

## **Review of Practice Direction 12J FPR 2010**

### **Child Arrangement and Contact Orders: Domestic Violence and Harm**

Report to the President of the Family Division

The Hon. Mr. Justice Cobb

1. In January 2016, Women's Aid<sup>i</sup> published, as part of its Child First Campaign, a report entitled 'Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts.' The publication of that report was followed by a Parliamentary Hearing convened by the All Party Parliamentary Group (APPG) on Domestic Violence; a Parliamentary Briefing Paper in turn followed the hearing. Both papers included a number of recommendations for the Ministry of Justice, for the Senior Family Judiciary, and for statutory agencies involved in family law processes in relation to cases of domestic abuse in the family court.
2. On 15 September 2016, the issues raised by the report of Women's Aid and the APPG were debated in Parliament; the Government was called upon to review the treatment and experiences of victims of domestic abuse in family law courts. It was noted in the reports, and in the debate, that in recent years the criminal courts had made significant positive adaptations to its processes to accommodate the needs of victims of abuse in contrast to the family court.
3. In light of these important reports, and the debate generated by them, the President of the Family Division has commissioned a review of the terms of PD12J, and its current application in the Family Court. PD12J in its current form was revised in 2014 by the Private Law Working Group under my chairmanship.
4. In undertaking this review, I have consulted with Professor Rosemary Hunter (Professor of Law and Socio-Legal Studies at Queen Mary University of London); Professor Hunter was closely involved in the re-drafting of the 2014 version of the Practice Direction. I have consulted with the family course directors (specifically HHJ Dancey) at the Judicial College in relation to the training provided for the judiciary on issues of domestic abuse, and with Ms Justice Russell, Co-Chair of the Vulnerable Witnesses Working Group. I have met with Sian Hawkins and Hilary Fisher of Women's Aid. I have received representations in writing from Women's Aid, Rights of Women, Prof Marianne Hester (University of Bristol) and Dr Gillian Macdonald (University of Bath).
5. I have considered the Women's Aid report 'Nineteen Child Homicides ...', the briefing paper of the APPG on Domestic Violence, and the research report "Picking up the pieces: domestic violence and the child contact" (2012)

(Rights of Women), all of which contain many disturbing accounts of domestic abuse in the context of court ordered child arrangements.

6. It is indeed most disturbing to note<sup>ii</sup> that for at least twelve children (in seven families), of the nineteen children killed who are the subjects of the Women's Aid report, contact with the perpetrator (the father) was arranged through the Family Courts. For six families, this contact was arranged in Family Court hearings (two of these were interim orders), and for one family, contact was decided as part of the arrangements for a non-molestation order and occupational order.

#### PD12J (2014)

7. PD12J was published in its original form in 2008 in response to the first report of Women's Aid into 'Twenty-Nine Child Homicides'. PD12J was substantially revised in April 2014, following the report of Professor Hunter and Adrienne Barnett for the Family Justice Council: 'Fact-finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm' (January 2013); the re-publication coincided with the launch of the Child Arrangements Programme (PD12B). The 2014 version saw the following key revisions/amendments:
  - a. A substantially revised definition of domestic abuse in accordance with the revised cross-government definition;
  - b. The inclusion of a statement of General Principles as a judicial aid to the application of the Practice Direction;
  - c. The prescription of clearer expectations in relation to fact-finding hearings;
  - d. Tighter provisions for the making of interim child arrangement orders.
8. Ms Hawkins and Ms Fisher confirmed that Women's Aid regards the Practice Direction, for the most part, as essentially sound, providing "a solid framework for the family court judiciary"<sup>iii</sup>. However, Women's Aid have made a number of recommendations which it believes, if implemented, will render the Practice Direction and its implementation "more robust". Women's Aid is particularly concerned, as is Rights of Women, that the Practice Direction is not effectively or consistently implemented by the judges (including the Magistrates) of the Family Court when dealing with child arrangement (contact) cases where domestic abuse is alleged. This is an important point, which I address under 'training' below.
9. Among the specific recommendations, I particularly note the following:

- a. The Government and senior leaders in the Family Courts and Cafcass need to take action to bring about cultural change within the Family Court system to ensure that the safety and well-being of child(ren) and non-abusive parents are understood and consistently prioritised;
  - b. Children should always be listened to, and their safety must always be at the heart of any child contact decision made by the family court judges;
  - c. Children's experiences of domestic abuse and its impact on them should always be fully considered by the family court judiciary with an acknowledgement that post-separation abuse is commonly experienced by non-abusive parents.
10. The APPG has added to this list, and of the seven recommendations which it makes, the President has asked me to focus upon the following:
- a. The Ministry of Justice, and the President of the Family Division, must clarify that there must not be an assumption of shared parenting in child contact cases where domestic abuse is a feature, and child contact should be decided based on an informed judgement of what is in the best interests of the child;
  - b. The President of the Family Division must ensure family court judges never order child contact in supported contact centres where a risk assessment has found that the abusive parent still poses a risk to the child or non-abusive parent.

