'ALL THE FACTS MA'AM' – A Paper about Discrete Hearings

Some Context

1. It is, or should be, trite to say that matters that "*contain(s) high risk features*" [1] are the most difficult to manage, be it in terms of the client(s), the issues before the Court as well as the Court process itself.

2. Typically, these matters feature one or more of the following:
   (1) allegations that, by their very nature, are distressing to hear, understand and investigate;
   (2) a sometimes overwhelming volume of material to digest from any number of sources eg reports, documents produced on subpoena, lengthy affidavit material, etc
   (3) a lack of cogent evidence to support or refute the allegations made, despite this voluminous material;
   (4) an inherently lengthy court process that will take at least several months and perhaps many years to navigate, involving:
      i. interim hearing(s);
      ii. numerous other Court appointments;
      iii. compulsory Family Dispute Resolution process or processes; and/or
      iv. engagement in any number of reports eg Family Report, updated Family Report(s), psychiatric assessments and/or risk assessment;

      culminating in a multi-day trial and then some wait for judgement;
   (5) a tension between discharging one's professional obligations to one's client to the appropriate standard on the one hand and the costs in doing so on the other, irrespective of whether that client comes to you in a private capacity or pursuant to a grant under s102NA;
   (6) an emotionally draining client, traumatised by the subject matter of the allegations and the entrenched litigation with their former partner; and

[1] See Practice Direction for Lighthouse Project and Evatt List

(7) a client to whom one must devote a disproportionately amount of time relative to other clients so that he/she can vent his/her frustration at the delay in the Court process and outcome from that process.

3. Against that background, much commentary has been made on topics directed to exploring the nature of risk and managing client's expectations.

4. The focus of this paper is instead, in essence, one of case management and specifically what has been variously described as a 'finding of fact', 'discrete', or 'split' hearing.

The Concept

5. The most challenging aspect of 'high risk' cases must be the draconian outcomes potentially facing both parents.

6. The party making the allegations (often, but not necessarily, the Mother) faces the removal of the child or children from his/her long-term primary care as an inevitable consequence of being unable to reconcile the impossible in the same hearing ie:
   - the belief that the child or children have been the subject of abuse and/or is at risk of abuse from the other parent; and
   - his/her willingness to promote the relationship between the child or children and the potential abuser.

7. The other party (often, but again not necessarily, the Father) faces a lengthy wait until he/she can establish any type of relationship other than that allowed under the limitations of supervised time. Indeed, he/she may find themselves on the wrong side of the argument that the reintroduction/maintaining of the child's or children's relationship at an interim stage may cause more harm than good if that relationship is to be ultimately severed after a final hearing. An evitable consequence of that interim decision is that, by the time the matter comes to trial, the child or children

has not seen one parent for up to 12 months or more, with any semblance of a future relationship potentially lost.

8. One might well ask: "How did it come to this?"

9. One solution to this binary Sword of Damocles is to "split" the final hearing into two components.

10. Initially, a discrete hearing as to risk which, depending on the facts of the particular case and the framing of the questions to be determined, may be confined to a specific factual dispute or a broader consideration of risk.

11. Thereafter, a further hearing some time afterwards which would feed the findings made in the discrete hearing into the more general enquiry as to what Orders best meet the subject child's or children's interests.

12. Depending on the findings made at that initial discrete hearing, the intervening period between the two hearings could be used by one or both parties to engage in therapeutic or psychological assistance, meaningfully re-establish a child's relationship with a parent and perhaps move the parties to resolve their litigation without the need for any further hearing.

13. Various alternatives to discrete hearings have been used to address the difficulties outlined at the start of this paper.[2]

14. By way of example, a Court may resolve to make interim Orders at the end of what otherwise has been conducted as a final hearing. Although potentially achieving the same result as a discrete hearing, the cost and delay in achieving that result would be no different to that inherent in a final hearing. Without the benefit of the clearly

[2] See paragraphs 6-7

defined issue for determination at a discrete hearing, a judgement made at an interim hearing may be open to challenge at the subsequent final hearing.

15. Parties making allegations of abuse often run parallel cases at a final hearing to address the dichotomy in their position outlined at paragraph 6 of this paper ie "*the Russell v Close option*" that because of the very nature of the allegations, that parent's capacity to care for the children will be compromised by any decision that sees the subject children have any form of relationship with the other parent.

