



NINESTJOHNSTREET
FAMILY & MENTAL HEALTH

Domestic Abuse:
Finding of fact
hearings post
Re H-N and Others
(children) (domestic
abuse: finding of
fact hearings) [2021]
EWCA Civ 448



Domestic Abuse: Finding of fact hearings post *Re H-N and Others (children)* (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448

In this article Holly Platt and Kate Pye-Jones consider a selection of judgments and the Guidance issued by the President, following *Re H-N*, and provide some overall conclusions and practical tips in relation to finding of fact hearings in private law proceedings. The article is lengthy but we hope that it provides a comprehensive overview of the key issues to consider in cases involving allegations of abuse.

Practice Direction 12J

The starting point when considering the necessity and proportionality of a finding of fact hearing is, of course, PD12J. Paragraphs 16, 17 and 19 are particularly important:

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.
19. Where the court considers that a fact-finding hearing is necessary, it must give directions as to how the proceedings are to be conducted to ensure that the matters in issue are determined as soon as possible, fairly and proportionately, and within the capabilities of the parties. In particular it should consider –
- a) what are the key facts in dispute;
 - b) whether it is necessary for the fact-finding to take place at a separate (and earlier) hearing than the welfare hearing;
 - c) whether the key facts in dispute can be contained in a schedule or a table (known as a Scott Schedule) which sets out what the applicant complains of or alleges, what the respondent says in relation to each individual allegation or complaint; the allegations in the schedule should be focused on the factual issues to be tried; and if so, whether it is practicable for this schedule to be completed at the first hearing, with the assistance of the judge;
 - d) what evidence is required in order to determine the existence of coercive, controlling or threatening behaviour, or of any other form of domestic abuse;
 - e) directing the parties to file written statements giving details of such behaviour and of any response;
 - f) whether documents are required from third parties such as the police, health services or domestic abuse support services and giving directions for those documents to be obtained;
 - g) whether oral evidence may be required from third parties and if so, giving directions for the filing of written statements from such third parties;
 - h) where (for example in cases of abandonment) third parties from whom documents are to be obtained are abroad, how to obtain those documents in good time for the hearing, and who should be responsible for the costs of obtaining those documents;
 - i) whether any other evidence is required to enable the court to decide the key issues and giving directions for that evidence to be provided;
 - j) what evidence the alleged victim of domestic abuse is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence;
 - k) in cases where the alleged victim of domestic abuse is unable for reasons beyond their control to be present at the hearing (for example, abandonment cases where the abandoned spouse remains abroad), what measures should be taken to ensure that that person's best evidence can be put before the court;
 - l) what support the alleged perpetrator may need in order to have a reasonable opportunity to challenge the evidence; and
 - m) whether a pre-hearing review would be useful prior to the fact-finding hearing to ensure directions have been complied with and all the required evidence is available.



Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448

Case link: <https://www.bailii.org/ew/cases/EWCA/Civ/2021/448.html>

On 30 March 2021 the Court of Appeal (CA) delivered judgment in *Re H-N*. A detailed summary of the judgment was set out in a previous 9 St John Street newsletter, which can be found [here](#).

The CA took the opportunity to provide guidance in relation to the proper approach of the court regarding the following issues:

1. Whether there should be a finding of fact hearing;
2. The use of Scott Schedules;
3. The approach to controlling and coercive behaviour; and
4. The relevance of criminal law concepts.

Domestic abuse

Before addressing the four issues referred to above, the judgment discusses there are many cases in which the allegations are not of violence, but of a pattern of behaviour which it is now understood is abusive. This has led to an increasing recognition of the need in many cases for the court to focus on a pattern of behaviour [25]. The judgment goes on to consider the definitions of domestic abuse and the various references within PD12J to a pattern of acts, and highlights that it is now understood that specific incidents, rather than being seen as free-standing matters, may be part of a wider pattern of abuse or controlling or coercive behaviour [27].

