When and how can Hearsay Evidence be relied upon as evidence in the Family Court?

by

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Introduction

Hearsay evidence is routinely relied upon in family proceedings. Firstly, this may happen in 'private law' proceedings, which are those brought by private individuals, typically parents who are involved in a divorce, or separation, thereby giving rise to applications brought pursuant to section 8 of the Children Act 1989. Secondly, it may happen in 'public law' proceedings, typically when a local authority makes an application for a court order intended to safeguard the welfare of a child. In such proceedings the child (or children) is/are automatically made a party to the proceedings, and the child is represented by a children's formal Guardian, appointed by Cafcass (Children and Family Court Advisory and Support Service). It is in these two forensic scenarios that parents often complain that the legal process is unfair to them, because the court decision making processes appear to rely largely, if not almost entirely, on hearsay evidence.

Hearsay Evidence

In family proceedings a judge, as in all civil proceedings, sits alone as the fact finding tribunal. He or she must decide whether the relied upon hearsay evidence is both relevant and admissible, applying established principles of law. The family court judge has to fairly weigh all the evidence, and then decide whether hearsay evidence is relevant, cogent and reliable; taking account of its importance in understanding the case, and in particular, its relevance in relation to the welfare of the subject child. Finally, considering whether it aligns with the other evidence presented.

Examples of hearsay evidence in a care case would be:

- A report from a teacher as to what a child has said or how the child has behaved;
- A report from a foster carer about what a child in their care has said or how the child has behaved;

- Or – as in a current case in which I represent the children's guardian – a telephone conversation between a family member and an assessing social worker where concerns about events some years ago were identified and recorded, but the family member had not provided a statement and was not willing or able to attend the hearing.

The Statutory Framework

The following key provisions govern the court's approach to the admissibility of hearsay evidence:

(i) The Children (Admissibility of Hearsay Evidence) Order 1993 provides that in civil proceedings before the High Court or a county court, and in family proceedings, or civil proceedings under the Child Support Act 1991, in a family proceedings court, (hearsay) evidence in connection with the upbringing, maintenance or welfare of a child will be admissible, notwithstanding any rule of law relating to hearsay.

(ii) The Civil Evidence Act 1995, s 1 (2)

> '(a) "hearsay" means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and
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> (b) references to hearsay include hearsay of whatever degree.'

(iii) By Rule 23.2 of the Family Procedure Rules 2010 an applicant has to give notice of intention to rely on hearsay evidence.

(iv) Section 4 of the Civil Evidence Act 1995 – considerations relevant to weighing of hearsay evidence –

> '4(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
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> (2) Regard may be had, in particular, to the following:
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> a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
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> b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
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> c) whether the evidence involved multiple hearsay;
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> d) whether any person involved has any motive to conceal or misrepresent matters;

e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.'

(v) Family Court Practice 2020 (at page 1848) provides that: 'The 1995 Act steers a course between technical rules of hearsay evidence and the need in civil proceedings to take a proportionate view as to the forms of evidence that may be admitted.'

Recent Case Law

In the recent case of Re AL M (Fact-Finding) (2020) 2 FLR 409 (2019) EWHC 3415 (Fam) 11th December 2019, before Sir Andrew McFarlane, the President of the Family Division, Sheikh Mohammed bin Rashid al-Maktoum ('Sheikh Mohammed'), the ruler of Dubai applied to the English High Court in London for the return of his daughter Sheikha Al Jalila bint Mohammed bin Rashid Al Maktoum ('Jalila') aged 12 and son Sheikh Zayed bin Mohammed bin Rashid al Maktoum ('Zayed') aged 10.

Princess Haya bint al-Hussein ('Princess Haya'), his former wife, resisted the application, alleging not only a campaign of harassment and intimidation of herself, but also a history of abduction of Shamsa (an elder daughter now aged 38) and Latifa (her sister now aged 25) - two of the father's older children by another wife.

Discussion

This is a case with a complex factual background but the real objective of the fact-finding exercise - and indeed all the consequential judgments referred to below - was the welfare of the two children, Jalila aged 12 and Zayed aged 10. The focus/purpose of the fact-finding hearing was to identify past events which may be relevant when the court – as part of its welfare proceedings – came to evaluate any future risks to the children in the arrangements for contact with their father that the court will ultimately order.

