TO FACT-FIND OR NOT TO FACT-FIND: THAT IS THE QUESTION

***An analysis of H-W (Care Proceedings: Further Fact-Finding Hearing)* [2023] EWCA Civ 149**

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Introduction

1. On 24 January 2023, in the matter of ***H-W (Care Proceedings: Further Fact-Finding Hearing)* [2023] EWCA Civ 149**, the Court of Appeal allowed an appeal that had been brought by a local authority against the decision of a circuit judge who had refused to direct a further fact-finding hearing in long-running care proceedings.

2. The judgment setting out the rationale that underpinned the decision of the Court of Appeal to allow the appeal was handed down on 21 February 2023. The link to the judgment can be found here: https://caselaw.nationalarchives.gov.uk/ewca/civ/2023/149

3. The matter of ***H-W*** is useful for family practitioners to consider as the Court of Appeal re-visited the legal principles that are to be considered and applied by the family court when deciding whether a finding of fact hearing is necessary and proportionate.

4. The judicial decision of when and where to order a split hearing remains highly relevant in everyday practice. It is an area of the law that has enjoyed extensive development in recent years. As such, we thought it would be helpful to attempt to draw together some of the strands of the guidance and case law to review the current state of the law.

An overview of the relevant law that is to be applied when deciding whether a fact-finding hearing is necessary and proportionate

I. The Overriding Objective

5. As ever, a helpful starting point are the Rules. Rule 1.1(1) of the Family Procedure Rules ('FPR') sets out the overriding objective of the rules themselves is to enable the court to deal with cases justly having regard to any welfare issues involved.

6. Rule 1.1(2) of the FPR clarifies that dealing with a case justly includes, so far as is practicable:

    (a) Ensuring that it is dealt with expeditiously and fairly;

(b) Dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
(c) Ensuring that the parties are on an equal footing;
(d) Saving expense; and
(e) Allotting to it an appropriate share of the court's resources, whilst taking into account the need to allot resources to other cases.

7. Rule 1.4 of the FPR confirms that 'the court must further the overriding objective by actively managing cases.' A menu of examples of active case management are provided.

II. *Oxfordshire County Council v DP, RS and BS* [2005] EWHC 1593 (Fam)

8. July 2005 was a special time. One of the authors of this article was finishing pupillage. The other was finishing primary school. Readers are invited to guess which is which. There are no prizes available. It was also noteworthy for the judgment of the then Mr Justice McFarlane in ***Oxfordshire v DP***.

9. In the ***Oxfordshire case***, McFarlane J held:

> *[21] If it is lawful for the court to conduct a fact finding exercise despite the fact that at this stage no party is seeking a public law order, it is common ground that the court has a discretion whether, on the individual facts of each case, it is right and necessary to do so.*
> …
> [24] *The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:*
>
> *(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."*

III. *Re S (Split Hearing)* [2014] EWCA Civ 25

10. The tale continues in 2014, with the judgment of Ryder LJ in ***Re S***. This case concerned an appeal by a local authority against findings made in care proceedings where a young child had suffered skull fractures and associated injuries. Within the judgment, addressing the issue of there having been a split hearing, Ryder LJ observed:

> *"[27] It is by no means clear why it was thought appropriate to have a 'split hearing' where discrete facts are severed off from their welfare context. Unless the basis for such a decision is reasoned so that the inevitable delay is justified it will be wrong in principle in public law children proceedings. 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 (ie whether a statutory order is necessary) to be made more expeditiously. The reasons for this are obvious: to remove consideration by the court of the background and contextual circumstances including factors that are relevant to the credibility of witnesses, the reliability of evidence and the s 1(3) CA 1989 welfare factors such as capability and risk, deprives the court of the very material (ie secondary facts) upon which findings as to primary fact and social welfare context are often based and tends to undermine the safety of the findings thereby made. It may also adversely impinge on the subsequent welfare and proportionality evaluations by the court as circumstances change and memories fade of the detail and nuances of the evidence that was given weeks or months before.*

