

**CONTACT AT ALL COSTS?  
DOMESTIC VIOLENCE, CHILD CONTACT  
AND THE PRACTICES OF THE FAMILY COURTS  
AND PROFESSIONALS**

A thesis submitted for the degree of  
Doctor of Philosophy

by  
Adrienne Elise Barnett

Brunel Law School  
Brunel University  
March 2014

## **ABSTRACT**

This thesis explores the practices and perceptions of the courts and professionals in child contact proceedings where domestic violence is an issue and the implications of this for mothers, with particular reference to Practice Direction 12J which establishes the framework for best practice to be followed in such proceedings. In-depth interviews were undertaken with 29 family lawyers and Cafcass officers covering a broad geographic and demographic area, and the reported cases to which the Practice Direction applies were reviewed. The resulting data were analysed utilising discourse analytic and qualitative approaches, drawing on a feminist poststructuralist approach and also insights from autopoietic theory. It was found that the ‘presumption of contact’ and an acontextual, legalistic approach to domestic violence reinforce each other and have a powerful normative influence on professional and judicial perceptions and practices. Dominant parental subjectivities of ‘implacably hostile mothers’ and ‘safe family men’ continue to resonate with many courts and professionals, who focus on promoting contact rather than safeguarding mothers and children. Despite more judges and professionals gaining a broader understanding of the coercively controlling nature of domestic violence, only recent, very severe physical violence warrants the holding of fact-finding hearings on disputed allegations and provides sufficiently ‘cogent’ reasons for family lawyers to support mothers in opposing contact and for courts to refuse contact. The notion that domestic violence is morally reprehensible and a significant failure in parenting, and that women’s desires for safety, wellbeing and autonomy are morally legitimate, finds very little expression. This study concludes that in order to regain a valid and authoritative voice for women in current family law we need to expose and disrupt law’s construction of the ‘scientific truth’ about children’s welfare, the dominant parental subjectivities to which it gives rise, and the ‘safe haven’ of law’s ideal post-separation family.

### **Key words**

Child contact; domestic violence; Practice Direction 12J; welfare of the child; fact-finding hearings; consent orders; autopoietic theory

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## ACKNOWLEDGEMENTS

I would like to express my deepest gratitude to my first supervisor, Felicity Kaganas. Your encouragement, advice, guidance and patience have been invaluable. I could not have benefitted from having a better advisor and mentor for my PhD study, and it has been a privilege and pleasure working with you. I would also like to thank my second supervisor, Professor Christine Piper, for your keen insights and knowledge, and for keeping me on the straight and narrow throughout this study.

My sincerest thanks go to Cafcass for assisting in and supporting this project and enabling my empirical work to become a reality, including the Research Governance Committee, the research officer, Dennis Jones, the regional managers and, of course, the Family Court Advisers who participated in this project. Your help has been indispensable.

I would like to pay a special tribute to all the barristers, solicitors and Cafcass officers who willingly took time out of their busy, pressurised practices to participate in this study. Without the thoughtful consideration you gave to the interviews this thesis would not have been possible.

I am very grateful to my friends and colleagues at 1 Pump Court Chambers, and in particular Melanie Johnson and family law clerks, Scott Haley and Clare Sabido, for all your encouragement and tolerance over the past six years.

Last, but by no means least, many thanks to my family and in particular my mother, Dr Ursula Barnett, for your inspiration and support, and my daughters, Sian and Tania, for putting up with a mentally absent mother and for keeping the feminist flag flying.

## LIST OF ABBREVIATIONS

ADR	Annual Data Requirements
CAADA DASH	Co-ordinated Action Against Domestic Abuse, Domestic Abuse, Stalking and Honour-Based Violence
CAFCASS	Children and Family Court Advisory and Support Service
CASC	Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law
CFLQ	Child and Family Law Quarterly
DAP	Data Access Panel
DJ	District Judge
DVIP	Domestic Violence Intervention Project
DVPP	Domestic Violence Perpetrator Programme
FCA	Family Court Adviser
FHDRA	First Hearing Dispute Resolution Appointment
FJC	Family Justice Council
FPC	Family Proceedings Court
FRM	Fathers' Rights Movement
FWINS	Force-wide Information Network Systems
HMCS	Her Majesty's Court Service
HMICA	Her Majesty's Inspectorate of Court Administration
JSWFL	Journal of Social Welfare and Family Law
PAA	Privileged Access Agreement
PIP	Parenting Information Programme
PRFD	Principal Registry of the Family Division

# INTRODUCTION

This thesis explores the practices and perceptions of the courts and professionals when applying Practice Direction 12J in relation to child contact proceedings, and the implications of these practices and perceptions for women involved in contact disputes where domestic violence is an issue.

Practice Direction 12J<sup>1</sup> [‘the Practice Direction’] was issued by the President of the Family Division in May 2008 in response to concerns expressed by the Family Justice Council that the safety of children and resident parents (usually mothers) was being put at risk in contact proceedings. Courts and professionals were downgrading or ignoring domestic violence in their drive to promote contact between children and non-resident fathers.<sup>2</sup> The Family Justice Council called for a “cultural shift” in the approach of courts and professionals away from pursuing contact “at all costs”, towards promoting contact when it is “safe and positive for the child”,<sup>3</sup> and also for recognition that domestic violence constitutes a “significant failure in parenting”.<sup>4</sup> It was hoped that the Practice Direction would provide the vehicle for effecting that cultural transformation. The Practice Direction establishes the framework for best practice to be followed by courts and professionals in terms of scrutinising proposed consent orders, proving domestic violence, assessing risk, ensuring the safety of children and resident parents both prior to and after domestic violence has been proved or admitted, and determining whether contact may benefit the child.

The Practice Direction was not the first judicial attempt at encouraging the family courts and professionals to take domestic violence seriously in private law Children Act proceedings. Research undertaken in the 1990s, which inquired into the implications for women and children of continued contact with violent fathers, found that the practices and perceptions of professionals were both influenced by, and reinforced, the ideological separation of contact and domestic violence, with serious

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<sup>1</sup> Potter P, *Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* [2008] 2 FLR 103, reissued on 14<sup>th</sup> January 2009 at [2009] 2 FLR 1400

<sup>2</sup> This study explicitly refers to ‘mothers’ and ‘fathers’ as opposed to the gender-neutral term, ‘parents’, which works to conceal the gendered operation and effect of current family law.

<sup>3</sup> Jane Craig, ‘Everybody’s Business: Applications for Contact Orders by Consent’ (2007) 37 *Family Law* 26, 27

<sup>4</sup> *ibid* 30

consequences for mothers and children.<sup>5</sup> This research led to ‘good practice’ guidelines issued by the Children Act Sub-Committee of the Advisory Board on Family Law [the ‘CASC’]<sup>6</sup> in 2000 as well as guidelines laid down by the Court of Appeal in the combined appeals in *Re L, V, M, H* [‘*Re L*’].<sup>7</sup> However, subsequent research and case law revealed that many courts and professionals disregarded these guidelines and continued to promote contact by minimising, trivialising or ignoring women’s concerns about continued contact with violent fathers. This raises questions about why contact between children and violent fathers is seen as not only permissible but positively desirable and why it is so hard for women to oppose such contact. These are questions that this study seeks to answer.

This project is the first in-depth, national study into the operation and effect of the Practice Direction. It provides a unique exploration of whether the practices and perceptions of courts and professionals reveal any transformation in the discursive and ideological terrain of current family law since the implementation of the Practice Direction, and whether there has been any change in the ability of women involved in contact proceedings to obtain protection and autonomy from violent fathers. In so doing, this project aims to benefit the women who are so harshly disciplined and regulated by current family law, and to contribute to a broader tradition of feminist legal scholarship that seeks to deconstruct and transform the patriarchal relations of power that inform family law in England and Wales, and to illuminate the possibilities for, and limitations on, articulating a feminine subject with a valid and authoritative voice and knowledge.

It should be noted that during the course of undertaking this PhD, other studies emerged on this topic. National survey research was undertaken for the Family Justice Council into fact-finding hearings and the implementation of the Practice

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<sup>5</sup> Marianne Hester and Lorraine Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (The Polity Press 1996); Marianne Hester, Chris Pearson and Lorraine Radford, *Domestic Violence: A National Survey of Child Welfare and Voluntary Sector Mediation Practice* (The Polity Press 1997); Leslie Anderson, *Contact between Children and Violent Fathers* (Rights of Women 1997)

<sup>6</sup> Lord Chancellor’s Advisory Board on Family Law, Children Act Sub-Committee, *Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence* (TSO 2000)

<sup>7</sup> *Re L, V, M, H* (*Contact: Domestic Violence*) [2000] 4 All ER 609, [2000] 2 FLR 334, CA

Direction, which gathered quantitative (and some qualitative) data.<sup>8</sup> Additionally, London-based research was undertaken by Rights of Women, comprising interviews with women involved in contact proceedings and a survey of legal professionals.<sup>9</sup> The data from these studies were of assistance in enhancing the findings of this project.

Research methods that would facilitate an in-depth investigation of the perceptions and practices of professionals operating in the family justice system, as well as an exploration of the way in which the lower and appellate courts apply the Practice Direction, best suited the subject of this study. Accordingly, empirical research in the form of in-depth interviews with legal and child welfare professionals as well as a review and analysis of the relevant case law was undertaken, to provide rich, original texts. The resulting data were analysed within a theoretical framework informed by a poststructuralist feminist approach as well as insights from ‘autopoietic’ or ‘systems’ theory. These perspectives provide a productive framework for exploring the world constructed in and by current family law, how meanings are represented and produced, and the consequences of those representations and meanings for judicial and professional practice and consequently for the women and children who are subjected to those practices.

## **Overview of chapters**

This thesis is presented in eight chapters. Chapter 1 discusses the research methodology and the specific methods employed. The chapter commences with an explanation of the theoretical perspectives that inform this study. A poststructuralist feminist approach enables us to explore the extent to which professional and judicial perceptions and practices are informed by and reinforce dominant discourses that structure child contact proceedings. This approach also enables us to examine what the possibilities are for transforming patriarchal power relations so that suppressed or oppositional meanings can emerge and gain authority. Insights from autopoietic theory, which explains the contingent nature of societal communications, are very

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<sup>8</sup> Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council 2013) [www.familyjusticecouncil.org.uk](http://www.familyjusticecouncil.org.uk), last accessed 12.11.13

<sup>9</sup> Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women 2012)

useful in explaining how particular assumptions about children's best interests and dominant understandings of domestic violence have been constructed and sustained, and enable us to acknowledge and confront the complexities of modern society and the possibilities for, and limitations on social change.

Chapter 1 then discusses the methodological approaches that best suit these theoretical perspectives and the research question. These are a combination of discourse analytic and qualitative approaches, as well as the strategic use of a quantitative approach. The chosen research methods that were considered most appropriate to the subject matter and methodology of the study were:

- a review and analysis of all reported cases relevant to the operation of the Practice Direction
- a review of selected case records held by county courts and Family Proceedings Courts in five HMCS regions. However despite a lengthy and exhaustive application process which is described in Chapter 1, it was not possible to undertake the review of court records or to interview judicial officers because the requisite permissions were not obtained
- in-depth interviews with judicial officers, barristers, solicitors and Cafcass officers.
- a national survey of judicial officers and professionals. It was not necessary to undertake survey research because the findings of the FJC research undertaken by Hunter and Barnett became available during the course of this study.<sup>10</sup>

The review of reported cases and the interviews with professionals comprised the empirical component of this study. Chapter 1 explains how the interviews were piloted, the sampling strategy and method for selecting participants, and the interview process. Semi-structured interviews were conducted with a total of 29 participants covering a diverse geographical and demographic area. Finally, Chapter 1 describes how the data obtained from the interviews and the review of reported cases were analysed thematically, utilising discourse analytic and qualitative approaches.

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<sup>10</sup> Hunter and Barnett (n 8)

Chapter 2 explores legal constructions of children and parents, and in particular how law has selectively constructed a dominant model of children's welfare that constitutes contact between children and non-resident fathers as essential for children's emotional, psychological and developmental welfare. A review of the case law and academic research and literature reveals the increasing importance ascribed to post-separation contact by courts and professionals. This has been reinforced by political discourses and ideologies of the equal, democratic family that seek to reinstate the father in the post-separation family by portraying father-absence as detrimental to both children and society and rendering invisible the work involved in caring for children and sustaining post-separation contact. The case law and literature show that an important ideological effect of these familial discourses is the construction of the gendered subjectivities of 'implacably hostile mothers' and 'safe family men' which have increasingly structured professional practice and legal decision-making in private law Children Act proceedings. As a consequence, any attempt by women to restrict or oppose contact is seen as irrational, pathological, selfish or vengeful, generating a harsh response from courts and professionals.

Chapter 3 examines how the presumption of contact worked to erase men's violence against women in legal discourses concerning the family so that contact between children and violent fathers came to be actively encouraged by law, despite successful attempts in other legal domains to deal more effectively with violence against women. The case law and research prior to *Re L* reveal that domestic violence was systematically effaced from political, legal and professional discourses concerning the post-separation family even where there was known or suspected domestic violence. Domestic violence was minimised by courts and professionals and seen as irrelevant to contact. Efforts of professionals were focused on persuading mothers to co-operate and agree to contact rather than on the father's behaviour or on women's and children's safety, often resulting in unsafe contact arrangements.

The case law and research following *Re L* show that the guidelines were "more honoured in the breach than the observance" as they were inconsistently applied by the lower courts and frequently disregarded.<sup>11</sup> In particular, one of the principal

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<sup>11</sup> Craig (n 3) 29

recommendations of the Court of Appeal and the CASC – that preliminary fact-finding hearings should be held on disputed allegations of domestic violence – was often ignored principally because domestic violence was not seen as relevant to contact. Courts and professionals continued to minimise or neutralise domestic violence, and women who raised allegations of domestic violence continued to be treated with suspicion, disbelieved, and regarded as obstructive. Risk was rarely assessed and courts rarely refused to order contact. Mothers continued to be pressurised into agreeing to unsafe contact arrangements, and proposed consent orders were rarely scrutinised by courts. It was as a consequence of the research discussed in this chapter that Practice Direction 12J was issued, which embodies the CASC and *Re L* Guidelines.

Chapters 4 to 7 present an analysis and discussion of the data obtained from the empirical research. The findings from both the interviews and the review of the case law are analysed and discussed together in order to present a cohesive picture of the perceptions and practices of judicial officers and professionals in applying the Practice Direction. Additionally, the findings of contemporaneous research on the application of the Practice Direction were incorporated into the analysis and discussion.

Chapter 4 explores the way in which professionals and judicial officers understand domestic violence, their views on the merits of post-separation contact and on the relevance of domestic violence to contact, and their attitudes towards mothers and fathers. The interviews and case law, together with other research, demonstrate how the presumption of contact and an acontextual approach to domestic violence reinforce each other, resulting in the conceptual separation of the father's conduct from his parenting practices. While a significant proportion of family lawyers and Cafcass officers have a broad and insightful theoretical understanding of domestic violence and some professionals and judicial officers understand its coercive, controlling nature, many judges and family lawyers apply a narrow, legalistic approach to domestic violence. It was found that nearly all professionals fully endorsed the 'presumption of contact', which has had the effect of narrowing the range of behaviours that may be construed as providing 'cogent reasons' to deny children the benefits of contact and has meant that their broad theoretical insights



into the nature and effects of domestic violence did not necessarily translate into practice. Only recent, 'severe' physical violence was seen as 'relevant' to contact and 'historic incidents' of abuse were considered completely irrelevant.

Most interview participants did not see mothers as deliberately malicious and hostile to contact, and some acknowledged the extent to which many women support post-separation contact. However, for significant numbers of professionals and judges, women's fears of domestic violence in all but the most extreme circumstances may be met with suspicion, and their concerns for their own safety, well-being and autonomy may be seen as expressions of self-interest. Professional and judicial attitudes towards mothers contrast sharply with their attitudes towards fathers. Family lawyers and judges appear to be very reluctant to perceive fathers in a negative light or to impute suspect motives to fathers seeking contact, accepting expressions of 'genuine' motivation at face value.

Chapter 5 considers whether there has been any change in the extent to which unsafe agreements are negotiated by professionals and sanctioned by courts as a consequence of pressure put on mothers to compromise and agree to contact. It was found that the majority of family lawyers continue to advise mothers to agree to contact using various strategies ranging from 'advice' on the courts' approach to contact, to more forceful coercion. Further pressure on mothers and on their representatives may come from the father's representatives, the court and Cafcass officers, who may themselves be bullied into recommending contact. However, a minority of family lawyers and Cafcass officers have a much greater appreciation of, and concern about the pressures that can be put on resident mothers to agree to unsafe contact. These family lawyers try to avoid replicating the perpetrator's behaviour when representing mothers, and make concerted efforts to stand up for their clients. The extent to which judges and magistrates scrutinise proposed consent orders seems to vary widely, with some judges being reluctant to go on a 'fishing expedition' in case the agreement 'unravels'. It also appears that a great deal of 'rubber-stamping' of consent orders still happens. Cafcass officers may need to be very robust if they have concerns about agreements that have, or are about to be, made as lawyers and judges may not only ignore their concerns and advice but

actively avoid their involvement in cases in order to drive through agreements for contact.

Chapter 6 examines preliminary fact-finding hearings, including the willingness of professionals to request them and of courts to hold them. It examines also the circumstances in which they may be held and the reasons why courts may refuse to list them, what happens to disputed allegations of domestic violence if they are not held, and participants' views on fact-finding hearings. The findings of this study are strongly indicative of an increase in the numbers of fact-finding hearings held following implementation of the Practice Direction in May 2008, with a subsequent 'backlash' following *The President's Guidance in Relation to Split Hearings* in 2010,<sup>12</sup> and a wide variation in the extent to which different judges and courts are likely to direct fact-finding hearings. The narrow, incident-based approach to domestic violence, together with professional and judicial perceptions of the relevance of domestic violence to contact mean that fact-finding hearings are usually restricted to cases involving incidents of recent, severe physical violence. If preliminary fact-finding hearings are not held, it appears that 'composite' final hearings are not very common, which suggests that many disputed allegations may be disregarded altogether.

Chapter 6 also explores the way in which evidence and findings of fact are constructed in and by family law and in particular, the heavy burden on the mother to prove her allegations as a consequence of the operation of the burden of proof and dominant familial discourses. This can mean that the uncorroborated oral testimony of the mother may be viewed with suspicion and discounted as not being 'real' evidence. Additionally, the consequences of law's selective construction of 'reality', and the potential for a judge's decision to be considered 'unjust' is discussed, including participants' concerns about the harsh consequences for mothers and children of law 'getting it wrong'.

Chapter 7 discusses assessment of risk and of the broader 'welfare' factors prescribed by the Practice Direction, as well as interim and final orders and

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<sup>12</sup> Wall P, *The President's Guidance in Relation to Split Hearings* [2010] 2 FLR 1897

interventions for perpetrators. There appears to be a mixed approach by courts and professionals to the issue of interim contact, with courts being most likely to resolve the problem of the 'dangerous unknown' by relying on the 'status quo'. While a small minority of family lawyers would strongly support mothers who oppose direct contact pending fact-finding hearings, most appear to start from the premise that some direct contact will and should take place, so mothers may have to be very forceful and tenacious to resist the pressure from their own representatives. If domestic violence is proved, it seems that the 'risk' posed by the father is most frequently determined by his ability to accept the findings made against him. Although most fathers appear to be 'high risk' because they refuse to accept the findings, direct contact is nevertheless the most likely outcome in such cases. Pressure on mothers by family lawyers to agree to contact unless very severe physical violence has been proved, and the reluctance of many judges to accept that an abusive father is motivated by anything other than a desire to see the child, may contribute to these outcomes.

Chapter 7 also explores the way in which contact could be 'made safe' in the interim and where domestic violence is proven, including the preference of courts and professionals for contact centres as the 'solution' to the problem of making contact safe. It appears, however, that in the absence of resources for supervised or supported contact, courts and professionals may resort to the nebulous support of family or friends, or the mother being left to cope directly with the father in a 'public place'. Finally, participants' views on interventions for perpetrators are discussed and in particular, the over-use of anger management, which some courts and professionals confuse with Domestic Violence Perpetrator Programmes ['DVPPs'], or consider to be an appropriate intervention. Alternatively, anger management and other inappropriate resources may be used if DVPP provision is unavailable on the basis that 'something is better than nothing'.

This thesis concludes, in Chapter 8, that the strong belief of most judicial officers and professionals in the benefits of contact reinforces the narrow, incident-based approach to domestic violence and has a powerful normative influence on professional and judicial perceptions and practices in contact proceedings where domestic violence is an issue. The ambit of when and how domestic violence is

relevant to contact has grown increasingly narrow, and the focus of many courts and professionals is still on promoting contact rather than safeguarding mothers and children. Dominant parental subjectivities of ‘implacably hostile mothers’ and ‘safe family men’ marginalise other subject positions and have important implications for the way in which courts and professionals respond to mothers who oppose contact and to fathers who perpetrate domestic violence. The notion that domestic violence is morally reprehensible and a significant failure in parenting, and that women’s desire for safety, wellbeing and autonomy is morally legitimate, finds very little expression in current family law.

However, this study also concludes that seeking to regain a valid and authoritative voice for women in current family law is not a futile exercise. The fact that some judges and professionals have started to demonstrate a broader understanding of the coercively controlling nature of domestic violence and its implications for contact demonstrates that dominant meanings are not immutable or inevitable and indicates the powerful potential of oppositional discourses. While this thesis acknowledges that we cannot ‘use’ law to solve social problems, it is nevertheless important for oppositional discourses to play a strategic role in maintaining control over the direction of law reform. With this in mind, a number of practical recommendations are discussed in Chapter 8, including amendment of the Children Act 1989, revision of the Practice Direction, training for judicial officers and family lawyers, and further research into the way in which litigants in person are managing fact-finding hearings. Most importantly, in order to transform the prevailing discursive order and create a valid, legitimate voice for mothers, we need to expose and disrupt ‘the welfare of the child’ as a mechanism of power and the dominant parental subjectivities to which it gives rise, as well as the ‘safe haven’ of law’s ideal family. It is hoped that this study makes a contribution to that transformative process.