#### Revisions to PD12J

11. I have considered the representations made by Women's Aid, the APPG, and others with care and have concluded that revisions can usefully be made to the Practice Direction; I recommend these to the President. A proposed draft of the revised PD12J is attached to this short report. Annotations (in endnotes) explain some of the revisions.
12. Among the key revisions are:
- a. Paragraph 4 has been re-worked to go some way to addressing one of the main concerns of Women's Aid and the APPG (see [10](a) above) that the presumption contained in *section 1(2A)* of the *Children Act 1989* operates to require 'contact at all costs' in all cases, without a proper evaluation of the risk of harm from domestic abuse; therefore, where the involvement of a parent in a child's life would place the child or other parent at risk of suffering harm from abuse, it is suggested that the presumption would be displaced;

- b. Paragraph 6 has been amended to include a requirement for the court to ensure that the court process is not being used as a means in itself to perpetuate coercion, control or harassment by an abusive parent; no specific illustrations of this type of coercion or control have been included in the revised draft Practice Direction notwithstanding Women's Aid's keenness that they should be. However, Family Court judges plainly need to be alert to, and deal robustly with, the respondent who is uncooperative or obstructive in the litigation and/or in relation to the child arrangements themselves. Furthermore, Family Court judges should be sure that they understand the new offence of coercion ("controlling or coercive behaviour in an intimate or family relationship") which was introduced in the *Serious Crime Act 2015* and which came into force in December 2015; this may be a training issue for the Judicial College (see below);
- c. Paragraph 10 includes a proposal for the courts to consider more carefully the waiting arrangements at court prior to the hearing, and arrangements for entering and exiting the court building; Women's Aid reports that 55% of women respondents to their recent survey (2015) who had been to the Family Courts had no access to any special measures. 39% were physically abused by their former partner in the family court. The APPG report speaks of women commonly being followed, stalked, harassed and further traumatised after leaving court.
- d. Paragraph 28 has been amended to afford further protection for the alleged victim of abuse from cross-examination by an alleged unrepresented perpetrator (see more fully [13] to [18] below);
- e. Paragraph 33 recommends that in a case where domestic abuse has been proved, a court shall obtain a safety and risk assessment conducted by a specialist domestic abuse practitioner working for an appropriately accredited agency; this ties in with paragraph 38 (addressing the second of the specific recommendations of the APPG) that where a risk assessment has concluded that a parent poses a risk to a child or to the other parent, contact via a supported contact centre, or contact supervised by a parent or relative, is not appropriate;
- f. Greater consistency and clarity of language has been introduced, by adopting a common test of 'protection from risk of harm'; 'harm' itself is now specifically defined within the Practice Direction, adopting the language of *section 31(9) of the Children Act 1989*.

#### Cross-examination of the alleged victim by unrepresented alleged perpetrator

13. Women's Aid report (following a survey in 2015) that 25% of survivors of domestic abuse who had recently been through the Family Courts had been cross-examined by their former partner/abuser during family court proceedings. The Women's Aid report includes this important passage<sup>iv</sup>:

“Allowing a perpetrator of domestic abuse who is controlling, bullying and intimidating to question their victim when in the family court regarding child arrangement orders is a clear disregard for the impact of domestic abuse, and offers perpetrators of abuse another opportunity to wield power and control.”

In light of this, Women’s Aid recommends that the Ministry of Justice should support the necessary rule change (and by inference fund the relevant arrangements) to ensure that (a) survivors of domestic abuse will not be cross-examined/questioned by their alleged abuser, where the alleged abuser is appearing without representation in court, and/or, (b) as a Litigant in Person, the victim should not be required to question their abuser. Women’s Aid require the Family Court judiciary to play its part in managing and averting these potentially abusive situations in the courtroom. The APPG makes a similar point, referring to “routine” experience of women being questioned by the alleged abuser, and the:

“... urgent need for an end to cross-examination of survivors of domestic abuse by their abuser in the family court if they do not have legal representation.” (Exec Summary)

Later the APPG states the following:

“As well as being a traumatic experience for a survivor of domestic abuse, this can also mean that women feel that they are unable to advocate properly for the safety of their children, meaning that they and their children are denied access to justice”. (p.15)

And it added:

“The APPG is calling for an immediate end to survivors of domestic abuse being cross-examined by, or having to cross examine, their abusers in the family courts.”

14. This is a serious issue, affecting the *Article 6* and *Article 8 ECHR* rights of the individuals concerned, which has, as I explain in the paragraphs which follow, been the subject of very considerable debate in and out of the courts for many years.

15. It is well known that in the criminal jurisdiction, there is provision within *Section 29, 34, 35, 36 and 38 of the Youth Justice and Criminal Evidence Act 1999*, and *Part 23 of the Criminal Procedure Rules 2015* for an alleged perpetrator to obtain representation. More than ten years ago Roderic Wood J (in *H v LR* [2006] EWHC 3099 (Fam)) drew attention to the lack of comparable provision in the Family Court, making this observation at [25] of his judgment:

“I would invite urgent attention to creating a new statutory provision which provides for representation in such circumstances analogous to the existing statutory framework governing criminal proceedings as set out in the 1999 Act. Such a statutory provision should also provide that the costs of making available to the court an advocate should fall on public funds. I can see no distinction in policy terms between the criminal and the civil process. Logic strongly suggests that such a service should be made available to the family jurisdiction. If it is inappropriate for a litigant in person to cross-examine such a witness in the criminal jurisdiction, why not in the family jurisdiction?”

