Articles

Final curtains at the intermission? Part 1: final orders at interim hearings – when and why

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The Family Justice System remains under significant pressure. The mean duration of a private law case in 2024 was almost 10 months,[1] compared for example to 6 months in 2018.

There has been sustained focus on 'making every hearing count'.

Final hearing fixtures naturally require the allocation of more court time and resources than those at an interim stage.

In this current context, consideration of when and why a court may dispose of a case prior to a final hearing, in the absence of a party's consent, is particularly relevant.

This issue arose in three recent cases in the private law jurisdiction, which will be taken in chronological order and summarised within this first part of the article.

The second part of this article will take a broader view and (i) offer some observations as to what we may learn from these three cases (ii) comment on what the likely relevant factors/arguments may be when the court, either of its own accord, or by invitation of one of the parties, considers dispensing with a final hearing at an interim stage (iii) discuss analogous scenarios in the public law and financial remedies jurisdiction.

(1) *P v F* [2023] EWHC 2730 (Fam)

MacDonald J granted a father's appeal against an order of HHJ Tolson dated 21 March 2023 made at a dispute resolution appointment. Father was a LIP both at that hearing, and also on appeal. It is unclear whether the mother was represented at the DRA, but she did not participate in the appeal, nor was she represented at the same.

Litigation history

The subject children, twins, were aged rising 12. A final child arrangements order had been made back in 2021, providing that the children were to spend time with the father one night each fortnight and for defined time during holidays. Contact stopped in March 2022. Father made an application to enforce in the October of that year.

Father had been subject to a restraining order for 2.5 years, expiring in June 2023, preventing him from contacting the mother and her new partner and from entering the road on which they lived. Mother complained of ongoing harassing behaviours.

Cafcass prepared a s 7 report in which the children expressed a clear wish that they did not wish to see their father. They described him being drunk 'loads', swearing frequently

1 Family Court Annual Report October 2023 – September 2024 published in December 2024 [pg.14]. A further aspect is the impact of the collective burden on courts, when financial remedies work is taken with private law cases.

and for no reason and witnessing an incident whereby he physically assaulted the mother.

Cafcass concluded that there was no evidence of mother having influenced the children or otherwise having exhibited alienating behaviours. Cafcass were concerned at the father's lack of insight. Father assessed the children's views as being attributable to mother and his criticisms of her were put in explicit and derogatory terms to Cafcass.

Cafcass recommended that the children 'live with' their mother, the 2021 order be varied such that father may have indirect contact only in line with their wishes and feelings and that the mother was to provide updates to the father every 3 months. Cafcass suggested the court consider both making a PSO against father preventing removal of the children during visits to the paternal grandparents and making a s 91(14) order.

HHJ Tolson made a final order at the DRA. The key terms were that the children were to 'live with' mother, to have indirect contact (cards/presents) only with father sent via a third party and the imposition of a s 91(14) order for a period of 2 years.

Grounds of appeal

The President granted the father permission to appeal, substituting three grounds in place of those originally pleaded by father:

i) The judge was in error in making a final child arrangements order at a dispute resolution hearing when the applicant was clearly not consenting to a final order for no direct contact being made;

ii) In circumstances where the applicant did not agree to a 'no direct contact' order and challenged the Cafcass report, the hearing was conducted in breach of his right to a fair trial under the European Convention on Human Rights, Art6.

iii) The imposition of an order under the Children Act 1989, s. 91(14), preventing further applications, was wrong in circumstances where none of the procedural requirements necessary to establish a fair process with respect to a litigant in person were followed (see *Re C (Litigant in Person: Section 91(14) Order)* [2009] EWCA Civ 674, [2009] 2 FLR 1461) and the judge gave no judgment in support of making the order.

Appeal hearing before MacDonald J

MacDonald J set out substantial excerpts from the transcript of the DRA which captured exchanges between HHJ Tolson and the father. HHJ Tolson had explained the choice before the court: to make an order in line with the Cafcass recommendation or to list a final hearing.

