4 Paper Buildings
Temple, London
EC4Y 7EX
T: 020 7427 5200
E: clerks@4pb.com
W: 4pb.com

PS v BP (2018)

[2018] EWHC 1987 (Fam)

27/07/2018

Barristers
Paul Hepher

Court
Family Division

Practice Areas
Private Children Law

Appeal in relation to a fact finding hearing concerning a contact application in which the judge who had been in an "invidious position", had not permitted the father to cross-examine the Mother directly. Hayden J sets out observations concerning the procedure for cases where the court is required to hear a case "put" to a key factual witness where the allegations are serious and intimate and where the witnesses are themselves the accused and accuser.

This appeal concerns L, a three year old girl. The Father sought contact with L on 6th February 2017. On 29th November 2017, District Judge Green listed the matter for a fact-finding hearing in January 2018 in front of His Honour Judge Scarratt to avoid further delay. By the time of the hearing, the Father was acting in person. The Father was informed at the start of the hearing that he would not be permitted to cross-examine the Mother directly, relying on Re: A (a minor) (fact finding; unrepresented party) [2017] EWHC 1195 (Fam).

On appeal, the 'invidious' position facing judges in cases of alleged domestic violence where one party is unrepresented was highlighted. Re: J (children) (contact orders; procedure) [2018] EWCA Civ 115 was referenced as highlighting the 'very substantial difficulties engendered by a litigant in person whose case needs to be 'put' to a key factual witness where the allegations are of the most intimate and serious nature and where the litigant and the witness are themselves the accused and accuser'. McFarlane LJ observed in that matter that two options were realistically left to the court: the alleged abuser conducting the cross-examination himself (possibly with the assistance of a McKenzie friend) or questions are put to the witness on that party's behalf by the judge. Hayden J viewed the possibility of granting rights of audience to a McKenzie friend as firmly inconsistent with the 2015 Litigant in Person Guidelines. He also reminded himself that the Courts do not have the power to direct funding from HM Courts and Tribunal Service (as per Re K and H [2015] EWCA Civ 543).

In the current case, although Hayden J felt that the Father's cross-examination mirrored an approach frequently taken in the criminal courts, his points were 'essentially proper questions' when dealing with allegations of this significance. Although the Judge had intended for the Father to identify the questions and for the Judge to refine them, the role was 'plainly unfamiliar' to the Judge and did not achieve the

identified objective. As a consequence, the Father's questions, when put, were 'rendered superficial, overly simplified and repeatedly phrased in a way as to minimise their impact'. The approach 'hindered the effectiveness' of the cross-examination put on behalf of the Father.

Hayden J noted that the 'cross examination of a complainant alleging rape, requires particularly careful preparation, great sensitivity and rigorous forensic discipline. Ultimately, the complainant's evidence must be challenged effectively and the alleged perpetrator's case put fairly'. Although the Family Court strives to be non-adversarial, the party bringing the allegation has the burden of proving it to the civil standard of proof (Re B [2008] UKHL 35).

Although Hayden J was 'extremely sympathetic' to the Judge's predicament, the Judge was deemed to have formed an adverse impression of the Father and the hearing 'fell short of what fairness demands'. Hayden J noted that the conclusions reached in the short ex tempore judgment were not rooted in the substance of the factual allegations but on the Judge's observations of the Father's demeanour. Although important, the impression that a witness makes on the first instance Judge is not a substitute for a detailed analysis of the evidence, and a true assessment of a witness's demeanour can only properly be undertaken when the witness is 'put to the assay by challenge'. The weight placed on the Mother's presentation in the witness box was therefore diminished. The process of the hearing was 'so fundamentally flawed that it inevitably corroded the reasoning of the Judgment'.

Hayden J drew particular attention to the Youth Justice and Criminal Evidence Act 1999 (YJCEA) as a useful starting point for a family judge, as well as PD 12J, FPR 3A, PD 3AA and Matrimonial and Family Proceedings Act 1984, s 31G(6). As per K v H, the possibility of other case management options were considered, as well as their compliance with Convention rights, including:

(i) any direction that a party should give oral evidence being subject to the condition that they are questioned through a legal representative;
(ii) a party to be questioned 'sensitively and fairly' by the judge himself (including the potential for identification of the questions in advance);
(iii) a party to be questioned by a justices' clerk;
(iv) a guardian to be appointed to conduct proceedings on behalf of the children.

Observations were offered to provide a 'forensic life belt until a rescue craft' – by way of Parliamentary action – arrives:

(i) Once it becomes clear to the court that a case including serious and intimate allegations must be put where the witnesses are accused and accuser, a Ground Rules Hearing ('GRH') will always be necessary;
(ii) The GRH should usually be conducted prior to the hearing of the factual dispute;
(iii) Judicial continuity between the GRH and the substantive hearing is essential;
(iv) The accuser bears the burden of establishing the truth of the allegations. This burden may not be compromised in response to a witnesses' distress, and fairness to both sides must be ensured;
(v) There is no presumption that the accused may not cross-examine the accuser in every case. The Judge must consider whether the evidence would be likely to be diminished if conducted by the accused or improved if a prohibition on direct cross-examination was directed. In a Family Court fact-finding hearing, these two factors may be divisible;
(vi) If cross-examination of the alleged victim runs a 'real risk' of being abusive (if allegations are established, it should bear in mind that the impact of the court process is likely to adversely affect the welfare of the subject children;
(vii) Where the factual conclusions are likely to have an impact on the arrangements for, and welfare of, a child, the court should consider joining the child as a party and securing representation. In that

instance, the child's advocate may be best placed to undertake the cross-examination;
(viii) If cross-examination is not permitted by the accused in person and there is no advocate available, questions should be reduced to writing under specific headings. The Judge is not constrained to put every question sought but will have to evaluate relevance and proportionality. Cross-examination is dynamic and the process cannot become formulaic;
(ix) Although fact-finding hearings have a 'highly adversarial complexion', the central philosophy of Children Act proceedings is investigative. A judge may therefore conduct questioning in an open and less adversarial style without compromising fairness to either side.

Hayden J noted that a complainant in family proceedings not being offered the same protection as a complainant in a criminal trial is 'manifestly irrational and unfair'. Hayden J reiterated the need for a regime which replicates that operating in the Criminal Courts and expressed his hope for urgent legislation to address this 'lamentable situation'. With the observation that the system has failed both parents, a rehearing was directed and the case remitted to the High Court.