16. These are sentiments endorsed by at least two Presidents of the Division, Sir Nicholas Wall P in *A Chief Constable v YK* [2010] EWHC 2438 (Fam) at [112], and Sir James Munby P in *Q v Q* [2014] EWFC 31 (at [92]) and *Re D (A child)* [2014] EWFC 39 (see also a number of other cases which raise similar issues<sup>v</sup>). In his ‘12<sup>th</sup> View from the President’s Chambers’ (June 2014), Sir James Munby P said this:

“... there is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system. This includes the inadequacy of our procedures for taking evidence from alleged victims, a matter to which Roderic Wood J drew attention as long ago as 2006: *H v L and R* [2006] EWHC 3099 (Fam), [2007] 2 FLR 162. As HHJ Wildblood QC observed in *Re B (A Child) (Private law fact finding – unrepresented father)*, *D v K* [2014] EWHC 700 (Fam), para 6(ii), processes which we

still tolerate in the Family Court are prohibited by statute in the Crown Court. ... A vast amount of thought has gone into crafting the arrangements now in place in the criminal courts: see for example, in addition to the Criminal Procedure Rules, the Criminal Practice Directions [2013] EWCA Crim 1631, CPD 3D-3G, the Judicial College's Equal Treatment Bench Book, Lord Judge's Bar Council Annual Law Reform Lecture 2013, *The Evidence of Child Victims: the Next Stage*, the Criminal Bar Association's DVD, *A Question of Practice*, and the relevant 'toolkits' on 'The Advocate's Gateway', funded and promoted by the Advocacy Training Council: [www.theadvocatesgateway.org/toolkits](http://www.theadvocatesgateway.org/toolkits). We need to consider the extent to which this excellent work can be adapted for use in the Family Division and the Family Court."

17. It is helpful to draw attention here to the contribution of Sir Keir Starmer QC MP in the recent Parliamentary debate:

"Then there are special measures. When I went along to the All-party Parliamentary group on domestic violence and heard some of the evidence about the family courts, I was struck by the fact that what I was hearing simply would not be tolerated in the criminal courts any more. Special measures are a norm in the criminal courts, and it would be thought to be the duty of the prosecution, the defence and the court to ensure that they are in place.... Real change has already happened in the criminal sphere; it can happen in the family courts as well, and it need not take 15 years if lessons from one jurisdiction borrowed by the other."

18. In light of comments which I have highlighted in this section of the report, from all sides of the political and social debate, I very much hope that the revisions to PD12J will coincide with some decisive action to cure this deeply unsatisfactory situation.

#### Obligatory provisions of PD12J: Implementation

19. PD12J, in its current form, contains a number of compulsory directions for the Family Court judges. In two recent decisions of the Court of Appeal, the obligatory nature of aspects of PD12J has been emphasised. In *Re A (A child)* [2015] EWCA Civ 486 at para.48-59, McFarlane LJ referred to the ‘requirement’ of the court to consider and follow PD12J in a case involving allegations of domestic abuse:

“Any court dealing with a case where domestic violence or abuse is established is required to afford appropriate weight to such findings in accordance with the *Re L* decision and to conduct a risk assessment in accordance with PD12J, paras 35 to 37. So that there can be no doubt that the court has indeed approached matters in the required manner, it is wise for some express reference to be made, at least, to PD12J in the judgment or record of decision. In some cases, the circumstances may justify descending to detailed reference to the terms of paragraphs 35 to 37 in the judgment” ([49], emphasis by underlining added: see also [51-54] where McFarlane LJ repeats the “requirement” on the court to observe the provisions of the Practice Direction).

20. Yet more recently, in *Re H* [2016] EWCA Civ 988, Black LJ referred to PD12J observing that the Practice Direction imposes “obligations on the court when faced with certain consent orders to do with children” and indicating that:

“The Practice Direction underlines the caution that needs to be exercised in approving parental agreements in the context of allegations of domestic violence”.

21. Given the obligatory nature of the PD12J it is essential that judges at all tiers of the Family Court are familiar with the Practice Direction, and apply it as they are obliged to do, and conscientiously. The APPG reports a clear consensus from its Parliamentary hearing as to the “patchy” operation and/or implementation of PD12J throughout the family courts; the APPG felt that if PD12J was always put into practice and strictly followed, a number of the pressing concerns raised in the Parliamentary hearing would automatically be addressed, “and the safety and well-being of women and children would be far better protected”.

### Training issues



22. Women's Aid makes this point in its October 2016 briefing paper:

“Women's Aid and the APPG have concluded that many of the issues with compliance to PD12J arise from some poor professional understanding of the nature and impacts of domestic abuse within the family judiciary. We recommend that all members of the family court judiciary receive specialist training on all aspects of domestic abuse, particularly to understand: the dynamics of domestic abuse; coercive and controlling behaviour; the frequency and nature of post-separation abuse; and the impact of domestic abuse on children, on parenting and on the mother-child relationship. This training must be face-to-face, delivered in collaboration with independent specialists, and supported by ongoing professional development”

23. Women's Aid proposes *specialist* training for all judges sitting in the Family Court on all aspects of domestic abuse, particularly to raise understanding of the dynamics of domestic abuse, coercive and controlling behaviour (in light of the new criminal offence), the frequency and nature of post-separation abuse, and the impact of domestic abuse on children on parenting and on the mother-child relationship. Rights of Women raises its own concerns that there remain within the judiciary at all levels a low-level of understanding of coercive control, and the serious impact of coercive and controlling behaviour on mothers and children.