The case is of particular importance because 'it is the first time that a court has ever heard and found proved, albeit on the balance of probabilities, allegations about the abduction, imprisonment and ill-treatment of the father's two older daughters.' In the context of the forthcoming 'welfare' hearing for the abovementioned children, the learned judge's findings are 'crucial information'. (Family Law June 2020 page 692; and see generally at pages 690 to 700).

One of the key points of principle to be derived from this judgment, is the 'one-sided nature' of the fact-finding hearing, in that the father did not attend the High Court in London, or give oral evidence,

but rather he invited the court to proceed on the basis of an 'assumption' of the truth of the mother's evidence, whilst making it clear that he denied the truth of her allegations.

The court, however, rejected that proposed course, as it did in relation to the father's application to withdraw his contact application, noting that there was no burden of proof on the father. The mother's allegations had to be proved to the civil standard (i.e. more likely than not that they occurred and any future decision making to be based on the fact that a particular event took place.)

'If an allegation is not proved to the required standard, then it will be treated as not having occurred. The most extraordinary feature of that process here is that the allegations concerning the two elder daughters are extremely serious and probably contrary to criminal and international law. But despite that seriousness and despite the status of the father the standard of proof remains the same; it is not higher, there is no enhanced yardstick (see Baroness Hale in Re B (Care Proceedings: Standard of Proof) (2008) UKHL 35, (2008) 2 FLR 141).' (Family Law June 2020, page 692.)

Publication of the Court's Judgments

In the linked judgment Re: AL M (Publication) (2020) EWHC 122 (Fam) 27th January 2020, the President carried out the required balancing exercise, in respect of each party's Convention based rights (see below), and held that, inter alia, the immediate publication of the 'Fact-Finding' and the 'Assurances and Waiver' judgments, including the identification of the children by name and gender, should be permitted. [*The application had been made by the media, Princess Haya and by the children's guardian.*]

The media's claim was based on Article 10 of the European Convention on Human Rights and emphasised the 'public interest' test, in terms of 'freedom of expression', in seeking to publicise the findings, whilst the mother's claim, was based on her, and her children's right to a 'family life', under Article 8. The children's guardian supported publication of the 'Fact-Finding Judgment', but without publication of the children's names.

For the father, it was argued that publication would '*be contrary to the interests of the children*' because it might undermine the chance of them resuming contact with their father.

Discussion re: 'Fact-Finding' and Hearsay Evidence

These linked cases are of wider interest, not only because of their unusual factual background, but also because the fact-finding hearing of (2019) EWHC 3415 (Fam), had to address the issue of how to assess a substantial volume of hearsay material, all of which fell to be evaluated.

The mother's Schedule identified 18 primary findings, with each substantiated by a number of subsidiary findings. The mother's distilled down to three key assertions:

- Firstly, that in August 2000, the father had ordered and orchestrated the unlawful abduction of his daughter Shamsa (then 19) from the UK to Dubai.
- Secondly, that on two occasions in June 2002, and February 2018, the father had ordered and orchestrated the forcible return of his daughter Latifa to the family home in Dubai. In 2003 the return was from the border of Dubai with Oman, and in 2018 it was by an armed commando assault on a boat sailing near the coast of India.
- Thirdly, the mother made a number of allegations to the effect that the father had conducted a campaign by various means with the aim of harassing, intimidating or otherwise putting her in great fear both in early 2019, when she was still in Dubai, and at all times since her move to England, in April 2019.

The mother's allegations were each drawn from and supported by witness statements and other supporting documentation filed on her behalf. The mother and three of the key witnesses upon whom she relied each attended court, and each gave sworn testimony expressly confirming the truth of that which was contained in detail in their respective witness statements.

Of particular note, is that the father did not attend court for the 'finding of fact' hearing.

Burden of Proof

In view of the seriousness of the allegations made in this case, it is important to have in mind that whilst in a criminal case the burden is being 'sure of guilt', by way of contrast, in a 'fact finding hearing' in a family case, which may involve findings amounting to serious criminal misconduct, the standard of proof is 'on the balance of probabilities'.

Baroness Hale in Re B (Care Proceedings: Standard of Proof) (2008) UKHL 35, (2008) 2 FLR 141, at paragraph 70, opined that:

> 'Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.'
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> See also Lord Hoffman in Re B at paragraph 12 thereof and in particular at paragraph 13 where he observed:

> 'I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.'

Lord Hoffman adding, at paragraph 15:

> 'Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.'