However, MacDonald J observed that these exchanges were 'confused and confusing'. Throughout the hearing, there was a:

> 'pattern of the father seeking to articulate his ambition for the mother to offer more contact in line with previous arrangements, and the judge responding by seeking to demonstrate to the father the reasons this ambition was unrealistic having regard to the contents of the Cafcass report and pressing the father to indicate whether he sought a final hearing.'

In the final exchange, the father appeared to accept, in response to the judge's assessment, that a final hearing would be 'a bit of a pointless thing'. The judge treated that as an election for him to instead make a final order at the DRA, albeit the father, labouring under a misapprehension, commented that 'the next thing' would be a 'final order so I can see my kids'.

MacDonald J set out the law. What does the FPR tell us happens at a DRA? Per FPR 2010 PD 12B Para 19.3:

> 'At the DRA the Court will –
>
> (1) Identify the key issue(s) (if any) to be determined and the extent to which those issues can be resolved or narrowed at the DRA;
> (2) Consider whether the DRA can be used as a final hearing;

(3) Resolve or narrow the issues by hearing evidence;
(4) Identify the evidence to be heard on the issues which remain to be resolved at the final hearing;
(5) Give final case management directions including:
(a) Filing of further evidence;
(b) Filing of a statement of facts/issues remaining to be determined;
(c) Filing of a witness template and / or skeleton arguments;
(d) Ensuring Compliance with Practice Direction 27A
(e) Listing the Final Hearing.'

Regarding Art 6, MacDonald J stated:

> 'In determining whether there has been a breach of the right to a fair hearing, the court must ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair, as well as individual deficiencies in the . . . The question for the court is whether the person complaining of a breach has been deprived overall of their right under Art 6 to a fair trial. Within this context, a procedure whereby civil rights are determined without hearing the parties submissions will not be compatible with Art 6(1) . . . An element of a fair hearing is the right to comment on all evidence adduced or observations filed with a view to influencing the court's decision'

Turning to Art 8:

> 'whilst Art 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference in the right to respect for private and family life must be fair and such as to afford due respect to the interests safeguarded by Art 8'.

MacDonald J noted the amendment to s 91(14) introduced by the Domestic Abuse Act 2021 ('DAA 2021') such that, per s 91A of the DAA 2021:

> '(5) A section 91(14) order may be made by the court—
> (a) on an application made—
> (i) by the relevant individual;
> (ii) by or on behalf of the child concerned;
> (iii) by any other person who is a party to the application being disposed of by the court;
> (b) of its own motion.'

MacDonald J quoted from the relevant Practice Direction, PD 12Q, noting 'the circumstances in which such an order may be made are many and varied'. Para 2.8 read together with Para 3.5 record that the court, in contemplation of making a s 91(14) order and in consideration of what opportunity for representations should be provided to the parties, 'the courts should look to case law for further guidance and principles'.

Whilst a court may impose an order under s 91(14) of its own motion, MacDonald J cautioned, 'this is subject to the rules of natural justice (see *Re P (Section 91(14) Guidelines)(Resident and Religious Heritage)* [1999] 2 FLR 573)'.

What does this mean? MacDonald J explained:

> '. . . before making an order under s 91(14), the court must be satisfied that the parties affected (i) are fully aware that the court is seised of an application and is considering making such an order, (ii) understand the meaning and effect of such an order, (iii) have full knowledge of the evidential basis on which the order is sought, and (iv) have had proper opportunity to make representations in relation to the making of the order . . . In this regard, in *Re C (Litigant in Person: s 91(14) Order)* [2009] 2 FLR 1461 at [13] the Court of Appeal noted that:
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> "Where the parties are both or all in person, there is a powerful obligation on any court minded to make a s 91(14) order to explain to them the course the court is minded to take. This will involve the court telling the parties in ordinary language what a s 91(14) order is; and what effect it has, together with

> the duration of the order which the court has in mind to impose. Above all, unrepresented parties must be given the opportunity to make any submissions they wish about the making of such an order, and if there is a substantive objection on which a litigant wishes to seek legal advice the court should either normally not make an order; alternatively it can make an order and give the recipient permission to apply to set it aside within a specified time." '[2]

MacDonald J permitted father's appeal on each of the three grounds and remitted the case to a different CJ. The essence of his reasoning was that whilst the father's position, as expressed to the judge, was muddled at times, he was a LIP, and what was ultimately clear was the father's view: he disagreed with Cafcass and wished to pursue direct contact with the children.