16. Although a topic for another day, *Russell v Close* arguments, although often raised, seem to be rarely successful, due to a number of factors. There seems to be a fundamental misunderstanding of that authority's meaning by parties and their legal representatives. In addition, the particular parent's psychologist almost needs to concede that, despite their best efforts, they have been unable to treat their client so that they can adequately care for their children despite the allegations made.

17. Finally, one artificial solution sometimes used, especially in matters resolved by consent, is to include a "*Rice v Asplund"* notation in any Final Orders, the intention being to afford a party the opportunity to revisit parenting arrangements once certain steps have been undertaken. The difficulty with such a approach is often in the interpretation of the conditions that need to be satisfied as well as the non-binding nature of notations, especially if the fresh application comes before a different judicial officer.

<u>The Australian Context – Legislation</u>

18. The 'split' hearing has in fact been a constant in the landscape of parenting proceedings in both public or care proceedings in England and Wales, and now private law, for many years.

19. What may not be appreciated is that the concept of a "finding of fact" or 'discrete" hearing is in fact enshrined in Australian legislation. Such hearings seem to be increasingly common in proceedings before the Australian Courts exercising jurisdiction under the Family law Act.

20. There are several specific and implicit references in the Family Law Act and accompanying Rules of Court giving a Court the power to direct parties to a discrete hearing with respect to allegations of risk.

21. It is worth being reminded of the "*Principles for conducting child-related proceedings"* found in s 69ZN in Division 12A of the Act:

Principle 1

…The first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.

Principle 2

….The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.

Principle 3

…The third principle is that the proceedings are to be conducted in a way that will safeguard:

a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; and
b) the parties to the proceedings against the family violence.

Principle 4

…The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

Principle 5

….The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

22. Those Principles would seem to be consistent with the Overarching Purpose to "*facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible"* now found in the Federal Circuit and Family Court of Australia Act[3] and accompanying Rules.[4]

23. As can be seen, discrete hearings in turn fall within these Principles and the Overarching Purpose.

24. Arguably, the structure of s 60CC itself lends weight to a discrete hearing as to risk, noting in particular the requirement under s 60CC (2A) to give greater weight to the primary consideration set out in paragraph (2)(b) ie "*the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence."*

25. More specifically, s 69ZR of the Act makes provision for finding of fact or discrete issue hearings:

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

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

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

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

[3] See s190

[4] See rule 1.04

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

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

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

26. That section should be read in conjunction with the "*General Duties*" provided for in s 69ZQ.

<u>The Australian Context – Case Law</u>

27. The Full Court of the Family Court recently had cause to consider the use of a discrete hearing by a first instance judge.

28. In *Rodelgo & Blaine*[5], a Full Court comprised of Strickland, Kent & Hogan JJ considered an appeal from a decision of Judge Jarrett (as he then was) by the Father of the two children the subject of the proceedings. His Honour had, after a 'fact finding hearing', made Final Orders for the children's time with the Father to be indefinitely supervised.

29. As explained by the Full Court:

[5] [2019] FamCAFC 73

"4......the issue which was ultimately of determinative significance to the parenting orders the trial judge made was whether the children spending unsupervised time with the father posed an unacceptable risk of harm to them. On 20 and 21 February 2017 the trial judge conducted a trial, as a separate issue or matter within the meaning of Division 12A of Part VII of the Act,[2] of the issue as to whether the children were at risk of harm from either parent. In reasons for judgment delivered on 22 February 2017 ("the risk reasons") the trial judge recorded detailed findings for his Honour's conclusion that there exists an unacceptable risk of physical harm and of emotional harm to the children should they have unsupervised time with the father.

