derbyshire* case, the child had sustained fractures to three adjacent ribs. Lieven J was therefore able to conclude that the fractures had been sustained in a single incident. In the present case, however, the medical evidence indicated that the injuries would have been sustained or inflicted in at least two acts through different mechanisms

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In the *Derbyshire* case, Lieven J concluded that there was “no evidence … to support any finding of deliberately inflicted injury”. In the present case, there plainly is evidence which is capable of supporting a finding that the injuries were inflicted deliberately, although no such finding could be made without consideration of all of the evidence

- In P and E, the parenting assessment included the following observation: “P sustained incredibly serious injuries within days of her birth which have since been deemed by medical experts to be non-accidental, inflicted injuries”. It concluded that the assessor could not “safely make a recommendation as to how to manage the potential risk of harm to P and E should they be returned to the mother and F's care if the injuries have been inflicted and/or if the Court has not taken a decision as to how they occurred”, and that it would be “incredibly difficult … to manage risk if professionals are not aware of triggers and stressor which might have an impact on a parent's parental capacity to meet their child's needs safely or indeed what the actual risks are.” None of those observations were mentioned in the judge's summary of the assessment.

This was a fatal flaw in the judge's reasoning

- ‘Although the judge was plainly seeking to apply the correct legal principles, I agree with the appellants' submission that she erred in basing her decision on a comparison with the Derbyshire case. Decisions of this sort should be made by a careful application of the principles derived from the case law. Comparison with decisions of other judges at first instance are unlikely to be helpful because inevitably each case turns on its own facts. And there is a danger that the comparison will be inaccurate. Here the judge concluded that “other than the difference regarding current placement, I cannot see what else distinguishes this case from [the Derbyshire case]”. In fact, as noted above, there were a number of significant differences which the judge overlooked.’

- There is always a danger with checklists of the sort set out in the Oxfordshire case that each factor will be seen as attracting equal weight. Some factors, however, if present, are likely always to carry greater weight. As Peter Jackson observed in H-D-H, “clearly, the necessity or otherwise of the investigation will always be a key issue.” In Re H-W (Care Proceedings: Further Fact-Finding Hearing) [2023] EWCA Civ 149, this Court concluded that the necessity or otherwise of the investigation and the relevance of the potential result of the investigation to the future care plans for the children were, on the facts of that case, “the magnetic factors in deciding whether or not to allow a further fact-finding hearing”.

- In my view they were also the decisive factors in the present case and the judge was wrong to reject the local authority's submission that findings were “fundamental”.

- Of course, the adverse effect on the children resulting from a further delay in reaching decisions about their future welfare is a very important factor.

The costs of the proceedings, and the impact on the expenditure of resources on other cases, are also relevant. For those reasons, if the judge had been right to conclude that the potential result of the fact-finding hearing would have no material impact on future care plans for the children, her decision would in all probability not have been open to challenge.

- In those circumstances, the importance of the children having a clear narrative about what happened, although a matter of importance, would probably not have justified continuing the proceedings to a full hearing.

- But for the reasons set out in the parenting assessment, the fact-finding hearing is necessary to provide a greater understanding of the risks of future harm and without that understanding it will not be possible to make plans for the future care of the children which safeguard their welfare.

- ‘In the *Derbyshire* case, Lieven J was able to conclude that “the overwhelming probability is that if the court did find a non-accidental injury it would be a single act of significantly inappropriate handling of a very young baby, rather than any deliberate act or any course of conduct.” In the present case, it is plainly possible that after a fact-finding hearing the court could conclude that the injuries were sustained as a result of “significantly inappropriate handling” but the judge was in no position to conclude at the case management hearing that such an outcome was the “overwhelming probability”. It will be unusual for a court to be in a position to reach such a conclusion at a case management hearing.’

Future Developments

Is there a difference of approach emerging between Public and Private Law proceedings?

Questions