24. The Judicial College runs training for judges. The family law training programmes already include education, presentations, and interactive problem-solving training on domestic violence issues, including the identification of domestic abuse, the dynamics involved in domestic violence and the impact it has on survivors and children. The Judicial College is responsible for the content and delivery of training for the judiciary within a budgetary allocation which is, ultimately, the responsibility of ministers. By this report, I wish to highlight the concerns raised by Rights of Women, Women's Aid and others about importance of applying and implementing PD12J conscientiously and effectively; I invite the Judicial College to ensure that the content of its private family law induction and continuation courses highlight the risks which are being addressed by this Practice Direction, satisfy themselves that these risks are properly understood by the judiciary, and reinforce to the judiciary the importance of applying PD12J conscientiously.

### Conclusion: going forward

25. I am pleased to recommend the proposed revisions to PD12J.
26. As indicated in [18] above, I hope that positive steps can now be taken to address in the Family Court the problem, long-since addressed in the criminal court, of the alleged victims of domestic abuse being directly questioned by their unrepresented alleged abusers. I also consider that it would be helpful and reassuring (per [24] above) if the Course Directors of the Judicial College could reassess the content of the training programmes for Family Judges on domestic abuse to take specific account of the issues highlighted by the Women's Aid, APPG and other reports.
27. The President may further wish to take this opportunity to remind all Family Court judges of the imperative terms of PD12J, and of the key messages of this report.
28. It should be noted that Women's Aid calls for an independent monitoring, oversight and evaluation body in order to understand current adherence to PD12J within the family justice system. This proposal is outwith the remit of my review of the Practice Direction. However, it would be helpful if more consistent monitoring and oversight of the use of PD12J, including the collection of relevant statistics, could be undertaken in order to focus sustained attention on the implementation of this Practice Direction.

Mr Justice Cobb

181116

Revised Practice Direction 12J<sup>vi</sup> –  
Child Arrangements & Contact Orders: Domestic Violence and Harm

This Practice Direction supplements FPR Part 12, and incorporates and supersedes the President’s Guidance in Relation to Split Hearings (May 2010) as it applies to proceedings for child arrangements orders.

1. This Practice Direction applies to any family proceedings in the Family Court under the relevant parts of the Children Act 1989 or the relevant parts of the Adoption and Children Act 2002 (‘the 2002 Act’) in which an application is made for a child arrangements order, or in which any question arises about where a child should live, or about contact between a child and a parent or other family member, where the court considers that an order should be made.
2. The purpose of this Practice Direction is to set out what the Family Court is required to<sup>vii</sup> ~~should~~ do in any case in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic violence or abuse perpetrated by another party or that there is a risk of such violence or abuse.
3. For the purpose of this Practice Direction, the term ‘domestic violence’ includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse.

‘Controlling behaviour’ means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

‘Coercive behaviour’ means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim.

‘Harm’ means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another; ‘development’ means physical, intellectual, emotional, social or behavioural development; ‘health’ means physical or mental health; and ‘ill-treatment’ includes sexual abuse and forms of ill-treatment which are not physical.<sup>viii</sup>

## General principles

4. Where the involvement of a parent in a child's life would put the child or other parent at risk of suffering harm arising from domestic violence or abuse, the presumption in section 1(2A) of the Children Act 1989 shall not apply.<sup>ix</sup> ~~The Family Court presumes that the involvement of a parent in a child's life will further the child's welfare, so long as the parent can be involved in a way that does not put the child or other parent at risk of suffering harm.~~
5. Domestic violence and abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to violence or abuse, or witness one of their parents being violent or abusive to the other parent, or live in a home in which violence or abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with violence or abuse, and may also suffer harm indirectly where the violence or abuse impairs the parenting capacity of either or both of their parents.
6. The court must, at all stages of the proceedings, and specifically at the First Hearing Dispute Resolution Appointment ('FHDRA'), consider whether domestic violence is raised as an issue, either by the parties or by Cafcass or CAF/CASS Cymru or otherwise, and if so must:
  - identify at the earliest opportunity (usually at the FHDRA) the factual and welfare issues involved;
  - consider the nature of any allegation, admission or evidence of domestic violence or abuse, and the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order and, if so, in what terms;
  - give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly;
  - ensure that where violence or abuse is admitted or proven, that any child arrangements order in place protects the safety and wellbeing of the child and the parent with whom the child is living, and does not expose either of them to the risk of further harm. ~~In particular, the court must be satisfied that any contact ordered with a parent who has perpetrated violence or abuse is safe~~ does not expose the child and/or other parent to the risk of harm and in the best interests of the child;
  - ensure that any interim child arrangements order (i.e. considered by the court before determination of the facts, and in the absence of admission) is only made having followed the guidance in paragraphs 25-27 below;
  - ensure that the court process is not used as a means to perpetuate coercion, control or harassment by an abusive parent<sup>x</sup>.