The CA noted that central to the modern definitions of domestic abuse is the concept of coercive and / or controlling behaviour [29] and a pattern of such behaviour is as relevant to the child as to the adult victim:

31. *A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:*
 - i) *Is directed against, or witnessed by, the child;*
 - ii) *Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;*
 - iii) *Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;*
 - iv) *Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men.*

At paragraph 32, the CA emphasised the importance of recognising when certain behaviours may not amount to abuse, noting that much will depend on the intention of the perpetrator and the harmful impact of the behaviour:

32. *It is equally important to be clear that not all directive, assertive, stubborn or selfish behaviour, will be 'abuse' in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour. We would endorse the approach taken by Peter Jackson LJ in Re L (Relocation: Second Appeal) [2017] EWCA Civ 2121 (paragraph 61):*

"Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is defined as behaviour that is 'used to harm, punish, or frighten the victim...' and 'controlling behaviour' as behaviour 'designed to make a person subordinate...' In cases where





the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict.”

The approach of the court to patterns of abusive behaviour

The CA indicated that although the principal focus of the judgment was on coercive and controlling behaviour, the definition of domestic abuse makes reference to patterns not only in respect of controlling and / or coercive behaviour but to all forms of abuse including physical and sexual violence, and that the court’s observations therefore applied equally to all forms of abuse [33].

(i) The need for and the scope of any fact-finding hearing

The judgment quotes extensively from the relevant paragraphs of PD12J [35] and highlights the need for procedural proportionality and the key word “necessary”. The word “necessary” is a word that also sits at the core of the President’s Guidance, *The Road Ahead* (June 2020) [36]. The judgment also highlights the importance of keeping the overriding objective, FPR 2010, r 1.1, in mind. At paragraph 37 the CA provides a summary of the proper approach to deciding whether a finding of fact hearing is necessary:

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’.*

(ii) Scott Schedules

The CA noted that within the dozen oral submissions heard, there was effective unanimity that the value of Scott Schedules in domestic abuse cases had declined to the extent that, in the view of some, they were now a potential barrier to fairness and good process, rather than an aid [43]. The CA saw the force in the criticisms that: a) there is a need for the court to focus on the wider context of whether there has been a *pattern* of coercive and controlling behaviour, as opposed to a list of specific factual incidents that are tied to a particular date and time [44], and (b) requiring a party to limit to the allegations to be tried to a specific number risks depriving the court of a vantage point from which to view the alleged behaviour as a whole, and removed consideration of whether there was a *pattern* of coercive and controlling behaviour from its assessment [45]. At paragraph 46 the CA accepted that an alternative means was now required:

46. *For our part, we see the force of these criticisms and consider that serious thought is now needed to develop a different way of summarising and organising the matters that are to be tried at a fact-finding hearing so that the case that a respondent has to meet is clearly spelled out, but the process of organisation and summary does not so distort the focus of the court proceedings that the question of whether there has been a pattern of behaviour or a course of abusive conduct is not before the court when it should be. This is an important point. Everyone agrees.*





The judgment acknowledged that the form of any replacement pleading raised a difficult question [48] and it would be for others, outside the crucible of an individual case or appeal, to develop suggestions into new guidance or rule changes [49]. The CA suggested that in practice that work was likely, in the first instance, to be done through the Private Law Working Group together with the Harm Panel's implementation group whose final recommendations may lead to changes to the FRP or in the issuing of fresh guidance through the medium of a Practice Direction [49].

(iii) *Approach to controlling and coercive behaviour*

The CA stated that in the meantime, cases must still be heard and with an increased focus on controlling and coercive behaviour [50]. The approach of regarding controlling and coercive incidents occurring during the parties' relationship as being "in the past", and therefore of little or no relevance in terms of establishing a risk of future harm, should be considered to be "old fashioned" and no longer acceptable [52].

The importance of focussing on a pattern of coercive and / or controlling behaviour and the implications of this on other, more specific, factual allegations is set out at paragraph 59:

59. *Where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary in the context of PD12J, paragraph 16, that assertion should be the primary issue for determination at the fact-finding hearing. Any other, more specific, factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise, unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape).*

Re JK (A Child) (Domestic Abuse: Finding of Fact Hearing) **[2021] EWHC 1367 (Fam)**

Case link: <https://www.bailii.org/ew/cases/EWHC/Fam/2021/1367.html>

On 21 May 2021 Pool J delivered judgment in *Re JK* following a finding of fact hearing concerning allegations of a pattern of coercive and / or controlling behaviour. *Re JK* was case managed before the CA handed down judgment in *Re H-N* but the finding of fact hearing took place shortly after the judgment.