5. Having made those findings the trial judge ordered on 22 February 2017 that written submissions be provided by each parent and the ICL as to the following questions:

- *Whether it is appropriate to make final orders;*
- *Whether a further hearing is necessary; and*
- *If final orders are appropriate, what final orders ought to be made.*

It bears emphasis that ***the trial judge's approach in this respect was permissible*** **(emphasis added)** *pursuant to Division 12A of Part VII of the Act."*

30. Indeed, the issue on appeal was not whether His Honour's approach as to a discrete hearing was incorrect but whether he had failed to afford the parties, and in particular the Father, procedural fairness in departing from the procedure he had foreshadowed would be adopted following the discrete hearing ie that the findings as to risk "*would be furnished to the family report writer for an updated report, presumably with a view to conducting a trial of the parenting issues in the usual way, that is, with parties having the usual opportunity of cross-examining expert witnesses."*[6]

[6] At [24]

31. Ultimately, the appeal was dismissed, the Full Court noting that no substantial injustice was occasioned to the Father in the procedure the trial judge had adopted.

32. Although not expressly concerned with a discrete hearing, a differently constituted Full Court of the Family Court, of Watts, Austin & Tree JJ dismissed the Mother's appeal against interim Orders made by the trial judge in *Blann & Kenny* [7], stating at [48]:

"……no principle of law obliged the primary judge to finally dispose of the proceedings. While the Act exhorts the finality of child-related proceedings as a desirable objective (s 60CC(3)(l)), it does not mandate such an outcome. The circumstances affecting children's best interests are multifarious and liable to change quickly, meaning relevant issues may need to be determined sequentially in the litigation (ss 69ZQ(1) and 69ZR), or certain aspects of the litigation may even need to be re-visited (ss 64B(2)(g) and 65D(2)), or more evidence may be required because the available evidence at trial is manifestly inadequate to enable a proper decision (Reid & Lynch [2010] FamCAFC 184; (2010) FLC 93-448 at [213]). Such clear statutory provisions governing the ambit of procedural and substantive power override the force of any generalised quotes which may be cherry-picked from an authoritative common law case lauding the finality of litigation."

33. In a local context, Justice Baumann has regularly employed discrete hearings as part of the management of risk cases that come before him, eg:
    - *Launay & Kitanovski* [2019] FamCA 814
    - *Ziegler & Ziegler* [2021] FedCFamC1F 19
    - *Allen & Sacco* [2022] FedCFamC1F 120

34. In all of these cases, it is assumed that His Honour listed the matter for a discrete hearing himself "*pursuant to the power to do so under the Family Law Act 1975 (ss*

[7] [2021] FamCAFC 161

69ZQ and 69ZR) and the Rules and as recently considered by the Full Court in Rodelgo & Blaine (2019) FLC 93-897".[8]

35. In so doing, His Honour was "*well aware that both parents raise other issues in the parenting proceedings, yet to be determined, on allegations, yet to be tested.*"[9] One of His Honour's intentions in setting a discrete hearing was "*to provide Reasons more quickly".*[10]

36. In all three cases referred to above, Justice Baumann:
    - was required to determine whether the Father posed an unacceptable risk to the subject child or children by reason of sexual abuse;
    - conducted the discrete hearing in no more than two days; and
    - adjourned the matter for interim/case management hearing to consider the reintroduction and/or development of the subject child or children's time with the Father.

37. Mention is also made of *Isles & Nelissen* [2022] FedCFamC1A 97 where the Federal Circuit and Family Court of Australian Division 1 Appellate Jurisdiction (Alstengren CJ, McClelland DCJ, Aldridge, Austin & Tree JJ) clarified the evidential requirements for a finding of unacceptable risk of harm as distinct from positive findings of abuse ie "*the evidentiary fact-finding exercise is conducted to the standard of the balance of possibilities pursuant to s 140 of the Evidence Act whereas the predictive consideration of unacceptable risk, not being limited to findings of past fact, looks more to 'possibilities'…"*[11]

38. As is noted below, that distinction is especially important in framing the question or questions to be determined at any discrete hearing.

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[8] *Launay & Kitanovski* [2019] FamCA 814 at [9]
[9] *Ziegler & Ziegler* [2021] FedCFamC1F 19 at [10]
[10] Ibid at [9]
[11] See [82] where the Full Court quoted with approval from the trial judge's Reasons at [65]

39. We take the view that the Court in *Isles & Nelissen* provides at least implicit support for the concept of discrete, finding of fact hearings as to risk in appropriate cases when at [85] it states what may be considered self-evident: "*The assessment of risk is an evidence-based conclusion and is not discretionary….The finding about whether an unacceptable risk exists, based on known facts and circumstances, is either open on the evidence or it is not. It is only the overall judgement, expressed in the form of orders made in the children's best interests, which entails an exercise of discretion. That discretionary judgement is influenced by the various material considerations enumerated within s 60CC of the Act,* ***of which the evidence-based findings made about the existence of any unacceptable risk of harm is but one****."(* **emphasis added)**