# CHAPTER 1

## RESEARCH METHODOLOGY

### 1. Introduction

This study combined discourse analytic and qualitative approaches, using primarily qualitative data gathering methods, namely, a review of cases reported after the implementation of the Practice Direction and in-depth interviews with professionals (barristers, solicitors and Family Court Advisors employed by Cafcass).

The research methodology of this study will be discussed under the following heads:

- the theoretical perspectives informing this study
- choice of methodological approaches
  - a discourse analytic approach
  - a qualitative approach
  - a quantitative approach
  - feminist approaches to research
- combining methodological approaches
- operationalising the concepts in the research question
- the advantages and disadvantages of the methods potentially available for use in this project
- conducting the research, including a consideration of sampling design and procedure and the research tools used
- ethical issues
- methods of data analysis

### 2. The theoretical perspectives informing this study

#### 2.1 Introduction

It is important for the researcher to make the theoretical assumptions upon which empirical work is based explicit, as “it is clear that theory is inseparable from the research process”.<sup>1</sup> This study places itself within a theoretical framework that aims to deconstruct legal and professional discourses informing current family law by

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<sup>1</sup> Mary Seneviratne, ‘Researching Ombudsmen’ in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005) 173

drawing on feminist, poststructural perspectives,<sup>2</sup> as well as perspectives from autopoietic, or ‘systems’, theory. These theoretical approaches enable us to explore the complexities of the social system within and through which the processes of the regulation of women in and by current family law take place, the difficulties for women and children in obtaining protection from violent fathers in contact proceedings, and the possibilities for, and limitations on, articulating a feminine subject with a valid voice and knowledge. These perspectives are also of immense utility in deconstructing and analysing the way in which courts and professionals constitute parents and children in contact proceedings in which domestic violence is an issue, and illuminating the harsh, disciplinary effects on mothers of those discursively constructed subjectivities.

What post-structural feminist and ‘systems’ theories share is a rejection of modernist, interpretive principles, where individuals are seen as the primary sources of social meanings, and where ‘true’ and certain knowledge is considered possible.<sup>3</sup> At the core of feminist post-structuralist ideas and, it is suggested, Luhmannian thought, “is the crucial insight that there is no one truth, no one authority, no one objective method which leads to the production of pure knowledge.”<sup>4</sup> We can thus see the phenomenal world – the world that has meaning for us – as wholly constructed and recognise that the unknown, the indecipherable, itself has meaning.<sup>5</sup> This does not mean that the environment – the world ‘out there’ – does not exist and is simply an invention of discourse or of social systems. What it does mean is that the meanings and perceptions by which we understand that world are structured through discourse, or, in autopoietic terms, through social systems’ internal constructs of the external world.<sup>6</sup> This helps us understand how professionals and courts construct and

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<sup>2</sup> For similar treatments, see Rebecca Morley and Audrey Mullender, ‘Domestic Violence and Children: What do we Know from Research?’ in Audrey Mullender and Rebecca Morley (eds), *Children Living with Domestic Violence* (Whiting and Birch 1994); Carol Smart, ‘The Legal and Moral Ordering of Child Custody’ (1991) 18(4) *Journal of Law and Society* 485; Susan Boyd, ‘Is there an Ideology of Motherhood in (Post)Modern Child Custody Law?’ (1996) 5(4) *Social and Legal Studies* 495

<sup>3</sup> See Reza Banakar and Max Travers, ‘Ethnography and Law’ in Banakar and Travers (n 1); John Patterson, ‘Trans-Science, Trans-law and Proceduralisation’ (2003) 12 *Social and Legal Studies* 525

<sup>4</sup> Shulamit Reinharz, *Feminist Methods in Social Research* (OUP 1991) 7. See also Michael King, ‘What’s the Use of Luhmann’s Theory?’ in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics* (Hart 2006) 41

<sup>5</sup> See Michael King, *A Better World for Children* (Routledge 1997) 189

<sup>6</sup> John Patterson and Gunther Teubner, ‘Changing Maps: Empirical Legal Autopoiesis’ in Banakar and Travers (n 1) 235

interpret concepts such as ‘the family’, children’s welfare, and gendered violence in current family law.

These perspectives recognise that data, like meaning, are constructed, not ‘discovered’, and reject the purely positivist notion of scientific objectivity, including the privileging of ‘scientific’ research, which has been criticised for perpetuating patriarchal power relations, and the silencing of women’s voices.<sup>7</sup> In doing so it rejects the ‘problem-solving’ model of research which assumes that research “provides empirical evidence and conclusions that help to solve a policy problem.”<sup>8</sup>

A number of commentators have noted that “despite apparent differences, Luhmann and Foucault may be confronted productively with each other.”<sup>9</sup> Borch points to their “similar epistemological-analytical perspectives – on difference rather than identity, on second-order observation rather than positivism, on communication rather than subjects.”<sup>10</sup> Both systems and post-structural theorists also avoid reproducing law’s ideology, by treating law’s self-descriptions as the object of analysis.<sup>11</sup> The focus is therefore on “how the social world becomes represented, and how meanings are produced. Texts are therefore seen as social practices, embedded with multiple values and vested interests, not the reporting of independent, objective judgements.”<sup>12</sup>

Such perspectives have great utility in enabling us to deconstruct current legal and professional discourses informing the issue of child contact and domestic violence,

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<sup>7</sup> Tim May, *Social Research* (Open University Press 1993); Tim May, *Social Research Issues, Methods and Process* (Open University Press 2001); Charles M Judd, Eliot R Smith and Louise H Kidder, *Research Methods in Social Relations* (6<sup>th</sup> edn, Harcourt, Brace and Jovanovich 1991), who assert that social research can never be ‘value-free’.

<sup>8</sup> Carol H Weiss, ‘The many meanings of research utilisation’ from (1979) 39(5) *Public Administration Review* 426-431 in Clive Seale (ed), *Social Research Methods: A Reader* (Routledge 2004) 445

<sup>9</sup> Christian Borch, ‘Systemic Power: Luhmann, Foucault and Analytics of Power’ (2005) 48(2) *Acta Sociologica* 155-167

<sup>10</sup> *ibid* 155

<sup>11</sup> See further Reza Banakar and Max Travers, ‘Structural Approaches’ in Banakar and Travers (n 1); Paterson and Teubner (n 6) 217

<sup>12</sup> David E Gray, *Doing Research in the Real World* (1<sup>st</sup> edn, Sage 2004) 24-25. See also John W Creswell, *Qualitative Inquiry and Research Design* (1<sup>st</sup> edn, Sage 1998) 79, who points to “the need to ‘deconstruct’ texts in terms of both reading and writing, examining and bringing to the surface concealed hierarchies as well as dominations, oppositions and contradictions.”

and in particular, to understand how concepts such as ‘the welfare of the child’ have been selectively constructed by the reductive operations of law. By deconstructing the notion of ‘the welfare of the child’ and locating it within its historical, social, political and ideological context, it can be seen to operate as a mechanism of power that serves particular interests. By exposing the contingent, provisional nature of this construct, it is hoped that we can create the space for oppositional meanings to emerge and for the “shifting of subjectivities” which, as Boyd says, “can, at certain junctures, be as crucial and as difficult as shifting economic structures”.<sup>13</sup> This enables ‘other’, subjugated knowledges to be articulated, as part of the process of regaining a feminine subject with a valid voice and knowledge in the context of current family law.<sup>14</sup>

## 2.2 Feminist theory(ies)

Enlightenment epistemology is structured on the subject/object dualism which privileges “the abstract, knowledgeable subject [which is] associated with the masculine, the object of knowledge with the feminine” resulting in trivialising or rendering irrational the perspective of women.<sup>15</sup> So feminists have sought to critique the “dominatory logic of the subject/object model”.<sup>16</sup> In so doing, feminists question and render problematic the concepts of rationality, impartiality and objectivity by showing that these are historically specific and contingent generalisations embodying dominant values which, in the process, devalue those attributes associated with ‘the feminine’ such as ‘unacceptable’ emotions and desires.<sup>17</sup> This provides us with useful insights for exploring how courts and professionals construct parents involved in contact proceedings and in particular, how dominant maternal

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<sup>13</sup> Susan Boyd, ‘Some post-modernist challenges to feminist analyses of law, family and State: ideology and discourse in child custody law’ (1991) 10 *Canadian Journal of Family Law* 79, 113. See further Adrienne Barnett, ‘Contact and Domestic Violence: The Ideological Divide’ in Jo Bridgeman and Daniel Monk (eds) *Feminist Perspectives on Child Law* (Cavendish 2000) 132

<sup>14</sup> Smart (n 2)

<sup>15</sup> Lois McNay, *Foucault and Feminism: Power, Gender and the Self* (Polity Press 1992) 169. See also Richard Collier, ‘Feminist Legal Studies and the Subject(s) of Men: Questions of Text, Terrain and Context in the Politics of Family Law and Gender’ in Alison Diduck and Katherine O’Donovan (eds), *Feminist Perspectives on Family Law* (Routledge Cavendish 2006) 238 who explains how “classic tenets of liberal legalism (for example, individualism, autonomy and so forth) were refigured as quintessentially ‘masculine’ values.” See further Vanessa Munro, *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart 2007) 42

<sup>16</sup> McNay (ibid) 169

<sup>17</sup> ibid 84, 91



subjectivities of ‘implacably hostile mothers’, who are seen to deny their children contact with fathers for their own selfish reasons, have arisen and been sustained.<sup>18</sup>

Feminist models such as the ‘difference’ model pioneered by Carol Gilligan or Catherine McKinnon’s ‘dominance’ model have been critiqued, *inter alia*, for their essentialism, that is, for failing to question and render problematic the notion of an essential ‘womanhood’, as well as for failing to disrupt the binaries of masculinity and femininity and of dualistic thought per se.<sup>19</sup> What is needed is a theoretical perspective that recognises “the constructed, partial and politicised nature of these binaries between masculinity and femininity, and between public and private spheres”, and which is able to demonstrate the interests sustained by competing subjective realities.<sup>20</sup> It is suggested that post-structuralist theories in the Foucauldian tradition hold the most cogent explanatory and political potential for a feminist study of current family law.

### **2.3A feminist post-structuralist approach**

Many feminists are worried about “what the postmodern rejection of metanarratives implies for feminist theory and politics”.<sup>21</sup> The particular concern is that a postmodern relativist perspective reduces feminist values to “just one of many equally valid viewpoints”, and deprives ‘women’ as a category of a valid, speaking voice,<sup>22</sup> thereby depriving feminists of political leverage and the ability to engage with legal reform.<sup>23</sup>

It is suggested, however, that poststructuralism can offer a useful, productive framework for understanding the gendered mechanisms of power in modern society and the possibilities for transforming patriarchal power relations. Poststructuralist theories of meaning, power and subjectivity have great utility for feminists in

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<sup>18</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 116

<sup>19</sup> See, eg, Munro (n 15) 24-25

<sup>20</sup> *ibid* 13. See also Chris Weedon, *Feminist Practice and Poststructuralist Theory* (1<sup>st</sup> edn, Blackwell 1987) 8-9

<sup>21</sup> McNay (n 15) 123

<sup>22</sup> *ibid* 127. See also Munro (n 15) 36

<sup>23</sup> Munro (n 15) 113; see also at 129. See also Maria Drakopoulou, ‘The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship’ (2000) 8 *Feminist Legal Studies* 199, 201 who argues that, in law, questions of subjectivity “destabilise our project and undermine its political and ethical legitimacy.”

understanding the ways in which the heterogenous forms of power governing social relations are exercised, how oppression works, and the possibilities for resistance and change, which enables us to see “whose interests are silenced, marginalised or excluded and how open it is to change”.<sup>24</sup> The task of research, according to a poststructuralist perspective, is to examine historically how knowledge (and in this context, dominant patriarchal knowledge) and truth in society is produced, to deconstruct the processes by which that knowledge is formed, and make visible the relations of power that give rise to discursive claims to truth.<sup>25</sup>

The founding insight of post-structuralism is that language constitutes, rather than reflects, social ‘reality’, so that meaning and therefore knowledge is not absolute, fixed and certain, but is “always bound up with historically specific regimes of power and, therefore, every society produces its own truths which have a normalising and regulatory function.”<sup>26</sup> The power of language derives from its ability to portray the meanings it constructs as natural, ‘true’ and obvious. This symbiotic relationship between knowledge, truth and power is central to poststructuralist thought.<sup>27</sup> Knowledge is produced and circulated through ‘discourse’, which Foucault explains as “a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements” which always embodies a standpoint or a claim to truth.<sup>28</sup> Discourses permit what counts as authoritative statements or knowledge, and exclude or marginalise other forms of expression.<sup>29</sup> By denying their own partiality and the interests they represent, and marginalising or discrediting alternative or oppositional meanings, an important ideological effect of discourse is to present sectional or specific interests as universal

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<sup>24</sup> Weedon (n 20) 169; see also at 135

<sup>25</sup> See May (n 7); Gray (N 12)

<sup>26</sup> McNay (n 15) 25

<sup>27</sup> See Susan Boyd, ‘Backlash and the Construction of Legal Knowledge: The Case of Child Custody Law’ (2001) 20 *Windsor Yearbook of Access to Justice* 141-165, 147

<sup>28</sup> Michel Foucault, ‘Truth and Power’ in Colin Gordon (ed) *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Pantheon Books 1980) 133. See also Sara Mills, *Michel Foucault* (Routledge 2003); Bettina Lange, ‘Researching Discourse and Behaviour as Elements of Law in Action’ in Banakar and Travers (n 1) 177, who describes Foucault’s concept of discourse as comprising “not just statements but also the regulated practices which account for statements.”

<sup>29</sup> Gary Kinsman, ‘Queerness is Not in our Genes: Biological Determinism Versus Social Liberation’ in Deborah R Brock (ed), *Making Normal: Social Regulation in Canada* (Harcourt 2003) 263. See also Lange (n 28) 177

and hegemonic, so that dominant constructs appear normal, legitimate and ‘true’.<sup>30</sup> Fairclough and Wodak describe how discourse is constitutive in contributing to the formation of social identities and objects of knowledge, and in helping to sustain and reproduce the status quo, by constituting and reproducing unequal relations of power based on, for example, class and gender.<sup>31</sup>

Boyd explains, however, that without an analytical tool, discourse analysis does not provide us with a clear idea of how some discourses come to be more powerful and privileged than others, and whose interests are being served.<sup>32</sup> In focusing strategically on gender as a tool for analysis, we can make visible the gendered relations of power that give rise to discursive knowledge and their ideological and normative effects, which enables us to see the way in which “most women are still excluded from the production of forms of thought, images and symbols in which their experiences and social relations are expressed and ordered.”<sup>33</sup> Deploying gender as an analytical tool enables us to disrupt and displace the hierarchical bipolar oppositions, such as the binary divisions of male/female and public/private that structure gendered power relations, as well as the moral validity of objectivity and neutrality, thereby creating the space for other ways of knowing and of being a subject. As Hekman notes, “feminists cannot overcome the privileging of the male and the devaluing of the female until they reject the epistemology that created those categories.”<sup>34</sup> So rather than obstructing or erasing a feminist voice, a poststructuralist perspective can allow “contemporary feminist theorists to move towards a more empowering vision of the complexities of male-female relations.”<sup>35</sup> Applying these insights to current family law, the deconstruction and analysis of the extent to which the perceptions of professionals and judicial officers construct, reinforce and are reinforced by dominant discourses informing private law Children

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<sup>30</sup> Alison Diduck, ‘Legislating Ideologies of Motherhood’ (1993) 2 *Social and Legal Studies* 462. See also Weedon (n 20) 98, 108 & 131; Hubert L Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Harvester Wheatsheaf 1982) 63

<sup>31</sup> Norman Fairclough and Ruth Wodak, ‘Critical discourse analysis’ from Teun A van Dijk (ed) *Discourse Studies: A Multidisciplinary Introduction Vol 2* (Sage 2004) in Seale (n 8) 358

<sup>32</sup> Boyd (n 13)

<sup>33</sup> See Reinharz (n 4) 247. See also Munro (n 15) 128

<sup>34</sup> Susan Hekman, *Gender and Knowledge: Elements of a Post-Modern Feminism* (Polity Press 1990) 8

<sup>35</sup> Vanessa Munro, ‘Legal Feminism and Foucault – A Critique of the Expulsion of Law’ (2001) 28(4) *Journal of Law and Society* 546-567, 552. See also Richard Collier, ‘A Hard Time to be a Father?: Reassessing the Relationship Between law, Policy and Family (Practices)’ (2001) 28(4) *Journal of Law and Society* 520-545, 536.

Act proceedings enables us to acquire a greater understanding of the difficulties for women in articulating a valid, authoritative voice.

Foucault's ideas on power and its inter-relation with discourse assist us to understand how current familial ideologies have gained dominant status and what the possibilities are for resistance against them.<sup>36</sup> For Foucault, power is not something to be possessed or owned, but is relational, effected in its exercise, and strategic.<sup>37</sup> Munro explains that according to Foucault, power can be conceived of "as a positive social presence which exerts itself in all aspects of life and in all directions... Foucault has emphasised the notion of power as a fluid source of both oppression and resistance".<sup>38</sup>

Foucault's thesis on disciplinary power and the way it is dispersed throughout society, immanent in the micro-levels or 'capillaries' of everyday practices, as well as in discourses such as law and science,<sup>39</sup> enables us to see how power is deployed "around ideas of what constitutes a good mother, a good father, a 'good' parent. With questions, that is, of gender."<sup>40</sup> Foucault conceived of three forms of power – juridical, disciplinary and governmental – which have not replaced each other but can operate simultaneously. The advantages of Foucault's theses on power are that they enable us to recognise "the plurality of powers and resistances which are the relations of our real lives",<sup>41</sup> which help us appreciate how law operates increasingly through both juridical and disciplinary strategies. For example, at the point when the 'implacably hostile mother' can no longer be disciplined, when she refuses to be regulated to permit contact with the non-resident father, law resorts to juridical power in the form of the committal, abandoning attempts at disciplining her, and downgrading 'the welfare of the child' as a guiding precept.

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<sup>36</sup> See Munro (n 34) 549

<sup>37</sup> Barry Smart, *Michel Foucault* (rev. edn, Routledge 2002) 77. This encapsulates Foucault's notion of the 'microphysics of power'.

<sup>38</sup> Munro (n 34) 54

<sup>39</sup> Michel Foucault, 'Body/Power' in Gordon (n 28) 113

<sup>40</sup> Collier (n 34) 525

<sup>41</sup> Kevin Walby, 'Contributions to a Post-Sovereignist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism' (2007) 16(4) *Social and Legal Studies* 551-571, 555

Law, as discourse, is both the product of relations of power which have arisen out of historically specific circumstances, and, according to Foucault, a discursive system that masks the circulation of power. The relations of power that law disguises today are not monarchical power, but disciplinary power, constituted in current family law by legal and scientific discourses.<sup>42</sup> So we need to expose not only “law’s role as a discourse of construction, which is self-legitimizing in so far as its power to construct is sustained by its own ideological claims to truth”,<sup>43</sup> but also the extent to which, and manner in which, law’s power to construct is reliant on its legitimation of claims to truth of discourses external to law, such as scientific discourses.<sup>44</sup> This has particular relevance for analysing the way in which law interprets science in its construction of children’s welfare in the area of post-separation parenting, and how that selected construct influences the practices and perceptions of professionals involved in contact proceedings.

The empowering aspect of Foucault’s theses on power lies in the recognition that, while the power of discourse can have exclusionary, repressive and disciplinary effects, “language is not monolithic. Dominant meanings can be contested, alternative meanings affirmed.”<sup>45</sup> Accordingly, the exercise of resistance is implicit in prevailing power structures, rather than constituting an external force.<sup>46</sup> So, for example, exposing the contingent, unstable nature of familial constructs such as ‘the welfare of the child’ has the potential for offering “a potentially transformative rather than merely subversive agenda.”<sup>47</sup>

A significant ideological effect of power and discourse is the construction of ‘the subject’, which is of particular significance for understanding the ways in which family law constitutes mothers and fathers in child contact proceedings.

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<sup>42</sup> See Michel Foucault, ‘Power/Knowledge’ in Gordon (n 28); Michel Foucault, *Discipline and Punish* (Penguin 1977)

<sup>43</sup> Eileen Fegan, ‘“Ideology after Discourse”: A reconceptualisation for feminist analyses of law’ (1996) 23 *Journal of Law and Society* 173, 197

<sup>44</sup> Gerald Turkel, ‘Michel Foucault: law, power and knowledge’ (1990) 17 *Journal of Law and Society* 170, 189. See also Reza Banakar and Max Travers, ‘Studying Legal Texts’ in Banakar and Travers (n 1) 134, who refer to commentators who argue that “legal discourse and forms of knowledge are intimately linked to, and dependent on, other forms of discourse and knowledge.”