The parties had both filed Scott Schedules setting out their respective allegations against one another. At paragraph 27 Pool J stated that had the case been case managed after the judgment in *Re H-N*, it would have been helpful to have had, in addition to the witness evidence, concise statements on behalf of each party including:

- a) *a summary of the nature of the relationship;*
- b) *a list of the forms of domestic abuse that the evidence is said to establish;*
- c) *a list of key specific incidents said to be probative of a pattern of coercion and/or control; and*
- d) *a list of any other specific incidents so serious that they justify determination irrespective of any alleged pattern of coercive and/or controlling behaviour.*

The court would have needed to know which specific allegations listed at (d) were admitted or disputed, but there would have been no need to have formal responses to the other sections of the statements.





GK v PR [2021] EWFC 106

Case link: <https://www.bailii.org/ew/cases/EWFC/HCI/2021/106.html>

On 14 December 2021 Peel J delivered judgment in respect of an appeal against the decision of a Recorder following a finding of fact hearing, in which he dismissed a wide range of allegations of domestic abuse. The mother's allegations were set out in a Scott Schedule and included allegations of coercive and controlling behaviour.

Peel J referred to the concerns raised in respect of Scott Schedules in *Re H-N* and *Re JK* [21], and at paragraph 22 he echoed the need for a holistic overview to determine fluid and nuanced patterns:

22. *The risk of applying the Scott Schedule technique is that the judge approaches the case in a formulaic, incident by incident way which detracts from the holistic overview necessary to determine fluid and nuanced patterns. It also runs the risk that incidents which may appear trivial are overlooked and not relied upon. In some cases, a Scott Schedule may be appropriate, for example if the complainant alleges a small number of specific incidents without asserting a pattern of behaviour. But in a case such as this, I am doubtful as to the utility of a Scott Schedule.*

Re B-B (Domestic Abuse: Fact-Finding) [2022] EWHC 108 (Fam)

Case link: <https://www.bailii.org/ew/cases/EWHC/Fam/2022/108.html>

On 20 January 2022 Cobb J delivered judgment in *Re B-B* following a finding of fact hearing involving cross-allegations of domestic abuse, the case having been remitted to the High Court following the mother's successful appeal as one of the conjoined appeals in *Re H-N*.

At paragraph 6 Cobb J made a number of important observations which are worth setting out in full:

6. *This hearing, and the preparation of this judgment, has highlighted the following:*
 - i) *The benefit of considering the evidence relevant to each different form of alleged domestic abuse in 'clusters': thus, it was useful to 'cluster' the evidence which went to the issue of alleged physical abuse; separately I considered the evidence of the allegations relevant to sexual abuse, separately emotional abuse, separately financial abuse and so on. Inevitably, the evidence relevant to each form of abuse overlapped in places, but in looking at the evidence by reference to the different forms of alleged abuse, a picture was built up of the nature of the relationship under scrutiny, and it was easier to see whether patterns of behaviour emerged. This may not have been so apparent had the matters been looked at by reference to individual / freestanding items on a Scott Schedule. I accept the Court of Appeal's view that it is the cumulative effect of individual incidents within each of those clusters of abuse-type, and of each type of abuse on the other, which give the clearest indication of the experience of abuse;*
 - ii) *The importance of resolving these issues close in time to the events in question; this hearing took place between three and five years after the key events. The delay in resolving the issues has compromised the quality of the evidence itself, and the delay has inevitably taken a toll on the litigants who have not been able emotionally to get on with their lives;*
 - iii) *The need for flexible arrangements to ensure that participation directions (rule 3AA FPR 2010) truly meet the needs of the parties and the case; the increased use of 'hybrid' hearings over the last 18 months (for all types of hearing in the family court) provides a useful template which worked well in this case;*
 - iv) *The need for advocates to focus on those issues which it is necessary to determine to dispose of the case, and for oral evidence and/or oral submissions to be cut down only to that which it is necessary for the court to hear;*