<u>The Experience in England and Wales – Public Law</u>

40. Child Protection Responsibility in the United Kingdom, rests with Local Authorities. That is, rather than one national or state (county) based department with child protection responsibility, it falls to each of the Local Councils. In 2001, there were 27 London Boroughs, each employing between 5 and 10 Lawyers In their Child Protection teams. That is, somewhere around 200 lawyers in London alone, 'prosecuting' child protection applications.

41. It is our recollection that, at the same time Legal Aid QLD employed two solicitors specifically for child protection, and one of them worked part time.

42. Child protection in the United Kingdom is heavily litigated, and somewhat monolithic. There is a mature jurisprudence, and whilst it would be unfair to suggest that it is unresponsive to changes or development, the volume of case law it produces, gives it particular momentum. It also means that, unlike Australia where child protection is often the 'poor relation' of private parenting matters, in respect of court time, child protection matters, represent the bulk of the work of the courts and receive the bulk of the procedural scrutiny in the United Kingdom. Further,

because the UK does not have its public law children matters taking place in a different court to its private law matters, the process from those public law matters, flows understandably and inexorably into private parenting matters.

43. In that Jurisdiction, split hearings, involving a separate Fact Finding Hearing have long been the norm. The structure of the Legislation tends to support it.

44. The Children Act 1989, provides a quite clear two stage process, including a threshold question, readily described as such:

Section31 A court may only make a care order or supervision order if it is satisfied—

> *(a)that the child concerned is suffering, or is likely to suffer, significant harm; and*
>
> *(b)that the harm, or likelihood of harm, is attributable to—*
>
> > *(i)the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or*
> >
> > *(ii)the child's being beyond parental control,*

and then a subsequent consideration of what is often referred to as the welfare checklist, set out in section 1(3) of the Children Act, and bearing more than a passing resemblance to our own section 60CC(3).

45. It is a structure and a legislative pathway, somewhat more compartmentalised than the delineation in the Family Law Act, between the primary considerations in section 60CC(2) and the other considerations in section 60CC(3), and we would suggest invites split hearings. Further, practice guidance issued from time to time, if not actually presuming or preferencing a split hearing, has at the very least required it to be considered.

46. The Family Procedures Rules 2010 [FPR 2010] include a need for the court to decide which issues need full investigation and which do not and the procedure to be involved in the case.

47. Practice Direction 12A which reflects the courts 'Public Law Outline' and was relaunched in January of 2023, includes provision for an "Issues Resolution Hearing". This Hearing is more than just for the identification of Issues. The Practice Direction makes clear that it is to be used to resolve issues in dispute and may or may not finalise the matter. Where a live issue in the matter is as to whether harm has occurred, or who might be the perpetrators of harm it is clearly open to the court in it's case management to consider whether those might be determined at that hearing, in which event it would become a fact finding hearing.

48. That is not to say that split hearings have always been the preferred path.

49. In a number of cases in 2014, the Court of Appeal provided some push back against what they saw as an unhelpful 'default' to a split hearing. In Re S [2014] EWCA Civ 25 at 27 Lord Justice Ryder offered:

"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 to be made more expeditiously."

Though interestingly, at paragraph 28, he made clear that he was not criticising the use of split hearings in appropriate private law cases.

50. In *Barnsley Metropolitan Council v VW and ors [2022] EWFC*, Mr Justice Mostyn, cautioned against pursuing a fact finding hearing which was superfluous to the ultimate determination of the matter.

51. But there remains a ready acceptance of split hearings or fact finding hearings within the jurisdiction, and a consideration of whether they will be useful in each case. Even recent cases where the court has decided against a fact finding hearing speak to the need to genuinely consider whether that case management path, is necessary or will have a benefit in a particular case. eg RE HDH (Children) [2021] 4 WLR 106, Lincoln CC v CB and Ors [2021] EWHC 2813.