In making this observation, it might be thought, that Lord Hoffman, as had Baroness Hale, (see above), was seeking to distance the Court, (finally), from Lord Nicholls of Birkenhead's often relied upon observations in In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, 586D-H, where he stated:

> 'The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.'

In Re AL M (Fact-Finding) (2020) 2 FLR 409 (2019) EWHC 3415, the President stressed the legal context within which findings of fact are made, in that the burden of proving each and every allegation that the mother made fell upon her, the mother, as there is no burden of proof on the father. That an allegation would only be proved if the court was 'satisfied' that it was 'made out' on the 'balance of probability', in other words, that the alleged fact was 'more likely than not to be true'.

In giving his 'Fact-Finding' judgment, the President set out the legal background to hearsay evidence in such family proceedings, stating that hearsay evidence is admissible when relating to the welfare of children under the Children (Admissibility of Hearsay Evidence) Order 1993 and the Civil Evidence Act 1995.

Firstly, the fact that the father had not been represented during the fact finding hearing did *not* relieve the mother of the burden of establishing the matters she alleged; *nor was the court relieved of its duty fully and carefully to scrutinise all of the evidence placed before it.*

Secondly, the father's earlier proposal - which was rejected by the court - that the court should *'assume the truth' of many of the mother's allegations without finding facts'* was of no relevance to the judicial fact-finding exercise. The mother had to prove each of the allegations identified in her schedule of allegations (often referred to as a 'Scott Schedule' in private law finding of fact cases). She could not rely on any concessions which the father had been prepared to make at an earlier stage, but which had been rejected by the court.

Thirdly, in the same way, the fact that the father at an earlier stage was prepared to withdraw his application for contact with the children, and concede that certain specific orders would be made, were not factors that could be taken into account at this stage in determining which factual allegations were or were not proved.

Fourthly, the father's absence from the fact-finding hearing, (i.e. by him not giving oral evidence, and not calling other witnesses or actively participating in the process through representation,) was of relevance because it fell to be considered as part of the exercise of attributing weight to the hearsay evidence filed on his behalf.

The father had made two witness statements, but he had been always clear that he was *not* going to attend court to give oral evidence, and it followed (in the court's judgement) that at the time of him making those statements he knew he would never 'face the prospect' of being cross examined upon the statements' contents. However, his none attendance did *not* render his statements inadmissible, or automatically of no weight, but the court deemed that his absence was an additional factor that may affect the weight that could be attributed to what he had said. *[Separately, holding that it would be 'both dangerous and inappropriate' to regard the father's 'subsequent forensic behaviour' to be of relevance to the question of whether the mother had proved her case.]*

Conversely, the evidence of the four witnesses who *did* attend court to give oral evidence, following the taking of an oath or the making of an affirmation, should attract greater weight, 'when set against contrary hearsay evidence'.

Of particular (and of wider legal) interest is the approach which the Court adopted when evaluating the issue of weight to be given to hearsay evidence, when it is supported by oral evidence. This issue arose as neither of the children (Shamsa nor Latifa) were available to engage in the 'fact-finding' proceedings, either in person, or by video link, and so other evidence (had) to be provided to the Court – this by reference to the sworn testimony of Latifa's close friend 'TJ'.

Importance of oral evidence to the assessment of hearsay evidence

In making an overall assessment of the evidence relating to Latifa, the President regarded the evidence of TJ '*as being of singular importance'*. She had filed a full statement in the fact-finding hearing and given sworn evidence in the High Court as to its truth. She had given a highly detailed account of her departure with Latifa from Dubai in February 2018 on a number of occasions 'with a significant degree of consistency' (paragraph 127). The President regarded TJ 'as a wholly impressive individual' (paragraph 128).

Her evidence was not only important because of 'the step-by-step' account she gave of the escape itself, but also because the 'most important part' of her evidence was 'her more general account of Latifa's demeanour, and what she said over the preceding 3 or 4 years' (paragraph 129).

The key to TJ's evidence was that it enabled the court to make an assessment of Latifa's credibility in respect of statements she had made in a video film (admitted in evidence), and in other hearsay accounts, without having the benefit of hearing directly from Latifa; either from the witness box, or the live link. This was the reason was why the oral evidence of her friend TJ was considered so important to the Court's assessment of Latifa, the President stating:

> 'In my view, the confidence that I have in the overall soundness and credibility of TJ's testimony is sufficiently strong to, in turn, place reliance upon her assessment of the credibility of her very close friend Latifa whom she had the opportunity to observe so closely over a period of years.' (Paragraph 130)

It is to be noted that save for four witnesses, who attended to give live oral evidence, each of the written statements supplied to the court either as filed in these proceedings, e.g. as statements made to the police during earlier investigations, were all treated as 'hearsay' evidence.

