

PRACTICE DIRECTION: RESIDENCE AND CONTACT ORDERS: DOMESTIC VIOLENCE AND HARM

14 January 2009

*The Practice Direction issued on 9 May 2008 is re-issued in the following revised form to reflect the decision of the House of Lords in **Re B (Children) [2008] UKHL 35**, in which Baroness Hale confirmed (at [76]) that a fact-finding hearing is part of the process of trying a case and is not a separate exercise and that where the case is then adjourned for further hearing it remains part heard. This principle applies equally in private law and public law family cases. Paragraphs 15 and 23 of the Practice Direction have been amended to reinforce this principle.*

1. This Practice Direction applies to any family proceedings in the High Court, a county court or a magistrates' court in which an application is made for a residence order or a contact order in respect of a child under the Children Act 1989 ("the 1989 Act") or the Adoption and Children Act 2002 ("the 2002 Act") or in which any question arises about residence or about contact between a child and a parent or other family member.
2. The practice set out in this Direction is to be followed in any case in which it is alleged, or there is otherwise reason to suppose, that the subject child or a party has experienced domestic violence perpetrated by another party or that there is a risk of such violence. For the purpose of this Direction, the term 'domestic violence' includes physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may have caused harm to the other party or to the child or which may give rise to the risk of harm.
(‘Harm’ in relation to a child means ill-treatment or the impairment of health or development, including, for example, impairment suffered from seeing or hearing the ill-treatment of another: *Children Act 1989, ss 31(9),105(1)*)

General principles

3. The court must, at all stages of the proceedings, consider whether domestic violence is raised as an issue, either by the parties or otherwise, and if so must:
 - identify at the earliest opportunity the factual and welfare issues involved;
 - consider the nature of any allegation or admission of domestic violence and the extent to which any domestic violence which is admitted, or which may be proved, would be relevant in deciding whether to make an order about residence or contact and, if so, in what terms;
 - give directions to enable the relevant factual and welfare issues to be determined expeditiously and fairly.
4. In all cases it is for the court to decide whether an order for residence or contact accords with Section 1(1) of the 1989 Act or section 1(2) of the 2002 Act, as appropriate; any proposed residence or contact order, whether to be made by agreement between the parties or otherwise must be scrutinised by the court accordingly. The court shall not make a consent order for residence or contact or

give permission for an application for a residence or contact order to be withdrawn, unless the parties are present in court, except where it is satisfied that there is no risk of harm to the child in so doing.

- 5 In considering, on an application for a consent order for residence or contact, 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 1989 Act either orally or in writing before it makes its determination; in such a case, the court 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 shall make a note of its substance on the court file.

Issue

6. Immediately on receipt of an application for a residence order or a contact order, or of the acknowledgement of the application, the court shall send a copy of it, together with any accompanying documents, to Cafcass or Cafcass Cymru, as appropriate, to enable Cafcass or Cafcass Cymru to undertake initial screening in accordance with their safeguarding policies.

Liaison

7. The Designated Family Judge, or in the magistrates' court the Justices' Clerk, shall take steps to ensure that arrangements are in place for:
- the prompt delivery of documents to Cafcass or Cafcass Cymru in accordance with paragraph 6
 - any information obtained by Cafcass or Cafcass Cymru as a result of initial screening or otherwise and any risk assessments prepared by Cafcass or Cafcass Cymru under section 16A of the 1989 Act to be placed before the appropriate court for consideration and directions
 - a copy of any record of admissions or findings of fact made pursuant to paragraphs 12 & 21 below to be made available as soon as possible to any Officer of Cafcass or Welsh family proceedings officer or local authority officer preparing a report under section 7 of the 1989 Act.

Response of the court on receipt of information

8. Where any information provided to the court before the first hearing, whether as a result of initial screening by Cafcass or Cafcass Cymru or otherwise, indicates that there are issues of domestic violence which may be relevant to the court's determination, the court may give directions about the conduct of the hearing and for written evidence to be filed by the parties before the hearing.
9. If at any stage the court is advised by Cafcass or Cafcass Cymru or otherwise that there is a need for special arrangements to secure the safety of any party or child attending any hearing, the court shall ensure that appropriate arrangements

are made for the hearing and for all subsequent hearings in the case, unless it considers that these are no longer necessary.

First hearing

10. At the first hearing, the court shall inform the parties of the content of any screening 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.
(Specific provision about service of a risk assessment under section 16A of the 1989 Act is made by the Family Proceedings Rules 1991, r 4.17AA and by the Family Proceedings Courts (Children Act 1989) Rules 1991, r 17AA.)
11. The court must ascertain at the earliest opportunity whether domestic violence is raised as an issue and must consider the likely impact of that issue on the conduct and outcome of the proceedings. In particular, the court should consider whether the nature and effect of the domestic violence alleged is such that, if proved, the decision of the court is likely to be affected.