The Experience in England and Wales– Private Law

52. The management of parenting proceedings in any case "*in which it is alleged or admitted, or there is other reasons to believe, that the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse"* is governed in England and Wales by Practice Direction 12J – Child Arrangements & Contact Orders: Domestic Abuse and Harm, which came into force in 2017.

53. That Practice Direction mandates the early determination of whether it is necessary to conduct a finding of fact hearing in relation to any disputed allegation.

54. The apparent prevalence of finding of fact hearings as a matter of course has in fact led to recent criticism by the England and Wales Court of Appeal in *K and K* [2022] ECWA Civ 468. To that Court's mind, "*there is an [incorrect] 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…"*[12]

55. Some helpful and cautionary comments emerge from that case applicable to discrete hearings in this jurisdiction:
    - "*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"*[13]*;*
    - *"A decision to hold a fact-finding hearing is a major judicial determination…[which] will inevitably introduce delay and postpone anything other than an interim determination of issues relating to the child's welfare….contrary to the….general principle that any delay in resolving issues is likely to be prejudicial to a child's welfare";*[14]

[12] At [67]
[13] At [8]
[14] At [42]

- *"…the litigation of factual issues between parents is likely to be adversarial and…to have a negative impact on their ongoing relationship…"[15];* and
- *"A fact-finding hearing …..is not to be allowed to become an opportunity for the parties to air their grievances….nor…a chance for parents to seek the court's validation of their perception of what went wrong in their relationship…"[16]*

56. There is no suggestion, however, that finding of fact hearings as to risk are disappearing from the practice of family law in England and Wales anytime soon. The message, as always, is one of relevance to the ultimate determination of what Orders will best meet the children's welfare and interests.

<u>The NZ Experience</u>

57. New Zealand appears to offer somewhat less freedom to its Judges in respect of case management than appears to be afforded under the Family Law Act. Pursuant to the Family Court Rules, matters under the Care of Children Act 2004 are assigned to a case track, and while there is some scope for Judges to deem a matter complex, and accordingly take more personal responsibility for it, they are somewhat bound to the case track.

58. From a practical perspective, and having spoken to practitioners familiar with the process in that Jurisdiction, the emphasis is on determining issues such as allegations of family violence at an early interim stage, rather than seeking to bifurcate the final hearing. We would suggest that such a process may have difficulty accommodating those significant allegations of physical and sexual abuse, or significant family violence, which in and of themselves require more than a day.

[15] ibid
[16] ibid

Raising a Discrete Hearing

59. Logically the question of how to raise the possibility of a discrete hearing, can be split into two questions, how to raise it and when to raise it.

60. Pursuant to s 69ZP, the Court may order a finding of fact/discrete hearing on its own initiative or at the request of one or more of the parties to the proceedings.

61. As mentioned above, the discrete hearings ordered by Baumann & Jarrett JJ in the authorities referred to above arose on the Court's own motion.

62. Pursuant to rule 10.10 of the FCFCOA Rules, a party may seek a discrete hearing by application for "a separate decision." That rule provides as follows:

    (1) A party may apply for a decision on any issue, if the decision may:

    (a) dispose of all or part of the proceeding; or

    (b) make a trial unnecessary; or

    (c) make a trial substantially shorter; or

    (d) save substantial costs.

    (2) *An application under this rule must be made by filing an application in accordance with the approved form*.

63. Subrule 10.10(2), requires an application. While rule 1.31(1) provides the court the power to dispense with compliance or full compliance with any of the Rules, such that an oral application could be considered, we would suggest, in circumstances where your application itself is somewhat novel, requiring an indulgence of the court before you can make it, is not the firmest footing on which to commence.

64. Rule 10.11 provides for Orders that may be made be made by the Court:

    (1) *On an application under this Part, the court may*:

    (a) dismiss any part of the proceeding; or

    (b) decide an issue; or

    (c) make a final order on any issue; or

> (d) *order a hearing about an issue or fact; or*
>
> (e) *with the consent of the parties, order arbitration about the proceeding or a part of a proceeding…*

65. The power to order a separate hearing about an issue or a fact seems to remain the province of a judge. Interestingly, while the power to order a hearing about an issue pursuant to rule 10.11(d) appears in the Schedule 4 delegations, at 31.2, it is not ticked for either a Senior Judicial Registrar or Judicial Registrar. One might assume therefore that this power is one that may yet be delegated or that is under consideration for delegation.