The options available to HHJ Tolson, per PD 12B, were 'either in the form of hearing evidence at the Dispute Resolution Appointment in order to resolve or further narrow the issues or in the form of final case management directions towards a final hearing'. MacDonald J accordingly found the father had been deprived of the opportunity to 'present his evidence and argument with respect to the Cafcass report'. The procedure used was not fair, contravened the father's Article 8 rights and the s 91(14) order made was wrong being imposed without reasons and the procedural safeguards set out in *Re C* not being followed.

(2) *LA v KA* [2024] EWHC 2258 (Fam)

The appellant mother brought an appeal against an order of HHJ Kushner made at a Dispute Resolution Appointment. Cohen J allowed the mother's appeal.

Litigation history

The subject children were aged 7 and rising 5. Litigation between the parents had already spanned 3.5 years post separation.

At an earlier fact-finding hearing, magistrates determined that the father had, on two occasions, put his hands around the mother's neck and sought to minimise his actions as being playful. Supervised contact was ordered and took place.

On 6 July 2023, HHJ Kushner heard the matter at a DRA. One of the recitals stated:

> 'Upon the father being in agreement that there should be a final lives with order in respect of the mother and a final spend time order in respect of school terms only in terms that were agreed between the parties.'

There remained significant disagreement between the parties as to what should happen in school holidays. The judge directed that contact be progressed, such that as of the following March, it would progress to three overnights from after school Friday – return to school Monday on a fortnightly basis. Handover arrangements were provided for.

The matter was then listed as follows:

> 'next hearing: this matter should be listed for a further DRA hearing for one hour on 17th April 2024. This hearing will consider the issue of school holiday contact and any issue in respect of costs.'

At the further DRA (held on 26 April, due to judicial unavailability on the original date):

1. The judge made a *final* order.
2. The order was silent on 'lives with' – ie *no* 'lives with' order was made to Mother.
3. The 'spend time with' order was such that the children were to spend increased time with Father from Friday after school – Wednesday return to school the following week on a fortnightly basis (ie from 3 nights/fortnight to 5 nights/fortnight).

2 *P v F* [36]

4. The parties had agreed half term arrangements.
5. Summer holidays were contentious. The judge decided to divide them equally in two three-week blocks. Christmas holidays were to be shared equally, with the Christmas period alternated.
6. Handover arrangements were directed, these having also remained contentious.

Grounds of appeal

Mother appealed against the order of 26 April 2024. She reasoned that this hearing was listed as a DRA and it was inappropriate for the judge to make decisions on disputed issues in such a forum. Mother described being 'ambushed' by the fact that wider issues than those set in the judge's own agenda (ie school holiday contact and costs) were determined. Further, the judge did not refer to PD 12J, was wrong to effectively 'vary' orders which she herself formulated as 'final' at the last hearing and it was improper for the judge to proceed in the way she had when no updating written evidence had been filed since the end of 2022 (and she was reliant only on submissions).

Cusworth J granted mother permission to appeal for the following reasons. First:

> 'the judge did not in her judgment appear to explain or justify her decision to allow for increasing contact during term time by reference to the welfare interests or by reference to any supporting evidence.'

Second:

> 'whilst the judge has a discretion to take such steps to advance arrangements for the children in accordance with the overriding objective, there is insufficient evidence that she considered the children's wishes and feelings or the matters referred to in PD12J.'

Appeal before Cohen J

Cohen J cited and endorsed MacDonald J's analysis in *P v F*. He granted the mother's appeal application.

Whilst HHJ Kushner was familiar with the matter and Cohen J was sympathetic to her desire to bring litigation to an end, seeming influential on his decision was that (i) mother did not consent to a final order being made and (ii) mother had come to court expecting that the 'agenda' would be that defined by the court on the last occasion and, in the absence of agreement, the matter would go off for a Final Hearing with directions for filing of evidence.