In particular, the court must be satisfied that any contact ordered with a parent who has perpetrated violence or abuse ~~is safe~~ does not expose the child and/or other parent to the risk of harm arising from domestic violence or abuse and is in the best interests of the child;

7. In all cases it is for the court to decide whether a child arrangements order accords with Section 1(1) of the Children Act 1989; any proposed child arrangements order, whether to be made by agreement between the parties or otherwise must be carefully scrutinised by the court accordingly. The court shall not make a child arrangements order by consent or give permission for an application for a child arrangements order to be withdrawn, unless the parties are present in court, all initial safeguarding checks have been obtained by the court, and an officer of Cafcass or CAFCASS Cymru has spoken to the parties separately, except where it is satisfied that there is no risk of harm arising from domestic violence or abuse to the child and/or the parent in so doing.
8. In considering, on an application for a child arrangements order by consent, whether there is any risk of harm to the child, the court shall consider all the evidence and information available. The court may direct a report under Section 7 of the Children Act 1989, to be provided either orally or in writing, before it makes its decision; in such a case, the court shall<sup>xi</sup> ~~may~~ ask for information about any advice given by the officer preparing the report to the parties and whether they, or the child, have been referred to any other agency, including local authority children's services. If the report is not in writing, the court must ~~shall~~ make a note of its substance on the court file.

#### Before the FHDRA

9. Where any information provided to the court before the FHDRA or other first hearing (whether as a result of initial safeguarding enquiries by Cafcass or CAFCASS Cymru or on form C1A or otherwise) indicates that there are issues of domestic violence or abuse which may be relevant to the court's determination, the court must ensure that the issues are addressed at the hearing, and that the parties are not expected to engage in conciliation or other forms of dispute resolution which are not suitable and/or safe.
10. If at any stage the court is advised by any party ~~the applicant~~, by Cafcass or CAFCASS Cymru or otherwise that there is a need for special arrangements to ~~secure the safety of any~~ protect the party or child from harm arising from domestic violence or abuse while attending any hearing, the court shall ensure so far as is practicable that appropriate arrangements are made for the hearing (including the waiting arrangements at court prior to the hearing, and arrangements for entering and exiting the court building)<sup>xii</sup> and for all subsequent hearings in the case, unless it is advised and considers that these are no longer necessary.

#### First hearing/ FHDRA

11. At the FHDRA, if the parties have not been provided with the safeguarding letter/report by Cafcass/CAFCASS Cymru, the court shall inform the parties of the content of any safeguarding letter or report or other information which has been provided by Cafcass or CAFCASS Cymru, unless it considers that to do so would create a risk of harm to a party or the child.
12. Where the results of Cafcass or CAFCASS Cymru safeguarding checks are not available at the FHDRA, and no other reliable safeguarding information is available, the court shall adjourn the FHDRA until the results of safeguarding checks are available. The court shall not generally make an interim child arrangements order, or orders for contact, in the absence of safeguarding information, unless it is to protect the safety of the child, and/or safeguard the child from harm arising from domestic violence or abuse.
13. There is a continuing duty on the Cafcass Officer/Welsh FPO which requires them to provide a risk assessment for the court under section 16A Children Act 1989 if they are given cause to suspect that the child concerned is at risk of harm arising from domestic violence or abuse. Specific provision about service of a risk assessment under section 16A of the 1989 Act is made by rule 12.34 of the FPR 2010.
14. The court must ascertain at the earliest opportunity whether domestic violence or abuse is raised as an issue ~~of risk of harm to the child\*\*\*~~ which is likely to be relevant to any decision of the court relating to the welfare of the child, and specifically whether the child and/or parent would be at risk of harm arising from domestic violence or abuse in the making of any child arrangements order.

#### Admissions

15. Where at any hearing an admission of domestic violence or abuse toward another person or the child is made by a party, the admission should be recorded in writing and retained on the court file. A copy of any record of admissions must be made available as soon as possible to any Cafcass officer or officer of CAFCASS Cymru or local authority officer preparing a report under section 7 of the Children Act 1989.

#### Directions for a fact-finding hearing

16. The court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic violence or abuse:
  - (a) in order to provide a factual basis for any welfare report or for assessment of the factors set out in paragraphs 36 and 37 (below);

- (b) in order to provide a basis for an accurate assessment of risk; or
  - (c) before it can consider any final welfare-based order(s) in relation to child arrangements, or
  - (d) before it considers the need for a domestic violence-related Activity (such as a Domestic Violence Perpetrator Programme (DVPP)).
17. In determining whether it is necessary to conduct a fact-finding hearing, the court should consider:
- (a) the views of the parties and of Cafcass or CAFCASS Cymru;
  - (b) whether there are admissions by a party which provide a sufficient factual basis on which to proceed;
  - (c) if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;
  - (d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;
  - (e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact-finding hearing;
  - (f) the nature of the evidence required to resolve disputed allegations;
  - (g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court;
  - (h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.
18. Where the court determines that a finding of fact hearing is not necessary, the order ~~shall~~ must record the reasons for that decision.
19. Where the court considers that a fact-finding hearing is necessary, it must give directions as to how the proceedings are to be conducted to ensure that the matters in issue are determined as soon as possible, fairly and proportionately, and within the capabilities of the parties. In particular, it should consider:
- (a) what are the key facts in dispute;
  - (b) whether it is necessary for the fact-finding to take place at a separate (and earlier) hearing than the welfare hearing;
  - (c) whether the key facts in dispute can be contained in a schedule or a table (known as a Scott Schedule) which sets out what the applicant complains of or alleges, what the respondent says in relation to each individual allegation or complaint; the allegations in the schedule should be focused on the factual issues to be tried; and if so, whether it is practicable for this schedule to be completed at the first hearing, with the assistance of the judge;
  - (d) what evidence is required in order to determine the existence of a pattern of coercive, controlling or threatening behaviour, violence or abuse;
  - (e) directing the parties to file written statements giving details of such behaviour and of any response;