66. That 'gap' in the Rules seems to sit at odds with the delegated powers to Senior Judicial Registrars at 3.7 in Schedule 4 "*to make a finding of fact, determine a matter or make an order in relation to an issue before final orders are made"* under s69ZR(1). While Senior Judicial Registrars make findings every day in the truncated nature of interim hearings, arguably they have the power to conduct discrete hearings of risk with cross-examination etc.

67. In reality, however, there are probably good policy reasons why this does not and will not become common practice. Decisions of Senior Judicial Registrars are of course subject to review. Any findings made by a Senior Judicial Registrar in a discrete hearing would presumably need to be adopted by another judicial officer in the final determination of the parenting dispute before the Court, offending the preferred need for judicial continuity in the separate hearings.

68. The exercise of the power, that is, the decision on the issue would also then remain the province of a judge, as one would expect.

69. It is worth noting that the Federal Court also makes provision for separate fact finding hearings. Chapter Six of the Case Management Handbook, provides inter alia:

"6.66 In the ordinary course, all of the issues of fact and law in the proceedings should be determined together at one time[17]. Notwithstanding this, in some cases the conduct of the proceedings may be made more efficient by determining some issues before other issues.

6.67 The Court may order that any question or issue (whether or fact or law) in the proceedings be decided before, at or after any trial or further trial in the proceedings – that is, as a 'separate question'."

70. And, usefully from a procedural standpoint:

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

• the formulation of the 'separate questions' for the Court to answer; and

• a trial confined to the issues raised by the separate questions."

71. The fact that the power will only be exercised by a judge might reasonably have a bearing on when you would seek that there be a separate fact finding hearing.

72. The Central Practice Direction identifies that a Compliance and Readiness Hearing (CRH) will take place as close as possible to six months from the date of filing, and will be listed before a judge. Further, that Practice Direction lists among the purposes of the CRH the following:
    - 5.55(g) to consider whether "*determination of a discrete issue would likely facilitate the timely resolution of the overall proceedings*"
    - 5.55(h) to ensure that *"the relevant issues of fact and law and the relief sought by the parties are appropriately defined and particularised including, if appropriate, by way of formal pleadings or short form statements of contentions"*

73. We would suggest that both of those purposes are explicitly consistent with consideration of a separate fact finding hearing. One can see particularly in the

[17] Taglierei Pty Ltd v TV Holdings Pty Ltd 91996) 22ACSR 130 at 141-2

requirement to appropriately define the issues a correlation with the Federal Court Handbook's reference to the '*formulation of the separate questions*'. We would suggest that the defining and formulation of the questions posed, is as necessary in family law matters as it might be in a general federal law matter.[18]

Advantages and Disadvantages

74. As already noted, the question of whether to pursue a split hearing would normally arise in those cases where a parent alleges that the other poses a risk.

75. There is clearly an advantage to that parent, in having a clear finding made, to which they can turn their mind, and to which they can reconcile themselves, prior to their being an assessment of their capacity to support a relationship. As was said by Baumann J in *Launay & Kitanovski*[19], the issue of whether or the Mother would "*be able to accept the finding now made by the Court…is still a matter to be determined.*"

76. It is generally the narrative that clients making allegations upon which a case of unacceptable risk is formulated, present themselves as unsure of the veracity of the disclosure, and at least on paper as wanting a determination to be made. One may be reasonably circumspect as to how genuine they are in that position, but it is the general presentation.

77. A split hearing affords the opportunity to test that position. It also affords that party a chance to avail themselves of therapy and counselling where the practitioner engaged has the benefit of findings made by the Court to direct the focus of such work.

[18] Lahiri & Saha [2022] FedCFamC1F 271

[19] At [51]

78. We would submit that a fact finding hearing can often be undertaken without the need for a family report. Given that the availability of experts will often be a determining step in child proceedings, it opens up the possibility that a fact finding hearing could be conducted earlier than our existing timescales for final hearings.

79. In those cases where an unacceptable risk is found, it might be largely determinative of the matter eg *Rodelgo & Blaine* at first instance

80. Where no unacceptable risk is found, it affords the opportunity to make interim orders, often providing for time or a move beyond supervised time, in circumstances where the parties and the children's response to that time may be useful evidence in respect of number of s 60CC factors.