<sup>45</sup> Weedon (n 20) 76

<sup>46</sup> See Munro (n 15) 91-92, 103; McNay (n 15) 39

<sup>47</sup> Munro (n 15) 103. See also Mairtin Mac an Ghaill and Chris Haywood, *Gender, Culture and Society* (Palgrave MacMillan 2007) 61

Poststructuralism enables us to see subjectivity as an ideological effect of discourse that is always historically specific.<sup>48</sup> Different modes of subjectivity serve specific interests and thus the constitution of the subject has political implications by reproducing or contesting power relations.<sup>49</sup> Indeed, at specific historical moments, “a dominant construction emerges which could almost be said to over-determine legal policy or decision-making or at least structures the debate which gives rise to new policy formation. In embracing certain subject positions, others are marginalised.”<sup>50</sup> This conception of subjectivity assists us in exploring how intersecting legal, political and child welfare discourses construct and sustain dominant gendered subjectivities of ‘implacably hostile mothers’ and ‘safe family men’. This can have harsh disciplining effects on mothers who resist that dominant construct, and supports the ideological divide between the ‘safe family man’ of child welfare discourses and the ‘dangerous perpetrator’ of domestic violence discourse.

Foucault’s theses on power and resistance thus “opens a space for feminists to understand and intervene in the processes through which meaning is produced, disseminated and transformed in relation to the changing configurations of modern power.”<sup>51</sup> In this way, we can see feminist critique as itself a discursive practice with the power to transform dominant power relations and the discursive structures that they create and sustain. It is because of the relationship between discourse and power that language can be an important site of political struggle.<sup>52</sup> It is hoped that this study can make a contribution to that struggle by exposing the shifting, uncertain nature of discourse and deconstructing the role of law in constructing the gendered subjectivities of current family law, thereby creating the space and opportunity for contested, oppositional meanings to emerge.<sup>53</sup>

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<sup>48</sup> See Walby (n 40) 557; Weedon (n 20) 33, 41-42, 92; Alison Diduck, *Law’s Families* (LexisNexis UK 2003) 11; Selma Sevenhuijsen, *Citizenship and the Ethics of Care* (Routledge 1998) 63

<sup>49</sup> Lange (n 28) 181

<sup>50</sup> Smart (n 2) 486

<sup>51</sup> McNay (n 15) 115

<sup>52</sup> *ibid* 24

<sup>53</sup> See Boyd (n 13) 113; Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart 1998) 7

## 2.4 'Autopoietic' or 'systems' theory

'Autopoietic' or 'systems' theory was developed by the German sociologists, Niklas Luhmann and Gunther Teubner, who were interested in "how social order was possible if the contrary, chaos, was so much more plausible".<sup>54</sup> Where Luhmann and Teubner differ from other contemporary social theorists, is in seeing the phenomenal world constructed at two distinct levels - the psychic and the social - and it is the interaction between them which, at the level of individual consciousness, provides people with the information they need to make sense of the external world. We thus need to make a distinction between people (conscious or psychic systems) and society (social systems).<sup>55</sup>

Since the political and industrial revolutions of the eighteenth century, western societies have evolved from stratified and hierarchical differentiation, to functionally differentiated sub-systems such as law, politics, economics and science, with no ultimate hierarchical authority.<sup>56</sup> "[None] of these systems can claim to be dominant, in the sense that the authority of one does not preclude the authority of the others."<sup>57</sup> What defines and structures these social systems is their communications – everything that can be communicated by words, gestures and actions, and understood as having meaning. So Luhmann offers "the idea of a social system which consists of constructions arising out of communications, not at the level of individual interaction, but at that of society".<sup>58</sup> Modern society's identity and conception of itself is the product of the operation of these sub-systems, which provide the authority and justification for social communication.<sup>59</sup> None of society's subsystems can replace the knowledge-creating and interpretive functions of other systems or is able to offer an exclusively 'correct' view of society: only law may

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<sup>54</sup> Klaus A Ziegert, 'Systems Theory and Qualitative Socio-Legal Research' in Banakar and Travers (n 1) 51

<sup>55</sup> See King (n 5); Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993)

<sup>56</sup> King (n 5) 131. See also Chris Thornhill, 'Luhmann's Political Theory: Politics After Metaphysics?' in King and Thornhill (n 4) 76; Samantha Ashenden, 'The Problem of Power in Luhmann's Systems Theory' in King and Thornhill (n 4) 131; Niklas Luhmann, *Political Theory in the Welfare State* (de Gruyter 1990)

<sup>57</sup> King (n 5) 18

<sup>58</sup> *ibid* 165. See also Niklas Luhmann, 'Differentiation in Society' (1977) 2(2) *Canadian Journal of Society* 29; Niklas Luhmann, *Ecological Communications* (University of Chicago Press 1989); Michael King, 'The "truth" about autopoiesis' (1993) 20 *Journal of Law and Society* 1

<sup>59</sup> See Robert van Krieken, 'The Socio-Legal Construction of the "Best Interests of the Child": Law's Autonomy, Sociology, and Family Law' in Michael Freeman (ed) *Law and Sociology: Current Legal Issues* (OUP 2005) 440

decide what is lawful; politics what is national policy; economics what is profitable; science what is scientifically true or false.<sup>60</sup> Each of these systems has developed its own internally generated version of reality and its own internal processes for reproducing this image of society and guaranteeing its future.<sup>61</sup>

Law's function in modern society is to process "normative expectations that are capable of maintaining themselves in situations of conflict."<sup>62</sup> This enables us to determine in advance whether particular conduct would be answerable to law, and what the attitude of law would be towards that conduct. By reducing the range of possibilities, law thus "provides a degree of certainty in the face of an always open future that no other communication system can."<sup>63</sup>

In considering how society functions and how its sub-systems maintain their differentiated character, we need to look at Luhmann's theory of 'autopoiesis'.<sup>64</sup> Luhmann defines an autopoietic social system as one that "produces and reproduces its own elements by the interaction of its elements."<sup>65</sup> Each functional system distinguishes itself from its environment through binary codes, which are developed by each system itself.<sup>66</sup> Without such closure, the system would have no way of distinguishing its own operations from those of its environment.<sup>67</sup> Before information can be recognised as existing for the system, it has to be reproduced in the system's own terms and can only then enter the system's programmes.<sup>68</sup> In modern societies it is law alone that decides whether a conflict is legal or non-legal.

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<sup>60</sup> See King (n 5); Jiri Priban, 'Beyond procedural legitimation: legality and its "infictions"' (1997) 24 *Journal of Law and Society* 331-347

<sup>61</sup> Ashenden (n 55) 131

<sup>62</sup> Luhmann, *Ecological Communications* (n 57) 140

<sup>63</sup> Ziegert (n 53) 61

<sup>64</sup> 'Autopoiesis' derives from the biological term for an organism that reproduces itself from its own elements.

<sup>65</sup> Niklas Luhmann, 'Law as a Social System' (1989) 83 *Northwestern University Law Review* 136, 137. See also Helmut Willke, 'The autopoietic theory of law: autonomy of law and contextual transfer' in Paul Amselek and Neil MacCormick (eds), *Controversies about Law* (Edinburgh University Press 1991) 116-117

<sup>66</sup> See further Ashenden (n 55); Carole Smith, 'Autopoietic Law and the "Epistemic Trap": A Case Study of Adoption and Contact' (2004) 31(3) *Journal of Law and Society* 318-344, 321. Michael King (n 57) explains that communicative events occur for law "whenever people express themselves in terms of lawful/unlawful, legal/illegal, and whenever their communicative acts are directed towards claim-making and claim-defending." [224-225]

<sup>67</sup> See Luhmann, *Ecological Communications* (n 57) 378

<sup>68</sup> See Niklas Luhmann, 'Closure and Openness: On Reality in the World of Law' in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (de Gruyter 1988) 1426; Van Krieken (n 58) 441



Once law has selected a conflict applying its legal/non-legal code, it then applies its lawful/ unlawful coding to that conflict and produces communications (decisions) based on this distinction.<sup>69</sup> It is in this way that systems reproduce themselves from their own elements. Each system is thus “continually engaged in carrying out the self-reproduction (autopoiesis) of the overall social system as well as its own.”<sup>70</sup> This means that each system participates in society’s construction of reality.<sup>71</sup>

Each functional system is operationally and normatively closed to the external world, which means that social systems cannot communicate directly with each other in the same way that individuals cannot communicate directly with, or steer, a social system. “Information from outside the legal system, for example, cannot enter the system as raw data... Instead they have to be coded by the system – that is, given meaning within the system’s programmes.”<sup>72</sup> For example, political decisions, when reconstructed as legislation, enter the legal system as law; however politics then has no control over law once its own decisions have entered law’s environment.<sup>73</sup>

Social systems are, however, cognitively open, that is, they are dependent on other social systems producing authoritative communications on which they are able to rely.<sup>74</sup> For example, judges in family proceedings are increasingly reliant on information from child welfare science to produce ‘the facts’ to enable them to make legal communications/decisions on children’s welfare. Although society’s subsystems cannot communicate directly or interpenetrate, there are a variety of ways in which they are open to each other and to communications from the external world.<sup>75</sup> A communicative event from one system or from a source external to social systems may constitute an ‘irritation’<sup>76</sup> or an ‘interference’<sup>77</sup> for another system.

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<sup>69</sup> See Luhmann (n 64); Wilke (n 64); Priban (n 59)

<sup>70</sup> Luhmann (64) 138

<sup>71</sup> See Reza Banakar and Max Travers, ‘Method Versus Methodology’ in Banakar and Travers (n 1) 28

<sup>72</sup> King (1997) *op cit* FN. 1 at Pg. 166

<sup>73</sup> *ibid* 165-167; Van Krieken (n 58) 441

<sup>74</sup> See Luhmann (n 67); Smith (n 65) 321

<sup>75</sup> See Paterson and Teubner (n 6) 223

<sup>76</sup> An ‘irritation’ is an event that occurs in one or more social system, which causes that system to respond by reconstituting it in ways that the system can understand – see King (n 5); Luhmann (n 64)

<sup>77</sup> “What may sometimes appear to constitute direct communications between systems has been described as ‘interference’ – communications that apparently bridge both discourses [but which] are, in reality, separate pieces of information for each discourse and are coupled only by their

Whatever cannot be explained using the system's programmes but nevertheless has to be acknowledged by the system as existing is 'noise'. The existence of noise creates a commitment by the system to reduce that noise, if not by that system, then by one or more of society's other systems.<sup>78</sup> This has important implications for understanding how concepts such as 'domestic violence' and 'child abuse' emerged and became understood in family law and in political and popular discourses. The selective nature of the production of meanings by social systems, involving a reduction in complexity, also has important implications for the way in which the concept of 'the welfare of the child' has been constructed and understood.<sup>79</sup> For family law:

“[T]he space...that was once available for morality has now been filled by science...[and] the co-evolution of law with child welfare science has left virtually no space for such moral observations. It is the weight of scientific evidence which is seen as justifying the correctness of the decision, and not morality.”<sup>80</sup>

However, law does not, and cannot, import wholesale into its programmes and communications 'raw' science because it is not science. That is, it cannot reproduce the complexities, ambiguities and differing theoretical perspectives found within scientific discourses on child health and development, but selects and reconstructs such knowledge in ways that 'make sense' to law, which inevitably leads to reductionism.<sup>81</sup> An important aspect of this study, therefore, is to explore how current understandings of children's welfare and domestic violence have been constructed, the extent to which they are reinforced or opposed in and by judicial and professional perceptions, and what the implications of those selective constructions are for professional and judicial practice.

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synchronisation and co-evolution.” - Michael King and Christine Piper, *How the Law Thinks about Children* (2<sup>nd</sup> edn, Ashgate 1995) 33-34

<sup>78</sup> See King (n 5) 91

<sup>79</sup> *ibid* 167. See also Reza Banakar, 'Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden' in Banakar & Travers (n 1) who explain how "systems constitute themselves by excluding the diversity of their environments." [149]

<sup>80</sup> King (n 5) 45 - 46

<sup>81</sup> See further Adrienne Barnett, 'The Welfare of the Child Re-Visited: Is Whose Best Interests? Part I' (2009) 39 *Family Law* 50-54

Systems theory is, above all, based on the notion of observation and in particular, the partiality of observation – by first-order observers (observations by systems themselves), second-order observers (observers of observers) and so on.<sup>82</sup> Social systems are unable to observe their own selectivity as they are blind to the self-referential nature of their operations. This enables law to evaluate its own system from the ideal of justice by blinding itself to the paradoxes and tautologies of its own operations in doing so, as well as to its artificial exclusion of other values,<sup>83</sup> by making “the operations through which this is done invisible” so that, for the system, its operations do not appear to be based on self-reference.<sup>84</sup> Law cannot, therefore, “deal with the question whether the distinction between justice and injustice is being used justly or unjustly [as this] would lead the system into paradoxes and block at least the operations based on this question.”<sup>85</sup> So the price to be paid for law’s ability to impose legal order upon what would otherwise be inaccessible and chaotic, is a blindness to its own paradoxical nature. While justice may represent the ideal for law, all law can do is decide with certainty what is legal or illegal.

However, moral observers of society are unable to distinguish between system communication and the generalised ideal values that the system constructs. This means that whether the court’s decisions are considered ‘fair’ or ‘just’ depends on the perspective of the observer of those decisions. However, law itself cannot ‘see’ that a decision about ‘the welfare of the child’ can be both just and unjust, depending on the perspective of the observer of the system. For example, it is irrelevant to law that a court’s decision that a violent father should have contact with a child may be seen as both morally ‘wrong’ and legally ‘right’ depending on the moral view of the observer, as long as the correct legal procedures have been followed in arriving at the decision. Law’s inability to ‘see’ its self-referential decision-making also has significant implications for how fact-finding hearings are ‘observed’. So another important aspect of this study is to explore whether, and to what extent, professionals may observe decisions by judges in fact-finding hearings, and in determining contact thereafter, to be ‘just’ or ‘unjust’, and what the consequences of this may be for

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<sup>82</sup> What Luhmann calls ‘second-order observation’ is the observation of what others observe and what they cannot observe – see Paterson and Teubner (n 6) 226. See also Banakar and Travers (n 70) 28; Patterson (n 3) 541

<sup>83</sup> See Luhmann (n 64) 140

<sup>84</sup> *ibid* 145. See also Michael King and Chris Thornhill, ‘Introduction’ in King and Thornhill (n 4) 18

<sup>85</sup> Luhmann, ‘Differentiation in Society’ (n 57) 145

parents involved in contact proceedings and for the children who are the subject of those proceedings.

There are clearly some important differences between Luhmann's theories and poststructural feminist perspectives as sociological approaches. Most importantly, perhaps, what systems theory does not explain (and does not see the role of sociology as being to explain) is *why* specific abstractions are constructed and validated by social systems as having particular meanings; nor does it purport to explain the discursive and ideological effects of the operation of power in modern society. To expect systems theory to answer such questions would be to misconceive the theory itself. The task of the sociological researcher, for Luhmann, is to identify systems and their operations, not to search for causes and effects, and he is critical of a causal notion of power because of the unlimited possibilities for causes and effects: "The determination of a causal relation is, thus, a contingent enterprise, an observer-dependent ascription or attribution that could have been different."<sup>86</sup> If we wish to observe and analyse the relations of power that give rise to legal and intersecting discourses and their ideological effects, it is suggested that post-structural perspectives provide the most productive avenue for a feminist engagement with current family law, while recognising the partiality of those perspectives.

Autopoietic theory has great utility in assisting us to understand the selective, reductionist construction of concepts such as 'the welfare of the child', 'domestic violence' and 'findings of fact', as well as the difficulty in 'using' law to achieve 'progress' in protecting women and children. The merit of autopoietic theory lies in its acknowledgement of the complexity of society, rather than the denial of such complexity arising from descriptions of society that see social change as directly achievable through law.

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<sup>86</sup> Niklas Luhmann, (1969) 'Klassische Theorie der Macht, Kritik ihrer Pramissen' (1969) 16 *Zeitschrift fur Politik* 149-179, 151-152, quoted in Borch (n 9) 157

### 3. Choice of methodological approaches

#### 3.1 A discourse analytic approach

Potter explains that discourse analysis is not a method, “but a whole perspective on social life and research into it”.<sup>87</sup> A discourse analytic approach is particularly suited to feminist post-structuralist and autopoietic theoretical perspectives and to the subject of this research in that it recognises the centrality of discourse in constructing social life,<sup>88</sup> and enables the researcher to examine how knowledge about a topic acquires authority at a particular historical moment.<sup>89</sup>

Discourse analysts “are interested in texts in their own right, rather than seeing them as a means of getting at some reality that is assumed to lie behind the discourse, whether social or psychological”.<sup>90</sup> The notion of ‘construction’ is important in discourse analysis because it “emphasizes the fact that, in a very real sense, texts of various kinds *construct* our world”.<sup>91</sup> In this way discourse analysis can have immense utility in making visible the ‘opaque’ aspects of discourse and the way in which relations of domination and subordination, and social identities based on gender, class and race are signified, constructed and reproduced.<sup>92</sup> “Researchers can investigate how the dominant discourse is produced, how it is disseminated, what it excludes, how some knowledge becomes subjugated and so forth.”<sup>93</sup> So we need to analyse the discourse itself as well as its social, political and historical context.<sup>94</sup> The focus moves beyond analysing whether the text is “an accurate description of the

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<sup>87</sup> Jonathan Potter, ‘Discourse analysis and constructionist approaches: theoretical background’ in John T E Richardson (ed), *Handbook of Qualitative Research Methods for Psychology and the Social Sciences* (BPS Books 1996) 129

<sup>88</sup> See Rosalind Gill, ‘Discourse analysis: practical implementation’ in Richardson (n 86) 141.

<sup>89</sup> See Stuart Hall, ‘Foucault and Discourse’ in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (Open University Press 1997)

<sup>90</sup> Gill (n 87) 141

<sup>91</sup> Gill (n 87) 142; see also at 155

<sup>92</sup> See Fairclough and Wodak (n 31) 358; Banakar and Travers (n 43) 136; Gill (n 87) 156.

<sup>93</sup> Patricia Leavy, ‘Feminist Postmodernism and Poststructuralism’ in Sharlene Nagy Hesse-Biber, and Patricia Lina Leavy (eds), *Feminist Research Practice* (Sage 2007) 91.

<sup>94</sup> See Gill (n 87) 142, 143 & 147. Similarly Reinharz (n 4) suggests that we examine “both the text and the processes of its production.” [145]. See also Patricia Leavy, ‘The Feminist Practice of Content Analysis’ in Hesse-Biber and Leavy (n 92) 229

participant's viewpoint",<sup>95</sup> to "how such discourses order a domain of reality which has repercussions beyond those understood or intended by the speaker".<sup>96</sup>

Discourse analysis can therefore play an important role in the methodology of this study by enabling the researcher to deconstruct pre-existing texts and original accounts by social actors and to make visible the extent to which the perceptions and practices of professionals and judicial officers both construct, and are influenced by, prevailing dominant discourses that currently inform family law.

### 3.2 A qualitative approach

Strauss and Corbin describe qualitative research as any kind of research that produces findings not arrived at by statistical procedures and other means of quantification.<sup>97</sup> It is clear from the texts on research methods that qualitative, ethnographic methods should play an important part in this study, since such methods are considered the best way of uncovering the thoughts and experiences of the groups under study and of providing a detailed analysis of the research texts.<sup>98</sup> Qualitative research also enables us to gain an 'authentic' understanding of people's experiences.<sup>99</sup> A qualitative approach places more emphasis on description and discovery, and less on hypothesis testing and verification.<sup>100</sup> According to Polkinghorne: "Qualitative methods are specifically constructed to take account of the particular characteristics of human experience and to facilitate the investigation of experience."<sup>101</sup> In contrast to a discourse analytic approach, qualitative research analyses "a whole range of social interactions, including non-verbal behaviour...through entering the social actor's behavioural world and becoming familiar with its perspectives."<sup>102</sup>

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<sup>95</sup> Seneviratne (n 1) 171. See also Jonathan Potter and Margaret Wetherell, 'Discourse Analysis' in Jonathan A Smith, Rom Harre and Luk Van Langenhove (eds), *Rethinking Methods in Psychology* (Sage 1995) 81; Lange (n 28) 178

<sup>96</sup> May, *Social Research Issues* (n 7) 142

<sup>97</sup> Anselm S Strauss and Juliet M Corbin, *Basics of Qualitative Research* (Sage 1990)

<sup>98</sup> See David M Fetterman, *Ethnography: Step by Step* (2<sup>nd</sup> edn, Sage 1989); Kjell Erik Rudestam and Rae R Newton, *Surviving your Dissertation* (Sage 1992); Strauss and Corbin (n 96)

<sup>99</sup> David Silverman, *Interpreting Qualitative Data* (Sage 1997) 10

<sup>100</sup> Rudestam and Newton (n 97)

<sup>101</sup> Donald E Polkinghorne, 'Language and Meaning: Data Collection in Qualitative Research' (2005) 52(2) *Journal of Counselling Psychology* 137 – 145, 138

<sup>102</sup> Lange (n 28) 178

Feminist researchers who have studied similar areas to that explored by this project have utilised an ethnographic, qualitative approach.<sup>103</sup> Maynard explains that the use of qualitative methods:

“which focus more on the subjective experiences and meanings of those being researched, was regarded as more appropriate to the kind of knowledge that feminists wished to make available, as well as being more in keeping with the politics of doing research as a feminist.”<sup>104</sup>

An awareness is needed, however, of the limitations of qualitative research. Because qualitative research emphasises the “thick description” of a relatively small number of subjects within the context of a specific setting, the possibilities for generalising to other subjects and situations are limited.<sup>105</sup>

### **3.3A quantitative approach**

The question may be asked whether quantitative methods, which are frequently criticised for failing to capture people’s experiences and understandings,<sup>106</sup> could have any place in this study. Hesse-Biber and Leavy note that “many feminists openly question the viability and utility of neutral, value-free research methods and the positive concept of objectivity itself”,<sup>107</sup> in particular because quantitative research is based on and validates the “masculinist” values of neutrality and “objective detachment”.<sup>108</sup>

While recognising the limitations of quantitative methods, it is also important to acknowledge the strategic advantages of methods that produce generalisable, statistical data, which are considered authoritative by policy-makers, professionals and courts and therefore can lend legitimacy to studies that wish to pursue policy change. Miner-Rubino and Jayaratne argue that opponents of feminist values “might

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<sup>103</sup> See, eg, Smart (n 2); Jackie Barron, *Not Worth the Paper? The effectiveness of legal protection for women and children experiencing domestic violence* (Women’s Aid Federation of England 1990); Marianne Hester and Lorraine Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (The Policy Press 1996)

<sup>104</sup> Mary Maynard, ‘Methods, Practice and Epistemology’ from Mary Maynard and June Purvis (eds), *Researching Women’s Lives from a Feminist Perspective* (Taylor and Frances 1994) in Seale (n 8) 465.

