



Cafcass Cymru

Finding of Fact Hearings & Practice
Direction 12J

Practice Guidance

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Practice Guidance: Finding of Fact Hearings

Adapted from guidance developed by Cafcass and used by their kind permission.

1. Overview

This guidance sets out the legal context in which the court may direct a fact-finding hearing and the role of Cafcass Cymru. It should be used by Cafcass Cymru staff and Fee Paid Practitioners when considering the best interests of children in relation to fact-finding.

2. Legal Context

Practice Direction 12J sets out the legal context. The wording is as follows:

Paragraph 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 violence or 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; or
- 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 violence-related Activity (such as a Domestic Violence Perpetrator Programme (DVPP)).

Paragraph 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;
- h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.

3. When a fact-finding is needed

When the court makes a decision about whether to hold a fact-finding hearing it should consider the views of the parties and of Cafcass Cymru. Whether the court is seeking a response from Cafcass Cymru to a request for views in relation to the listing of a fact-finding, or the FCA is recommending such a hearing, the factors below should be taken into consideration. A fact-finding hearing is not always necessary and both Cafcass Cymru and the court have to consider whether a fact-finding is necessary and proportionate in the circumstances of the case.

The purpose of the fact-finding is to provide a factual basis for the assessment of risk following disputed allegations of domestic abuse, sexual abuse and physical harm (including non-accidental injuries) where there is inconclusive, insufficient or no independent evidence to support the claim either way and without which, the risks cannot be assessed.

This does not mean that the FCA must recommend a fact-finding where there is no corroborating evidence, for example where there are local authority investigations with no further action. The decision needs to be taken on a case by case basis, weighing up the consequences of there being unresolved allegations, against the potential negative consequences of holding a fact-finding hearing, which are listed below.

4. When finding of fact hearings are not needed

If there is any corroborating evidence of the allegations such as convictions, admissions by a party or other documentary or 'static' evidence, a fact-finding hearing would not usually be necessary and a risk assessment can be undertaken on the basis of the information already known. The Domestic Abuse Practice Guidance is the reference for undertaking risk assessments in respect of domestic abuse.

5. Impact on the children or parties

There may be negative consequences for the child in having a fact-finding hearing. These include delay, stress and trauma for the children or parties, cost and duration of the hearing, especially where there are litigants in person. Cafcass Cymru must be mindful of this, without compromising safeguarding.

The court must consider what support the alleged victims and perpetrators should be given at the hearings. One or more of the parties may want the child to give evidence at a fact-finding hearing, or the child themselves may wish to give evidence and the court would have to carry out an assessment of whether it is appropriate, taking into account the relevant guidance. In such cases the court may ask for an assessment of the impact on the child of giving evidence. If a non-subject child is to give evidence the court has to consider the same issues and may not even direct that the child be made party to the fact-finding. In this case it is not the expectation that Cafcass Cymru will undertake an assessment in respect of the non-subject child.

6. Avoiding delay

Practice Direction 12J is clear that an early assessment of the need for a fact-finding is imperative. It is not necessary for a section 7 report to be fully completed before identifying the need for a fact-finding hearing for the courts' consideration, as this inevitably causes delay.

7. Additional information

Cafcass Cymru acknowledges that the findings of the court are binding on all parties and any report prepared under Section 7 will be based on the narrative which has been established by the court. However, there may be circumstances where Cafcass Cymru want to request the court to reconsider or reopen a fact finding for example when:

- a) Significant relevant information has come to light which was not available to the court at the time of the fact-finding hearing; or
- b) The court has made no findings and omitted to reach a view about relevant and significant risk information.

In these circumstances, which it is accepted will be rare, Cafcass Cymru should inform the court to set out how this will impact upon the risk assessment and if necessary ask for the case to be reopened.

If the risk assessment concludes that the decision of the court places the child at risk, the FCA can submit a report under 16A if they consider the child is at risk of harm. If there is a concern that the child is at risk of significant harm then a referral under Section 47 will be made.

8. Other considerations

Findings are not required for a referral to be made to a domestic violence perpetrator programme, if there is sufficient undisputed or corroborated evidence of domestic abuse and there is some acknowledgement of the behaviour by the perpetrator.

The hearing should be limited to establishing the facts that are pertinent to making the welfare decision and facilitating a robust risk assessment by Cafcass Cymru. The Scott Schedule should be succinct, relevant and focussed. This is a matter for the court to manage.

The court may determine disputed facts within a hearing listed for another purpose, such as directions. This can mean that delay is avoided as it may not then be necessary to hold a standalone fact-finding hearing, courts may prefer this approach. From a Cafcass Cymru perspective this approach can be positive where it reduces delay for the child, but caution is necessary in endorsing this if it leads to key risk information being missed or cross examination of parties who are not fully prepared or represented.