Cohen J remitted the matter to another judge at the Luton Family Court for a 1-day final hearing.

Cohen J was clear that his decision should not be interpreted as a comment on the merits of orders made, but rather was one predicated on the flawed process by which they had been reached:

> 'I am not saying that the judge's orders are not the best outcome for the children. I am not saying that they are wrong either. But I do think that the mother, and for that matter the father, should be given the opportunity to put their cases properly in evidence and for the judge to consider it in that way on a final hearing.'

Cohen J also made an interim order, such that the children 'lived with' both parents and, during term time, were to be in father's care from Friday – Tuesday on a fortnightly basis, and on various dates during upcoming holidays as a holding position. He defined the issues for the final hearing 'summer holidays, Christmas and how that is to be divided, pick up and drop off venues and term time contact and the duration of it' as well as whether the final order would be on the footing of a 'joint lives with' order or a 'lives with' / 'spends time' arrangement.

(3) *Re A and others (Child Arrangements: Final Order at Dispute Resolution Appointment)* [2025] EWCA Civ 55

DDJ O'Leary made a final order on 21 November 2023 at a Further DRA, by

way of ex tempore decision, later supported by a written judgment dated 22 January 2024.

The mother, unsuccessfully, appealed twice against DDJ O'Leary's decision.

At the first appellate stage, mother was granted permission to appeal by a CJ. At the substantive appeal hearing, her application was refused by HHJ Robertson.

Mother then sought to appeal HHJ Robertson's decision. At the second appellate stage, permission was granted by the Court of Appeal. Again, at the substantive appeal hearing, the mother's application was refused.

Litigation history

The proceedings concerned three children, aged between 7 and 11. There was a protracted litigation history. In 2019, DDJ O'Leary made a 'shared care' order under a 5:2:2:5 arrangement. Before this determination, mother withdrew an application for a SIO to permanently remove the children to her native Ireland. A recital was included:

> 'If the father is unable to collect the children from school/nursery, he shall contact the mother offering that she collect the children instead and retain them thereafter until the father is able to collect them from her home. In the event that the mother is unable to collect and/or retain the children beyond 3.30pm, the father shall make his own childcare arrangements.'

Only 9 months later, the mother applied to vary the final CAO and subsequently made a fresh application for permanent relocation to Ireland with the children.

An ISW report was prepared, recommending the mother's relocation application be refused and that the 2019 CAO be continued.

In June 2021, a three-day hearing took place before Recorder Trowell KC, (as he then was). The recorder dismissed the mother's relocation application and maintained the previous child arrangements order, with minor variations.

The third and most relevant tranche of litigation, with which this article is concerned, was started by mother in February 2023.

She filed an application to disclose parts of the order dated 24 September 2019 to the children's school, in particular the recital relating to collection of the children. A bone of contention being father's use of a nanny to effect collections. One of the children was shortly thereafter diagnosed with autism. Mother subsequently filed a further application for variation of the 2019 order. Father cross-applied for a s 91(14) order.

DDJ O'Leary conducted the first hearing on 6 September 2023. She directed statements from both parties, with mother's statement to address 'events and changes in circumstances since June 2021 in support of her application for a variation of the current child arrangements orders'. Cafcass was directed to file a safeguarding letter. DDJ O'Leary listed the matter for a DRA 'with a TE of 2 hours . . .at which the court will consider the parties' applications'.

The directions were complied with. Notably, Cafcass did *not* recommend a further s 7 report.

At the DRA on 13 November 2023, DDJ O'Leary indicated she was not minded to direct a s 7 and adjourned the matter to 21 November, with a view to giving judgment on that day. Instead, on 21st November the judge heard further submissions on father's application for a s 91(14). At the conclusion of that hearing, she gave an ex tempore judgment in which she dismissed the mother's applications and granted father's application, making a s 91(14) order against mother for 3 years.