<sup>105</sup> See Rudestam and Newton (n 97) 38; Strauss and Corbin (n 96)

<sup>106</sup> See, eg, Maynard (n 103); Kathi Miner-Rubino and Toby Epstein Jayaratne, ‘Feminist Survey Research’ in Hesse-Biber and Leavy (n 92) 298-299

<sup>107</sup> Hesse-Biber and Leavy (n 92) 12

<sup>108</sup> Maynard (n 103) 465

be particularly likely to distrust qualitative data that convey a feminist message ... [and] may be more apt to listen to and consider quantitative research legitimate.”<sup>109</sup>

### 3.4 Feminist research methodology

Feminist commentators have pointed to the fact that there is no one methodology that can exclusively be said to be ‘feminist methodology’.<sup>110</sup> Reinharz’s approach, which was to look at research methods used *by* feminists, led her to conclude that in research, “feminism is not a method but a perspective, which guides feminist researchers in the varied methods that they utilise.”<sup>111</sup> This means that there is no single ‘feminist way’ to do research.<sup>112</sup> “The fact that there are multiple definitions of feminism means that there are multiple feminist perspectives on social research methods.”<sup>113</sup> What is most important to acknowledge in feminist research is that “most women are still excluded from the production of forms of thought, images and symbols in which their experience and social relations are expressed and ordered”.<sup>114</sup> Reinharz calls it a developing “sociology of the lack of knowledge”<sup>115</sup> in which we examine how and why knowledge is not produced, is obliterated, or is not incorporated into a canon, to enable us to understand how such lack of knowledge is constructed and to constitute women as subjects in their own right.

The literature on feminist research identifies four aspects that may be said to characterise feminist research:

#### 3.4.1 The use of gender as a tool for analysis for deconstructing dominant discourses<sup>116</sup>

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<sup>109</sup> Miner-Rubino and Jayaratne (n 105) 302. See also Reinharz (n 4) 247; Rudestam and Newton (n 97) 22; Maynard (n 103) 466; Hesse-Biber and Leavy (n 92) 34; Denise Leckenby and Sharlene Nagy Hesse-Biber, ‘Feminist Approaches to Mixed-Methods Research’ in Hesse-Biber and Leavy (n 92)

<sup>110</sup> See, eg, Reinharz (n 4). Harding, too, argues against a distinctive feminist method of research – Sandra Harding, ‘Is there a feminist method?’ from Sandra Harding, *Feminism and Methodology* (Indiana University Press and Open University Press 1987) in Seale (n 8)

<sup>111</sup> Reinharz (n 4) 241

<sup>112</sup> See Hesse-Biber and Leavy (n 92) 4

<sup>113</sup> Reinharz (n 4) 241

<sup>114</sup> *ibid* 247. See also Harding (n 109)

<sup>115</sup> *ibid* 248

<sup>116</sup> See Maynard (n 103) 466. See also Creswell (n 12) 83; Harding (n 109) 460



- 3.4.2** Some feminist approaches, in the same way as poststructuralist perspectives do, refute “the viability of the objective researcher and neutral, value-free tools of empirical observation.”<sup>117</sup> They emphasise social knowledge and ‘truths’ as being historically specific and contingent, rather than abstract and fixed,<sup>118</sup> and the task of the researcher is to uncover the “subjugated knowledge that often lies hidden from mainstream knowledge building.”<sup>119</sup>
- 3.4.3** Feminist researchers attempt to reduce the distance between researcher and reader: “the goals are to establish collaborative and nonexploitative relationships, to place the researcher within the study so as to avoid objectification, and to conduct research that is transformative.”<sup>120</sup>
- 3.4.4** Feminist research is political in nature in seeking to bring about change in women’s lives and to produce knowledge that assists in the emancipation of women.<sup>121</sup>

In summary, as knowledge is productive of power, many feminist researchers see a dual vision or dual responsibility – to contribute to the interests of women and to contribute to knowledge.<sup>122</sup> There are thus a number of ways in which feminist perspectives may impinge on the research process of this study: by acknowledging and sharing my theoretical perspectives and understandings with the reader;<sup>123</sup> by the use of gender as a tool for deconstructing current discourses informing the issue of child contact and domestic violence; and by attempting to contribute to the process

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<sup>117</sup> Hesse-Biber and Leavy (n 92) 13

<sup>118</sup> See Marcia Westcott, ‘Feminist Criticism of the Social Sciences’ in Joyce M. Nielsen (ed) *Feminist Research Methods* (Westview Press 1990) 61.

<sup>119</sup> Sharlene Nargy Hesse-Biber, ‘The Practice of Feminist In-Depth Interviewing’ in Hesse-Biber and Leavy (n 92) 147. See also Leckenby and Hesse-Biber (n 108) 253

<sup>120</sup> Creswell (n 12) 83. See also Harding (n 109) 461-62

<sup>121</sup> See Westcott (n 117) 65; Maynard (n 103) 37; Judith A Cook and Mary Margaret Fonow, ‘Knowledge and Women’s Interests: Issues of Epistemology in Feminist Sociological Research’ in Nielsen (n 117) 65

<sup>122</sup> See, eg, Reinharz (n 4) 8

<sup>123</sup> *Ibid.* This approach to the role of researcher is frequently shared by qualitative research generally – see Rudestam and Newton (n 97)

of regaining a valid feminine voice and subjectivity within the context of current family law by making visible oppositional meanings.<sup>124</sup>

### **3.5 Combining theoretical and methodological approaches**

The theoretical perspectives that inform this study suggest a combination of approaches that would facilitate an in-depth investigation of the perceptions and practices of professionals and tribunals operating in the family justice system, to enable me to determine both how they appear to be applying the Practice Direction, and how their perceptions and practices influence and are influenced by current dominant discourses in family law.<sup>125</sup> At the same time, it was important to ensure that this study would be viewed as sufficiently authoritative by family law professionals, courts and policy makers. This suggests a combination of discourse analytic and qualitative approaches, as well as the strategic use of quantitative methods.

#### **3.5.1 Combining a qualitative and discourse analytic approach**

Both qualitative and discourse analytic approaches recognise the multiple nature of social reality, and lend themselves to “the deep involvement in issues of gender, culture, and marginalized groups”.<sup>126</sup> However, while a qualitative approach sees language as representing the social world, from a discourse analytic perspective, language is constitutive of the social world.<sup>127</sup> They also offer different views about how theory is generated from the data. Whereas discourse analysis is frequently informed by preconceived theoretical concepts, in qualitative research, data are often analysed from a ‘grounded theory’ perspective.<sup>128</sup>

It can therefore be questioned how these two approaches “and in particular their criteria for what constitutes ‘good’ data and analysis procedures, can be combined in practice.”<sup>129</sup> By analysing the meaning of the text from a qualitative perspective, and deconstructing the “discursive techniques through which [the discourse] is

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<sup>124</sup> See Reinharz (n 4) 268

<sup>125</sup> Gray (n 12) 33, observes that: “Approaches to research include both truth-seeking and perspective-seeking methods.”

<sup>126</sup> Creswell (n 12) 19

<sup>127</sup> See further Lange (n 28)

<sup>128</sup> *ibid* 186. See also Dreyfus and Rabinow (n 30)

<sup>129</sup> Lange (n 28) 183

established” the researcher can approach the texts to gain qualitative data about events, practices and attitudes, as well as to examine their discursive construction.<sup>130</sup>

Qualitative data-gathering methods such as interviews provide us with rich original text, which can then be analysed to uncover the participants’ understandings of the operation of the family justice system and their roles in it, and to deconstruct the discourses and discursive practices that both shape, and are shaped by, that understanding and those roles. Similarly, case reports can be analysed both for the qualitative data they provide about the ‘facts’ of and decisions made in each case, as well as for the discursive construction of the judgments.

### **3.5.2 Combining qualitative/discourse analytic approaches with a quantitative approach**

Qualitative and quantitative methods are not mutually exclusive and can enhance each other to good effect; it all depends on the subject matter and aim of the research.<sup>131</sup> Bryman observes that it is the strengths and weaknesses of each approach that should provide the rationale for integrating them.<sup>132</sup> Additionally, a number of commentators question the idea of a simplistic distinction between qualitative and quantitative methodologies, which may “replicate the very biases that feminist researchers, for example, seek to address and overcome.”<sup>133</sup>

Bryman suggests that utilising both approaches can enhance the validity of the research findings, for example by “the results of a qualitative investigation [being] checked against a quantitative study.”<sup>134</sup> So interviews or observation could precede or follow a survey.<sup>135</sup> Quantitative data could also ‘plug gaps’ in a qualitative study and may enable claims of representativeness to be made where this could not be

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<sup>130</sup> Lange (n 28) combined discourse analysis with a qualitative approach in her study of BAT discourse. “The combined approach also allows us to ground [the discourse being studied] in the social process.” [179, emphasis in original]

<sup>131</sup> See Silverman (n 98)

<sup>132</sup> Alan Bryman, ‘Quantitative and Qualitative Research: Further Reflections on their Integration’ from Alan Bryman (ed), *Mixing Methods: Qualitative and Quantitative Research* (Avebury 1992) in Seale (n 8) 506. See also See also Rudestam and Newton (n 97) 39; Strauss and Corbin (n 96), who advocate a combined approach, where appropriate.

<sup>133</sup> May, *Social Research Issues* (n 7) 144. See also Maynard (n 103) 470; Potter(n 86) 139; Reinharz (n 4) 47; Cook and Fonow (n 120) 82 & 89; Miner-Rubino and Jayaratne (n 105) 295

<sup>134</sup> Bryman (n 131) 506-7

<sup>135</sup> See May, *Social Research Issues* (n 7) 112. See also Leckenby and Hesse-Biber (n 108) 286

done on the basis of the qualitative methods alone.<sup>136</sup> Reinharz suggests that multiple methods “increase the likelihood of obtaining scientific credibility and research utility” by, for example, using data derived from one method to validate or expand on information obtained by other methods.<sup>137</sup>

However, Leckenby and Hesse-Biber caution that “[m]ore is not necessarily better ... mixing methods is no substitute for the hard work of conceptual thinking and data analysis”.<sup>138</sup> Financial and time constraints are also an important factor.

### **3.6 Summary of Choice of methodological approaches**

It is suggested that a combination of discourse analytic and qualitative approaches, which draw on feminist perspectives in the research process, with some quantitative methods, where practicable, would best serve the subject-matter and theoretical framework of this study. As discussed below, however, it was not always possible to undertake the most appropriate methods, and some compromises were necessitated.

## **4. Operationalisation of concepts**

The research question: what are the practices and perceptions of judicial officers and professionals in applying Practice Direction 12J: *Residence and Contact Orders: Domestic Violence and Harm* [2008]<sup>139</sup> [‘the Practice Direction’], and what are the implications of these perceptions and practices for women involved in child contact proceedings where domestic violence is an issue?

### **4.1 Child contact proceedings**

All private law Children Act proceedings where there is a dispute relating to contact between children and their non-resident parent, including:

- those cases where the parent with care opposes all contact between the child/children and the non-resident parent;

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<sup>136</sup> See Bryman (n 131) 507; Leckenby and Hesse-Biber (n 108) who suggest that a qualitative study can be followed up with quantitative research to “add to or clarify the results of the qualitative study.” [ 259]

<sup>137</sup> Reinharz (n 4) 197. See also Leckenby and Hesse-Biber (n 108) 287.

<sup>138</sup> Leckenby and Hesse-Biber (n 108) 283, emphasis in original

<sup>139</sup> Potter P, *Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* [2008] 2 FLR 103, reissued on 14<sup>th</sup> January 2009 at [2009] 2 FLR 1400

- those cases where contact in principle is not opposed but the form of contact and/or the details and arrangements for contact are in dispute.

The Practice Direction is not limited to proceedings concerning contact only, nor to private law Children Act proceedings, but applies to both public and private law proceedings where orders for residence and contact are in issue. It should be noted, also, that many Children Act cases involve issues relating to both residence *and* contact.<sup>140</sup> The decision to limit the scope of this study to private law proceedings concerning contact only was made because proceedings concerning residence raise issues which would extend the scope of this study beyond that which could be accomplished within the constraints of this thesis.<sup>141</sup> Additionally, since the vast majority of resident parents are mothers,<sup>142</sup> contact between children and non-resident fathers has the most profound implications for women's safety, well-being and autonomy by extending the scope of parenting across households.

## 4.2 Courts

Contact cases are heard in the High Court, the county courts and the Family Proceedings Courts ['FPCs']. The vast majority of such cases are heard in the county courts, with a smaller proportion in the FPCs and negligible numbers in the High Court. For this reason, this study focuses primarily on the county courts and FPCs.<sup>143</sup>

The judicial officers within those courts who form the subjects of this study are:

County Courts: circuit judges; recorders; district judges

Family Proceedings Courts: district judges; lay magistrates; legal advisors<sup>144</sup>

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<sup>140</sup> Cases involving residence and contact have not been excluded from this study, although the focus remains on issues relating to contact.

<sup>141</sup> Residence disputes may include such issues as: who is/was the primary carer of the child; attempts by fathers to portray women as neglectful mothers; whether women can care for children because of specific difficulties such as mental health problems and drug or alcohol misuse.

<sup>142</sup> See, eg, Joan Hunt and Alison Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (Ministry of Justice 2008)

<sup>143</sup> The Judicial and Court Statistics for 2006 reveal that of 103,551 private law applications made during that year, 86,544 were made in the county court, 16,400 in the FPCs and 607 in the High Court – Ministry of Justice, *Judicial and Court Statistics 2006* (Cm 7273, 2007)

<sup>144</sup> Legal Advisors to the Justices advise the Justices on matters of law and procedure, and have limited powers to adjudicate on some non-contentious issues

### **4.3 Professionals working in the family justice system**

Barristers: all those barristers in private practice in England and Wales who specialise in family law work

Solicitors: all those solicitors in private practice in England and Wales who specialise in family law work

Family Court Advisors [‘FCAs’]: officers employed by the Children and Family Court Advisory and Support Service [‘Cafcass’]. Cafcass is independent of the courts and of public authorities (such as social services, education and health). The role of FCAs relevant to this study is to advise the family courts in England on what they consider to be the best interests of individual children.<sup>145</sup> FCAs also undertake safeguarding checks and risk assessments, and perform an in-court conciliation service at First Hearing Dispute Resolution Appointments [‘FHDRAs’].

### **4.4 The Practice Direction**

The Practice Direction was issued by the President of the Family Division on the 9<sup>th</sup> May 2008 and came into effect on that date.<sup>146</sup> It applies to any family proceedings in which an application is made for a residence or contact order under the Children Act 1989 or the Adoption and Children Act 2002, “or in which any question arises about residence or about contact between a child and a parent or other family member”.<sup>147</sup> The Practice Direction applies in such cases where “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”.<sup>148</sup> The Practice Direction sets out the general principles and the process to be followed in all cases to which it applies. The Practice Direction can be found at Appendix A.

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<sup>145</sup> Cafcass Cymru provides the same service to the courts in Wales

<sup>146</sup> The Practice Direction was reissued with amendments on the 14<sup>th</sup> January 2009, and is included in the Family Proceedings Rules 2010 as Practice Direction 12J

<sup>147</sup> The Practice Direction [1]

<sup>148</sup> The Practice Direction [2]

#### 4.5 Domestic violence

The problems inherent in the concept of ‘domestic violence’ have been of concern to many feminist and other researchers and writers.<sup>149</sup> For example, Mullender and Morley point out its negative connotations in trivialising the violence, and in detracting from other ways in which men can abuse women in relationships, such as emotional, psychological, sexual and financial abuse.<sup>150</sup> Morley and Mullender encapsulate the gendered power relations involved by describing these abusive behaviours as “control tactics, ways of instilling fear and coercing compliance”<sup>151</sup> and suggest the broad definition: “men’s abuse of women in intimate relationships”.<sup>152</sup> The coercively controlling nature of domestic violence has been increasingly understood in ‘mainstream’ spheres since this project commenced, and is now incorporated into the cross-government definition of domestic violence as: “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.”<sup>153</sup> This understanding of domestic violence was also included in Cafcass’s Domestic Violence Toolkit.<sup>154</sup>

Because the operation of the Practice Direction is the subject of this study, it was decided that the definition of domestic violence contained in the Practice Direction should be the starting point for operationalising this concept, and that respondents should be specifically asked to express their view on this definition. The description of domestic violence in the Practice Direction is set out in Chapter 4.

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<sup>149</sup> See, eg, Mullender and Morley (n 2); Isabel Marcus (1994) ‘Reframing “Domestic Violence”: Terrorism in the Home’ in Martha Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence* (Routledge 1994); Hester and Radford (n 102); The Law Commission, *Domestic Violence and Occupation of the Family Home* (Cm 207, 1992)

<sup>150</sup> Mullender and Morley (n 2)

<sup>151</sup> Morley and Mullender (n 2) 7

<sup>152</sup> *ibid* 11. See also Ellen Pence and Michael Paymar, *Power and Control: Tactics of Men who Batter. An Educational Curriculum* (Minnesota Program Development Inc 1990); Marianne Hester, Chris Pearson and Lorraine Radford, *Domestic Violence: A National Survey of Court Welfare and Voluntary Sector Mediation Practice* (The Policy Press 1997) for a further discussion on the problems in defining ‘domestic violence’.

<sup>153</sup> Home Office, [www.gov.uk/government/news/new-definition-of-domestic-violence](http://www.gov.uk/government/news/new-definition-of-domestic-violence), last accessed 18.07.13

<sup>154</sup> Cafcass’s Domestic Violence Toolkit (August 2007 Version 2.1) was replaced in 2012 with a Child Protection Policy, <https://www.cafcass.gov.uk/leaflets-resources/policies-and-templates-for-secs/policies.aspx>, last accessed 29.11.13

## 5. Choice of research methods

This section will seek to identify the specific methods of research most appropriate to the subject matter and theoretical perspectives of this project, and any limitations on and compromises to the research methodology. It is important to acknowledge that considerations such as available resources and the nature of what is being investigated can affect choice of method.

A key issue is whether the chosen methods yield valid research data, that is, whether the data shed accurate light on the research question. The type of ‘good’ data required from a qualitative approach “should report truthfully about the social world researched and the way in which it is constructed by social actors.”<sup>155</sup> Discourse analysis also strives for ‘naturalistic’ data, but the focus is not on whether the accounts given are ‘truthful’ but on the way in which the discourse is constituted.<sup>156</sup>

Finally, it should be noted that there are advantages in triangulation by the use of more than one method. Cook and Fonow suggest that triangulation is particularly appropriate for feminist research in that, by combining both qualitative and quantitative methods, the problems of the “dichotomous subject/object is resolved”.<sup>157</sup> Gray points out that multiple methods assist not only in data triangulation but help “balance out any of the potential weaknesses in each data collection method”.<sup>158</sup> Combining methods is one way of enhancing the internal validity of the study, for example, a review of written records being complemented by interviews or observation.

### 5.1 Documentary research

Documentary review can be an important research tool, particularly for studies utilising a qualitative/discourse analytic approach.<sup>159</sup> Texts can be utilised in two ways: to access attitudes and find out about events that are revealed by the content of the texts (a qualitative approach) and by approaching and analysing texts in order to

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<sup>155</sup> Lange (n 28) 184

<sup>156</sup> *ibid* 184

<sup>157</sup> Cook and Fonow (n 120) 89

<sup>158</sup> Gray (n 12) 33

<sup>159</sup> See May, *Social Research Issues* (n 7) 190



explore their construction within the social context in which they were produced (a discourse analytic approach).<sup>160</sup> Documents can be of interest “for what they leave out, as well as what they contain. They do not simply reflect, but also construct social reality and versions of events.”<sup>161</sup>

Legal texts can be viewed as a source of sociological data, which can enable researchers to shed light on how institutional facts are constructed and how law is socially organised.<sup>162</sup> From the perspective of autopoietic theory, legal texts “can be studied as empirical indicators of the way law organises itself internally, interacts with its social environment and constructs its images of social relations.”<sup>163</sup>

Feminist researchers have found the study of written texts helpful in addressing feminist issues, for example, to understand “the social relations that underlie the production of the text as well as the ways in which it is heard or read.”<sup>164</sup>

It was decided, therefore, that documentary research, including the study of legal texts, should form an important component of this project, and should comprise three aspects:

**5.1.1** The preliminary stages of the research involved a review of the academic literature and research on historical and current legal and child welfare discourses relating to child contact and domestic violence, as well as governmental and parliamentary reports and consultation papers relating to private law Children Act proceedings.<sup>165</sup>

**5.1.2** Primary data was obtained from a review and analysis of all reported cases relevant to the issue of contact and domestic violence after the

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<sup>160</sup> Ibid 1. See also Banakar and Travers (n 43) 136

<sup>161</sup> May, *Social Research Issues* (n 7) 183; see also at 197

<sup>162</sup> See Banakar (n 78)

<sup>163</sup> Banakar and Travers (n 43) 137

<sup>164</sup> Cook and Fonow (n 120) 84

<sup>165</sup> Mary Seneviratne, in her study of ombudsmen, similarly “relies heavily on the study of legal documents which include statutes, annual reports, investigation reports, complaints, statistics, articles by ombudsmen and ombudsmen files.” - Banakar and Travers (n 43) 136

Practice Direction was issued in May 2008, as well as the most pertinent cases reported prior to its implementation.

