St.Mary's
FAMILY LAW SPECIALISTS

Why don't facts always seem to matter?

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May 2024

It is a cardinal principle in all legal proceedings that decisions should be made based on facts. This should be particularly true within public law proceedings involving the welfare of children. It can only be fair that decisions are made about children's future welfare interests on the basis of what has happened historically, rather than what is assumed or suspected to have occurred or been occurring.

However increasingly it appears that the concept of a factual background has become lost within many litigated public law proceedings, particularly when it comes to the welfare analysis undertaken by social workers or guardians.

It is often glaring obvious when it comes to the welfare analysis, that it has been undertaken on the basis of assumptions rather than matters that are accepted or proven. It often is the most obvious example as to why the analysis may be fundamentally flawed and thus why it needs to either be treated cautiously by the court, ignored entirely or repeated by way of further assessment.

Legal Basis

The legal position is not a complicated one and must be understood by all practitioners.

The dicta of Sir James Munby in the case of Re A[1] should be a document that all public law practitioners both understand but have ready to utilise in all cases. It is worrying that now almost 10 years since this judgment was given the issues raised within it are still commonplace.

Sir James Munby in this case emphasises several critical elements, most notably the following:

> *It is for the local authority to prove, on a balance of probabilities, the facts upon which it seeks to rely. It is for the local authority, since it is seeking to have A adopted, to establish that "nothing else will do" (para 4)*
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> *The first fundamentally important point relates to the matter of fact-finding and proof. I emphasise, as I have already said, that it is for the local authority to prove, on a balance of probabilities, the facts upon which it seeks to rely … the elementary proposition that findings of fact must be based on evidence (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation. (para 8)*
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> *The local authority, if its case is challenged on some factual point, must adduce proper evidence to establish what it seeks to prove. Much material to be found in local authority case records or social work chronologies is hearsay, often second- or third-hand hearsay. Hearsay evidence is, of course, admissible in family proceedings. But … a local authority which is unwilling or unable to produce the witnesses who can speak of such matters first-hand, may*

[1] [2015] EWFC 11

> *find itself in great, or indeed insuperable, difficulties if a parent not merely puts the matter in issue but goes into the witness-box to deny it. (para 9)*
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> *It is a common feature of care cases that a local authority asserts that a parent does not admit, recognise or acknowledge something or does not recognise or acknowledge the local authority's concern about something. If the 'thing' is put in issue, the local authority must both prove the 'thing' and establish that it has the significance attributed to it by the local authority. (para 9)*

Sir James Munby also made the point in this case, again often overlooked by lawyers as well as social work professionals, that the suggestion that people (including ex-partners or children) have 'stated' or 'reported' things is crucially different to a finding that someone has a**ctually done something**. Often the reports themselves are not disputed, however whether the reports are accurate is disputed. It is crucial that legal professionals understand this, often because it is crucial to be explained to clients.

When are 'facts' missed

Facts can come in many forms whether the result of admissions by a party, by convictions made within the criminal courts or by findings made on the basis of evidence filed within civil proceedings. Now in single issue cases, or ones where there is a substantive event that has allegedly occurred, then a fact finding hearing may resolve this issue. However with the push towards 'making cases' smaller or having composite hearings that won't always be the case.

Often counsel will have the first involvement with cases at a final hearing, often opposing or seeking long term removal of children from a family environment. As such the advantage that counsel has is that they come to cases afresh, reading into papers where welfare recommendations will already have been made, but not yet determined by the court. However that is often the position that the judge at a final hearing will also be in, unless there has been significant judicial continuity previously.

It is often surprising that the factual position against an individual is often undetermined or the result of ongoing dispute. The fact that it is disputed is not often surprising, however what is more surprising is that there has often been inadequate attention paid to how that difference will be resolved.

Now in some cases the reasons for that are obvious, the LA has filed detailed primary evidence that support the assertion and counsel's role is to go in and explain why it probably won't help the case at the final hearing to litigate the point against the independent 3rd party witness. For those cases there is little purpose in the parties (or the court) having considered how the issue will be resolved, as it is clearly able to be resolved either by agreement or by simple evidence.

In other cases it won't matter. There might be enough primary evidence but there is a positively assessed family member who everyone agrees the child should live with. In those cases the final factual basis matters very little, and will often be either not dealt with ('it's a special guardianship order we don't need to worry about threshold') of some limited admissions will be thought acceptable.

However in many other cases there is not primary evidence that has been filed, nor has there been any real consideration as to how matters will be proven, but the distinction in those cases is that there is not agreement on the appropriate welfare argument. The most typical of these cases are the following:

- Domestically violent partners : In these cases, often the father, is said to have been repeatedly violent during the relationship. However there is no convictions, often no police reports and limited information from a notoriously unreliable mother;
- Separations from former partners : In these cases, the parent is suspected to still be in a relationship with the other parent who has historically posed a risk. There is often no evidence of an ongoing relationship however that is presumed;
- Drug misuse : In these cases drug testing may show that there is some level of use but it is far from clear and ultimately is denied by the parent.

