

NOTE

From time to time issues will arise with which magistrates and judges at every level will have to grapple and which will cause difficulties. Against this background I intend from time to time to issue what I propose to call “Guidance” designed to help colleagues make difficult decisions. Self-evidently such Guidance is not designed to tell courts what to decide: the objective is to assist them in the process of going about the decision making progress. Plainly, it will be appropriate not to follow the Guidance in some circumstances: what I hope is that in a sufficiently large number of instances the Guidance will be of use and will help magistrates and judges in the decision making process.

THE PRESIDENT’S GUIDANCE IN RELATION TO SPLIT HEARINGS

May 2010

Introduction

1. Over recent months and years it has become apparent to me that split hearings are: (1) taking place when they need not do so; and (2) are taking up a disproportionate amount of the court’s time and resources.
2. I have therefore decided to issue the following Guidance in an attempt to assist judges and magistrates who are invited to direct split hearings.
3. Like all Guidance, what follows is not binding on the judiciary at any level. It is an attempt to identify good practice. Moreover, it is designed to apply in both private and public law proceedings.
4. In this Guidance, I propose to use the following terminology: -

A “split hearing” is a hearing divided into two parts, during the first of which the court makes findings of fact on issues either identified by the parties or the court, and during the second part of which the court, based on the findings which it has made, decides the case.

A “fact finding hearing” is the first limb of a split hearing.

Guidance

5. Judges and magistrates should always remember that the decision to direct a split hearing or to conduct a fact finding hearing is a *judicial* decision. It is not a decision for *Cafcass* or for the parties. It is a decision to be taken by the court. Thus the court should not direct a fact finding hearing simply because the parties agree that one is necessary or because *Cafcass* says that it cannot report without one. Such considerations are, of course, to be taken into account, but they are not conclusive. In any event, the focus of any report is a matter for the court.

6. Judges and magistrates should always remember that a fact finding hearing is a working tool designed to assist them to decide the case. Thus a fact finding hearing should only be ordered if the court takes the view that the case cannot properly be decided without such a hearing.
7. Even when the court comes to the conclusion that a fact finding hearing is necessary, it by no means follows that such a hearing needs to be separate from the substantive hearing. In nearly every case, the court's findings of fact inform its conclusions. In my judgment it will be a rare case in which a separate fact finding hearing *is* necessary.
8. Thus, for example, the fact that domestic abuse is put forward by the residential parent of a child as a reason for denying the non-residential parent contact with the child is not automatically as reason for a split hearing with a preliminary fact finding hearing. As the President's *Practice Direction: Residence and Contact order: Domestic Violence and Harm* of 14 January 2009 [2009] 2 FLR 1400 makes clear, the court must consider the nature of any allegations, and the *extent* to which those allegations, if admitted or proved "*would be relevant in deciding whether to make an order about residence or contact and, if so, in what terms*" - see para [3] (emphasis supplied). In para [11] the court is again instructed to "*consider the likely impact of that issue (domestic abuse) on the outcome of the proceedings*" (emphasis supplied) and whether or not the decision of the court is likely to be affected by findings of domestic abuse. Plainly, if the allegations are unlikely to have any impact on the court's order, there is no need for a separate fact finding hearing.
9. In addition, in cases in which the court concludes that a fact-finding hearing is necessary, the *Practice Direction* requires the court to give directions designed to ensure that "*the matters in issue are determined expeditiously and fairly*" (emphasis supplied).
10. None of the foregoing is designed to minimise or trivialise domestic abuse or its effects on children and upon its other victims, or to discourage victims from coming forward with abuse allegations. I repeat that the aim of the Guidance is to enable magistrates and judges fully to address their minds to the need for a separate fact finding hearing.
11. The rationale for split hearings in care proceedings was enunciated by Bracewell J in *Re S (Care Proceedings: Split Hearing)* [1996] 2 FLR 773 when, voicing the views of the Children Act Advisory Committee, she stated that consideration could usefully be given to whether or not there were questions of fact within a case which needed to be determined at an early stage. The advantages of doing so, she said were that early resolution of such facts "*would enable the substantive hearing to proceed more speedily*" and would enable the court to "*focus on the child's welfare with greater clarity*". Cases suitable for split hearings, she commented "*would be likely to be cases in which there is a clear and stark issue, such as sexual abuse or physical abuse*". Once again, the object was "*to prevent delay and the ill-focused use of scarce expert*

resources”. These factors should be borne in mind by the court when deciding whether or not to order a split hearing.

12. Magistrates and judges are reminded of the decision of the Court of Appeal in *Re C* [2009] EWCA Civ 994. They might also care to look at paragraphs 27 to 35 of my recent judgment in the case of *W (Children)* [2009] EWCA Civ 644, now also reported at [2009] 3 FCR 1.
13. Courts are also reminded of the provisions of the Practice Direction: The Revised Private Law Programme which came into effect from 1 April 2010.

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