You can find examples of case studies when fact-finding hearings have been found to be necessary, or not necessary, by the High Court and Court of Appeal. See, for example, *Re T* [2016] EWCA Civ 1210; *Re G* [2017] EWHC 2591 (Fam); *Re J (Children)* [2018] EWCA Civ 115; *Re P* [2015] EWCA Civ 466.

9. Risk Assessment and Interventions after fact-finding (PD12 paras 32-34)

It is important that FCAs are aware of signposting in cases where domestic abuse has occurred. The [Live Fear Free](#) helpline will provide local information to professionals or individuals around what support is available in their local area.

The court can order a risk assessment to be prepared by Cafcass Cymru under s.7 Children Act 1989, but only specifically in relation to the child. Paragraph 33 PD12J strengthens the requirement for the court to consider an assessment of adult seeking treatment, if there is to be any parental involvement in the child's life.

10. Welfare recommendations after fact-finding (PD12J paras 35-39)

The court needs to ensure that any arrangements for the child does not expose the child to '*unmanageable risk of harm*'. The report prepared post fact finding should consider the long term likelihood of impact on the child of contact arrangements and whether they are realistic on the basis of the risks. The FCA should be forecasting and considering arrangements for the future also and whether they are sustainable.

When considering recommendations for contact, where domestic abuse has occurred, FCAs should be outlining the risks posed to the parent with whom the child should live as well as the child. The court should only make an order for contact if it can be assured that the parent with whom the child lives, will not suffer further domestic abuse. This is particularly important when considering coercive and controlling behaviour and the risk of escalation post separation.

Amendments to Practice Direction 12J – October 2017

Prepared by Welsh Government Legal Services

Paragraph	Amendment	Implications for Cafcass Cymru
1 – Application of the Practice Direction	Practice Direction is confirmed to apply to the High Court as well as the Family Court.	None; the PD previously applied to relevant family cases heard in the High Court. The amendment merely provides clarification.
2 – Purpose of the Practice Direction	<i>“Domestic violence or abuse”</i> is amended to <i>“Domestic abuse”</i> .	None; this is just a simplification as <i>“domestic abuse”</i> is defined in paragraph 3 as including violence.
3 - Definitions	<p>Definition of <i>“domestic abuse”</i> is expanded to include culturally specific forms of abuse such as forced marriage, honour based violence, abandonment etc.</p> <p><i>“Abandonment”</i> definition added.</p> <p>Definitions of <i>“development”</i>, <i>“harm”</i> & <i>“ill treatment”</i> added; these mirror the definitions in the CA 1989.</p> <p>Definition of <i>“judge”</i> added, includes lay justices and justices clerk where appropriate.</p>	<p>FCAs will need to be aware of the expanded definitions so that the Practice Direction can be used in cases in which cultural specific abuse is an issue.</p>
Old paragraph 4 removed and replaced with new paragraph 7	The restatement of the statutory presumption of parental involvement under s.1(2A) of the CA 1989 is reworded and accompanied by requirement for the court to consider whether it applies in each case.	FCAs will need to be aware of the greater emphasis on whether the statutory presumption applies.

5 – General Principles	Adds requirement for the court to be satisfied that an order for contact will not expose the child and the parent to risk of harm from domestic abuse.	This strengthens an existing requirement but FCAs will need to be aware of the greater emphasis placed on a contact order not being made where there is risk of harm to the parent.
6 – General Principles	Adds requirement for the court to be satisfied that there is no risk to the parent when making a CAO by consent or granting permission to withdraw without doing safeguarding checks (previously only applied to the child).	FCAs will need to be aware of the additional requirement when advising the court whether to make a CAO by consent or allow application to withdraw.
8 – General Principles	Adds requirement for a summary of any oral s.7 report to be recorded on a schedule to the court order.	FCAs should be made aware for their information only.
9 – Before the FHDRA	Adds express requirement that parties should not have to engage in conciliation if not safe to do so.	FCAs need to be aware when carrying out in court conciliation.
10 - Before the FHDRA	Adds more detail to the requirement for the court to consider special measures for vulnerable parties, includes waiting arrangements at court.	FCAs need to be made aware of the additional details when considering special measures in reports to the court or otherwise.
11 – FHDRA	Strengthens requirement on the court to inform parties of safeguarding report unless it would create a risk of harm; “ <i>shall</i> ” replaced by “ <i>must</i> ”.	FCAs should be made aware for their information only.
12 – FHDRA	Strengthens the requirements on the court to adjourn the FHDRA and not make interim orders when safeguarding information is not	FCAs attending FHDRA will need to be aware of the change to advise the court accordingly.