IV. *Re H-D-H (Children), Re C (A Child)* [2021] EWCA Civ 1192

11. We now fast-forward to 2021. ***Re H-D-H and C*** represented the judgment of the Court of Appeal in two conjoined appeals. Therein, Peter Jackson LJ approved the above statement of the law in the ***Oxfordshire case:***

> "*20. It is unnecessary to cite other authority. Although the approach outlined in* ***Oxfordshire*** *predates the incorporation of the overriding objective into the Family Procedure Rules and the 26-week requirement, in my judgement it remains valid when read alongside the statutory framework. It helps judges to reach well-reasoned decisions and counsel appearing in the present appeals were content to frame their submissions by reference to it. As Mr Rowley QC put it, the decision, properly applied, has stood the test of time.*
>
> *21. Many of the factors identified in* ***Oxfordshire*** *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 paragraph 21 of Oxfordshire 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.

*22. The factors identified in **Oxfordshire** should therefore be approached flexibly in the light of the overriding objective in order to do justice efficiently in the individual case…."*

V. *H-W (Care Proceedings: Further Fact-Finding Hearing)* [2023] EWCA Civ 149

12. The above summary brings us to the Court of Appeal's recent consideration of the issue in ***H-W.***

Background

13. The mother had six children – A and B who were adults, and the four children that were subject to these proceedings: C (aged 14), D (aged 12), E (aged 9) and F (aged 2 years, 9 months).

14. The four children have three different fathers – F1 (the father of C and D), F2 (the father of E) and F3, the mother's current partner, who is the father of F.

15. M had been a child in care and her children had subsequently been involved with the local authority children's services for a number of years.

16. Care proceedings were issued in 2012 following C complaining that she had been sexually abused by A at home. Other allegations of a sexual nature were made against A, including by B. In 2013, following a two-week fact-finding hearing, the Court found that the children were at risk of neglect and a number of allegations concerning A's sexual behaviour were found to be proven. These proceedings ultimately concluded with a care order in respect of A, a residence order to M in relation to the four other children coupled with a supervision order and an injunction against F2.

17. The local authority's involvement with the family lapsed for some time following the end of the supervision order but resumed again following further reports regarding concerns of neglect. This continued until October 2019 when the case was closed again.

18. In March 2020, however, the local authority issued care proceedings in respect of C, D and E after learning of an incident when A (who had been advised to leave his supported living accommodation) had visited the family home and sexually abused E. When F was born a few weeks later, the local authority started proceedings in respect of her. Interim supervision orders were made in respect of all four children.

19. A fact-finding hearing took place before HHJ McPhee in November and December 2020 which concluded with findings. In summary, it was found that:

    (1) A sexually abused E upstairs in the family home on 18 November 2019, witnessed by B, while M and F3 were downstairs attending to an injured dog.
    (2) M failed to protect the children from actual sexual abuse and the risk of sexual abuse by permitting A to stay in the family home.
    (3) M delayed in reporting the incident to children's services until 21 November 2019.
    (4) F3 failed to protect the children from actual sexual abuse and the risk of sexual abuse by permitting A to stay in the family home.
    (5) As a result of the M's and F3's failure to protect the children, they suffered or were at risk of suffering, significant harm.

20. Following these findings, the interim supervision orders were extended until a welfare hearing which took place before in July 2021. In his judgment, at the conclusion of the welfare hearing, the judge accepted the arguments advanced on behalf of the local authority and children's guardian that the children should be removed from the care of M and F3.

21. M, supported by F3, filed a notice of appeal against the care orders in respect of C, D and E and was granted permission to appeal and a stay of the order pending appeal. On 7 October 2021, the Court of Appeal by a majority dismissed the appeal.