- (f) whether documents are required from third parties such as the police or health services, or domestic violence organisations<sup>xiv</sup> and giving directions for those documents to be obtained;
- (g) whether oral evidence may be required from third parties and if so, giving directions for the filing of written statements from such third parties;
- (h) whether any other evidence is required to enable the court to decide the key issues and giving directions for that evidence to be provided;
- (i) what evidence the alleged victim of violence is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence;
- (j) what support the alleged perpetrator may need in order to have a reasonable opportunity to challenge the evidence;
- (k) whether a pre-hearing review would be useful prior to the fact-finding hearing to ensure directions have been complied with and all the required evidence is available.

20. Where the court fixes a fact-finding hearing, it must at the same time fix a Dispute Resolution Appointment to follow. Subject to the exception in paragraph 31 below, the hearings should be arranged in such a way that they are conducted by the same judge or, wherever possible, by the same panel of lay justices; where it is not possible to assemble the same panel of justices, the resumed hearing should be listed before at least the same chairperson of the lay justices. Judicial continuity is important.

#### Reports under Section 7

- 21. In any case where a risk of harm to a child resulting from domestic violence or abuse is raised as an issue, the court should consider directing that a report on the question of contact, or any other matters relating to the welfare of the child, be prepared under section 7 of the Children Act 1989 by an Officer of Cafcass or a Welsh family proceedings officer (or local authority officer if appropriate), unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests.
- 22. If the court directs that there shall be a fact-finding hearing on the issue of domestic violence or abuse, the court will not usually request a section 7 report until after that hearing. In that event, the court should direct that any judgment is provided to Cafcass/CAFCASS Cymru; if there is no transcribed judgment, an agreed list of findings should be provided.
- 23. Any request for a section 7 report should set out clearly the matters the court considers need to be addressed.

#### Representation of the child



24. Subject to the seriousness of the allegations made and the difficulty of the case, the court shall consider whether it is appropriate for the child who is the subject of the application to be made a party to the proceedings and be separately represented. If the court considers that the child should be so represented, it shall review the allocation decision so that it is satisfied that the case proceeds before the correct level of judge in the Family Court.

#### Interim orders before determination of relevant facts

25. Where the court gives directions for a fact-finding hearing, or where disputed allegations of domestic abuse are otherwise undetermined the court should ~~consider whether~~ not make an interim child arrangements order unless it is satisfied that ~~is in the interests of the child; and in particular whether the safety of the child and the parent who has made the allegation and is at any time caring for the child are not exposed to a risk of harm and~~ (bearing in mind the impact which domestic violence against a parent can have on the emotional well-being of the child, the safety of the parent, and the need to protect against controlling or coercive behaviour) ~~and that the parent who has made the allegation and is at any time caring for the child can be secured before, during and after any contact and that the order is in the interests of the child.~~

26. In deciding any interim child arrangements question ~~pending a full hearing~~ the court should: –

- (a) take into account the matters set out in section 1(3) of the Children Act 1989 or section 1(4) of the Adoption and Children Act 2002 ('the welfare check-list'), as appropriate;
- (b) give particular consideration to the likely effect on the child, and on the care given to the child by the parent who has made the allegation of domestic violence, of any contact and any risk of harm arising from domestic violence or abuse, whether physical, emotional or psychological, which the child and that parent is likely to suffer as a consequence of making or declining to make an order.

27. Where the court is considering whether to make an order for interim contact, it should in addition consider

- (a) the arrangements required to ensure, as far as possible, that any risk of harm to the child and the parent who is at any time caring for the child is minimised and that the safety of the child and the parties is secured; and in particular:
  - i. whether the contact should be supervised or supported, and if so, where and by whom; and
  - ii. the availability of appropriate facilities for that purpose
- (b) if direct contact is not appropriate, whether it is in the best interests of the child to make an order for indirect contact; and
- (c) whether contact will be beneficial for the child.

The fact-finding hearing or other hearing of the facts where domestic abuse is alleged

