Fact-finding hearings: a practical guide

By Nigel Hawkins

I love a good Finding of Fact hearing. Madness, I hear you cry!!!! All that paperwork to read through, schedules to prepare and the expectations of clients to be managed. There is nothing more satisfying than getting a good outcome for your client and, more importantly, the children concerned. Findings or not, as the case may be, arm the court with a basis upon which to make fully informed and hopefully the welfare decisions that are in the children's best interests. What could be more rewarding? Perhaps, not so mad after all?

Having dealt with many such hearings over the last decade or so, I have developed a checklist of things to do and things not to do when conducting them. I have acted for Local Authorities, children through their Children's Guardians and parents. Each bring their own challenges, whether you are seeking to persuade the court to make findings or not to do so.

In this article, I will concentrate on Finding of Fact Hearings in the Private Law arena. Please forgive me if some of what I say appears blatantly obvious. Experience tells me that the obvious is sometimes overlooked and not dealt with, to the detriment of clients and, more importantly, their children.

The first point to make is a very important, yet fundamental one. Ensure that you get "your ducks lined up" from day one. Form C1A needs to contain full, not partial, details of allegations of harm and domestic violence. It is unforgivable to complete this lazily and without full consideration. By way of example, I was instructed on a case in which a client alleged, amongst other things, drug use by the other parent. The allegation made was specific, alleging cannabis use around the children. Drug tests came back negative. In conference, shortly before the hearing, my client alleged cocaine use. Why had this not been raised at the outset? Why was this being raised on the day of the hearing? One would have thought that a parent alleging such a serious matter would do so at the outset. That is precisely what the judge thought too, deciding that my client was raising this as an afterthought, as a means of delaying proceedings and because a Child Impact Report was recommending contact should recommence as soon as possible. My client had instructed me to raise this issue. I did as instructed but not before warning my client that doing so could backfire on her, which sadly it did.

When completing Form C1A, allegations should be made with as much clarity and detail as possible. Simply saying the other parent was violent or exhibited controlling and coercive behaviour does not cut the mustard. What violence was there? When? Where? What injuries were sustained? Where were the children? Did they witness what happened? Were they in the family home at the time? Would they/could they have heard what happened? Were the police involved? Did injuries sustained require medical attention? Was the incident mentioned to professionals – teachers, health visitors (etc.)? Are there photographs of any injuries sustained? Are there messages referring to the incident? There is a lot to think about, not least what impact would such behaviour, if found to have happened, have upon future arrangements for a child.

In completing Form C1A, do not include information that the court is not going to have any interest in. This "deflects" from the issues that really need to be determined and leaves the client open to be cross-examined about issues as to their judgement. For example, why raise a partner being lazy and not getting up to help care for the children. Allegations of this nature are not going to impress the judge or advance your client's case. It also necessitates managing a client's expectations from the outset. Clear and focussed advice is essential.

At this point I will digress slightly. If you are acting for a Children's Guardian, you can seek a Finding of Fact Hearing on behalf of the children. I once had an experienced District Judge take issue with me on this point. In the end, he accepted that this is a course that can be pursued as there is nothing to prevent a Children's Guardian from doing so. One of my most rewarding Finding of Fact Hearings was in such a case, when we were dealing with 7 and 9 year old siblings, at which their older siblings gave evidence about their mother's conduct towards them. The older siblings were young adults when they gave evidence about, for example, how their mother would lock one of them in a dark shed, whilst telling the other how similar punishment would be meted out in the event of bad behaviour. This was clear emotionally abusive behaviour, which the older siblings did not want their younger siblings to be subjected to. The judge was persuaded to make all but one of fifteen or so findings sought and at the welfare stage determined that any contact should be supervised.

This case also highlights other areas of good practice to think about. The Children's Guardian and I met the witnesses we were relying upon several times. This meant we built up a rapport and a great deal of trust. We were able to prepare our witnesses for the inevitable Finding of Fact Hearing over a period of time. Their evidence was amongst the most powerful I have ever seen, particularly as they both bravely opted to give evidence in court and have no screen in place. They wanted their mother to see them give evidence. The judge agreed that the evidence was amongst the most powerful he had ever seen and gave a great deal of credit

for their composure. They had got to know me and were confident in my abilities as an advocate, which I like to think helped them concentrate on being themselves and being able to give their best evidence.

This leads on to other important considerations. Continuity of representation is extremely important in my view. You get to know the client, their strengths and weaknesses, and they get to know you. I know from my time as a solicitor that you can shape these cases if you are involved from the outset. This includes preparing any schedule of allegations, which means we come back nicely to where we were when I digressed. Judges are, in my experience, more inclined to accede to requests for listing when advocates are available. This is no doubt helped by the fact that most Finding of Fact Hearings require at least two days of court time and often more. Do not be afraid to ask the judge to bear availability in mind. The worst that can happen is a polite refusal.

When preparing statements, be continually mindful of what your client's case is. Do not put unnecessary and unhelpful information in statements. Do not waffle. Also, ensure that the statement is your client's statement, in language they use, not how you would describe events. There is more chance of clients being caught out if you do not do this. I used to ask my secretary what she thought abouts statements that I had dictated and she had typed. Are these clear? Persuasive? Could any points made be made in a better way? Never be afraid to ask for a second opinion. It can be invaluable.