22. M and F3 filed separate notices of appeal to the Supreme Court. Permission was granted and the appeal heard on 22 March 2022. On 15 June 2022, the Supreme Court delivered a unanimous judgment allowing the appeals and remitting the case for rehearing of the final welfare hearing, expressing the hope that the remitted case and the outstanding case relating to F would be heard together.

23. On 23 June 2022, the matter returned for case management directions and the final hearing was re-listed to take place. On the same date, however, a 12-year-old girl ('Y') had made allegations of sexual abuse against F3. Y was subject to a care order following proceedings in 2016 to 2017 in which F3 was involved as the father of her half-siblings, G.

24. A police investigation commenced, in the course of which Y was interviewed by the police under the ABE procedure. In summary, Y alleged that, over a period of years when she was aged between 2 and 6, she was sexually abused by her parents, another man and F3. F3 was also interviewed and denied the allegations.

The judgment under appeal

25. A hearing was listed on 3 November 2022 for one hour in order to consider the local authority's application for a further finding of fact hearing to be listed. Despite the fact that a substantial bundle of documents relating to Y's allegations had been filed with the Court (including the video recording and transcript of the ABE interview and other evidence of statements made by Y which the judge confirmed he had respectively neither watched nor read).

26. The local authority's application was supported by the children's guardian but was opposed by F3 and M.

27. The judge commenced the ex-tempore judgment by recording that his decision had to be made by applying the overriding objective in rule 1.4 of the Family Procedure Rules.

28. The judge concluded:

> *"In the circumstances, and having considered all of the matters, taking into account the likely impact, taking into account the severity of the allegations, but taking into account the likelihood that the local authority would be able to prove such allegations, the court is not satisfied it would be appropriate to give the local authority permission to pursue those allegations within these proceedings."*

29. The rationale that underpinned the decision of the judge in this instance included the following:

    (a) The allegations made by Y related to a period when she was between two and six, Y had been the subject of care proceedings after that in which F3 had been involved, but that no findings had been sought in relation to allegations of the sort now under consideration (paragraph 16).

    (b) Y had apparently undergone a child protection medical in 2016 and, although the records of that examination were not available, it appeared to the judge that there had been no finding of scarring which might be expected (paragraph 16).

    (c) The judge was doubtful that the hearing listed at the end of January 2023 could be used for the proposed fact-finding hearing and that it would be unlikely that the police

investigation would be concluded by that time. Accordingly, to accede to the local authority's application would significantly impact upon the timetable (paragraph 17).

(d) The judge considered the question of the serious of the allegations but also took into account the likelihood of proving any allegation. The judge concluded that, on the current information, the chances of the local authority proving those allegations were low and that the court was not satisfied it would be appropriate to give the local authority permission to pursue those allegations within these proceedings (paragraph 19).

Grounds of Appeal

30. The grounds of appeal were:

(1) The court did not give any/sufficient weight to the arguments put forward by the local authority and endorsed by the guardian that investigation of the findings were necessary for there to be no gaps in the final evidence given their link to the issues in the case and the ongoing assessment of F3.

(2) The court fell into error by not having viewed the ABE or reading the transcript of the ABE at the time of considering the application.

(3) The court was wrong to place weight on the following propositions when refusing the application:

(a) That because the allegations had been made by a child who was 12 and related to when she was aged 2-6, there was no chance the local authority would be able to prove the findings sought.

(b) That because there were no injuries previously indicated in child protection medicals that the child had been subjected to, that there was no chance the local authority would be able to prove the findings sought.

(c) That there were lots of cases before the court whereby allegations remained in the background and the court was able to make final decisions without them having been investigated by the court.

Legal Principles

31. The Court of Appeal's judgment in given by Baker LJ. Therein, he confirms that the statement of principles as set out and summarised in the ***Oxfordshire*** and in ***Re H-D-H*** are those to which the courts should turn when deciding whether to hold a fact-finding hearing.

