



ALL THE FACTS MA'AM

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THE CONTEXT

- Potentially draconian outcomes in ‘high risk’ cases
- Party making the allegations must reconcile the impossible
 - a belief that the allegations made are true; and
 - a willingness to facilitate a relationship between the child and the ‘abuser’
- Party answering the allegations faces at best a limited relationship pending the trial

THE CONCEPT

- One solution – ‘finding of fact’ or ‘discrete’ hearing
- Proceeding ‘split’ into two hearings
- Firstly, a discrete hearing as to the allegations
 - confined to specific factual dispute and/or
 - broader consideration of risk
- Then, further hearing using those findings of risk in more general enquiry
- Intervening period between two hearings:
 - for therapeutic/psychological engagement
 - re-establish child’s relationship with parent
 - assist in resolving proceeding

THE CONCEPT – SOME ALTERNATIVES

- Interim orders
 - BUT, any different to one final hearing?
- the 'Russell and Close option'
 - BUT
 - misunderstood?
 - rarely successful?
- the 'Rice & Asplund Notation'
 - BUT enforceability?

AUSTRALIAN CONTEXT - LEGISLATION

- Division 12A Family Law Act
- Principles for conducting child related proceedings – s69ZN
 - “...the court to consider...impact that conduct of proceedings may have on the child...” (Principle 1)
 - “...the court is to actually direct, control and manage the...proceedings” (Principle 2)
- Overarching Purpose – rule 1.04 of FCFCA Rules
- s60CC
- s69ZQ – General Duties of the Court

AUSTRALIAN CONTEXT - LEGISLATION

- s69ZR

(1) If, at any time after the commencement of child-related proceedings and before making final orders, the court considers that it may assist in the determination of the dispute between the parties, the court may do any or all of the following:

(a) make a finding of fact in relation to the proceedings;

(b) determine a matter arising out of the proceedings;

(c) make an order in relation to an issue arising out of the proceedings.

Note: For example, the court may choose to use this power if the court considers that making a finding of fact at a particular point in the proceedings will help to focus the proceedings.

(2) Subsection (1) does not prevent the court doing something mentioned in paragraph (1)(a), (b) or (c) at the same time as making final orders.

(3) To avoid doubt, a person who exercises a power under subsection (1) in relation to proceedings is not, merely because of having exercised the power, required to disqualify himself or herself from a further hearing of the proceedings.

AUSTRALIAN CONTEXT – CASE LAW

- *Rodelgo & Blaine* [2019] Fam CAFC 73
 - Trial Judge conducted discrete hearing as to whether children risk of harm from either parent
 - having made a finding of unacceptable risk of physical and emotional harm insofar as it related to the Father, the trial Judge adjourned the matter for written submissions as to ‘what happens next’.
 - Full Court found that *‘the trial Judge’s approach in this respect was permissible’*.

AUSTRALIAN CONTEXT – CASE LAW

- *Blann & Kenny* [2021] Fam CAFC 161
 - “...the circumstances affecting children’s best interests are multifarious and liable to change quickly...”
 - “...relevant issues may need to be determined sequentially in the litigation (ss69ZQ(1) and 69ZR...”
 - “such clear statutory provisions...override the force of any generalized quotes which may be cherry-picked from an authoritative common law case lauding the finality of litigation”

AUSTRALIAN CONTEXT – CASE LAW

- Use of discrete hearings where allegations of sexual abuse raised
- Justice Baumann in:
 - Launay & Kitanovski [2019] FamCA 814
 - Ziegler & Ziegler [2021] FedCFamC1F 19
 - Allen & Sacco [2022] FedCFamC1F 120
- Some comments on Isles & Nelissen [2022] FedCFamC1A 97
- Other uses?

THE UNITED KINGDOM CONTEXT



THE UNITED KINGDOM CONTEXT- PUBLIC LAW

Children Act 1989

A Single piece of legislation dealing with all matters relating to children.

- Part 2: Order with respect to Children in Family Proceedings (Section 8- 16)
- Part 3: Support for Children and Families Provided by Local Authorities (16B- 30)
- Part 4: Care and Supervision (31-42)
- Part 5: Protection of Children (43-52)
- Part 6: Community Homes (53- 58)

THE CHILDREN ACT 1989

The Threshold Criteria

- S31 Children Act 1989

(2) A court may only make a care order or supervision order if it is satisfied—

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to—

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control.