The forensic impact of the Court's 'Findings of Fact'

The above approach by the court to the assessment evidence has the following implications:

- If an allegation were proved on the balance of probability, any future decision as to the welfare of the children must take account of the fact that the particular event occurred.

  On the other hand:
- If an allegation which is *a possibility*[1] but is *not proved on the balance of probability*, then it did not occur, and any suggestion that it 'might' have occurred, would play no part in the future progress of the case. *[and then crucially,]*
- The fact that the father and his representatives did not appear to take part in the fact-finding hearing had 'no impact' upon the burden and standard of proof facing the mother, because the absence of one parent from the process did not reduce the court's responsibility carefully to examine all the evidence, and only reach factual conclusions if satisfied on the balance of probability that they were proved.
- Whilst the seriousness of the mother's allegations *might* suggest that they should only be found proved by a court if the evidence *was 'of a higher order of probity'* e.g. only if the

[1] Author's emphasis – this pertains throughout the article when any emphasis is made.

court were 'sure' as in the criminal standard or by some other 'enhanced' yardstick *it was a matter of law* - as elucidated by Baroness Hale (see above) - that 'neither the seriousness of the allegations nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts'.

The Appeal

On 28th February 2020, the Court of Appeal [Underhill, Bean and King LJJ] reported at (2020) 2 FLR 493, (2020) EWCA Civ 283, rejected Sheikh Mohammed's appeal, by which he was seeking to overturn the decision of the President of the Family Division, that two judgments[2] should be made public. Up to that point the hearings had been held almost entirely in private.

Underhill LJ at paragraph 67 said:

'In truth, this is a paradigm example of the kind of evaluative decision by a trial judge with which this court ought not to interfere. The decision which the President had to make was, as he himself acknowledged, not one that would be made in the ordinary case. But he carefully assessed the particular, and unusual circumstances of the case, addressing head-on the objections raised by the father, and gave a fully reasoned decision. There was a clear evidential basis for his decision to permit publication at the stage that he did, including the report of the guardian. He neither made any error of principle in his approach nor reached a conclusion which was plainly wrong.'

Sheikh Mohammed subsequently sought leave to appeal this judgment by petitioning the Supreme Court for leave to appeal, but the Court declined to grant leave, on the ground that the application did not raise 'an arguable point of law of general importance'.

Conclusion

- The test in fact-finding hearings is the balance of probabilities and neither the seriousness of the allegations, the seriousness of the consequences nor the inherent probabilities alters this – a more serious allegation does not attract a greater level of scrutiny.
- Hearsay evidence is admissible in family proceedings but it is important to stand back and examine all the evidence. Live 'sworn' evidence given by witnesses who are prepared to be cross examined in any fact finding hearing will be telling.

[2] The fact-finding judgment handed down on 11th December 2019 (2020) 2 FLR 409 and the assurances and waiver judgment handed down on 17th January 2019 (2020) 2 FLR 443.

- In regard to the case of Re AL M above, as the President said in his concluding remarks in the Assurances and Waiver case:
  'These proceedings are a dynamic process and they have not yet concluded.' (Paragraph 79, (2020) 2 FLR at page 462).

The President closed the 'assurances and waiver' hearing by saying that 'this case will now proceed to the concluding stages during which consideration will be given to the risks to the children in the light of the court's findings of fact and in the light of the analysis of the assurances and waiver set out in this judgment. Any risks identified will then fall to be drawn into a final, all encompassing, welfare evaluation within which they will be balanced against the advantages to the children of re-establishing and then maintaining their relationship with their father together with all other relevant factors.'

NOTES:

- The fact-finding judgment needs to be read alongside the other reported cases of Re AL M (Assurances and Waiver) (2020) EWHC 67 (Fam), Re AL M (Publication) (2020) EWHC 122 (Fam), Re AL M (Reporting Restrictions Order) (2020) EWHC 702 (Fam)[3] and Sheikh Mohammed Bin Rashid Al Makhtoum v Princess Haya Bint Al Hussein and others (Court of Appeal) (2020) EWCA Civ 283[4].

[3] The President allowed a witness's application for an anonymity order.
[4] The Court of Appeal enabled the publication of the finding of fact and publication judgments to go ahead.