28. While ensuring that the allegations are properly put and responded to, the fact-finding hearing or other hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved. At the fact-finding hearing or hearing:
- Each party can be asked to identify what questions they wish to ask of the other party, and to set out or confirm in sworn evidence their version of the disputed key facts.
  - The judge or lay justices should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focusing on the key issues in the case;
  - The judge or lay justices must not permit an unrepresented alleged abuser to cross-examine or otherwise directly question the alleged victim, and must not require an unrepresented alleged victim to cross-examine or otherwise directly question the alleged abuser<sup>xv</sup>.
- ~~Victims of violence are likely to find direct cross-examination by their alleged abuser frightening and intimidating, and thus it may be particularly appropriate for~~ The judge or lay justices may ~~to~~ conduct the questioning on behalf of the ~~other~~ party in these circumstances, in order to ensure both parties are able to give their best evidence
29. The court should, wherever practicable, make findings of fact as to the nature and degree of any domestic violence or abuse which is established and its effect on the child, the child's parents and any other relevant person. The court shall record its findings in writing, and shall serve a copy on the parties. A copy of any record of findings of fact or of admissions must be sent to any officer preparing a report under Section 7 of the 1989 Act.
30. At the conclusion of any fact-finding hearing, the court shall consider, notwithstanding any earlier direction for a section 7 report, whether it is in the best interests of the child for the court to give further directions about the preparation or scope of any report under section 7; where necessary, it may adjourn the proceedings for a brief period to enable the officer to make representations about the preparation or scope of any further enquiries. ~~The court should also consider whether it would be assisted by any social work, psychiatric, psychological or other assessment of any party or the child (such as an expert risk assessment), and if so (subject to any necessary consent) make directions for such assessment to be undertaken and for the filing of any consequent report.<sup>xvi</sup>~~ Any section 7 ~~or other~~ report should address the factors set out in paragraphs 36 and 37, unless the court directs otherwise.
31. Where the court has made findings of fact on disputed allegations, any subsequent hearing in the proceedings should be conducted by the same judge or by at least the same chairperson of the justices. Exceptions may be made only where observing this requirement would result in delay to the

planned timetable and the judge or chairperson is satisfied, for reasons recorded in writing, that the detriment to the welfare of the child would outweigh the detriment to the fair trial of the proceedings.

In all cases where domestic violence or abuse has occurred

32. The court should take steps to obtain (or direct the parties or an Officer of Cafcass or a Welsh family proceedings officer to obtain) information about the facilities available locally (to include local domestic abuse support services) to assist any party or the child in cases where domestic violence or abuse has occurred.
33. Following any determination of the nature and extent of domestic violence or abuse, whether or not following a fact-finding hearing,
- (a) The court shall obtain a safety and risk assessment conducted by a specialist domestic abuse practitioner working for an appropriately accredited agency;<sup>xvii</sup>
  - (b) The court should consider whether it would be assisted by any social work, psychiatric, psychological or other assessment of any party or the child and if so (subject to any necessary consent) make directions for such assessment to be undertaken and for the filing of any consequent report. Any such report should address the factors set out in paragraphs 36 and 37, unless the court directs otherwise;
  - (c) The court should consider whether any party should seek advice, treatment or other intervention as a precondition to any child arrangements order being made ~~or as a means of assisting the court in ascertaining the likely risk of harm to the child and to the parent with whom the child is living from that person,~~ and may (with the consent of that party) give directions for such attendance ~~and the filing of any consequent report.~~
34. Further or as an alternative to the advice, treatment or other intervention referred to in paragraph 33(c) above, the court may make an Activity Direction under section 11A and 11B Children Act 1989. Any intervention directed pursuant to this provision should be one commissioned and approved by Cafcass. It is acknowledged that acceptance on a DVPP is subject to a suitability assessment by the service provider, and that completion of a DVPP will take time in order to achieve the aim of risk reduction for the long-term benefit of the child and the parent with whom the child is living.

Factors to be taken into account when determining whether to make child arrangements orders in all cases where domestic violence or abuse has occurred

35. When deciding the issue of child arrangements, the court should ensure that any order for contact will not expose the child to the risk of harm ~~be safe~~ and will be in the best interests of the child.
36. In the light of any findings of fact or admissions or where domestic abuse is otherwise established, the court should apply the individual matters in the welfare checklist with reference to ~~those findings~~ the violence or abuse which has occurred, and the expert risk assessment obtained; in particular, ~~where relevant findings of domestic violence or abuse have been made~~, the court should in every case consider any harm which the child and the parent with whom the child is living has suffered as a consequence of that violence or abuse, and any harm which the child and the parent with whom the child is living, is at risk of suffering if a child arrangements order is made. The court should only make an order for contact if it can be satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before during and after contact, and that the parent with whom the child is living will not be subjected to further controlling or coercive behaviour by the other parent.
37. In every case where a finding or admission of domestic violence or abuse is made, or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other and towards the child and the impact of the same; in particular, the court should consider;
- (a) the effect of the domestic violence or abuse on the child and on the arrangements for where the child is living;
  - (b) the effect of the domestic violence or abuse on the child and its effect on the child's relationship with the parents;
  - (c) whether the applicant parent is motivated by a desire to promote the best interests of the child or is using the process to continue a process of violence, abuse, intimidation or harassment or controlling or coercive behaviour against the other parent;
  - (d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child;
  - (e) the capacity of the parents to appreciate the effect of past violence or abuse and the potential for future violence or abuse.

#### Directions as to how contact is to proceed

38. Where ~~the court has made findings of~~ domestic violence or abuse has occurred but the court, having considered the expert risk assessment and applied the welfare checklist, nonetheless considers that direct contact is safe and beneficial for the child, the court should consider what, if any, directions or conditions are required to enable the order to be carried into effect and in particular should consider:
- (a) whether or not contact should be supervised, and if so, where and by whom;

- (b) whether to impose any conditions to be complied with by the party in whose favour the order for contact has been made and if so, the nature of those conditions, for example by way of seeking intervention (subject to any necessary consent);
- (c) whether such contact should be for a specified period or should contain provisions which are to have effect for a specified period;
- (d) whether it will be necessary, in the child's best interests, to review the operation of the order; if so the court should set a date for the review consistent with the timetable for the child, and shall give directions to ensure that at the review the court has full information about the operation of the order.

