

# WESTGATE CHAMBERS



Domestic Abuse and Fact Finding Hearings - The Court's approach.

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## Domestic Abuse and Fact Finding Hearings - The Court's approach

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### When is a fact finding hearing necessary?

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The starting point is the Family Procedure Rules 2010 Practice Direction 12J

[https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_12j](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12j)

The definition of domestic abuse is at paras 2A and 3 of PD 12J and adopts the definition within the Domestic Abuse Act 2021.

When considering whether a FFH is necessary, practitioners should have particular regard to paragraphs 16, 17, 36 and 37 of the Practice Direction.

‘16 The court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic abuse –

- (a) in order to provide a factual basis for any welfare report or for assessment of the factors set out in paragraphs 36 and 37 below;
- (b) in order to provide a basis for an accurate assessment of risk;
- (c) before it can consider any final welfare-based order(s) in relation to child arrangements; or
- (d) before it considers the need for a domestic abuse-related Activity (such as a Domestic Violence Perpetrator Programme (DVPP)).

17 In determining whether it is necessary to conduct a fact-finding hearing, the court should consider –

- (a) the views of the parties and of Cafcass or CAFCASS Cymru;
- (b) whether there are admissions by a party which provide a sufficient factual basis on which to proceed;
- (c) if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;
- (d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;
- (e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact-finding hearing;
- (f) the nature of the evidence required to resolve disputed allegations;
- (g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and
- (h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.

**36 (1) In the light of- (a) any findings of fact, (b) admissions; or (c) domestic abuse having otherwise been established, the court should apply the individual matters in the welfare checklist with reference to the domestic abuse which has occurred and any expert risk assessment obtained.**

(2) In particular, the court should in every case consider any harm-

- (a) which the child as a victim of domestic abuse, and the parent with whom the child is living, has suffered as a consequence of that domestic abuse; and

(b) which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made.

(3) The court should make an order for contact only if it is satisfied-

(a) that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during and after contact; and

(b) that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.

**37 In every case where a finding or admission of domestic abuse is made, or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other and towards the child and the impact of the same. In particular, the court should consider –**

(a) the effect of the domestic abuse on the child and on the arrangements for where the child is living;

(b) the effect of the domestic abuse on the child and its effect on the child's relationship with the parents;

(c) whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent;

(d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and

(e) the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse’.

**Re H-N [2021] EWCA Civ 448** reminded practitioners that **PD 12J remains fit for purpose** at [28].

It is essential that practitioners properly address the PD when considering whether a fact finding hearing is necessary and when making representations on the issue.

In **K v K [2022] EWCA Civ 468** the Court of Appeal expressly endorsed Re H-N and sought to provide general guidance as to when a FFH is necessary:

*‘A decision to hold a fact-finding hearing is a major judicial determination within the course of family proceedings. The process will inevitably introduce delay and postpone anything other than an interim determination of issues relating to the child's welfare, which is contrary to the statutorily identified general principle that any delay in resolving issues is likely to be prejudicial to a child's welfare (section 1(2) of the CA 1989). Further, the litigation of factual issues between parents is likely to be adversarial and, whatever the outcome, to have a negative impact on their ongoing relationship and ability to cooperate with each other as parents. It is therefore important for the court, in every case where fact-finding is being considered, to take time to identify the welfare issues, to understand the nature of the allegations, and then to consider whether the facts alleged are relevant to those issues and whether it is, therefore, necessary for the factual dispute to be determined...at [42]*

*We emphasise in conclusion that, without in anyway resiling from what was said at [139] of Re H-N about the pernicious nature of domestic abuse, **fact-finding is only needed if the***

**alleged abuse is likely to be relevant to what the court is being asked to decide relating to the children's welfare**(see FPR PD12J at [14] and [17(g)]) at [45] (author's emphasis).