**5.1.3** A review of selected court records was to be a principal source of both quantitative and qualitative data for this project. For the reasons explained below, however, it was not possible to undertake this review.<sup>166</sup>

It is important to acknowledge the limitations of documentary research and textual analysis. Banakar and Travers point out that the empirical data provided by the study of cases can be limited because the information they contain can be very selective.<sup>167</sup> Banakar therefore doubted “that one could conduct a sociologically informed empirical study solely on the basis of legal cases”.<sup>168</sup> For these reasons, it was acknowledged that primary documentary research in the form of a case review and analysis and a review and analysis of court records should be supplemented and complemented by other forms of methodological inquiry.<sup>169</sup>

## **5.2 Interviews with judicial officers, barristers, solicitors and officers of Cafcass**

Interviews are the most appropriate method for “understanding how individuals make sense of their social world and act within it”, thus providing an understanding of, and explanation for, social events and relations.<sup>170</sup> Many qualitative researchers see in-depth interviews as the best way in which to understand how people interpret and act within their social universe,<sup>171</sup> and they are also more effective than survey research in dealing with complex issues.<sup>172</sup> Although they tend to be more costly and time-consuming to undertake than survey research, interviews allow for the more

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<sup>166</sup> May, *Social Research Issues* (n 7) 185, points out that the methods used to collect documents “depend not only upon the researcher’s perspectives, but also on time and resources available, the aims of the research and the problems encountered in the collection of data... there are often practical impediments to the realisation of research aims and the data may simply not be available or gatekeepers do not grant access to it.”

<sup>167</sup> Banakar and Travers (n 43) 137

<sup>168</sup> Banakar (n 78) 159. Banakar undertook a qualitative study of discrimination cases processed by ombudsmen in Sweden and found that the information in the case files was limited.

<sup>169</sup> Mary Seneviratne overcame the limitations of a case review by utilising a variety of additional methods such as interviews and a survey – see Banakar and Travers (n 43) 135. Similarly Banakar (n 78) complemented his review of case files with other types of data gathering such as interviews.

<sup>170</sup> May, *Social Research Issues* (n 7) 142

<sup>171</sup> See Fetterman (n 97) 47; May (n 7); Rudestam and Newton (n 97)

<sup>172</sup> See Earl Babbie, *The Practice of Social Research* (7<sup>th</sup> edn, Wadsworth 1995)

direct involvement of the interviewer in terms of probing and clarification of responses.<sup>173</sup>

Interviewing is a popular method among feminist researchers, for its versatility and compatibility with feminist concerns.<sup>174</sup> For example, it enables respondents to be actively involved in constructing the data about their own lives, thus avoiding the hierarchical nature of traditional scientific research methods.<sup>175</sup>

Interviews are also used extensively in discourse analysis, as they enable the researcher to “identify and explore the participants’ interpretive practices”.<sup>176</sup>

Silverman suggests that instead of treating interviews as ‘true’ or ‘false’ reports on reality, we can “treat interviews as giving us access to the *repertoire* of narratives that we use in producing accounts”.<sup>177</sup> Ultimately, however, the theoretical perspectives informing the study, and its nature and purpose, should guide the researcher in the epistemological approach to be taken to interviews, which can combine both qualitative and discourse analytic approaches.<sup>178</sup>

Seneviratne highlights the advantages of using interviews together with documentary research, as they enable the researcher “to investigate in more detail the information found in the documents, and to discover perceptions of the system. They can reveal any gaps in the documentation, and the underlying motives and assumptions of the [research subjects]”.<sup>179</sup>

It was decided that interviews should form an integral part of my research methodology, for their ability to gather in-depth qualitative data and their compatibility with feminist research practices and with a discourse analytic approach. I therefore needed to consider whether to utilise informal, unstructured

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<sup>173</sup> See Miner-Rubino and Jayaratne (n 105) 307

<sup>174</sup> See, for example, Hester and Radford (n 102), who conducted semi-structured interviews with 77 professionals in England. See also Alex Saunders, ‘Children in Women’s Refuges: A Retrospective Study’ in Mullender and Morley (n 2)

<sup>175</sup> See Reinharz (n 4).

<sup>176</sup> Potter (n 86) 134

<sup>177</sup> Silverman (n 98) 108, emphasis in original

<sup>178</sup> Ibid

<sup>179</sup> Seneviratne (n 1) 169

interviews, semi-structured interviews, or a structured questionnaire. Hesse-Biber suggests that we can:

“think of the interview method running along a ‘continuum’...A move from the informal end of interviewing to the more formal, structured end is to move from an *exploratory data gathering and in-depth understanding* goal of a project to a more *theory testing set of goals*.”<sup>180</sup>

Structured interviews are often utilised by researchers with a positivist approach.<sup>181</sup> The researcher has total control over the interview and all participants are asked the same set of questions in the same specific order.

Informal interviews are the most common method in ethnographic work, for their ability to uncover respondents’ thoughts and to compare their perceptions.<sup>182</sup> By allowing interviewees “to talk about the subject within their own frames of reference... it thereby provides a greater understanding of the subject’s point of view.”<sup>183</sup> However, they are more time-consuming to analyse than structured or semi-structured interviews,<sup>184</sup> and may be unfeasible to undertake with large numbers of respondents.<sup>185</sup>

Semi-structured interviews are conducted with an interview schedule listing specific questions, but it does not matter in which order they are asked, and the interviewer is free to probe.<sup>186</sup> They are “most valuable when the fieldworker comprehends the fundamentals of a community from the ‘insider’s’ perspective”.<sup>187</sup> They have the advantages of providing a greater structure to the interview, which facilitates analysis and comparison of responses, while at the same time enabling participants to respond more on their own terms, thus providing more qualitative depth than fully structured interviews.<sup>188</sup> Additionally, semi-structured or unstructured interviews are the forms most often associated with feminist perspectives because they enable more

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<sup>180</sup> Hesse-Biber (n 118) 115 – 117, emphasis in original

<sup>181</sup> See, eg, Silverman (n 98) 94

<sup>182</sup> See Fetterman (n 97) 48

<sup>183</sup> May, *Social Research Issues* (n 7) 124

<sup>184</sup> See Babbie (n 171); Eileen Kane, *Doing your own Research* (2<sup>nd</sup> edn, Marion Boyars 1985)

<sup>185</sup> See May, *Social Research Issues* (n 7), who observes that these considerations frequently dictate the methods used.

<sup>186</sup> See Hesse-Biber (n 118)

<sup>187</sup> Fetterman (n 97) 48

<sup>188</sup> See Babbie (n 171); Kane (n 183)

freedom to participants to respond than structured interviews.<sup>189</sup> For all these reasons it was decided that semi-structured interviews would be the most appropriate interview format for this study.

### 5.3 Survey Research

Many commentators observe that self-administered postal or online questionnaires, which are utilised as a primary means of obtaining quantitative data, are not appropriate for a qualitative, ethnographic study.<sup>190</sup> Survey research does not enable the researcher to understand how people's perceptions are formed because the interviewer and participant cannot interact in the way they can during interviews and the researcher cannot probe beyond the answers given. In this way survey research tends to simplify a complex social world and does not enable the researcher to understand "the ways in which people interpret the world around them and act within their social universe."<sup>191</sup> For these reasons, and because of its implicit endorsement of the positivist 'masculine' approach, feminist researchers have also been concerned about the use of survey research.<sup>192</sup> However, Reinharz points to the advantages of utilising surveys when "it is extremely important to the feminist researcher that her results be accepted as generalizable to a larger population."<sup>193</sup> Additionally, questionnaires are the only realistic way of obtaining the views of a large number of people,<sup>194</sup> and of demonstrating that a problem is widespread.<sup>195</sup>

It was therefore concluded that the use of a survey would be a useful, but not the primary, data-gathering method for this project.<sup>196</sup> My ideal approach would have been for the qualitative data obtained from the semi-structured interviews to be tested over a broader population by means of a survey. However, this was not possible for reasons of time and resources. Fortunately, during the latter stages of this study, research was published by the Family Justice Council, which gathered

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<sup>189</sup> See Maynard (n 103)

<sup>190</sup> Babbie (n 171); Fetterman (n 97); Kane (n 183); May, *Social Research* (n 7)

<sup>191</sup> May, *Social Research Issues* (n 7) 113

<sup>192</sup> See Reinharz (n 4)

<sup>193</sup> *ibid* 43. See also Miner-Rubino and Jayaratne (n 105) 306

<sup>194</sup> Fetterman (n 97). Similarly Strauss and Corbin (n 96) note that survey research can be used to collect data for qualitative analysis.

<sup>195</sup> Reinharz (n 4) 81. See also Toby Jayaratne, 'The Value of Quantitative Methodology for Feminist Research' in Gloria Bowles and Renate Duelli Klein (eds), *Theories of Women's Studies* (Routledge & Kegan Paul 1983)

<sup>196</sup> May, *Social Research Issues* (n 7) suggests that surveys can be used in a multi-method approach.

quantitative (and some qualitative) data on the operation of the Practice Direction by means of a national online survey.<sup>197</sup> Since many of the themes of that project were the same as those of this study, it was possible to utilise the data obtained from the survey to enhance the findings of this project. The survey gathered responses between October and December 2011 and received 623 usable responses from circuit judges, district judges, family magistrates, Justices' legal advisers, Cafcass officers, solicitors and barristers across all HMCTS regions.

#### 5.4 Observation

A principal method of qualitative research is observation, for the way in which it enables a deep understanding of events, processes and interactions to emerge.<sup>198</sup> Observation also assists in the construction of good, clear questionnaires, and enables the researcher to become familiar with the thoughts, terminology and practices of the study subjects.<sup>199</sup>

However, since the researcher is already familiar with the language, practices and work ethic of the study population,<sup>200</sup> it was considered that observation was not an essential component of this study's methodology.<sup>201</sup> Additionally, as observation can be time-consuming, undertaking this method would have been problematic for reasons of time and resources.<sup>202</sup>

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<sup>197</sup> Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council 2013), [www.familyjusticecouncil.org.uk](http://www.familyjusticecouncil.org.uk) last accessed 11.12.13. It should be noted that the researcher participated in this research, which was a separate research project and does not form part of the methodology of this study.

<sup>198</sup> Fetterman (n 97); May, *Social Research* (n 7); Strauss and Corbin (n 96)

<sup>199</sup> Strauss and Corbin (n 96)

<sup>200</sup> The researcher practised as a barrister specialising in family law until January 2014.

<sup>201</sup> It is recognised, however, that there may be drawbacks to undertaking ethnographic work in one's own 'back yard'. "[S]ometimes a familiar setting is too familiar, and the researcher takes events for granted, leaving important data unnoticed and unrecorded." - Fetterman (n 97) 46. The researcher kept this possibility in mind in undertaking the interview and survey research in order to limit this possibility.

<sup>202</sup> Private law Children Act proceedings can involve numerous hearings over many months (and sometimes years)

## **5.5 Summary of choice of methods**

It was decided to utilise documentary research, together with in-depth interviews of barristers, solicitors, Cafcass officers, judges and magistrates.<sup>203</sup>

## **6. Discussion of chosen research methods**

### **6.1 Case review**

All reported cases relating to contact proceedings in which domestic violence is an issue that were decided after the implementation of the Practice Direction were reviewed, as well as the most relevant cases reported prior to May 2008. The sources for the case review were the official law reports,<sup>204</sup> as well as cases reported online on Lawtel and Bailli. This was a substantial enterprise involving a detailed and thorough examination of the cases in order to ascertain the ‘facts’ of the case, as presented by the judgments, and also to analyse and deconstruct the discourses that informed the judgments.

### **6.2 Review of court records**

It was intended that court files relating to a sample of private law Children Act cases in selected county courts and FPCs would be reviewed. For the reasons detailed below, despite a lengthy and exhaustive application process, it was not possible to obtain access to such records. However, since the process of selecting the particular courts and cases for the proposed research involved a substantial amount of time and resources, and it assisted in identifying the regions from which the interview participants were selected, it is set out below.

It was anticipated that information on the following themes was likely to be gleaned from a review of court records: identifying domestic violence as an issue; the practice of courts in relation to consent orders; the practice of courts and professionals in relation to fact-finding hearings; the types of interim and final orders made and the factors courts take into account when making such orders; the types of safeguards put in place when orders for direct contact are made; the extent to which

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<sup>203</sup>For a similar approach, see Lenore J Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Press 1985) who reviewed court records, interviewed members of the matrimonial bar, judges, commissioners and recently divorced men and women in her study of California’s ‘no fault’ divorce law.

<sup>204</sup> Principally Family Law Reports and Family Court Reports

attendance at a perpetrator programme is required.<sup>205</sup> It was envisaged that the documents most likely to reveal this information would be application and C1A forms, parties' statements, orders and directions, Cafcass reports including safeguarding enquiries, other Section 7 reports (eg, from social services) and judgments (if any).

### **6.2.1 Sampling method**

As noted above, my study population of courts was defined as: all county courts and FPCs that hear private law Children Act cases. A complete list and basic details of all such courts were obtained from the HMCS website,<sup>206</sup> which was current at the date of review.<sup>207</sup> The resulting sampling frame comprised 75 county courts and over 300 FPCs in England and Wales. Given sufficient time and resources, I would have conducted a power analysis to ensure that my sample size was representative of the parent population.<sup>208</sup> Since my sample size would have to be limited by restraints of time and resources in any event, it was decided that this was not feasible or necessary.

In order to ensure that I covered as representative as possible a selection of courts in terms of geography and demographics, I would ideally have wished to select at least one county court and one FPC within each of the seven HMCS regions in England and Wales.<sup>209</sup> However, this would have meant reviewing the records of at least 14 courts, which would have been extremely difficult for reasons of time and resources. On the basis that the maximum number of courts whose records would be practicable to review was six, I decided to select courts in: a large inner city area with a high number of applications;<sup>210</sup> a smaller rural area in the South West with low numbers of applications; and a provincial town in the North East with a medium number of applications, thus covering a diverse geographical and demographic area. Similar

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<sup>205</sup> It should be noted that more extensive information on these and other themes should be available if a judgment is given at the conclusion of a fact-finding or final hearing.

<sup>206</sup> Ministry of Justice, [www.justice.gov.uk](http://www.justice.gov.uk)

<sup>207</sup> The website was reviewed in May 2008, when the initial sampling frame was compiled

<sup>208</sup> See Babbie (n 171)

<sup>209</sup> The seven HMCS regions are: London, Midlands, North East, North West, South East, South West, Wales

<sup>210</sup> Information regarding the number of private law applications made in England and Wales was gleaned from a review of the Judicial and Court Statistics 2006, which sets out the numbers of such applications made in that year per county court and per HMCS region.



studies that have involved a review of court records have selected three courts covering similar diverse catchment areas.<sup>211</sup>

I obtained the information upon which the selection of the specific courts was based from a review of all the HMCS Annual Family Court Reports, which are available for all county courts in England and Wales.<sup>212</sup> This was a substantial task involving the review of nearly 75 county court reports. The latest reports at the date of review (2008) covered the period from April 2006 to March 2007.<sup>213</sup> The reports provide the figures for the total numbers of private law Children Act applications per court per year. These figures were categorised into courts with low numbers of such application per year (1 – 299), medium numbers of applications per year (300 – 699) and high number of applications per year (700 and above).

In order to ensure that the courts reviewed also covered a broad range in terms of the numbers of solicitors available to represent parties in private law Children Act disputes, I reviewed the entire list of Resolution members based in each county court city and town.<sup>214</sup> This enabled me to estimate the number of solicitors most commonly available to undertake family law work for each of those court areas.<sup>215</sup>

Utilising the information from the HMCS Family Court Reports and Resolution's list of members, I selected the Principal Registry of the Family Division ('the PRFD') in London, a provincial town in the North East and a rural town in the South West for the case review.<sup>216</sup>

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<sup>211</sup> Carol Smart and Vanessa May, 'Why Can't they Agree? The Underlying Complexity of Contact and Residence Disputes' (2004) 26(4) *JSWFL* 347 – 360.

<sup>212</sup> Such reports are not available for the FPCs

<sup>213</sup> For a small number of courts, only the 2005 – 2006 reports were available.

<sup>214</sup> Resolution's website lists all its members per town throughout England and Wales – see [www.resolution.org.uk](http://www.resolution.org.uk) last accessed 20.05.08

<sup>215</sup> These figures will not be completely accurate, because there may be solicitors based in surrounding towns who act in such cases, but for reasons of time and resources, it was not possible to review Resolution's entire membership list. Additionally, not all solicitors who undertake contact cases are members of Resolution.

<sup>216</sup> Details of the selected courts and reasons for their selection are set out in Appendix B, although it should be noted that the names of the courts have been omitted to preserve anonymity.

It was not possible to determine the numbers of applications made each year to the FPCs, because these figures are not currently published by HMCS.<sup>217</sup> I therefore decided to select FPCs in each of the towns selected for the county court review for reasons of time and resources. This process enabled me to acquire a sample of courts that was as representative as possible in terms of geography and demographics, within the limits of time and resources available to me.

### **6.2.2 Selection of cases for review**

I intended to select 20 cases from each county court<sup>218</sup> and six cases from each FPC for review. The reason for the lower number of cases for review in the FPCs was because those courts receive far fewer private law Children Act applications than the county courts.<sup>219</sup>

I decided to select for review those cases initiated after the Practice Direction had been in effect for at least three months, to enable the courts and practitioners to become familiar with its operation. Ideally I would have wished to review cases that started and finished during the review period. Since it is clear from the HMCS court reports that the target for each court is to complete a case within 40 weeks,<sup>220</sup> I decided to review a sample of cases initiated in each selected court from the beginning of September 2008, the majority of which it was anticipated would have been completed by the time of my planned main stage review of courts records in August 2009. The first stage of the selection process was to be a feasibility study to identify the specific cases to be reviewed. I hoped to be able to undertake this phase of the research by June 2009.

### **6.2.3 Obtaining access to court records**

After communicating with the Ministry of Justice Research Unit and the secretary to the President of the Family Division, I was informed on 3<sup>rd</sup> September 2008 that,

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<sup>217</sup> Information from the county courts is provided to HMCS from the computer system, FamilyMan; the FPCs do not use FamilyMan. Information for 2007 and previous years was sourced manually – see Ministry of Justice, *Judicial and Court Statistics 2007* (Cm 7467, 2008) 203

<sup>218</sup> This figure was determined on the basis that it constituted the largest sample of cases that would be feasible to review within the time constraints of this project, but was also large enough to obtain useful data.

<sup>219</sup> HMCS (n 216). In the year April 2006 to March 2007 the total number of private law applications made to the county courts was 86,771 and to the FPCs was 19,600

<sup>220</sup> The degree to which this target is met varies, but is generally well above 70 per cent.

subject to methodology, the President had no objection in principle to my proposed research. I was provided with access to the relevant application form and accompanying information. The application form requests detailed information on the proposed research, including full details of the methodology, in order to obtain a Privileged Access Agreement [PAA].<sup>221</sup> HMCS produces Annual Data Requirements (ADR); the ‘gatekeeper’ role is undertaken by the HMCS Data Access Panel [‘DAP’].<sup>222</sup> The process to be followed in order to obtain approval for such a request comprises: completion of the application form, which is submitted to the HMCS Data Access Panel Secretariat, who will approach an HMCS Business Area to act as sponsor. Once sponsorship is granted, the application will be considered by the HMCS Data Access Panel, which then makes a recommendation to the HMCS Performance Committee. A full chronological account of my attempts at obtaining a PAA is set out in Appendix C.

The form took a substantial amount of time to complete, due to the detailed information required. The completed form and supporting documents were submitted on 30<sup>th</sup> March 2009.<sup>223</sup> These can be found at Appendix D.

On 2nd June 2009 I was informed by my allocated sponsor from the Family Law and Justice Division of the Ministry of Justice that my application had been rejected. The primary reason given was that the President’s office had advised that the Practice Direction was being revised and was likely to change by the end of 2009. The President therefore considered that it would be best to defer my research until the new revisions were effected, cases were completed under the new provisions, and could then be analysed. Shortly thereafter, I learnt that no further revisions were planned to the Practice Direction, although the Private Law Programme was to be revised. I therefore contacted the DAP to ask if my request for access to court records could be reconsidered, having incorporated suggested amendments in my application form.

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<sup>221</sup> The reason for this is that court files are closed to the public until they are at least 30 years old. This has not been altered by the Freedom of Information Act 2000.

<sup>222</sup> See Ministry of Justice, <http://www.justice.gov.uk/publications/research-and-analysis/courts>, last accessed 12.10.13

<sup>223</sup> Supporting documents comprised: Aims and Objectives; Methodology; Data Collection Themes; CV of researcher and her supervisor

On 22nd July 2009 I received an email from the representative of the Civil and Family Unit advising that my proposal had been considered but that it was of limited usefulness due to further changes being considered in the area of private law proceedings, which could alter the process further. Additionally, I was informed that as the current Practice Direction is still in the process of being ‘bedded-in’, it could not properly be evaluated at this stage. I was also informed that there were concerns about access to court material “due to the significant increased emphasis on information security across government, and secondly due to the pressure on court staff resources which would be required to help facilitate the research.”