In DDJ O'Leary's later written judgment, she described mother, to paraphrase, as quick and unrelenting in making unmeritorious complaints about father's care

of the children and about voicing these in a scattergun, evolving and seemingly tactical way with professionals involved. The judge commented:

> 'This mother has never accepted the decision that the children should spend equal time with both of their parents. This was the decision that I made in 2019. In 2021 Mr Recorder Trowell heard the application – including an application to relocate with the girls to Ireland. He maintained the child arrangements that they should spend equal time with each parent. Two ISWs have spent time considering this case and five days of court time have been used to consider the same issues. A total of three judgments have been contained in the bundle going over these issues as they presented in 2019 and 2021.'

DDJ O'Leary described the mother as 'engaging in evidence-gathering and is weaponizing the evidence she gathers'. The mother's actions were not 'not child-focused' and added that 'the volume and intensity of the complaints is out of the ordinary'.

Grounds of appeal

The mother's grounds of appeal were that DDJ O'Leary was wrong to:

(1) Summarily to dismiss mother's application to vary the child arrangements order and refuse to order a s 7 report in the context of a material change in circumstances and serious concerns about the children's welfare and the current child arrangements not meeting the children's welfare needs.

(2) Refuse a s 7 report, thus resulting in a gap in the evidence particularly in respect of the children's wishes and feelings

(3) Make findings against the mother without her being put on notice or having the opportunity to give evidence; furthermore, there was no evidential or factual basis upon which for the court to make such findings, which were unsafe.

(4) Refuse to allow the mother to disclose a recital of the 2019 order.

(5) Make a s 91(14) order against the mother for three years when the Cafcass safeguarding letter did not recommend this, where previous applications had been reasonable and also made by the father, and were genuine attempts to further the welfare of the children and where the s 91(14) prohibition is disproportionate to the harm it is seeking to avoid.

First appeal – before HHJ Robertson

Dealing with findings against mother, HHJ Robertson determined:

> 'These observations made by DDJ O'Leary are not "findings" in the formal sense. It is the role, and indeed the duty, of the judge to come to a view about the character of a case and the character of a witness, and to express those views. Expressing those views does not amount to making formal "findings". I consider that the comments made by the learned judge about the mother amount to her observations and views on the mother's character and propensities. If every such observation had to be withheld until separate evidence was brought forward and cross examined upon, courts would grind to a halt.'

As to mother's argument that DDJ O'Leary had wrongly accepted the father's narrative, (including ascribing the provenance of a complaint that father had thrown water at one of the children to mother, when this in fact emanated from the school), this was identified as an error. However, this was not a material one and did not undermine her fundamental analysis or conclusions:

> 'She was not dealing with a blank canvas. She had dealt with the case fully in 2019 and she had read the full judgment from the case in 2021. She was aware of the findings about the mother which I have referred to in this judgment, and her propensity to seek to influence professionals. She knew that many complaints about the father had emanated from the mother, as I have set out above. She had also come to a view about the mother seeking to portray the

> children as being harmed when the school reports provided evidence that they were not being harmed. In my view the learned judge was entitled to come to these views on the basis of previous findings and the existing evidence. She may have been mistaken as to the mother making a particular complaint to the local authority but that does not undermine her general approach.'

Second appeal – before the Court of Appeal

Before the Court of Appeal, mother's grounds were essentially the same as her first attempt, with some slight repackaging.

Having granted mother permission, the Court of Appeal unanimously refused mother's appeal. Baker LJ gave the lead judgment. Citing *Re C (Family Proceedings: Case Management)* [2012] EWCA Civ 1489, [2013] 1 FLR 1089, Baker LJ endorsed the comments of Munby J (as he then was) therein that a trial judge has a wide discretion:

> 'to determine the way in which an application . . . should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without the need for oral evidence. He may . . . decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of the evidence'.