THE CHILDREN ACT 1989

The 'Welfare Checklist'

- Section 1(3) Children Act 1989

3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

PRACTICE DIRECTION 12A

AKA The Public Law Outline

AKA Judicial Case Management Protocol

- **Stage 2 Case management hearing**
 - Deciding whether there is a real issue about threshold to be resolved
- **Stage 3 Issues Resolution Hearing**
 - Court identifies the key issue(s) (if any) to be determined and the extent to which those issues can be resolved or narrowed at the IRH
 - Court considers whether the IRH can be used as a final hearing

JUDICIAL 'RESISTANCE'

Re S [2014] EWCA Civ 25

- Per Lord Justice Ryder

Even where it is asserted that delay will not be occasioned, the use of split hearings must be confined to those cases where there is a stark or discrete issue to be determined and an early conclusion on that issue will enable the substantive determination (i.e. whether a statutory order is necessary) to be made more expeditiously....

I ought to emphasise for the avoidance of doubt that although parallels can be drawn between the use of fact finding hearings in public and private law children proceedings, the appropriate and measured use of fact finding hearings in private law proceedings which are often safety cases, for example involving recent domestic abuse between parents, are not the subject of this court's consideration in this judgment.

Re K (Care Proceedings: Fact Finding) [2010] EWHC 3341 (Fam)

THE UNITED KINGDOM CONTEXT- PRIVATE LAW

Practice Direction 12J: Child Arrangements & Contact Order: Domestic Abuse and Harm

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)).

THE UNITED KINGDOM CONTEXT- PRIVATE LAW

Practice Direction 12J: Child Arrangements & Contact Order: Domestic Abuse and Harm

28. 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...

29 The court should, wherever practicable, make findings of fact as to the nature and degree of any domestic abuse which is established and its effect on the child, the child's parents and any other relevant person...

30 At the conclusion of any fact-finding hearing, 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 or scope of any report under section 7...

31 Where the court has made findings of fact on disputed allegations, any subsequent hearing in the proceedings should be conducted by the same judge or by at least the same chairperson of the justices...

JUDICIAL CONSIDERATION

K and K [2022] EWCA Civ 468

- Per Sir Geoffrey Vos, MR

*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.*

HOW AND WHEN TO ASK FOR A SPLIT HEARING

- Appears to have been judicially driven to this point.
- However, RULE 10.10 provides
 - (1) A party may apply for a decision on any issue, if the decision may:
 - (a) dispose of all or part of the proceeding; or
 - (b) make a trial unnecessary; or
 - (c) make a trial substantially shorter; or
 - (d) save substantial costs.
 - (2) An application under this rule must be made by filing an application in accordance with the approved form.

WHEN TO ASK FOR A SPLIT HEARING

Compliance Readiness Hearing

- Includes as its primary purpose

5.55(g) to consider whether determination of a discrete issue would likely facilitate the timely resolution of the overall proceedings;

5.55(h) to ensure that the relevant issues of fact and law and the relief sought by the parties are appropriately defined and particularised including, if appropriate, by way of formal pleadings or short form statements of contention;

- But the CRH is to take place “on a date as close as possible to 6 months from the date of filing” might there be advantages to seeking a fact finding hearing prior to that date

FEDERAL COURT PROCESS

- Acknowledges that there will be cases in which the *'conduct of proceedings may be made more efficient by determining some issues before other issues.'*

6.70 If orders are made for a separate question (or questions), the process generally entails:

- the formulation of the 'separate questions' for the Court to answer; and
- a trial confined to the issues raised by the separate questions

ADVANTAGES

- an opportunity to accept findings
- an opportunity to test genuineness of belief
- an opportunity to engage in therapy/counselling
- an opportunity to re-establish and/or develop time with a parent
- utility of Family Report
- earlier resolution of proceedings
- saving of time and money

DISADVANTAGES

- potential delay
- potential costs implication
- delay of the inevitable
- continuity of legal representatives
- judicial continuity
- why not consider risk “as part of the wholesale consideration of all relevant...factors”