In these cases the welfare analysis has been undertaken either explicitly or implicitly on the basis of the facts that are not proven nor apparently sought to be proven. Practitioners need to be acutely aware when the case may fall into that final category, and realistically work on the basis that it will be in that category until it is not. Assumptions that facts won't be an issue cannot objectively be in the best interests of the children within these cases.

Why does this create a problem and why does it occur?

I have lost track of the amount of opening notes that I have filed for final hearings highlighting the apparent problem on behalf of parents. Why the issue has not been noted is unclear, particularly when the legal principles are so clear and when the legal premise is so obviously correct. It is not fair to assume that someone has done something that they deny, which they cannot be proven on the balance of probabilities to have done.

The reason why it often occurs is probably threefold.

Firstly because it is thought that it will all resolve itself in the end. The oft used quote of *'there is no smoke without fire'* probably applies in lots of these cases. Professionals presume that there will be enough within the evidence to prove enough to get what they want. There is of course also the possibility that the parent will not contest the issue. Indeed many clients will do this, the clients also may not turn up, representatives will not robustly make the position at a final hearing or the court will only give limited weight to the argument.

Secondly professionals are under ever increasing and unrelenting pressure to resolve multiple cases. The daily flurry of emails and issues on multiple different cases mean that issues such as this are missed. This probably feeds into my first point that if it is considered it will be presumed that it will resolve itself, or it is a problem that can be resolved later if required.

Thirdly (and probably most crucially) social care professionals fundamentally do not appear to understand the issue exists or fail to identify the issue. Social workers spend lots of time working cases out of the court arena where they do not have the luxury of judges always being available to make factual determinations. They understandably have to proceed on the basis that allegations are true so as to objectively protect vulnerable children. Those allegations are almost always presumed to be true without any real analysis as to whether they are correct. Thus when a social work professional looks at a chronology when undertaking a parenting assessment or final analysis,

they presume that all of the reported matters are true. Indeed in a parenting assessment if a parent seeks to deny matters in the chronology they are often said to be 'minimising' rather than denying matters.

I have had many social workers, when I have been cross examining them, seek to explain that they must deal with things differently to the legal premise. They have even said that they cannot ignore 'concerns' even if they cannot be objectively proven. There is often a fundamental inability to accept that if the evidence is founded on an unfair or unreasonable basis then they cannot use it as part of the welfare analysis.

The reason why this creates a problem is obvious, the welfare analysis cannot be objectively fair if it is taking into account many things that are not accurate. Highlighting this issue successfully can lead to further delays through further assessment, or a child being returned home incorrectly. The risk is as Sir James Munby says in Re A:

Failure to understand these principles and to analyse the case accordingly can lead, as here, to the unwelcome realisation that a seemingly impressive case is, in truth, a tottering edifice built on inadequate foundations.

How to resolve it as an issue

The main way to resolve this issue is to recognise that it is occurring. Too often even as legal professionals there isn't enough of a fuss made about the point. That cannot be right when it comes to the interests of our clients who categorically say that matters are not true (even when they appear that they might be). Too often individuals are labelled or pigeonholed into certain categories like the many clients we may have come across before. The pigeonholing might be thought to be fair, but often it will fail to identify the nuances in certain parents' behaviours.

For local authorities focus needs to be had at an early stage in proceedings as to how they are going to put their case and whether they can prove that case. Threshold documents are a key element of such planning; however these need to be done in consultation with the social work team, rather than as simply a legal exercise. They need to understand the factual background for their own assessment. Social workers also need to be trained to rely solely on matters which can be proven rather focussing on the damning anonymous telephone call or the report from the inherently unreliable witness.

Many of the cases to which I refer there could be a good argument on a factual basis, however that factual basis is often missed in pursuit of a different factual basis that can never be proven.

Often historically alleged domestic violence relationships are a good example. Much emphasis is placed in reliance on the reports of a parent of domestic abuse by a local authority, that also says within its final evidence that parent is inherently dishonest and cannot work openly with professionals. The two things cannot easily be true but often no thought has been had to how the factual case against the other parent is going to be proven.

Social workers and guardians crucially need to be trained away from over reliance on chronologies of historic wrongdoing unless those matters are specifically accepted. Often hefty chronologies are wrongly thought to be overwhelming evidence of wrongdoing, but as Sir James Munby says they can often hide a fundamentally weak case if those matters cannot be proven. Ultimately social

workers and guardians need to be better trained to understand how the court must make decisions which is rather different to how social work may operate outside of the court arena.

Whilst this might appear principally an issue for local authority and guardian representatives that isn't always true. Clearly the burden is on the local authority to prove the facts that it seeks to rely on, however in my experience more needs to be done by the parents' representatives at an early stage within proceedings to highlight that the problem exists.