- v) *The evidence of the principal parties is always likely to be far more valuable than the evidence of supporting witnesses; at the case management stage, judges should rigorously test with the parties and/or their advocates (and review for themselves) what (if any) real value is likely to be brought to the enquiry by the evidence of third parties;*
- vi) *The importance of judicial continuity in domestic abuse cases; unsurprisingly, I had no prior connection with this case before it was remitted for hearing by the Court of Appeal. But it struck me as I considered the case management of this case prior to the hearing, and indeed as I listened to the evidence itself, that continuity of judicial involvement would have enhanced the efficient and sympathetic management of the process;*
- vii) *That an abusive relationship is invariably a complex one in which the abused partner often becomes caught up in the whorl of abuse, losing objective sense of what was/is acceptable and unacceptable in a relationship. Like many abused partners, the mother in this case became immunised to the emotional volatility of the damaging relationship which she saw as normal and acceptable; like many abused partners, she clung to what she knew.*

B v P [2022] EWFC B18

Case link: <https://www.bailii.org/ew/cases/EWFC/OJ/2022/B18.html>

On 31 March 2022 HHJ Levey delivered judgment in respect of an appeal against the decision of a District Judge following a finding of fact hearing, in which she found most of the mother’s allegations not proved.

The trial judge did not follow the approach suggested in *Re H-N*. Instead, she approached the allegations one at a time, without standing back to consider the overall picture and the nature of the behaviour as a whole [51]. The judge made findings of abuse but did not then go on to consider whether that was a pattern of behaviour [52]. HHJ Levey found that in doing so, the trial judge fell into error.

In addition, a ground rules hearing had not been held and the trial judge made no reference to Part 3A, PD3AA or PD12J in her judgment. The judgment highlights the need to consider PD12J and special measures in every case where domestic abuse is alleged. The obligation to consider special measures lies with the court. HHJ Levey accepted it does not matter that the appellant was represented and that it appears that the court was not asked to consider special measures, but stated that one would hope and expect the appellant’s counsel would have raised these matters before the hearing started [44].

K v K [2022] EWCA Civ 468

Case link: <https://www.bailii.org/ew/cases/EWCA/Civ/2022/468.html>

On 8 April 2022 the CA delivered judgment in *K v K*. The CA provided general guidance on the proper approach to finding of fact hearings following the decision in *Re H-N*. The court endorsed the decision in *Re H-N* [1] and made it clear that the CA in *Re H-N* did not impose a requirement for a finding of fact hearing in every case in which domestic abuse is alleged [67]. The judgment emphasises that 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 [45].

Paragraphs 65–67 are worth setting out in full:

- 65. *A fact-finding hearing is not free-standing litigation. It always takes place within proceedings to protect a child from abuse or regarding the child’s future welfare. It is not to be allowed to become an opportunity for the parties to air their grievances. Nor is it a chance for parents to seek the court’s validation of their perception of what went wrong in their relationship. If fact-finding is to be justified in the first place or continued thereafter, the court must be able to identify how any alleged abusive behaviour is, or may be, relevant to the determination of the issues between the parties as to the future arrangements for the children.*





66. *At the risk of repeating what has been said at [37] in Re H-N and at [41] above, 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.*
67. *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.*

The judgment is also a useful reminder that any exemption from a MIAM must be validly claimed and at the first hearing the court will inquire into this, pursuant to rule 3.10(1) FPR. If an exception has not been validly claimed, the court may direct the parties to attend a MIAM and adjourn the proceedings to enable the parties to do so, pursuant to rule 3.10(2) [31].