Where a risk assessment has concluded that a parent poses a risk to a child or to the other parent, contact via a supported contact centre, or contact supervised by a parent or relative, is not appropriate.

39. Where the court does not consider direct contact to be appropriate, it shall consider whether it is safe and beneficial for the child to make an order for indirect contact.

#### The reasons of the court

40. In its judgment or reasons the court should always make clear how its findings on the issue of domestic violence or abuse have influenced its decision on the issue of arrangements for the child. In particular, where the court has found domestic violence or abuse proved but nonetheless makes an order which results in the child having future contact with the perpetrator of domestic violence or abuse, the court ~~should~~ must always explain, whether by way of reference to the welfare check-list the factors in paragraphs 36 and 37 or otherwise, why it takes the view that the order which it has made is safe will not expose the child to the risk of harm arising from domestic violence or abuse and is beneficial for the child.

This Practice Direction is issued by the President of the Family Division, as the nominee of the Lord Chief Justice, with the agreement of the Lord Chancellor.

---

#### EXPLANATORY NOTES

<sup>i</sup> Women's Aid is the national charity working to end domestic abuse against women and children; over the past 40 years Women's Aid has been at the forefront of shaping and coordinating responses to domestic violence and abuse through practice.

<sup>ii</sup> Reference: Key Findings: Women's Aid: "19 Child homicides..." page 17

<sup>iii</sup> Women's Aid Briefing Paper on PD12J (October 2016)

<sup>iv</sup> Reference: Key Findings: Women's Aid: "19 Child homicides..." page 27

---

<sup>v</sup> *In the Matter of D (A Child) (No.2)* [2015] EWFC 2; *In the Matter of D (A Child)* [2014] EWFC 39; *Q v Q* [2014] EWFC 31; *Re C (A Child) (No.2)* [2014] EWFC 44. Note also *A Father v SBC and Others* [2014] EWFC 6 (Baker J); *F and M v Swindon Borough Council and D* [2014] EWFC B77 (HHJ Marshall); *In Re C (A Child) (Care Proceedings: Deaf Parent)* [2014] EWCA Civ 128 (CA); *Re A (Vulnerable Witness)* [2013] EWHC 1694 (Fam) (Pauffley J); *Re A (Vulnerable Witness: Fact Finding)* [2013] EWHC 2124 (Fam) (Pauffley J); *Re K and H (Children: unrepresented father: cross-examination of child)* [2015] EWFC 1 (HHJ Clifford Bellamy). *Re M (A Child)* [2012] EWCA Civ 1905 (CA); *Re X (A Child)* [2011] EWHC 3401 (Fam) (Theis J); and *Wiltshire Council v N* [2013] EWHC 3502 (Fam) (Baker J)

<sup>vi</sup> See notes (further below) for explanations of the key changes.

<sup>vii</sup> The language has been changed to remove any ambiguity about the requirement of the court to apply the Practice Direction in these cases.

<sup>viii</sup> Para.3: The term ‘harm’ features throughout the PD12J; it was considered helpful to provide a definition of ‘harm’ in paragraph 3; the definition is the same as that set out in *section 31(9) Children Act 1989*; many of the references to ‘safe’ contact have been removed and replaced with references to the avoidance of ‘harm’ to promote clarity of understanding about risk; the emphasis is on the protection of the child and other parent from harm;

<sup>ix</sup> Para.4: The statutory presumption in *section 1(2A) CA 1989* applies “unless the contrary is shown”. Where the involvement of a parent in a child’s life would put the child or other parent at risk of suffering harm, then it is suggested that the contrary would indeed be shown. Paragraph 4 has been re-worked in order to give prominence to the avoidance of risk of harm;

<sup>x</sup> Para.6: The additional bullet-point is inserted to alert the judiciary to the possibility that the alleged abuser may be using the court process as a means to perpetuate the coercion, control or harassment; the final sentence of the fourth paragraph has been moved to the end of this paragraph;

<sup>xi</sup> Once a decision has been made to ask for a report, there should then be an obligation to ask for information about any advice given by the officer preparing the report to the parties and whether they, or the child, have been referred to any other agency, including local authority children’s services.

<sup>xii</sup> This amendment reflects the concerns of those consulted about the safety of the alleged victim at court; special measures in and out of the Family Court (as they are in the Criminal Court) are essential. It is to be noted that the alleged victim of the abuse should not be expected to participate by video-link; Women’s Aid report that many victims of abuse feel disadvantaged in not being able to participate by being in the court room with the judge.

<sup>xiii</sup> Domestic violence or abuse would create “an issue of risk of harm to the child”; however, the Hunter / Barnett (2013) report highlighted the need to encourage judges to consider specifically the relevance of the issue of domestic abuse to the question of child arrangements;

<sup>xiv</sup> This could include Outreach services, helplines etc. It will of course be a matter for the judge to weigh the evidence submitted.

<sup>xv</sup> It is widely acknowledged that direct questioning by a domestic abuse perpetrator of the victim is of itself abusive, and should not be permitted.

<sup>xvi</sup> This section has now been moved to §33(b)

<sup>xvii</sup> Following determination of domestic abuse, the court should obtain a suitable risk assessment conducted by a qualified and accredited professional.