Thus, unfortunately, 16 months after initiating my request for access to court records, and having undergone an extensive application process, my request was refused so it was not possible to undertake this method of research. It was decided therefore that the interviews would need to constitute the primary data-gathering methodology, and that reliability could be enhanced by increasing the numbers of judicial officers and professionals interviewed by broadening the sample areas to six HMCS regions. The interview methodology will now be considered.

### **6.3 Interviews with members of the judiciary**

Permission to interview members of the judiciary needs to be obtained from the President of the Family Division by means of a Senior Judicial Agreement. In September 2009 I contacted the Ministry of Justice and was provided with a list of the relevant information required. This included the background and aims of the project; methodology including number of interviews sought and type of judiciary to be interviewed; timeframe for the interviews; and foreseeable use or benefit of the interviews for the court service, Ministry of Justice, judiciary and others. The first draft of my proposal and the draft interview schedule were completed at the end of December 2009, and finalised in February 2010.<sup>224</sup> The proposal, interview schedule and revised data collection themes were completed and sent to the Ministry of

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<sup>224</sup> The delay in completing the documentation was caused by my professional involvement in a large case that ran from October 2009 until January 2010.

Justice Representative on the 14th February 2010.<sup>225</sup> The interview schedule can be found at Appendix E.

After further communications with the Judicial Office for England and Wales I was advised by the President of the Family Division, Sir Nicholas Wall, that since my research was approved by Sir Mark Potter in September 2008,<sup>226</sup> there had been two significant developments: the revised Private Law Programme was introduced and would be fully operative by October 2010, and the Guidance on Split Hearings was issued in May 2010. On advice from the Judicial Office, in November 2010 I sent an addendum to my original proposal and an amended interview schedule, to take these developments into account. On 23rd December 2010 I received a letter on behalf of the President saying that the introduction of the revised Private Law Programme and the Guidance on Split Hearings had both changed the landscape in which I would be conducting my research and had “diminished the potential benefits of any findings of the proposed research project”, particularly as there would be insufficient time for the revised Private Law Programme to work through the system and it would “not be possible in many cases for the judiciary to answer the many and complex questions posed.” The President therefore could not support my request to interview the judiciary.

For these reasons, it was not possible to include interviews with members of the judiciary in my research methodology. The interviews were therefore limited to solicitors, barristers and FCAs. Accordingly, the review of the reported case law gained additional significance in providing some relevant data on the perceptions and practices of judicial officers that could not be obtained directly from them.

## **6.4 Interviews with Professionals**

### **6.4.1 Sampling strategy**

The first question to consider was whether to utilise probability or purposive sampling. The principal advantage of probability sampling is that, because it is representative of the parent population, it enables statistical generalisation, thus

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<sup>225</sup> The documents were revised following my review of research by Hunt and McLeod (n 141) on the outcomes of applications to court for contact orders

<sup>226</sup> Sir Mark Potter was the previous President of the Family Division

maximising the study's external validity.<sup>227</sup> It is thus "particularly useful if the goal of the research is to inform public policy regarding women's issues".<sup>228</sup> May points out, however, that it is not always possible or necessary to utilise probability sampling.<sup>229</sup> Where the "goal is to look at a 'process' or the 'meanings' individuals attribute to their given social situations" it may not be necessary to make generalisations.<sup>230</sup> Polkinghorne goes further and positively advocates the use of purposive sampling for qualitative studies. "[T]he selection should not be random or left to chance... The concern is... whether the data that were collected are sufficiently rich to bring refinement and clarity to understanding an experience."<sup>231</sup> Additionally, non-probability (or purposive) sampling is relatively inexpensive and less time-consuming than random sampling, and can allow for more in-depth data-gathering than samples that are large enough to enable generalisations to be made.<sup>232</sup>

It was decided that non-probability sampling would be utilised to select the interview participants, in order to ensure that the respondents would be able to provide the data necessary for this project, for reasons of time and resources, because the number of participants to be interviewed would not in any event allow for statistical testing, and because the purpose of this project is to obtain in-depth information on processes and meanings. However, it was still considered important to ensure that the characteristics of the parent population were broadly represented, in terms of seniority and geographical spread, so that the findings would be indicative of the views of the broader population. In deciding to utilise purposive sampling, the limitations and drawbacks were borne in mind, principally, the inability to generalise to the parent population. "Exercising care not to overgeneralize from purposeful samples, while maximising to the full the advantages of in-depth, purposeful sampling, will do much to alleviate concerns about small sample size."<sup>233</sup>

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<sup>227</sup> The defining characteristic of probability sampling is that participants are selected at random, but can include systematic random sampling – see further Babbie (n 171); Judd, Smith & Kidder (n 7); May, *Social Research Issues* (n 7).

<sup>228</sup> Miner-Rubino and Jayaratne (n 105) 309

<sup>229</sup> May, *Social Research Issues* (n 7)

<sup>230</sup> Hesse-Biber (n 118) 119

<sup>231</sup> Polkinghorne (n 100) 140

<sup>232</sup> See Miner-Rubino and Jayaratne (n 105)

<sup>233</sup> Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (3<sup>rd</sup> edn, Sage 2002) 246

#### 6.4.2 Sampling method

At the stage when the review of court records still formed a component of my methodology, it was decided that the interview sample would comprise a small number of professionals and members of the judiciary from each of the three areas in which I would be reviewing court records, namely, two barristers, two solicitors, two Cafcass officers, one judge and one magistrate, providing a total sample of 24 interviewees. This was considered a feasible number to interview, in view of the amount of time that would be involved in reviewing court records.

When it became clear that I would not be able to access court records and the interviews would comprise my primary research method, I decided to broaden my sampling frame to five HMCS areas, within which I would select interviewees based in two large cities, two provincial towns and two small rural towns. This would enable me to cover a diverse geographical and demographic population, within the time constraints and resources available to me. It was decided that the interview sample would comprise one professional from each area, and one circuit judge, one district judge and one magistrate, providing a total sample of 36 interviewees.

The regions from which the samples were selected were:<sup>234</sup>

- London: the busiest HMCS area nationally and is serviced by the greatest numbers of solicitors and barristers.<sup>235</sup>
- A large city in the North West which is the third busiest HMCS area nationally.<sup>236</sup> At a later stage I decided that interviewees would be selected from another, demographically similar, large city in the North West because of the very low response rates from professionals in the city originally selected.<sup>237</sup>

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<sup>234</sup> The cities and towns themselves are not identified herein in order to preserve the anonymity of the interview participants.

<sup>235</sup> In the year April 2006 to March 2007 county courts in the London region (including the Principal Registry of the Family Division which is the county court for the whole of the Inner London area) received a total number of 7,494 private law Children Act applications.

<sup>236</sup> In the year April 2006 to March 2007 county courts in and around this city received a total of 2,649 private law Children Act applications.

<sup>237</sup> The city in which participants were ultimately selected is the largest HMCS area outside London. In the year April 2005 to March 2006 (the latest year that was available for Family Court Reports

- A town in the North East HMCS region; however it was necessary to broaden this area to include a neighbouring city, as many barristers and solicitors who undertake cases in the town's courts are actually based in the city, and a low response rate was received from legal professionals based in the town
- Two towns in the South East HMCS region<sup>238</sup>
- Two small towns in the South West HMCS region.<sup>239</sup> It was necessary to extend the sample of barristers to a South West city where the majority of barristers who undertake family law work in the selected South West region are based.

Because it was not possible to interview members of the judiciary, I decided to increase the number of professionals to be interviewed in each selected area to two, yielding a total sample of 30 interviewees. It is recognised that the relatively small size of this sample would not enable statistical generalisations to be made. However, qualitative interview studies are often conducted with small samples,<sup>240</sup> and Lange observes that “discourse analysis focuses on a detailed, in-depth analysis of the construction of the discourse itself and hence only a small sample can be entirely sufficient”.<sup>241</sup> Additionally, since my study population is fairly homogenous, it is suggested that a very large sample size would not be necessary.<sup>242</sup> Researchers undertaking studies of a similar nature have also utilised small samples for interview.<sup>243</sup>

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applying to that city) county courts in the area received a total of 3,179 private law Children Act applications.

<sup>238</sup> Two towns were selected, as the professionals practising in those areas cover the county courts and FPCs in both towns. From April 2006 to March 2007 county courts of both towns combined received 1,178 private law Children Act applications.

<sup>239</sup> It was decided to include two towns because the solicitors and barristers practising in those areas typically cover cases in the county courts and FPCs in both towns. In the year April 2006 to March 2007 the county courts of both towns together received 467 private law Children Act applications.

<sup>240</sup> See Rudestam and Newton (n 97); Silverman (n 98)

<sup>241</sup> Lange (n 28) 183

<sup>242</sup> The less varied the parent population is, the smaller the potential sampling error will be – Kane (n 183)

<sup>243</sup> See Christine Piper and Felicity Kaganas, ‘The Family Law Act 1996 s1(d): How Will “They” Know There is a Risk of Violence?’ (1997) 9(3) *CFLQ* 279-289, who interviewed a sample of 36 solicitors selected from firms in two geographical areas for their study on disclosure of domestic violence under the Family Law Act 1996.



### 6.4.3 Compiling the sampling frames

#### Barristers

My study population of barristers was defined as all barristers in England and Wales who describe themselves in directories and on their chambers' websites as practising predominantly in family law. There is, however, no complete list of such barristers.<sup>244</sup> The most comprehensive list available would be that held by the Bar's professional indemnity insurers.<sup>245</sup> However, it was not possible to obtain access to that list, nor to the membership list of the Family Law Bar Association, for reasons of confidentiality.

I therefore compiled a list of barristers who specialise in family law in the five selected areas by reviewing the websites of all chambers in those and surrounding areas.<sup>246</sup> I cross-checked the accuracy of the resulting list against all barristers in those areas who are listed in Waterlow's Directory as undertaking family law work as their sole or main area of practice,<sup>247</sup> as well as all leading family practitioners listed in Chambers Directory.<sup>248</sup> I excluded barristers over 20 years' call as they are unlikely to undertake a significant amount of private law Children Act work. The resultant sampling frame was as follows:

North East towns: 12 barristers

North West town: 13 barristers

South East towns: 26 barristers

South West city: 8 barristers

London: a complete sampling frame of all barristers based in London who undertake private law Children Act work was not compiled because the total number would have been extremely large in proportion to the actual interview sample of two

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<sup>244</sup> The Bar Directory contains a full list of all barristers in private practice in England and Wales; while areas of practice are listed for some individual barristers, this does not apply consistently throughout.

<sup>245</sup> Professional indemnity insurance with the Bar's own scheme is compulsory for all barristers in private practice; they have to indicate on the application form each year the types and proportions of work which they undertake.

<sup>246</sup> The areas of specialism of all members of chambers are indicated on the websites

<sup>247</sup> Waterlow's Directory lists all barristers in private practice in England and Wales and includes a note of each barrister's areas of practice, but only where the barristers themselves have supplied this information. See *Waterlow's Solicitors' and Barristers' Directory* (Waterlow Publishing 2010)

<sup>248</sup> Chambers Directory describes itself as listing leading solicitors and barristers in private practice. See [www.chambersandpartners.com](http://www.chambersandpartners.com) last accessed 15.10.11

barristers.<sup>249</sup> Additionally, because of my own professional practice, I frequently appeared in court against many of the barristers in London who undertake family law work, and it was therefore necessary to screen out those barristers with whom I was closely acquainted. The two interviewees were purposively selected on the basis of the high proportion of private law Children Act work that they undertook.

## **Solicitors**

My study population of solicitors was defined as all solicitors in England and Wales who specialise in family law work. A complete list of all such solicitors is not available. I therefore compiled a list of solicitors who specialise in family law in the five selected areas by reviewing the Resolution website,<sup>250</sup> which enables a search of all members of Resolution by town. I then cross-checked each individual solicitor against their entries in their firms' websites to screen out solicitors who only undertake public law or financial divorce work.<sup>251</sup> The resulting sampling frame was as follows:

North East towns: 25 solicitors

North West town: 26 solicitors

South East towns: 35 solicitors

South West towns: 17 solicitors

London: as with barristers, a complete sampling frame of all solicitors based in London who undertake private law Children Act work was not compiled because the total number would have been extremely large in proportion to the actual interview sample of two solicitors.<sup>252</sup> The two interviewees were purposively selected on the basis of the high proportion of private law Children Act work that they undertook.

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<sup>249</sup> 55 sets of chambers in London have a significant number of barristers who specialise in family law work.

<sup>250</sup> Resolution, formerly the Solicitors' Family Law Association, is the Law Society's membership sub-group of solicitors who specialise in family law

<sup>251</sup> I also excluded those solicitors who did not specify the type of work they undertook but did not undertake publicly funded cases as it was considered that they may not undertake a significant amount of private law Children Act work, and because in some areas the sampling frame would have been extremely wide.

<sup>252</sup> During the sampling period there were nearly 700 Resolution members in the London region.

## **Cafcass officers**

My study population of Cafcass officers was defined as all FCAs employed by Cafcass in England. The respondents were selected by the service managers of the Cafcass offices in each of the five sample areas, who circulated a request to their staff. The sampling frame comprised those FCA's who contacted me as a result of that request. A full account of the process of obtaining permission to interview Family Court Advisors is set out below.

### **6.4.4 Drafting the interview schedules**

As discussed above, I decided to utilise semi-structured interview schedules, comprising open-ended questions, while retaining uniformity in the sequence and format of the questions. Open-ended questions are the most effective route by which to gather an 'authentic' understanding of people's views and experiences, and give respondents greater freedom in the way they answer questions.<sup>253</sup> Closed questions were not utilised in the interview schedule as, although they are easier and quicker to analyse, they tend to compartmentalise responses.<sup>254</sup> The use of prompts and probes enabled me to maintain a flexible format, and to encourage the respondents to elaborate on their responses.<sup>255</sup> The use of open-ended questions enables the interviewer to enhance the in-depth qualitative data sought, while the standardised format increases the reliability of the data, enables the researcher to control the direction of the interview to ensure that the data sought is obtained, and facilitates analysis.<sup>256</sup> The use of open-ended questions with a standardised format has been used by other researchers to good effect.<sup>257</sup>

In order to facilitate the interview process and put the respondents at their ease, I placed broader, less demanding questions at the start of the interview.<sup>258</sup> Two hypothetical case studies, which covered issues already examined in direct question

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<sup>253</sup> May, *Social Research Issues* (n 7); Silverman(n 98)

<sup>254</sup> May, *Social Research Issues* (n 7), notes that convenience of analysis should not be a reason for choosing a particular format of interview; it is the aim of the research that should guide the method.

<sup>255</sup> See Fetterman (n 97); Hesse-Biber(n 118) 126

<sup>256</sup> May (2001) *op cit* FN 4; Fetterman (1989) *op cit* FN 31

<sup>257</sup> For example, Kathleen Daly utilised this method in her study of 'judicial paternalism' when she interviewed judges to determine if their sentencing differs for men and women defendants – see Reinharz (n 4) 39

<sup>258</sup> This is recommended by a number of commentators, such as Hesse-Biber (n 118)

format, were used to increase the reliability of the interviews and enable further exploration of participants' practices and perceptions.

All interviews, including the pilot interviews, were recorded digitally, to overcome the limitations on manual transcription and recollection, to enable precise observations to be made, and to provide direct access to the data by other researchers.<sup>259</sup>

The interview schedule for barristers and solicitors was completed by December 2009, and for FCAs in March 2010. The same interview schedule was utilised for both barristers and solicitors; certain questions were adapted for each group of professionals, where necessary. The interview schedules can be found at Appendices F and G.

#### **6.4.5 Piloting the interviews**

Pilot interviews were undertaken between December 2009 and March 2010 with a junior barrister (under 10 years' call), a senior solicitor (over 10 years' practice) and a solicitor of 12 years' practice who had transferred to the Bar five years previously.<sup>260</sup> Convenience sampling was used for selecting the barristers and solicitors for the pilot study, bearing in mind that while convenience sampling is rarely an adequate sampling method, it has utility in pilot studies.<sup>261</sup> When piloting the interviews, I sought the opinion of the respondents on the nature of the questions and any difficulties they experienced in answering them, and adjusted the interview schedule accordingly. The pilot interview with the senior solicitor in London was particularly useful, and since I had not revised the interview schedule significantly since that interview, I decided to utilise it as my second solicitor respondent for the London area.<sup>262</sup>

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<sup>259</sup> See May, *Social Research Issues*, (n 7) 138; Silverman (n 98) 119

<sup>260</sup> Silverman (n 98) 149, observes that pre-testing an interview schedule is important for improving the reliability of qualitative research that is concerned with narrative structure.

<sup>261</sup> Babbie (n 171)

<sup>262</sup> This was the last pilot interview, conducted on 9th March 2010; the interview schedule had already been adjusted following the earlier two pilot interviews.

#### **6.4.6 Interviews with Cafcass officers**

##### **Obtaining permission for the interviews**

The process for obtaining permission to interview FCAs commenced in January 2010. After substantial enquiries over a period of almost six months, I was contacted in June 2010 by Cafcass's new research officer, who provided me with the relevant application forms and supporting documents. A significant amount of information was required about the project, including the research process, aims and objectives, and benefits to Cafcass. By the beginning of December 2010 the proposal and supporting documents were complete and sent to Cafcass.<sup>263</sup>

On 11th January 2011 I was informed that my research had the full support of Cafcass's Research Governance Committee, subject to certain conditions relating to the acknowledgement of Cafcass in my final report and the provision of the report to Cafcass. On 28th January 2011 I signed the letter of agreement, and requested information about the appropriate procedure for identifying interviewees. At the beginning of February 2011 I was advised to write to the service managers of the local Cafcass offices to seek their assistance in identifying respondents to interview. Cafcass's research officer also very helpfully sent internal emails to some of the service managers, encouraging them to assist me in my research.

##### **Identifying FCAs and the interview process**

The process of identifying FCAs to interview took a substantial amount of time and involved repeated attempts to contact individual service managers.<sup>264</sup> Because of the difficulties experienced when attempting to conduct the interviews while at the same time meeting the demands of my professional practice, I took a short sabbatical from my professional practice and conducted all the interviews in May 2011, apart from those in London which were undertaken in June 2011.<sup>265</sup> All interviews were held at the local Cafcass offices.

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<sup>263</sup> The documents submitted to Cafcass, as required by their research governance procedures, comprised: the application form; research proposal; draft interview schedule; data collection themes; research participants' information sheet; informed consent form; CV for the researcher and her supervisor.

<sup>264</sup> It should be noted that all service managers were extremely helpful in identifying interviewees.

<sup>265</sup> These difficulties experienced in the interview process are detailed more fully below.

London Cafcass: I first attempted to contact the service manager of Cafcass at the PRFD on 22nd March 2011. Numerous attempts to contact her, by email, letter and telephone, were made, including two personal visits to Cafcass at the PRFD. On my second visit to the PRFD in June 2011, the service manager helpfully offered to identify two Cafcass officers immediately, who made themselves available for interview later that day.

South East Cafcass: On 22nd March 2011 I wrote to the service manager of Cafcass in one of the South East towns,<sup>266</sup> and followed up the letter with telephone calls and an email. An FCA emailed me directly; the interview took place on 9th May 2011. Unfortunately the only other FCA employed by Cafcass in the South East office was under too much pressure of work to participate in an interview.<sup>267</sup> The interview undertaken with the FCA on 9th May 2011 was, however, very detailed and informative.

North West Cafcass: On 22nd March 2011 I wrote to, and telephoned, the service manager of Cafcass in the North West town. On 8th April 2011 I received telephone calls from two FCAs who both agreed to be interviewed; the interviews were held on 25th May 2011.

South West Cafcass<sup>268</sup>: On 22nd March 2011 I wrote to the local service manager, followed by a number of telephone messages and emails. The service manager advised me on 15<sup>th</sup> April 2011 that he would request volunteers for the interviews and, following a number of ‘chasing’ emails, on 12th May 2011 I was sent a list of five Cafcass officers who were willing to be interviewed. I emailed all the Cafcass officers on the list; three FCAs responded and interviews were undertaken with two FCAs on 18th May 2011, and the third on 27th May 2011.<sup>269</sup>

North East Cafcass: On 22nd March 2011 I wrote to the Cafcass service manager and followed this up with a number of telephone messages and emails. I eventually

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<sup>266</sup> The Cafcass office in that town also covers the other South East town.

<sup>267</sup> The South East was the only area in which it was not possible to interview two Cafcass officers.

<sup>268</sup> One Cafcass office covers both of the small towns in the South West from which participants were selected.

<sup>269</sup> I decided to interview the third Cafcass officer in the South West, as my research sample only included professionals from one small town and this Cafcass office covers a wide geographical area.

managed to speak to the service manager on 21st April 2011, who said that she would make enquiries of her staff and contact me thereafter. After a number of ‘chasing’ emails, I received a telephone call from an FCA on 6<sup>th</sup> May 2013 who agreed to be interviewed and indicated that a colleague from her office may also agree to do so. Both FCAs were interviewed on 10th May 2011.

#### **6.4.7 Interviews with barristers and solicitors: conducting the interviews**

It was decided that three or four professionals from each sampling frame in each area would be contacted initially, by email or by letter (if no individual email address could be located). If no response was received after follow-up emails, letters or telephone calls were made, the other professionals contained in the sampling frame would be contacted.

#### **London and the South East**

Some of the interviews in London and the South East were undertaken first, for reasons of time and resources. The potential respondents were contacted in April 2010. Two solicitors in the South East were interviewed in May 2010, and two solicitors and a barrister in London were interviewed in March and May 2010.<sup>270</sup>

Difficulties arose, however, in arranging dates for the interviews with the other barrister in London and the barristers in the South East. Although the second barrister in London agreed to be interviewed, this did not take place, despite protracted attempts at setting a date, due to the barrister’s and my own professional commitments. I therefore contacted the next barrister in the sample in June 2011, and interviewed her at the beginning of September 2011. Two of the four barristers in the South East who were initially contacted in May 2010 agreed to be interviewed; after a large number of cancelled appointments due to their professional commitments, the interviews were eventually undertaken at the beginning of May 2011.