32. Baker LJ further confirms that the only additional guidance to be provided beyond what is set out in the ***Oxfordshire case*** and in ***Re H-D-H*** was as follows:

> '*When considering the potential evidential result of a fact-finding hearing it may sometimes be appropriate for the judge to have regard to the apparent quality of the evidence. It will never be appropriate, however, to carry out a detailed evaluation, not least because the court can only make findings on the totality of the evidence and at the case management stage not all of the evidence will have been filed. Anything akin to a mini-trial of the allegations would therefore be wrong in principle and wasteful of time and resources. Although each decision will depend upon the circumstances of the case, the apparent quality of the evidence is accordingly unlikely to be a powerful factor in the overall decision unless it is clear without the need for detailed assessment that the evidence appears to be particularly strong or particularly weak' (paragraph 28).*

Outcome

33. The appeal was allowed. The Court of Appeal unanimously held that the judge's case management decision to refuse the application for a further fact-finding hearing was 'plainly wrong'.

34. Baker LJ confirmed:

> '*The decision whether or not to hold a fact-finding hearing is one of the most important case management decisions to be taken in the course of proceedings under Part IV of the Children Act. It is not always a straightforward decision. Care proceedings are quasi-inquisitorial. They are not confined within the tramlines of adversarial pleadings. There is therefore a recurrent danger that they veer off track. In a case with a complex family history, the court will often be encouraged by one party or another to explore an issue that has been unearthed during the investigation. Judges have to be very careful before acceding to such an application to avoid the unnecessary use of the limited resources available. In deciding whether to hold a fact-finding hearing, it is imperative that they conduct a proportionality analysis by reference to the factors identified in the* ***Oxfordshire case*** ***and*** ***Re H-D-H****.*

35. In summary, the Court of Appeal determined that the judge came to a decision that was outside the ambit of his discretion and was plainly wrong for the following reasons:

(a) The judge had not been referred to either of the above cases and therefore had not had the opportunity to reflect upon the application of the principles to the complex facts of the case (paragraph 38).

(b) An analysis conducted by reference to the principles in the relevant case law 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. In this instance, the principal issue in the case was whether M and F3 could protect the children from the risk of future harm, and in particular sexual abuse. Whether F3 could play an effective protective role was therefore a crucial question (paragraph 39).

(c) The judge attached particular weight to his assessment of the prospects of the local authority proving the allegations notwithstanding the fact that it was unclear as to exactly how much evidence the judge had considered. It was noted that the judge had not looked at a recording of the ABE interview and was in no position therefore to observe, as he had, that *"the chances of the local authority proving those allegations are low"* (paragraph 40).

(d) It had been wrong for the judge to take into account the apparent absence of medical evidence at this juncture, particularly as the judge had not had the opportunity to consider the majority or possibly any of the evidence (paragraph 41).

(e) The fact that Y's allegations were historic was not a matter which should have carried any significant weight in the judge's analysis as to whether a fact-finding hearing should take place at all (paragraph 41).

36. Given the relevance of the potential result of the investigation to the future care plans for the children, the Court determined that there must be a further finding of fact hearing of Y's allegations against F3.

Conclusion

37. So, where does this leave us? As ever, the law develops apace. The above line of authorities needs to be considered in light of other decisions, mostly notably that of Lieven J in ***Derbyshire v AA*** **[2022] EWHC 3404 (Fam)** when the Court refused to allow a factual inquiry into injuries suffered by a child. That said, the facts of the ***Derbyshire*** case are likely to easily distinguished. It is also worth noting that the judgment in ***Derbyshire*** predates ***H-W*** by two months.

38. ***H-W*** does provide a useful and concise overview in respect of the relevant law that is to be applied by the Family Court when deciding whether a finding of fact hearing is necessary and proportionate within public law proceedings.

39. The Court of Appeal has re-affirmed that the principles set out in the ***Oxfordshire* case** and in ***Re H-D-H*** continue to apply and that it is '*imperative'* that a judge conducts a proportionality analysis by reference to the factors identified in these two cases.


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