	available; “ <i>shall</i> ” replaced by “ <i>must</i> ”.	
14 – FDHRA	Adds requirement for the court to record on the face of the order whether domestic abuse is raised as an issue relevant to decisions surrounding the child’s welfare and risk of harm to the child / parent.	FCAs attending FHDRA will need to be aware of the change to advise the court accordingly and FCAs receiving FHDRA order will need to look out for such a recording.
15 – Admissions	Admissions of domestic abuse must now be recorded in writing by the judge and set out in a schedule to the court order.	FCAs should be made aware for their information only.
18 – Directions for fact finding hearing	Imposes absolute requirement for the court to record its reasons for not holding a fact finding hearing.	FCAs should be made aware for their information only.
19 – Directions for fact finding hearing	19(f) and (h) adds a requirement for the court to consider whether it is necessary to order disclosure for records from domestic abuse support services and documents from abroad for use in fact finding hearing. (k) Court to consider how to allow party who cannot get to the hearing to participate e.g. abandonment cases.	FCAs should be made aware to be able to advise on whether a fact finding hearing is necessary and if necessary make recommendations as to what evidence is needed.
24 – Representation of the child	Adds requirement for the court to consider making the child a party where allegations have been made and, if so, review the allocation decision so that the case proceeds before the correct level of judge.	FCAs should be made aware to be able to advise on 16.4 appointment and reviewing allocation in domestic abuse cases.
25 – Interim Orders	Rewords and strengthens the prohibition of the court making an interim order unless	FCAs need to be aware to be able to advise on the appropriateness of interim orders in

	safe to do so. Expands to cases where no fact finding hearing has been ordered.	domestic abuse cases.
29 – Fact Finding Hearing	Adds requirement for the court to record any findings in writing on a schedule to the court order and serve on the parties and Cafcass Cymru.	FCAs need to be aware to expect a written summary of findings following a fact finding hearing and query its existence if absent.
30 - Fact Finding Hearing	Strengthens requirement for court to consider a s.7 report following fact finding hearing; “ <i>shall</i> ” replaced by “ <i>must</i> ”. Also removes previous reference to consider other assessment – social worker, psychological etc. (moved to para 33a).	FCAs should be made aware to expect a direction for a s.7 report following a fact finding hearing.
31 - Fact Finding Hearing	Requirement to record in writing reasons for a change of judge following fact finding hearing.	FCAs should be made aware for their information only.
32 – Cases where DA has occurred	Domestic abuse support services added as possible local service which may assist in cases where domestic abuse has occurred.	FCAs should be made aware for their information only.
33 – Cases where DA has occurred	Incorporates consideration of social work, psychological assessments, where findings have been made. Strengthens the requirement for the court to consider an assessment or adult seeking treatment etc. if there is to be any parental involvement in the child’s life.	This provision may increase the instances of the court ordering expert assessments and, in particular risk assessments. FCAs should only be ordered to prepare s.7 reports (unless appointed 16.4 Guardian). The court can order a FCA / CG to carry out a risk assessment of the child under s.7, but FCAs should not be carrying out assessments of parents or other adults.
35 – Factors to consider in deciding	Provision reworded for court to ensure that	FCAs should be made aware for their

<p>whether to make CAO</p>	<p>contact does not expose child to “<i>unmanageable risk of harm</i>”.</p>	<p>information only.</p>
<p>36 - Factors to consider in deciding whether to make CAO</p>	<p>Provision to provide that where findings are made or domestic abuse otherwise established, court should only make an order for contact if it can be ensured that the resident parent will not suffer further domestic abuse.</p>	<p>FCAs need to be aware of the change when conducting analyses and making contact recommendations.</p>
<p>37 - Factors to consider in deciding whether to make CAO</p>	<p>Reworded to capture all cases where domestic abuse is established, whether by findings, admissions or otherwise.</p>	<p>FCAs need to be aware of the change when conducting analysis and making contact recommendations.</p>
<p>38 – Directions as to how contact proceeds</p>	<p>Reworded to capture all cases where domestic abuse has occurred.</p> <p>Addition of “<i>Where a risk assessment has concluded that a parent poses a risk to a child or to the other parent, contact via a supported contact centre, or contact supported by a parent or relative, is not appropriate</i>”.</p>	<p>In such circumstances there can never be merely supported contact or informal supervision arrangements. If contact with third party involvement is considered necessary and appropriate to mitigate risks of harm to the child and/or the parent with whom the child lives, then that third party involvement must be supervision at a supervised contact centre.</p>

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