By the time of the CMH all parties should know the parties' responses to threshold. These documents should contain the factual foundation on which the final orders will be sought, but if there are other matters that are going to be relied upon then these should be highlighted at this early stage. Parents representatives must highlight from the outset what is not accepted but also what is unlikely to be accepted without further evidence. Respondent representatives need to be clear that certain matters are not accepted and that the local authority will need to prove them. To use the words of Sir James Munby, Respondent advocates need to make it clear that 'the matter is in issue' and that the local authority need to prove this.

Recitals to this effect, or a detailed position statement at an early stage, can be used later in the proceedings to show that this matter was in issue prior to the parenting assessment. If the evidence is then not forthcoming then the argument can be robustly made that the findings have not been proven and the welfare analysis is wrong.

At IRH, if the parenting assessments appear to be founded on an unclear or unreasonable basis then the same point should be made. Local authorities must be challenged to question on what basis they seek to prove their case, again with recitals or position statements to be used at final hearings to show that this has been done well in advance of the final hearing. If none of this has been done, an opening note highlighting the issue at the final hearing can suffice but this rather leads to a panicked attempt to belatedly find incriminating material.

Drug testing

This issue is probably too detailed to do justice in a short section here, but it appears important to highlight this issue within this article.

The burden of proof to establish ongoing drug (or alcohol) misuse also falls on the local authority. A must read case in this area is Re H (A child – Hair strand testing)[2] where Jackson J (as he then was) emphasises the point that even with positive drug test results it is for the local authority to prove drug misuse as it is an allegation that they make. He explicitly approves the submission by the mother's counsel that *'the presence of an ostensibly positive hair strand test does not reverse the burden of proof'.*

Indeed that case goes on to explore the limitations with hair strand testing, which not undermining the science behind it, must encourage advocates/the court to treat these test results with a degree of caution. Of particular importance is the oft quoted but crucial caveat of these test

[2] [2017] EWFC 64

that *'when used, hair tests should be used only as part of the evidential picture'* and an agreement by the experts in that case *'you cannot put everything on the hair test.'*

Far too often in cases drug testing is presumed by legal and social work professionals to be absolute. It categorically is not, and the testing agencies accept this.

If parents do not accept the outcome of drug test results then their representatives must say this and emphasise to the local authority that this is a fact that needs to be determined by the court, rather than simply assumed to be true. Often further questions can and should be put to the testing agencies to challenge the results, or further testing sought. It is a factual issue and needs to be emphasised as such. It is no different than a disputed historical event in this regard.

Conclusions

All of the above issues existed at the time of Re A and no doubt occurred for many years before that. However the ongoing pressures to make cases smaller, the focus on having fewer fact-finding hearings and the wish to make final hearings shorter will mean that greater focus needs to be had in these cases at an earlier stage to the factual basis. There is a greater risk now, more than ever, that the issues will be missed up until the final hearing.

Legal professionals on both sides of disputes have a duty to note that these issues exist throughout the proceedings. Ultimately because the absence of a historical background should mean that children are safe in the care of their parents. If this is correct, then this should be realised far sooner than a final hearing to avoid delay for the child. If it is not correct (and they are thus not safe) then the court needs to have the material properly available so as not to end up with that unsafe outcome for the child being ordered.

Postscript…

This article followed a presentation that I gave on the same topic at the St Mary's Public Law Conference in May 2024. Ironically on the day that this article has been released the case of SR v RT[3] has been published.

The case is a private law case, but with the LA having been invited to undertake a s37 report following significant findings having been made. HHJ Reardon notes within the judgment that the welfare analysis undertaken by the local authority appeared to totally ignore the facts that she herself determined at an earlier fact-finding hearing. Her description at paragraph 5 is particularly apt in the context of what I wrote above:

The local authority's approach has been misguided, wrong in law, and dangerous.

The judge ultimately did not follow the recommendations of the social worker on the basis that it was not founded upon the factual basis that she had determined. The mother in the case sought for

[3] https://assets.caselaw.nationalarchives.gov.uk/ewfc/b/2024/103/ewfc_b_2024_103.pdf

the social worker to be named within the published judgment. Notably for legal professionals HHJ Reardon said the following in the concluding paragraph of her judgment:

However, in this case the fault did not, in my judgment, lie with the individual social worker but with those in positions of greater authority, particularly those with legal qualifications who should have been expected to understand the local authority's obligation to accept the findings of a court. Essentially the social worker misunderstood the legal position in circumstances where she was not properly advised. In my view it would be unfair to expose her to public criticism for that, when the real failing was on the part of others in the local authority who could and should have steered this case in a very different direction.

I have added this postscript mainly because this passage really exemplifies what I have written above. It is our responsibility as legal professionals to not only seek to ensure that the court is aware of the factual basis, but also our clients (including our professional clients) understand that decisions must be formed on the basis of facts and facts alone.