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<sup>270</sup> The solicitor interviewed in March 2010 comprised the last pilot interview, as noted above.

### **The North West**

Ten solicitors in the original North West city selected were contacted but none responded to the request, despite ‘chasing’ emails being sent. Only one barrister was interviewed (in December 2010). By the end of December 2010 it became apparent that, because of my professional commitments and those of the interviewees, it would not be possible for me to undertake any of the interviews while still practising, as I needed the time and flexibility to accommodate the constant changes in the work diaries of the respondents. I therefore decided to take a professional sabbatical and conduct all the remaining interviews in all regions in May 2011.

Because of the lack of response from solicitors in the original city selected in the North West, I decided to revise the sampling area to another, demographically similar city. Of a total of eight solicitors contacted during April and May 2011, only one responded and agreed to be interviewed. However, two other solicitors at his firm joined in with that interview, which was conducted at the beginning of July 2011. Four barristers were contacted at the end of March 2011, two of whom were interviewed on the 24th May 2011.

### **The South West**

A total of 12 solicitors in the South West were contacted. One from each town agreed to be interviewed and the interviews took place in May 2011. Four barristers were initially contacted – two based in chambers in one of the South West small towns, the other two based in the South West city.<sup>271</sup> The barristers based in the small town never responded; two barristers based in the city responded positively and were interviewed in May 2011.

### **The North East**

A total of six solicitors in the North East town were contacted between March and May 2011; none responded positively. Of five barristers in the North East who were contacted during 2010 and 2011, only two agreed to be interviewed but because of their work commitments it was not possible to undertake either face-to-face or telephone interviews. Accordingly, I decided to contact solicitors and barristers in

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<sup>271</sup> The other South West small town had no sets of barristers’ chambers.



the neighbouring city, as practitioners based in the city also undertake cases in the county court in the North East town. Two solicitors out of the nine I had contacted responded positively; they were interviewed in the second and third week of May 2011. All six barristers based in the North East city who appeared to undertake a substantial amount of private law Children Act work were contacted but despite follow-up letters and telephone messages, none responded to my request. Accordingly, no interviews were undertaken with barristers in the North East.

#### **6.4.8 Addendum questionnaires**

Because the initial interviews were undertaken in 2010, prior to the implementation of the revised Private Law Programme, and when the Guidance on Split Hearings had only just been issued, a brief questionnaire, comprising a limited number of open-ended questions, was sent to those respondents who were interviewed in 2010. Despite follow-up requests being sent, only one response (from a barrister in London) was received.<sup>272</sup>

### **7. Ethical Issues**

A number of aspects of this project raised ethical issues, primarily arising out of the use of interviews as a research method, namely, ensuring the voluntary participation and informed consent of the participants, maintaining their confidentiality, and striving for honesty and openness in the research process.

These issues have, at their core, the recognition that research participants are not ‘objects of study’ but are to be valued and appreciated by developing non-exploitative relations between researcher and participant.<sup>273</sup> Reinharz advocates developing non-exploitative relations with participants without attempting to achieve ‘rapport’ or ‘intimacy’ with them. “Relations of respect, shared information, openness, and clarity of communication seem like reasonable substitute goals.”<sup>274</sup>

In order to ensure that all respondents participated voluntarily in the research and had sufficient information about the research to give their informed consent, I sent a

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<sup>272</sup> It appears that one of the solicitors interviewed in the South East is not currently practising.

<sup>273</sup> See Miner-Rubino and Jayaratne (n 105) 315; Rudestam and Newton (n 97)

<sup>274</sup> Reinharz (n 4) 267

‘Research Statement’ providing basic details of the research, together with an ‘Informed Consent Form’ in advance to all participants. It was made clear in those documents that if, at any stage before or during the interview, the participant wished to terminate it, they would be free to do so. Confidentiality and anonymity of the participants was maintained by only the researcher and her supervisors having access to information that could identify the participants,<sup>275</sup> and the use of pseudonyms for all participants. The small number of Cafcass officers employed in some areas could have led to their identification; as a consequence, none of the towns and cities in which participants were based have been identified. Additionally, a number of examples of cases provided by participants had highly unusual facts, which could have led to the parties to the proceedings and the children being identified. Where such cases have been referred to in this thesis, any such facts have been omitted or have been altered slightly to preserve anonymity.

My application for ethics clearance was submitted to the Brunel Law School Research Ethics Committee in November 2008. The work undertaken to complete the Expedited Review Checklist involved identifying and writing up my sampling procedure for the selection of barristers and solicitors to interview and explaining my rationale for the use of human participants. I also submitted my interview schedule, the research participant information sheet and informed consent form. Ethical approval was granted on 14th January 2009.

Finally, I had to consider my position as an ‘insider’. On the one hand, being an ‘insider’ can help establish credibility among participants, and the quality of interview data and reliability can be enhanced when the researcher is knowledgeable about and integrated into the community under study.<sup>276</sup> ‘Insider status’ can also assist in obtaining co-operation and rapport with participants.<sup>277</sup> On the other hand, there are advantages to being an ‘outsider’, as participants may perceive the

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<sup>275</sup> The recordings and transcripts thereof, which are kept in a locked filing cabinet

<sup>276</sup> See Reinharz (1991) *op cit* FN 8

<sup>277</sup> See Hesse-Biber (2007) *op cit* FN 59

researcher to be less biased, and the researcher will be more likely to ask questions on issues that she might otherwise take for granted as ‘shared knowledge’.<sup>278</sup>

## 8. Analysis

The data obtained from the interviews and case review were analysed thematically, utilising initial categories or themes derived from the Practice Direction itself and from existing research on the subject of this study.<sup>279</sup>

Hesse-Biber observes that: “The key to data analysis is to search for meanings within the data.”<sup>280</sup> This essentially involves “breaking down the data and reconfiguring them into new forms”.<sup>281</sup> Memoing and coding are considered two important components of such analysis. Coding is a technique used to conceptualise the raw data.<sup>282</sup> Data can be coded either inductively or into preconceived code categories, and can be quite literal and specific, or larger and more conceptual in nature.<sup>283</sup> Memoing involves the process of writing up the researcher’s interpretations of the data. Meaning emerges from the ongoing process of coding and memoing.

When undertaking discourse analysis, it is important to read and re-read the texts in order to ‘immerse’ oneself in the data. Gill recommends that coding be undertaken as inclusively as possible.<sup>284</sup> The researcher should search for patterns in the data, both with respect to variability (differences within and between accounts) and consistency, followed by attempts to identify the functions of particular features of the discourse.<sup>285</sup> From a feminist perspective, discourse analysis assists in deconstructing the text “to see not only what is there but also what is missing,

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<sup>278</sup> *ibid.* However, Hesse-Biber points out that insider/outsider status is fluid and can even change during the course of the interview. Indeed, I found myself to be very much an ‘outsider’ with respect to some data provided by FCAs.

<sup>279</sup> A copy of the initial Data Collection Themes can be found at Appendix H

<sup>280</sup> Sharlene Nagy Hesse-Biber, ‘Putting it Together: Feminist Research Praxis’ in Hesse-Biber and Leavy (n 92) 332

<sup>281</sup> Creswell (n 12) 20

<sup>282</sup> Anselm M Strauss, *Qualitative Analysis for Social Scientists* (CUP 1987) 20-21. See also Hesse-Biber (n 279) 333

<sup>283</sup> See Leavy (n 93) 231. See also Hesse-Biber (n 279) 344

<sup>284</sup> Gill (n 87) 145

<sup>285</sup> *ibid* 146

silenced, or absent. The goal of this kind of research is...to deconstruct the text to see what is revealed, what emerges, what juxtapositions develop.”<sup>286</sup>

Because the Practice Direction itself breaks down into categories the areas of interest and concern to this project, it was possible to formulate tentative broad data collection themes in advance of analysis.<sup>287</sup> This had the advantages of providing a broad structure to the interview schedules, and facilitated the analysis process, while at the same time it enabled me to be sensitive to new or different categories that emerged. Formulating broad pre-conceived categories also enhances reliability by setting out transparently what the data collection themes are, and the method of coding the raw data.<sup>288</sup>

Lange suggests a two-stage analysis process in order to encompass the differing approaches to data analysis demanded by qualitative and discourse analytic research.<sup>289</sup> During the first stage, the data is searched for consistency “in order to identify key themes, while trying to remain sensitive to detecting variation.”<sup>290</sup> From a discourse analytic perspective, the data is then coded into large sections “in order not to lose a feeling for the...discourse as a whole” while at the same time interrogating the themes to determine their function.<sup>291</sup> The coding categories can then be linked to detect patterns in the data. The data, from a qualitative perspective, can then be treated as ‘evidence’. During the second stage, the data can be more closely analysed from a discourse analytic perspective to determine how the narrative is constructed and through what discursive techniques arguments are built.

The interviews were analysed with the assistance of NVivo software by coding them into a total of 60 detailed categories within the broad functional themes set out in Appendix H.<sup>292</sup> Simultaneously, memos were written up and linked to the codes to

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<sup>286</sup> Leavy (n 93) 228. See also May, *Social Research Issues* (n 7) 195

<sup>287</sup> The initial themes are set out at Appendix J

<sup>288</sup> See Rudestam and Newton (n 97). Silverman (n 98) also notes that it is “important that these categories should be used in a *standardised* way, so that any researcher would categorise in the same way.” [148, emphasis in original]

<sup>289</sup> Lange (n 28)

<sup>290</sup> *ibid* 186

<sup>291</sup> *Ibid*

<sup>292</sup> It should be noted that those aspects of the initial themes relating to the disclosure of domestic violence that raise primarily procedural issues have not been included within the analysis and

assist with the final analysis and discussion. The codes were then grouped into broader categories as patterns in the data emerged, namely:

- Understanding domestic violence:
  - Professionals' perceptions of domestic violence
  - Participants' views on the description of domestic violence in the Practice Direction
  - Judicial perceptions of domestic violence
- The 'presumption of contact'
- Judicial and professional attitudes to mother and fathers:
- When is domestic violence 'relevant' to contact
- Seeking agreement for contact: advice or coercion?
- Consent orders
- Fact-finding hearings:
  - Frequency of fact-finding hearings
  - Effect of the Guidance on Split Hearings on fact-finding hearings
  - Are fact-finding hearings held when listed?
  - What happens to disputed allegations of domestic violence if separate fact-finding hearings are not held?
  - Willingness of judicial officers to hold fact-finding hearings and of family lawyers to request them
  - Reasons why fact-finding hearings may not be held
  - Are fact-finding hearings held where appropriate?
  - Participants' views on fact-finding hearings
  - The nature, effect and consequences of 'findings of fact' and 'evidence'
- Interim orders:
  - What orders do courts make for contact pending fact-finding hearings?
  - Recommendations by Cafcass officers for interim contact
  - Lawyers' advice to parents on interim contact pending fact-finding hearings
- Assessing 'risk' after the fact-finding hearing

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discussion of this study as they are not directly relevant to the theoretical approach guiding this thesis. It is intended that they will be published elsewhere.

- Application of Paragraph 27 of the Practice Direction after findings of fact are made
- Advice by family lawyers to parents about outcomes where domestic violence is proved or admitted
- Orders when findings of domestic violence are made
- Ensuring safety if final orders for contact are made
- Domestic violence perpetrator programmes and other interventions for perpetrators

The interviews were further closely interrogated within these categories to uncover the discursive techniques and narrative repertoires employed by professionals.

The reported cases were analysed thematically utilising a discourse analytic approach, to examine how the ‘facts’ of the cases were constructed, how the discursive context influenced the judges, and how the judgments both reinforce, and are reinforced by prevailing discourses and ideologies informing current family law. As Smart observes: “Cases, taken over time, can of course indicate how influential new forms of narratives are becoming.”<sup>293</sup> Additionally, a qualitative approach was adopted to ascertain, as far as possible, the extent to which, and manner in which, the lower and appellate courts follow the provisions of the Practice Direction. When analysing the case law, it should be borne in mind that the judgments will not provide the reader with a full account of all aspects of the case but are limited to the issues upon which the court is adjudicating and/or are the subjects of the appeal. The ‘facts’ of the case reported are those considered by the judge as relevant to those issues or that appeal.

The results of the case analysis are included in the analysis of the interviews in order to present a cohesive picture of the perceptions and practices of judicial officers and professionals in contact cases to which the Practice Direction applies. Additionally, the findings of current research on the application of the Practice Direction were included in the analysis and discussion. The findings and discussion are presented in Chapters 4 to 7 of this thesis.

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<sup>293</sup> Carol Smart, ‘The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood’ in Diduck and O’Donovan (n 15) 131

## CHAPTER 2

# THE PRESUMPTION OF CONTACT: LEGAL CONSTRUCTIONS OF CHILDREN AND PARENTS

The way in which children and parents are constructed in and by legal discourse has profound implications for the way in which courts and professionals respond to contact cases in which domestic violence is an issue. The importance attached to contact between children and non-resident fathers, and the familial images that are evoked by selective constructions of children's welfare, can have a significant impact on the ability of women to articulate a valid subject position in law, and achieve recognition of the moral value of their own needs for safety, protection and autonomy.

### 1. Legal constructions of children's welfare

“For a long time now it has been accepted by everybody who has much experience in these sad cases of broken unions of parents that, save in exceptional circumstances, it is of very real importance in the interests of a child's emotional health as he or she grows up that there should be contact with the non-custodial parent.”

This was the view expressed by Mr. Justice Latey in *Re B (A Minor) (Access)* [1984].<sup>1</sup> It is a view that has remained at the core of contact proceedings for the past forty years, and is based on the virtually incontestable assumption that the psychological and social science clinical findings, research and literature all support the proposition that children ‘need’ contact with non-resident fathers for their emotional, psychological and developmental health. This construction of children's welfare has increasingly been underpinned by, and has shaped family policy since the late 1970s as well as legal decision-making and professional practice in private law Children Act proceedings.

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<sup>1</sup> *Re B (A Minor) (Access)* [1984] 1 FLR 648, 649

However, children's welfare has not always been constructed in this way, and the 'welfare principle' has not always been family law's guiding precept. Until the mid-nineteenth century, fathers had absolute rights by common law over legitimate children; this paternal authority was portrayed as crucial to the familial and social order and in this way, masculine authority was naturalised.<sup>2</sup> By the 1950s, however, women's roles as mothers were seen as increasingly important for children's emotional and psychological welfare, and their position in the home was reinforced by 'maternal deprivation' theories, which coincided with the political imperative to reduce the female workforce.<sup>3</sup> The breadwinner ideology worked to ensure a role for the father in the family by the enforced dependence of women and children on the male breadwinner.<sup>4</sup>

The breadwinner ideology went largely unchallenged until the early 1970s, when a range of social, cultural and economic developments combined to render the construction of the father as economic provider increasingly problematic.<sup>5</sup> There was a vast increase in lone-parent families and in the proportion of lone parents dependent on state benefits.<sup>6</sup> The ideology of the 'normal' family with male breadwinner/female carer therefore increasingly diverged from reality.<sup>7</sup> This contributed to a moral panic about, and an increasing fear of autonomous

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<sup>2</sup> *Re Agar-Ellis v Lascelles* (1883) 24 ChD 317. See Richard Collier, 'Waiting Till Father Gets Home....': The Reconstruction of Fatherhood in Family Law' (1995) 4(1) *Social and Legal Studies* 5-30; Liz Trinder, 'Dangerous Dads and Malicious Mothers: The Relevance of Gender to Contact Disputes' in Mavis Maclean (ed), *Parenting After Partnering* (Hart 2007) 82.

<sup>3</sup> John Bowlby, *Child Care and the Growth of Love* (Penguin 1953). See also Michael King (ed), *Childhood, Welfare and Justice* (Batsford 1981) 111; Robert van Krieken, 'The Socio-Legal Construction of the "Best Interests of the Child": Law's Autonomy, Sociology, and Family Law' in Michael Freeman (ed) *Law and Sociology: Current Legal Issues* (OUP 2005). The government was concerned about jobs for ex-servicemen returning from the war, and about demands for state-funded childcare for working mothers.

<sup>4</sup> See Collier (n 2)

<sup>5</sup> For example, more women in the workforce, mass unemployment, the shift from an industrial to a service economy, and increasing divorce rates. See Carol Smart, 'Power and the Politics of Gender' in Carol Smart and Selma Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (Routledge 1989); Linda Hantrais, 'Comparing Family Policy in Britain, France and Germany' (1994) 23 *Journal of Social Policy* 35

<sup>6</sup> Between 1971 and 1991 the number of lone parent families more than doubled, particularly single, never married mothers. See Caroline Glendinning, Karen Clarke and Gary Craig, 'Implementing the Child Support Act' (1996) 18(3) *JSWFL* 273

<sup>7</sup> See Miriam David, 'Moral and Maternal: The Family in the New Right' in Ruth Levitas (ed), *The Ideology of the New Right* (Polity Press 1986)



motherhood, and threw into question the ideology of paternal subjectivity based on the centrality of work.<sup>8</sup>

A crucial shift in material and ideological conditions occurred from 1979, when the Conservative government came into power with the aim of ‘rolling back the frontiers of the state’.<sup>9</sup> The New Right, which espoused *laissez-faire* individualism and which was characterised by moral authoritarianism, sought to reinstate and reinforce the family form that could best be ‘privatised’ – the traditional nuclear family with its breadwinner ideology – in order to ensure more effectively that the family and not the state was responsible for its own fortunes and misfortunes.<sup>10</sup> Lone motherhood was strongly condemned and constructed as a major social problem,<sup>11</sup> and the traditional nuclear family was reasserted as the key to national prosperity, economic self-sufficiency and moral and social order.<sup>12</sup>

The developments that occurred during the late 1960s and the 1970s led to a perceived crisis for the father’s role in the family whereby men were portrayed as ‘losing out’ to increasingly empowered women,<sup>13</sup> and the law was seen as contributing to the construction of fathers as outside of, and even inimical to, the mother and child unit.<sup>14</sup> So while the father’s legal authority waned, it was

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<sup>8</sup> Lynda Clarke and Ceridwen Roberts, ‘Policy and rhetoric: The growing interest in fathers and grandparents in Britain’ in Alan Carling, Simon Duncan and Rosalind Edwards (eds), *Analysing Families: Morality and rationality in policy and practice* (Routledge 2002) 166

<sup>9</sup> See David (n 7); John Clarke, Allan Cochrane and Carol Smart, *Ideologies of Welfare: From Dreams to Disillusion* (Routledge 1992)

<sup>10</sup> See Fiona Williams, *Social Policy: A Critical Introduction* (Polity Press 1989); Nigel Parton, *Governing the Family: Child Care, Child Protection and the State* (Macmillan Education 1991); Clarke, Cochrane and Smart (n 9) 140

<sup>11</sup> See Carol Smart, ‘Losing the Struggle for Another Voice: The Case of Family Law’ (1995) 18 *Dalhousie Law Journal* 13-195, 179; Anne Barlow, Simon Duncan, and Grace James, ‘New Labour, the rationality mistake and family policy in Britain’ in Carling, Duncan and Edwards (n 8) 116; Clarke and Roberts (n 8) 168. By way of examples of such discourses, see George Gilder, *Wealth and Poverty* (Basic Books 1980); Norman Dennis and George Erdos, *Families Without Fatherhood* (Civitas 1992)

<sup>12</sup> Richard Collier and Sally Sheldon, ‘Fathers Rights, Fatherhood and Law Reform: International Perspectives’ in Richard Collier and Sally Sheldon (eds), *Fathers’ Rights Activism and Law Reform in Comparative Perspectives* (Hart 2006) 25

<sup>13</sup> Richard Collier, ‘From Women’s Emancipation to Sex War? Men, Heterosexuality and the Politics of Divorce’ in Shelley Day Sclater and Christine Piper (eds), *Undercurrents of Divorce* (Ashgate 1999) 127. See also Richard Collier, ‘Fathers 4 Justice, law and the new politics of fatherhood’ (2005) 17(4) *CFLQ* 511-533, 520

<sup>14</sup> Legislation during the 1970s improved the legal rights of married and unmarried women in relation to their children and financially after divorce, such as the Matrimonial Causes Act 1973

through the ‘welfare of the child’ that law constructed the father “as a desirable presence in the family”,<sup>15</sup> by regarding him “as more and more central to the family in emotional and psychological terms.”<sup>16</sup> The ‘logic of durability’ therefore emerged primarily because of the need for a new means to tie men to children.<sup>17</sup> So the way in which the welfare principle has developed indicates that it has always been constituted and underpinned by gendered relations of power that arise out of specific historical, material and social conditions that sustain dominant interests.