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## **K v K – The Guidance**

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The Court provided guidance as follows:

*"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." at [66]*

*'It seems that a misunderstanding of the court's role has developed. There is a perception that the Court of Appeal has somehow made it a requirement that in every case, in which allegations of domestic abuse are made, it is incumbent upon the court to undertake fact-finding, involving a detailed analysis of each specific allegation made. That is not the case. As Re H-N explained and we reiterate here, **the duty on the court is limited to determining only those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, in what terms**' at [67].*

In December 2022, in **Derbyshire County Council v AA & ORS [2022] EWHC 3404** in the context of public law proceedings involving alleged non accidental injuries, the High Court expressly considered the principles to be applied in determining whether a fact finding hearing is necessary, citing the principles in K v K:

*'Although that 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' at [13].*

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## Key Considerations/ Takeaways:

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- All practitioners should advise their client's that it is NOT the role of the family court to determine every allegation of domestic abuse or disputed issue as between the parties. This is often a misconception.
- Domestic abuse is not a bar to a parent's relationship with a child, the issue is what are the risks, can those risks be managed? If they can be managed, is a FFH necessary and proportionate?
- The fundamental question is: is a determination of the disputed factual issues necessary before the court can safely make orders in respect of child arrangements?
- The issue of whether a FFH is necessary should be considered at the first opportunity, usually the FHDRA with the reasons for the Court's decision properly recorded on the face of the Order
- When advising client's on the issue, consider specifically what the arrangements for contact were prior to the application.
- Scrutinise the reasons why the parent says there shouldn't be contact or why they say there should be restrictions in respect of contact e.g. supervision. If you don't, the court will.
- If the allegations, even if proved and however serious, would not be relevant to the decision, then no fact-finding hearing is required.

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## Judicial Guidance

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Following the decision in *K v K*, Sir Andrew Macfarlane invited Lady Justice Macur to produce guidance to Magistrates and Judges regarding fact finding hearings in private children matters.

The guidance was published in May 2022 and can be accessed here:

<https://www.judiciary.uk/guidance-and-resources/fact-finding-hearings-and-domestic-abuse-in-private-law-children-proceedings-guidance-for-judges-and-magistrates/>

The guidance is helpful and should be read in full. It highlights several important issues that legal representatives should consider when dealing with private law applications that can be summarised as follows:

- 1) Has a MIAM taken place? If not, why not?
- 2) Has form C1A being completed and is there a response? The forms should be considered in their entirety. Does the court have sufficient information to determine the issue of whether a FFH is necessary. Properly pleaded form C1A's will assist in the early determination of this issue.
- 3) Allegations of coercive control are likely to require a statement, whereas specific incidents of violence can be reduced to a schedule.
- 4) The Court controls the evidence. Is third party disclosure necessary, can this be distilled e.g. police disclosure. Do proposed witnesses assist with the issues in dispute?
- 5) **IMPORTANTLY** The Court must at all stages in proceedings consider whether DA is raised as an issue. '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’.

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## Participation Directions

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**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.

In *M (A Child) [2021] EWHC 3225 (Fam)* on an Appeal in the High Court before Mrs Justice Judd the following was noted:

- a. that it did not appear from any of the orders that the question of participation directions was considered or determined by the court...
- b. the provisions of rule 3A and PD3AA are mandatory. The word used is 'must' and the obligation is upon the court, even though the parties are required to cooperate.
- c. the obligation to consider vulnerability is upon the court...
- f. There was evidence before the judge that M had some long-term underlying fragilities and that she was anxious. In short this was a case that cried out for participation directions and Ground Rules Hearing not just for the sake of M but for the integrity of the court process itself.
- g. There should have been consideration of whether M should be visually shielded from F when she gave her evidence and what topics should have been covered in cross examination.
- h. It was not possible to know how the lack of special measures may have affected M and her evidence.

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## **Prohibition on Direct Cross Examination**

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In addition to the issue of special measures above, in the context of parties who are often litigants in person, the Court and parties must consider the issue of cross examination.

### **PD 12J para 28 provides:**

While ensuring that the allegations are properly put and responded to, the fact-finding hearing or other hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved. At the fact-finding hearing or other hearing –

- each party can be asked to identify what questions they wish to ask of the other party, and to set out or confirm in sworn evidence their version of the disputed key facts; and
- the judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focusing on the key issues in the case.

**s65 of the Domestic Abuse Act 2021** makes specific provision for the prohibition of victims of abuse from being directly cross examined by the alleged perpetrator of abuse.