Fact Finding Hearings and Domestic Abuse in Private Law Children Proceedings Guidance for Judges and Magistrates

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

On 5 May 2022 the President issued Guidance in relation to finding of fact hearings. The Guidance should be read in full, but the following paragraphs are particularly important:

At the FHDRA / first directions appointment/ to be considered at gatekeeping

4. 4. Non-court dispute resolution and MIAMs:
 - a) Has a MIAM taken place? If not, why not? Should it now be required? The court has a duty to consider non-court dispute resolution: FPR r3.3.
 - b) If a MIAM exemption has been claimed on the ground of domestic abuse, check that evidence exists as specified at FPR PD3A [20]. Is the exemption valid? FPR r.3.10.
6. What exactly is alleged in terms of domestic abuse and by whom? Consider the definitions at FPR PD 12J [2A] and [3] in addition to PD 12J [14].
7. Has a Form C1A been completed? Is there a response?
 - a) a. If so, ensure the forms are considered in their entirety. Are there admissions? Does the form and/or response suggest a possible way forward to the satisfaction of the court that will permit safe continuation of relationships with the child and avoid conflict with other adults?
 - b) b. If not, why not? Is it appropriate to obtain a verbal summary of any allegations and/or response during the hearing in order for progress to be made?
9. If further evidence/documentation is required to determine the issue, what is necessary in the fact specific circumstances of the case? The judgment in Re H-N [2021] EWCA Civ 448 (paras 41–49) cautioned against allowing a Scott Schedule to distort the fact finding process (by becoming the sole focus of a hearing), but the Court of Appeal did not rule out the use of a schedule as a structure to assist in analysing specific allegations.





10. In determining what further evidence/documentation is needed, the nature of the allegations will be important. Allegations that can be clearly defined (such as specific incidents of physical abuse) may be suitable for reduction to a schedule. Other allegations that require the court to take a broad overview and look at patterns of behaviour (such as coercive and controlling behaviour) are likely to require a statement. A hybrid of the two, dividing types of abuse into clusters to provide an overview akin to a threshold document in public law proceedings might be appropriate. However, do not consider only the nature of the allegations, but also practicality and expediency bearing in mind the parties before you. Require a like for like document in response from the alleged perpetrator.
11. Ensure that you obtain the essential information in respect of any allegation at an early stage. What, when, where? What was the effect on the child and the parent? Were there witnesses? What other evidence might be available? Is the behaviour complained of because of the breakdown of the relationship rather than a/the cause of the breakdown?

Is a fact-finding hearing required?

12. When determining whether to order a fact-finding hearing, consider:
 - a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of a child arrangements order;
 - b) that the purpose of a fact finding is to allow assessment of the future 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.
13. The fundamentals are relevance, purpose, and proportionality. Consider FPR PD 12J [14] and [17].
14. Allegations that require the assessment of a pattern of behaviour, such as controlling and coercive behaviour, do not justify a different approach. The court only needs to determine allegations of such behaviour to the extent that it is relevant and necessary to determine issues as to a child's future welfare. Even then, the court is only required to assess the overarching issue, rather than every single subsidiary factual allegation that may also be raised.
15. Always consider whether the allegations (at their highest) go to safeguarding in general or to particular circumstances that could be mitigated by supervision of contact or some other measures. If the latter and mitigations are available, why is it said that a fact-finding hearing is required?
16. If your conclusion is that the allegations, if proved and however serious, would not be relevant to the decision, then no fact-finding hearing is required.

Case management if a fact-finding hearing is required

18. When determining the specific allegations to be tried, consider relevance, purpose, and proportionality.
21. Only order third party disclosure where it is necessary and proportionate to do so. Require justification for any requests and refuse fishing exercises. In what respect is it said the proposed evidence supports or undermines an allegation? Ensure that any orders are targeted and precise. For example, is it possible to direct specific disclosure from the police, as opposed to a 'catch all' order? Will a GP summary suffice instead of a party's full GP records?
22. If a party seeks to rely on a witness of fact, only allow evidence that goes to an issue to be determined. Test with the parties and decide what, if any, real value is likely to be brought to your enquiry by the evidence of third parties.
24. Consider participation directions. 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.

Re-visiting a decision not to have a fact-finding hearing

27. The court must, at all stages in the proceedings, consider whether domestic abuse is raised as an issue: FPR PD 12J [5]. 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? Proceedings should have judicial continuity, wherever possible, and a consistent approach.
28. If 'new' evidence relating to past events is presented, ask why it was not available or disclosed before. If no good reason is advanced, then you may refuse to admit it. The more significant the evidence is said to be, the more compelling the explanation needs to be for its late receipt.