Admissions

12. Where at any hearing an admission of domestic violence to another person or the child is made by a party, the admission should be recorded in writing and retained on the court file.

Directions for a fact-finding hearing

13. 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 before it can proceed to consider any final order(s) for residence or contact. Where the court determines that a finding of fact hearing is not necessary, the order shall record the reasons for that decision.
14. Where the court considers that a fact-finding hearing is necessary, it must give directions to ensure that the matters in issue are determined expeditiously and fairly and in particular it should consider:
 - directing the parties to file written statements giving particulars of the allegations made and of any response in such a way as to identify clearly the issues for determination;
 - whether material is required from third parties such as the police or health services and may give directions accordingly;
 - whether any other evidence is required to enable the court to make findings of fact in relation to the allegations and may give directions accordingly.
15. Where the court fixes a fact-finding hearing, it must at the same time fix a further hearing for determination of the application. The hearings should be arranged in

such a way that they are conducted by the same judge or, in the magistrates' court, by at least the same chairperson of the justices.

Reports under Section 7

16. In any case where domestic violence 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 1989 Act 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. If the court so directs, it should consider the extent of any enquiries which can properly be made at this stage and whether it is appropriate to seek information on the wishes and feelings of the child before findings of fact have been made.

Representation of the child

17. 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 case is proceeding in the magistrates' court and the court considers that it may be appropriate for the child to be made a party to the proceedings, it may transfer the case to the relevant county court for determination of that issue and following such transfer the county court shall give such directions for the further conduct of the case as it considers appropriate.

Interim orders before determination of relevant facts

18. Where the court gives directions for a fact-finding hearing, the court should consider whether an interim order for residence or contact is in the interests of the child; and in particular whether the safety of the child and the residential parent can be secured before, during and after any contact.
19. In deciding any question of interim residence or contact pending a full hearing the court should: -
 - (a) take into account the matters set out in section 1(3) of the 1989 Act or section 1(4) of the 2002 Act ("the welfare check-list"), as appropriate;
 - (b) give particular consideration to the likely effect on the child of any contact and any risk of harm, whether physical, emotional or psychological, which the child is likely to suffer as a consequence of making or declining to make an order;

20. 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 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.

The fact-finding hearing

21. At the fact-finding hearing, the court should, wherever practicable, make findings of fact as to the nature and degree of any domestic violence 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
22. 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 and if so (subject to any necessary consent) make directions for such assessment to be undertaken and for the filing of any consequent report.
23. 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, in the magistrates' court, 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 has occurred

24. 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 assist any party or the child in cases where domestic violence has occurred.
25. Following any determination of the nature and extent of domestic violence, whether or not following a fact-finding hearing, the court should consider

whether any party should seek advice or treatment as a precondition to an order for residence or contact being made or as a means of assisting the court in ascertaining the likely risk of harm to the child from that person, and may (with the consent of that party) give directions for such attendance and the filing of any consequent report.

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

26. When deciding the issue of residence or contact the court should, in the light of any findings of fact, apply the individual matters in the welfare checklist with reference to those findings; in particular, where relevant findings of domestic violence have been made, the court should in every case consider any harm which the child has suffered as a consequence of that violence and any harm which the child is at risk of suffering if an order for residence or contact is made and 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.

27. In every case where a finding of domestic violence is made, the court should consider the conduct of both parents towards each other and towards the child; in particular, the court should consider:
 - (a) the effect of the domestic violence which has been established on the child and on the parent with whom the child is living;
 - (b) the extent to which the parent seeking residence or contact is motivated by a desire to promote the best interests of the child or may be doing so as a means of continuing a process of violence, intimidation or harassment against the other parent;
 - (c) the likely behaviour during contact of the parent seeking contact and its effect on the child;
 - (d) the capacity of the parent seeking residence or contact to appreciate the effect of past violence and the potential for future violence on the other parent and the child;
 - (e) the attitude of the parent seeking residence or contact to past violent conduct by that parent; and in particular whether that parent has the capacity to change and to behave appropriately.

Directions as to how contact is to proceed

28. Where the court has made findings of domestic violence but, having applied the welfare checklist, nonetheless considers that direct contact is in the best interests of 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 advice or treatment (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 or not the operation of the order needs to be reviewed; if so the court should set a date for the review and give directions to ensure that at the review the court has full information about the operation of the order.
- 29.** Where the court does not consider direct contact to be appropriate, it shall consider whether it is in the best interests of the child to make an order for indirect contact.

The reasons of the court

- 30.** In its judgment or reasons the court should always make clear how its findings on the issue of domestic violence have influenced its decision on the issue of residence or contact. In particular, where the court has found domestic violence proved but nonetheless makes an order, the court should always explain, whether by way of reference to the welfare check-list or otherwise, why it takes the view that the order which it has made is in the best interests of the child.
- 31.** 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.

The Right Honourable Sir Mark Potter
President of the Family Division and Head of Family Justice