81. Where a family report is obtained at that point, it allows the report writer to offer their opinion, having regard to the findings already made. Whilst it is not and should not be beyond the competence of a family report writer to offer recommendations in the alternative, we would ultimately suggest that the opportunity to rely less on hypotheticals should be embraced.

82. Again, where a relationship between a child and a parent has broken down as a consequence of the allegations (and the time taken to test those allegations), the court's findings at the discrete hearing could be used to shape the therapy necessary to repair the relationship.

83. There are of course potential disadvantages.

84. While we would suggest that, ultimately, it is an advantage that a party have the opportunity to consider their position in light of the court's findings and the testing of the evidence, there might be a concern that it is an opportunity for that party to shape their presentation. A chance to have the opportunity to 'roll the dice' on an unacceptable risk case, without the risks that flow from running one that clearly had no merit.

85. We would suggest that is a mischief that can be addressed at the point the split hearing is being sought.

86. Further, one might argue that, having the opportunity to test and rule on the evidence, even on what may appear prima facie weak cases of unacceptable risk, is preferable to a party making a tactical decision to resile from that case, and leaving the court with the task of still having to determine whether the abandonment of that case is genuine.

87. Further, and notwithstanding the submission made, perhaps in hope rather than genuine expectation that the resolution of an unacceptable risk issue will likely reduce the time needed for the subsequent hearing, it is conceded that that intervening period may present nothing more than an opportunity for a recalcitrant parent to find and or generate further 'risk' factors.

88. However, such a path by an alleging parent might make somewhat less speculative the question of that parent's capacity to support an ongoing relationship.

89. Where you are embarking on a process that necessarily involves two contested hearings, as opposed to one, it seems reasonable to suggest there would be cost implications. While it would be expected that neither of those hearings would be as long or as cumbersome as a single 'final hearing' nor could we argue that the cost would necessarily be less. Having said that, the discrete hearings ordered by Baumann & Jarrett JJ were conducted in substantially less time than a "complete" final hearing might ordinarily take with a view to curtailing or avoiding any further hearing days altogether.

90. In any event where there are two hearings, even shorter more focussed hearings, issues of judicial and counsel continuity may arise as well delay in the final resolution of the matter. As with so many aspects of the family law system, resourcing looms large.

91. Perhaps the most philosophical objection to the discrete hearing idea is that succinctly put by Justice Strickland in *Director-General, Department of Community Services & C and Ors* [2006] FamCA 361:

"…*having a final hearing about the discreet issue of unacceptable risk is to lose sight of the fact that that issue is just part of the wider issue of what is in the best interests of the child….once [the issue of unacceptable risk] is determined there still needs to be a determination of what is in the best interests of the child. The difficulty though is that the issue of unacceptable risk should still only be determined on a final basis as part of a determination on a final basis of what is in the best interests of the child; in other words, as part of the wholesale consideration of all relevant s68F(2) factors."* [20]

92. Whilst His Honour's comments were made prior to the 2006 amendments to the Family Law legislation, they do highlight that discrete hearings are not a panacea for all risk cases that come before the Court. Different judicial officers will have different approaches to the same proceedings, all being permissible under case management principles now applied in the Court.

93. To borrow again from the England and Wales authorities:

"*…it is of critical importance* ***to identify at an early stage the real issue in the case*** **(emphasis added)** *in particular with regard to the welfare of the child before a court is able to assess if, a fact-finding hearing is necessary and if so, what form it should take."*[21]

[20] At [72]

[21] *Re H-N* [2021] ECWA Civ 448 at [8]

Conclusion

94. Division 12A sets out at s 69ZN, the principles for conducting child related proceedings. It offers a suite of measures aimed at conducting proceedings in accordance with those principles. It seems to us that in many instances the only use made of Div12A, is to hide behind s 69ZT. Indeed, it may be that the rules of evidence specifically do apply to discrete hearings, pursuant to s 69ZT(3).

95. We would argue that in s 69ZR, and particularly in consideration of fact finding hearings, there is a tool which can be utilised in furtherance of those principles, so that where allegations of risk have been made:
    - they can be tested robustly, to the benefit of all parties
    - in a timely manner; and
    - in a manner that allows the court to actively manage the implications of any findings.

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