CM v IP [2022] EWHC 2755 (Fam)

Case link: <https://www.bailii.org/ew/cases/EWHC/Fam/2022/2755.html>

On 2 August 2022 Morgan J delivered judgment in respect of an appeal against the decision of a Circuit Judge involving allegations of coercive and controlling behaviour. The trial judge had refused an application for a finding of fact hearing to determine the mother's allegations of abuse. The judge referred to the fact that a District Judge had not directed a finding of fact hearing at an earlier hearing and that the children's guardian took the view the allegations were historic and did not prevent safe arrangements for the child being made.

Morgan J highlighted there is an obligation to give consideration to PD12J, not just at the earliest opportunity but to keep the matter under review throughout the court process [39]. The court was concerned that there appeared to be no consideration by the judge of matters contained in paragraph 17 of PD12J [42]. The judge did not provide an analysis as to how the views of the guardian fed into his own decision making [44]. Nor did the judge focus appropriately on the allegations of coercive and controlling behaviour and consider them alongside the guidance from *Re H-N* [45]. Morgan J found the trial judge had fallen into error and allowed the mother's appeal in relation to his refusal to determine the mother's allegations of abuse.

Morgan J also allowed the mother's appeal in relation to the judge's failure to make participatory directions. There was no reference in the judge's judgment to section 63 of the Domestic Abuse Act 2021, Part 3A or PD3AA. Nor was a ground rules hearing held in advance, or on the morning, of the substantive hearing [33].

Re A (A Child: Findings of Fact) [2022] EWCA Civ 1652

Case link: <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1652.html>

On 15 December 2022 the CA delivered judgment in respect of an appeal against the decision of a Deputy High Court Judge following a finding of fact hearing.

On the morning of the first day of the finding of fact hearing, the mother's representative applied for an adjournment for an intermediary assessment of the mother. In the alternative she applied for a number of special measures. The trial judge refused the application for an adjournment, but allowed most of the special measures. The mother's allegations were grouped together under seven heads: stranding, physical abuse and threats, sexual abuse, controlling and coercive behaviour, emotional and psychological abuse, financial abuse, and abuse of the child. Forty-one allegations were made, referenced to the mother's detailed statements. The trial judge found the stranding allegations to be the only allegations to have been proved. The mother appealed.

The CA set out several ways in which the judge's assessment of the evidence was lacking, including stating that while it was sensible to have regard to the presence of evidence from elsewhere, the judge placed unjustifiable





weight on the absence of corroboration at the expense of a broader assessment that took proper account of the predicaments of victims of an abusive relationship and of the inherent probabilities [43]. The judge referred to letters sent by the mother to the father in which she expressed her love for him, begged him to give her another chance, forgive her and return to their bedroom. The CA stated [26]:

26. ... *The judge seems to have treated these poignant letters as evidence that tended to support the father's case. In this connection I endorse the observations of Judd J in Re M [2021] EWHC 3225 (Fam):*

82. *"The reason it was so important for the judge to give very careful consideration to the question of vulnerability in this case is because a vulnerable person may not act in the same way as someone more independent or confident if they are exploited or abused in a relationship. Such an individual may be so anxious for the relationship to succeed that they accept treatment that others would not. They may be easy to exploit. They may not even realise what is happening to them, and will cling to the dream of a happy family and relationship..."*

The CA noted that the judge had referred to the court's duty to consider making participation directions where a person is stated to be the victim of domestic abuse and had rightly noted that this did not mean that an intermediary assessment was automatically required [31]. The CA stated that the judge's refusal to adjourn the finding of fact hearing to allow for an intermediary assessment of the mother was not open to any criticism [32]. However, although the judge was clearly aware of the FPR 3A.2A assumption that the quality of the evidence of a victim of abuse would be diminished, she did not make that assumption or explain why she was not making it in her assessment of the mother's evidence [43].

The CA held that the judge's assessments of the parties were not sustainable and did not supply the reasoning necessary to justify her conclusions [45]. The mother's appeal was allowed, necessitating a rehearing of the finding of fact hearing.