There is also the question of evidence to be relied upon. Social media may be helpful or unhelpful. The same applies with respect to texts. How often do we see messages annexed to statements which do not do as they say on the tin? Only annex evidence that supports your client's case, whether making the allegations or on the end of allegations being made. There is sometimes a tendency to only annex part of a message, meaning the context is lost. Your client can be caught out if you do not explore this fully. You may be shown a message riddled with expletives and threats. What is the lead up to these? Are they responses to reasonable messages from your client? Are they messages that stand alone? Have there been a series of offensive and threatening messages? Taking time to consider the evidence is key. Lazily accepting screenshots provided by the client is going to lead to problems further down the line.

Ensure that you aware of all evidence that your client may seek to rely upon from day one. I was briefed on a case where a client alleged cannabis use. The other parent was tested and the results were negative. Before going before the judge, my client alleged cocaine use. As you would expect, the judge was having none of this. Any drug use is concerning but even lay

clients would know that cocaine is seen as a more dangerous, concerning drug than cannabis. The judge took the view that my client was “making mischief” and was raising this issue as a means of scuppering progression of contact for the other parent. Cocaine use had not been raised within the Form C1A or with the Cafcass Officer. The point here, is that there is a limited window of opportunity within which to raise concerns and make clear, cogent allegations. Raising allegations late in the day is unlikely to impress the court. If these matters are so serious and amy be reasons for a child not being able to spend time with the other parent, they are surely going to be at the forefront of your client’s mind.

May I also suggest caution when seeking to rely upon recordings or videos that have been obtained covertly. As we all know, this area is a minefield and is worthy of a separate article. What I would say here is be very careful about such evidence. I had a parent who had a recording of the other clearly losing his temper towards family members dealing with a handover at contact. When the judge viewed this, he was more concerned about the individual filming than the behaviour of the parent. Why? The child could be seen, in the video, cowering and looking distressed. Why was the family member filming rather than protecting the child. Recordings can sometimes say more about the individual recording is the message here.

An example of a recording that assisted a parent was dash cam footage. My client said he had pulled over into a lay-by in his car, to make some urgent work-related telephone calls. As the other parent drove past, a dashcam on her filmed my client’s car in the lay-by. The car pulls out and follows the other parent before overtaking. A friend with the other parent films this happening. The judge had no hesitation finding this was pre-planned and formed part of a pattern of controlling and coercive behaviour. My client had been advised to accept what had happened so I could at least apologise and say he showed some remorse. My instructions were that what had happened was coincidental. There were further allegations flowing from this, which could have been closed down if my client had accepted the advice given.

Witnesses are also an important consideration. Do not simply meet the proposed witness and prepare a statement before filing and serving. Assess the witness. How will they come across when giving evidence? Will they be considered and measured? Will they end up being your worst nightmare as an advocate? When cross examining a grandparent I recently I opened by asking what that individual thought of my client. The response was, as I expected, full of vitriol and unsubstantiated allegations. Job done!!! My client’s mother, on the other hand was gentle and child-focussed. The message here is that your client’s case can be undone and undermined by calling the wrong witness and enhanced by calling a fair-minded witness. Witnesses are not character witnesses per se, but can help your client’s cause by giving a good impression.

Also be very careful about witnesses whose statements do not address the issues to be determined at the Finding of Fact Hearing. As already said they are not character witnesses. How many times have we heard a judge say, a parent is bound to say good thanks about their son or daughter? I always keep a printed off schedule of allegations by my side when preparing and considering statements. It helps maintain focus. Keep referring back the schedule is a golden rule. There are issues for the Finding of Fact Hearing and issues for the welfare hearing. Do not conflate and confuse these.

If there is to be a Pre-Trial review be prepared. Turn up, knowing your case as well as if it is the Finding of Fact Hearing. These hearings can vary. Some judges go through the motions, others will quite rightly fully explore what the case is about, whether all of the allegations need to determined, what the relevance of the allegations is and how long will be required with each witness. Getting caught out by being unprepared is embarrassing and can damage your client's case. They will not thank you for this.

You will also have the opportunity to explore what if any concessions and admissions may be made by the other side. Be open-minded about this, by looking at the bigger picture. What are the strengths and weaknesses of your client's case? Where would your client be best advised to accept a concession rather than run the risk of getting no finding or having a more significant finding being made. Is your client going to be a good witness or somewhat flaky? You need to know your case inside out. A point to make here is get counsel on-board as early as possible. It is always much easier as an advocate to represent a client from the get go, rather than being instructed a day or two before the hearing. Relationships can be built up, rapport achieved and advice given about a client's case.

Once the Finding of Fact Hearing is underway a great deal may depend upon your client's evidence and their credibility. To this end ensure that your client is as well prepared for cross-examination as possible. The usual golden rules of giving evidence apply. They need to listen to and answer the questions they are asked. Do not answer questions with questions. Do not be afraid to say if they do not understand questions asked of them. Address answers to the judge and try to speak clearly. Above all, they need to be honest. No client is perfect and showing their vulnerabilities, weaknesses and mistakes is not always a bad thing.

After many months of painstaking preparation and hard work, it is hoped that the outcome will be as favourable as possible for your client. I have had a great deal of success when dealing with Finding of Fact Hearing and continue to learn more about how to deal with these each time another one comes along. I hope my thoughts are of some assistance to all who have to deal with these challenging, yet rewarding hearings.

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