Referring to the guidance given in *Re K* [2022] EWCA Civ 468, [2022] 2 FLR 1064 and *Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448, [2021] 2 FLR 1116 as to when the court should direct a FFH on DA allegations, Baker LJ drew an analogy to all cases where one party is pursuing a finding of fact hearing (for example here, where mother was making criticisms of father's care of the children and as to what she asserted were a justifying change of circumstances):

> 'that guidance was given in a case involving allegations of domestic abuse. But it applies to all occasions when a court is considering whether to hold a fact-finding hearing in a private children's case. A fact-finding hearing should only be held where the findings are, or may be, relevant to the determination of the issues about the future child arrangements.'

Where there has been a recent contested hearing, and one party seeks to reopen the outcome of it, Baker LJ stated, quoting her own observations in a different case, *DP v PC* [2017] EWHC 2387 (Fam):

> 'where there has been a contested hearing relatively recently at which the issues have been properly and fully ventilated . . . if a parent then returns to court and seeks to reopen the issue, then it is likely that a court will take the view that there should be no further extensive investigation, unless there has been a significant or material change in circumstances.'

Important to the court's reasoning was the narrow scope of mother's application. She was suggesting father's time with the children was reduced from 7 days in a fortnight to 4, with an equivalent reduction in his holiday time. She was also seeking an order for the disclosure of the recital to the 2019 order to the school. Baker LJ surmised:

> 'Taken together or separately, these issues did not themselves inevitably require the court to seek a s.7 report. Nor did they inevitably require a full hearing with oral evidence. They were issues on which a judge exercising her case management powers might fairly conclude could be sensibly and proportionately determined on submissions.'

Whilst Baker LJ acknowledged DDJ O'Leary did not hear oral evidence, there was 'extensive written evidence' and DDJ O'Leary had the benefit of updating statements from both parties and Cafcass

safeguarding, as directed by her at the initial hearing on 13 November 2023.

Both parents were represented, DDJ O'Leary heard submissions and had recourse to the earlier two judgments of herself and Recorder Trowell KC.

What is the status of disputed written evidence at a DRA and how should the court deal with this?

> 'At a DRA, when deciding whether or not there should be a further investigation and full hearing, a judge has to assess the information put before her. Pragmatically, that cannot be confined to agreed evidence. When deciding whether it is in the interests of the child to authorise a full court investigation or to conclude the proceedings at the DRA, the court is not obliged to disregard any piece of contested evidence and only take into account matters that are agreed between the parties. That would undermine the court's powers to control and conduct proceedings in accordance with the paramountcy of the child's welfare.'

Baker LJ determined, quoting the language of Sir James Munby in *Re C*:

> 'it is "quite impossible" to assert that the deputy district judge, in taking that view and adopting that approach, exceeded the generous ambit of discretion which the law conferred upon her.'

However, Baker LJ highlighted that whether or not taking the course adopted by DDJ O'Leary was appropriate in any given case was fact specific, 'It will turn on the details of the contested issues and the proposed outcome'. She gave an example of where a party alleges sexual abuse against the other, and as a result seeks for all contact to be supervised. But where (as here):

> 'the proposal is for a less radical adjustment of the child arrangements order, it will often be open to the court to reach a conclusion without a fully contested hearing. This is a decision which can largely be left to the skill and experience of the family judge without appellate interference.'

Concluding remarks

On the tail of *A,B,C*, the take home point for now is that practitioners should *not* assume that a Final Hearing flows inevitably from a DRA at which there remain contested issues. Your tribunal may well look to make a final order, against a party's consent. Depending on your position, you should be prepared to argue for it or to counter arguments advanced by your opponent.

The second part of this article will address broader learning points:

- How each of the three decisions summarised above may be compared with and contrasted against one another.
- The factors which may support the court dispensing with proceedings at an interim stage and what you should be prepared to address in submissions dealing with the question.
- Is there any ambiguity as to whether an appeal against a final decision made at an interim stage, whereby the court makes a case management decision to effect the same, engages the (higher) threshold for appeals as outlined in the appellate authorities regarding appeals against case management decisions?
- Reflections on relevant decisions in the public law jurisdiction, involving either making final determinations on some or all parts of a case at an interim stage, or narrowing the scope of a fact-finding or final hearing such that oral evidence is limited.
- The issue of 'notice' when the court is making a final s 91(14) order or a non-molestation order of its own motion.