Conclusions

- a) A finding of fact hearing is not necessary in every case in which domestic abuse is alleged. Necessity, relevance and proportionality are key. Following *K v K*, the courts will require a very sharp focus on how it is said the alleged abuse is relevant to what the court is being asked to decide relating to the child's welfare.
- b) There is consensus in relation to the deficiencies of Scott Schedules in cases in which it is alleged there is / was a *pattern* of abusive behaviour. There is no definitive answer as to how such allegations should be pleaded. The various judgments refer to possible approaches including considering the evidence relevant to each different form of domestic abuse in "clusters" (*Re B-B*), and something akin to a public law threshold document. The **Fact Finding Hearing Guidance** suggests a hybrid of a schedule and a witness statement, dividing types of abuse into clusters to provide an overview akin to a threshold document in public law proceedings might be appropriate.
- c) If a finding of fact is necessary, the court will rigorously test the need and proportionality of evidence from supporting witnesses (*Re B-B*) and disclosure from third parties. Fishing exercises should be refused and any orders for third party disclosure, for example, police or medical disclosure should be targeted and precise (**Fact Finding Hearing Guidance**).
- d) The court is under a continuing duty to keep the necessity of a finding of fact hearing under review (*CM v IP*). If an application has been previously made and refused, the court will guard against attempts to re-argue the question and will require information as to what is said to have changed (**Fact Finding Hearing Guidance**).
- e) The court has a duty to consider special measures in every case in which domestic abuse is alleged, regardless of whether this is raised by a party / their advocate. However, the court would still hope and expect advocates to raise the issue.





- f) There is an assumption that the quality of the evidence of a victim of abuse is diminished. Judgments should be clear as to how a party's vulnerability has been considered in the assessment of their evidence (*Re A*).
- g) There is a re-emphasis on the use of MIAMs and consideration of whether any exemption has been validly claimed (*K v K*). Where the exemption is sought on the grounds of domestic abuse, the relevant piece of evidence should be made available to the court at the first hearing (FPR PD3A [19 – 20]).

Practical tips

Seeking a finding of fact hearing

- a) At the FHDRA / preliminary hearing the court will expect a description in short terms of the overall experience of being in a relationship with the other party (*Re H-N* and **Fact Finding Hearing Guidance**). At a FHDRA there are rarely witness statements before the court, but there should be a CIA and a response. Be prepared to address the court orally at the FHDRA as to what exactly is alleged, referring to the definitions of abuse in PD12J [2A] and [3] and the impact of the alleged abuse on the parent and child.
- b) If coercive and / or controlling behaviour is alleged, it is particularly important that detailed instructions are taken in advance of the FHDRA. This type of abuse can be difficult to articulate and victims of abuse will often require longer than is permitted during pre-hearing discussions at court to provide sufficient information. Given victims of abuse can lose an objective sense of what was acceptable and unacceptable in a relationship (*Re B-B*), it is important to ask the right questions as victims may not recognise that certain behaviours are abusive. The various tools and guidance used by **Cafcass** (including a tool for assessing coercive control and the DASH checklist) and the Domestic Abuse Act 2021 **statutory guidance** are useful to assist practitioners in understanding and recognising controlling or coercive behaviour.
- c) Be clear in your submissions as to how the disputed allegations are directly relevant to the child's welfare, highlighting the necessity and proportionality of determining the disputed allegations (*Re H-N* and *K v K*). The impact of the alleged abuse on the parent and child is important.

Opposing a finding of fact hearing

- a) Ensure a response to the CIA is filed in advance of the FHDRA / preliminary hearing to assist the court as much as possible.
- b) Consider whether the alleged behaviour amounts to domestic abuse, referring to the definitions of abuse in PD12J [2A] and [3]. Consider whether the alleged behaviour in fact amounts to bad behaviour, rather than domestic abuse (see para 32 of *Re H-N*), and whether the behaviour complained of is because of the breakdown of the relationship rather than a / the cause the breakdown (**Fact Finding Hearing Guidance**).
- c) *K v K* is a useful case to cite to remind the court that a finding of fact hearing is not necessary in every case. Be clear in your submissions as to how it is said that the allegations are not in fact relevant to the child's future welfare and determination of the same is not necessary to make final welfare decisions.

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