### **1.1 Narrowing the ‘welfare principle’- the presumption of contact**

Although social theorists in recent years have begun to see childhood as a socially constructed and variable concept, social, political and popular discourses still reflect and are underpinned by enlightenment discourses of rationality and universality which raised and reinforced images of children as incomplete beings on the way to becoming fully rational adults.<sup>18</sup> It was these discourses that led to universal, developmental notions of childhood, by which it was assumed that all children “progress through an inevitable process of maturation on their way to becoming ‘finished products’.”<sup>19</sup> These discourses inform private law Children Act proceedings, which are dominated by images of the dependent, ‘unfinished’ child, whose physical, psychological and developmental ‘needs’ must be met in order to enable her or him to reach competent, well-adjusted maturity. Just as the notion of ‘childhood’ is constructed, so “children’s needs are socially defined,

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and the Guardianship Act 1973. See Collier (n 2); Susan Boyd, ‘Is there an Ideology of Motherhood in (Post)Modern Child Custody Law?’ (1996) 5 *Social and Legal Studies* 495-521; Julie Wallbank, ‘Clause 106 of the Adoption and Children Bill: legislation for the “good” father?’ (2002) 22 *Legal Studies* 271-296, 277

<sup>15</sup> Collier (n 2) 6. See also Helen Reece, ‘UK Women’s Groups’ child contact campaign: “so long as it is safe” (2006) 18 *CFLQ* 538, 548

<sup>16</sup> Carol Smart, ‘The Legal and Moral Ordering of Child Custody’ (1991) 18(4) *Journal of Law and Society* 485, 485-6. See also Maria Eriksson and Marianne Hester, ‘Violent Men as Good-enough Fathers?: A Look at England and Sweden’ (2001) 7 *Violence Against Women* 779-798, 790

<sup>17</sup> Julie Wallbank, ‘Getting Tough on Mothers: Regulating Contact and Residence’ (2007) 15 *Feminist Legal Studies* 189-222, 213. See also Van Krieken (n 3) 35

<sup>18</sup> See David Archard, *Children: Rights and Childhood* (Routledge 1993); Chris Jenks, *Childhood* (Routledge 1996)

<sup>19</sup> Alison Diduck, *Law’s Families* (LexisNexis UK 2003) 75. See also Adrian James, Allison James and Sally McNamee, ‘Constructing Children’s Welfare in Family Proceedings’ (2003) 33 *Family Law* 889-895, 890

socially sustained and socially adjusted to conform with prevailing values and expectations.”<sup>20</sup> Since the 1970s, these ‘needs’ have been increasingly and now almost exclusively defined in contact proceedings in terms of contact with non-resident fathers.

Case law since the 1970s demonstrates an increasing reliance on, and endorsement of, the child’s ‘need’ for contact with non-resident fathers, providing courts with a basis for decision-making that enabled them to narrow the indeterminacy of the welfare principle.<sup>21</sup> In some cases courts used a complex interaction of rights and welfare discourses, together with forceful appeals to ‘nature’ and common sense. “[A] child, by the principle of law and nature, had the right to benefit from contact with his lawful or biological parent.”<sup>22</sup>

Before the Children Act 1989 was introduced courts were more willing to inquire into the particular circumstances of the case, including the quality of contact, and, on occasions, found the father wanting. For example, in *Starling v Starling* (1983),<sup>23</sup> the Court of Appeal said of the father, who had had no involvement in the child’s life, that he “had put forward no positive benefit to the child from having any further contact and the judge failed to apply his mind to the very strong reasons that exist for denying access.”<sup>24</sup>

The endorsement of the child’s perceived need for contact increased in intensity and focus after the implementation of the Children Act 1989, which introduced the gender-neutral concept of ‘parental responsibility’, which has underpinned family law ever since, and which evokes a powerful normative ideology of permanent dual parenting to which all parents should aspire in the interests of

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<sup>20</sup> Michael King, ‘Welfare and Justice’ in King (n 3) 116

<sup>21</sup> See, eg, *M v M* [1973] 2 All ER 81, 85 (Wrangham J)

<sup>22</sup> *Re A (Minors) (Access)* [1992] *Family Law* 67, 67 (Waite J). For similar judicial expressions, see also *Re BC (A Minor) (Access)* [1985] FLR 639; *Williams v Williams* [1985] FLR 509; *Re KD (A Minor) (Access: Principles)* [1988] 2 FLR 139; *Re S (Minors) (Access)* [1990] *Family Law* 336; *Re N (A Minor) (Access: Penal Notice)* [1992] 1 FLR 134

<sup>23</sup> *Starling v Starling* (1983) 4 FLR 135

<sup>24</sup> *ibid* 137 (Ormrod LJ)

their children.<sup>25</sup> However, by framing parental responsibility as a status, distinct from the exercise of care, the effect of the Children Act was to elevate parental rights to decision-making rather than to encourage responsibility for childcare, so that the practice of caring for children became increasingly invisible as the status of fatherhood gained political, legal and popular currency.<sup>26</sup> These developments, and in particular the increasing alignment of children's and fathers' interests, gave a new voice to fathers and meant that it became increasingly difficult for mothers to articulate a valid voice and authority in relation to their children, as "the changed deployment of the welfare principle with equality claims have combined to make fathers' claims virtually unanswerable."<sup>27</sup>

It is in this context that case law developed which interpreted the welfare principle almost solely in terms of the child's 'need' to maintain contact with non-resident parents.<sup>28</sup> According to Butler-Sloss LJ: "It is the general proposition, underpinned undoubtedly by the Children Act 1989...that it is in the interests of a child to retain contact with the parent [with whom he does not live]".<sup>29</sup> By emphasising the biological link and portraying contact as therefore 'natural', the benefits of contact do not need to be questioned.<sup>30</sup> In this way, the 'welfare of the child' operates as a device to erase the father's conduct from legal discourse informing child contact proceedings. Rather than considering how contact could benefit the child, courts framed the question in the alternative, as exemplified by the judgment of Balcombe LJ in *Re D (A Minor) (Contact:*

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<sup>25</sup> See Christine Piper, *The Responsible Parent: A Study of Divorce Mediation* (Harvester Wheatsheaf 1993); Collier (n 2); Wallbank (n 14); Helen Reece, 'From Parental Responsibility to Parenting Responsibly' in Freeman (ed) (n 3); Jeremy Roche, 'The Children Act 1989: once a parent always a parent?' (1991) 13(5) *Journal of Social Welfare and Family Law* 345-361, 346-347

<sup>26</sup> Sally Sheldon, 'Unmarried fathers and parental responsibility: a Case for Reform?' (2001) 9(2) *Feminist Legal Studies* 93-118, 95; Shelley Day Sclater and Felicity Kaganas, 'Contact: Mothers, Welfare and Rights' in Andrew Bainham, Bridget Lindley, Martin Richards and Liz Trinder (eds), *Children and Their Families: Contact, Rights and Welfare* (Hart 2003) 156; Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (Hart 2006) 299

<sup>27</sup> Diduck and Kaganas (n 26) 294, referring to Smart (n 5)

<sup>28</sup> See Day Sclater and Kaganas (n 26) 168

<sup>29</sup> *Re T (A Minor) (Parental Responsibility: Contact)* [1993] 2 FLR 450, 459 (Butler-Sloss LJ)

<sup>30</sup> See *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 128 (Sir Thomas Bingham MR); *Re W (Contact: Joining Child as Party)* [2001] EWCA Civ 1830, [2003] 1 FLR 681 [16] (Butler-Sloss LJ); *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18, [2004] 1 FLR 1279 [47]. See also Felicity Kaganas, 'Regulating Emotion: Judging Contact Disputes' (2011) 23(1) *CFLQ* 63-93, 70

*Mother's Hostility*), the leading authority on the 'general principles' to be applied by courts in contact cases:

“No court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interests of the child that access should cease, and that was a conclusion at which the court should be extremely slow to arrive. ... the test to be applied was whether there were cogent reasons why the child should be denied the opportunity of access to their natural father.”<sup>31</sup>

Not only is contact viewed as beneficial to children; lack of contact is seen as positively detrimental and harmful. In *Re O (Contact: Imposition of Conditions)* Balcombe LJ said:

“Where parents of a child are separated and the child is in the day-to-day care of one of them, it is almost always in the interests of the child that he or she should have contact with the other parent. The reason for this scarcely needs spelling out. It is, of course, that the separation of parents involves a loss to the child, and it is desirable that that loss should so far as possible be made good by contact with the non-custodial parent.”<sup>32</sup>

So we can see how “[t]he complex problem of child welfare has been reduced to the simple ‘solution’ of contact, which is being applied across the board regardless of the reality of parental and parent/child relationships.”<sup>33</sup>

## **1.2 Political constructions of children's welfare**

The perceived importance of fathers for children's welfare continued to underpin and to be reinforced by New Labour government policy, but with a new and distinctive paradigm shift towards co-parenting as opposed to mere 'father-presence', and “the belief that the promotion and encouragement of 'active parenting' on the part of men is something which is, or should be, a desirable

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<sup>31</sup> *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1, 3-4 (Balcombe LJ). These 'general principles' were affirmed in numerous subsequent cases – see, eg, *Re R (A Minor) (Contact)* [1993] 2 FLR 762; *Re H (Contact)(Principles)* [1994] 2 FLR 969; *Re O (Contact: Imposition of Conditions)* [n 30]; *Re M (Contact: Welfare Test)* [1995] 1 FLR 274; *Re O (Contact: Withdrawal of Application)* [2003] EWHC 3031 (Fam), [2004] 1 FLR 1258 [6] (Wall J as he then was). See also Wall LJ, 'Enforcement of Contact Orders' (2005) 35 *Family Law* 26-32, 27

<sup>32</sup> *Re O (Contact: Imposition of Conditions)* [n 30] 128 ( Balcombe LJ)

<sup>33</sup> Carol Smart and Bren Neale, 'Arguments Against Virtue – Must Contact be Enforced?' (1997) 27 *Family Law* 332-336, 335

objective on the part of liberal democratic governments.”<sup>34</sup> The ‘participant father’ was valorized in political and popular discourses in such a way that both fathers and children were seen as ‘suffering’ if this relationship was denied.<sup>35</sup>

Central to the promotion of New Labour’s communitarian vision was a model of the family marked by “emotional and sexual equality, mutual rights and responsibilities, a negotiated authority over children, co-parenting and ... a clear belief in promoting the commitment on the part of both women *and* men to lifelong obligations to children.”<sup>36</sup> The Fathers’ Rights Movement [‘FRM’], together with discourses of the New Fatherhood,<sup>37</sup> strongly influenced and shaped, and was bolstered by, the prevailing notions of gender equality, as their arguments “would, on the surface at least, appear to chime in a number of respects with the dominant welfare discourse,” and with New Labour’s ideal of the democratic, participant family.<sup>38</sup> The FRM was effective in appealing to policy-makers, the media and the public, and in impacting on the construction of legal knowledge, by utilising not only the language of rights and equality developed by feminists but also on ‘welfare’ and ‘care’ talk.<sup>39</sup> The fathers’ rights movement has not, however, sought to transform parenthood per se by promoting co-parenting in ‘intact’ families, but is “situated in the context of post-separation parenting,” in opposition to mothers.<sup>40</sup> So the FRM is able to “draw strategically on this caring, sharing image, without this translating into any kind of shift in the gendered division of caring labour.”<sup>41</sup>

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<sup>34</sup> Richard Collier, ‘A Hard Time to be a Father?: Reassessing the Relationship between Law, Policy and Family (Practices)’ (2001) 28 *Journal of Law and Society* 520, 527. See also Carol Smart, ‘Wishful thinking and harmful tinkering? Sociological reflections on family policy’ (1997) 26 *Journal of Social Policy* 1; Jonathan Scourfield and Mark Drakeford, ‘New Labour and the “problem of men”’ (2002) 22 *Critical Social Policy* 619-640; Richard Collier, ‘“The Outlaw Fathers Fight Back”: Fathers’ Rights Groups, Fathers 4 Justice and the Politics of Family Law Reform – Reflections on the UK Experience’ in Collier and Sheldon (n 12) 71; Susan Boyd, ‘“Robbed of their Families?” Fathers’ Rights Discourses in Canadian Parenting Law Reform Processes’ in Collier and Sheldon (n 12)

<sup>35</sup> Wallbank (n 17) 215

<sup>36</sup> Collier, ‘A Hard Time to be a Father’ (n 34) 527, emphasis in original.

<sup>37</sup> See Collier (n 13) 85; Smart (n 16)

<sup>38</sup> Collier, ‘The Outlaw Fathers Fight Back’ (n 34) 62

<sup>39</sup> Carol Smart, ‘The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood’ in Alison Diduck and Katherine O’Donovan, *Feminist Perspectives on Family Law* (1<sup>st</sup> edn, Routledge-Cavendish 2006) 126

<sup>40</sup> Ana Jordan, ‘“Dads aren’t demons. Mums aren’t madonnas. Constructions of fatherhood and masculinities in the (real) Fathers 4 Justice campaign’ (2009) 31(4) *JSWFL* 419-433, 421

<sup>41</sup> *ibid* 430

Indeed, a vast body of empirical research is available which suggests that the ideal is not matched by the reality, as parenting practices remain highly gender-specific.<sup>42</sup> Trinder refers to research findings indicating that: “Over the last decade father involvement in child care in intact families has increased, but still remains significantly lower than for mothers, even in dual earner families.”<sup>43</sup>

What is therefore effaced by the debates around the ‘new fatherhood’, the rhetoric of parental responsibility and the assumptions of gender-neutrality, is the still-entrenched sexual division of labour and the ability of men to ‘opt out’ of caring.<sup>44</sup> This results in a valorisation of abstract ‘fatherhood’, “and an implicit devaluing of ‘mothering’ and the caring work that it has traditionally entailed,”<sup>45</sup> so that the work of caring for children is disregarded or rendered invisible in family policy as well as by family courts and professionals in contact proceedings.

The promotion of the permanent dual-parent family meant that the issue of contact moved up the political agenda under New Labour.<sup>46</sup> Parents, according to the New Labour government, needed to be ‘educated’ to make rational decisions

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<sup>42</sup> See Collier, ‘A Hard Time to be a Father’ (n 34) 537; Felicity Kaganas and Christine Piper, ‘Shared Parenting – a 70% Solution?’ (2002) 14(4) *CFLQ* 365 – 484, 373-4; Bren Neale and Carol Smart, ‘Caring, Earning and Changing: Parenthood and Employment After Divorce’ in Carling, Duncan and Edwards (n 8); Brid Featherstone, Carol-Ann Hooper and Jonathan Scourfield, ‘Why Gender Matters for *Every Child Matters* (2005) 35 *British Journal of Social Work* 1343-1355, 1344; Jonathan Herring, ‘Why Financial Orders on Divorce Should be Unfair’ (2005) 19 *International Journal of Law, Policy and the Family* 218; Wallbank (n 17); Elizabeth Washbrook, ‘Fathers, Childcare and Children’s Readiness to Learn’ (Working Paper No. 07/175, University of Bristol 2007) 11; Leonora Rosen, Molly Dragiewicz and Jennifer Gibbs, ‘Fathers’ Rights Groups: Demographic Correlates and Impact on Custody Policy’ (2009) 15 *Violence Against Women* 513-531; Elizabeth Gavey and Julia Tolmie, ‘Between a Rock and a Hard Place: Resident Mothers and the Moral Dilemmas they Face During Custody Disputes’ (2010) 18 *Feminist Legal Studies* 253-274, 257

<sup>43</sup> Trinder (n 2) 83. See also Jane Lewis, ‘Political interventions and family policy in Britain’ in Carling, Duncan and Edwards (n 8); Jane Lewis, ‘Fathering Practices in Twenty-Six Intact Families and the Implications for Child Contact’ (2005) 1 *International Journal of Law in Context* 81, 94; John Carvel, ‘More Women Work as Pay Gap Narrows Slightly’ (*The Guardian*, London, 27 September 2008); Sarah Taylor, Fran Bennett and Sirin Sung, ‘Unequal but “fair”? Housework and child care in a sample of low- to moderate-income British couples’ (University of Oxford 2010) 4

<sup>44</sup> Richard Collier, ‘Feminist Legal Studies and the Subject(s) of Men: Questions of Text, Terrain and Context in the Politics of Family Law and Gender’ in Diduck and O’Donovan (n 39) 251

<sup>45</sup> Neale and Smart (n 42) 197

<sup>46</sup> See Carol Smart, ‘Equal shares: rights for fathers or recognition for children?’ (2004) 24 *Critical Social Policy* 484-503, 484-5

about their children, and in order to act rationally, they needed to co-operate to enable conflict-free contact to take place.<sup>47</sup> In 2000 a consultation into the facilitation and enforcement of contact was initiated and during the course of the ensuing years the ‘presumption of contact’ became increasingly entrenched in political discourses.<sup>48</sup> The target set by the 2001 Public Service Agreement of the Lord Chancellor’s Department was to increase contact between children and non-resident parents.<sup>49</sup> In the subsequent government green and white papers, *Making Contact Work*, the promotion of post-separation contact was explicitly stated to be government policy,<sup>50</sup> and the ‘benefits’ of such contact were presented as an ‘obvious’ and incontestable truth: “After separation, both parents should have responsibility for, and a meaningful relationship with, their children, so long as it is safe. This is the view of most people in our society.”<sup>51</sup> ‘Obstinate’, gate-keeping mothers were portrayed as the primary obstacle to contact, and the solution was seen as disseminating ‘information’, promoting education, and the imposition of more overtly coercive measures to “teach them how to be good parents and why the other parent matters because we want children to have both parents.”<sup>52</sup>

These relentless messages had their intended effect on courts and professionals working in the family justice system, as mothers became subjected to an increasingly harsh response from the courts if they sought to limit or restrict contact between children and fathers. In this way, the ‘civilising offensive’ of

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<sup>47</sup> Diduck (n 19) 96. See also Reece (n 25) 474; Kaganas (n 30)

<sup>48</sup> See Lord Chancellor’s Advisory Board on Family Law: Children Act Sub-Committee, *Consultation Paper on Making Contact Work: The Facilitation of Arrangements for Contact Between Children and their Non-Residential Parents and the Enforcement of Court Orders for Contact* (TSO 2001); Lord Chancellor’s Advisory Board on Family Law: Children Act Sub-Committee, *Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-Residential Parents and the Enforcement of Court Orders for Contact* (TSO 2002). The impetus for this consultation process was the perception that contact orders were not achieving ‘real’ relationships between children and non-resident fathers and that the process of enforcement of orders was deficient.

<sup>49</sup> The Lord Chancellor’s Departments, *Departmental Report: The Government’s Expenditure Plans 2001-2002 to 2003-2004* (Cm 5107, 2001) 5

<sup>50</sup> DCA, DfES & DTI, *Parental Separation: Children’s Needs and Parents’ Responsibilities* (Cm 6273, 2004) 2, see also at 7 [4]

<sup>51</sup> *ibid* 2. See also at 5, 7, 16 & 18. See also DCA, DfES and DTI, *Parental Separation: Children’s Needs and Parents’ Responsibilities, Next Steps* (Cm 6452, 2005) 7 [2]

<sup>52</sup> Select Committee on Constitutional Affairs, *Fourth Report: Family Justice: The Operation of the Family Courts* (HC 116-1, 2005) referring to evidence given to the Committee by Butler-Sloss LJ



law and politics has gendered disciplinary and governmental effects – of governing the family through women, and disciplining women through the promotion of the egalitarian family.<sup>53</sup>

### **1.3 How law selectively constructs children's welfare**

As we have seen, the 'benefits' of contact have become indisputable and unchallengeable, and "in the hands of the courts, this 'truth' has become embedded in the law."<sup>54</sup> However, the vast majority of professionals and judicial officers working in the family justice system have not reviewed the studies and findings emanating from psychiatric, psychological and social science research about children's welfare.<sup>55</sup> Rather, they rely on the views expressed principally by the courts and by other professionals, which gives rise to a legal discourse that self-validates the presumption of contact. As discussed in Chapter 1, however, in contemporary society it is not law but the experts within the field of 'child welfare science' who alone can claim authoritatively to 'know' what is good or bad for children, and it is to such experts that law and other social systems turn for 'the truth' about children's welfare.<sup>56</sup>

However, because of its self-referential nature, law cannot directly import all the factors that science would recognise as capable of affecting children's welfare – genetic, financial, educational, environmental and relational – but has to confine itself "to consideration of the individual means, behavior and relationships of the family members involved."<sup>57</sup>

Yet even this depoliticised, individualistic conception of child welfare presents courts with difficulties because of the indeterminate nature of the welfare

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<sup>53</sup> See Van Krieken (n 3) 46

<sup>54</sup> Felicity Kaganas and Shelley Day Sclater, 'Contact Disputes: Narrative Constructions of "Good" Parents' (2004) 12 *Feminist Legal Studies* 1-27, 4-5

<sup>55</sup> Gilmore points out that in England and Wales, unlike some other jurisdictions, judgments are not backed by research evidence – Stephen Gilmore, 'The Assumption That Contact is Beneficial: Challenging the "Secure Foundation"' (2008) 38 *Family Law* 1226-1229

<sup>56</sup> Felicity Kaganas, 'Contact, Conflict and Risk' in Shelley Day Sclater and Christine Piper (eds), *Undercurrents of Divorce* (Ashgate 1999) 109

<sup>57</sup> Diduck and Kaganas (n 26) 310. See also Michael King and Christine Piper, *How the Law Thinks About Children* (2<sup>nd</sup> edn, Gower 1995); Carol Smart and Vanessa May, 'Why Can't they Agree? The Underlying Complexity of Contact and Residence Disputes' (2004) 26(4) *Journal of Social Welfare and Family Law* 347-360

principle. Indeed, a problem that has taxed family courts for many decades is how to decide disputes concerning residence and contact without appearing arbitrary, unjust and uncertain. Partly for this reason, law has selected information from the ‘psy’ discourses and portrayed this as arising out of a consensus within these scientific discourses and therefore representing ‘the truth’ about children’s welfare.<sup>58</sup> The result of this selective construction is that, within the world constituted by law, the impression can be given that it is able to advance children’s welfare by applying these scientific ‘truths’. However, the evidence from child welfare ‘science’ itself does not support law’s selective interpretation of it.

Prior to the 1970s, child psychologists had promoted the idea that psychological damage was caused to children by the separation of their parents. By the end of the 1970s mental health professionals, such as Wallerstein and Kelly,<sup>59</sup> were concluding that many post-separation problems in children also stemmed from conflict arising from custody and access problems, and that such ‘harm’ to children is best avoided by both parents cooperating and maintaining contact with the children. Judges, lawyers, child welfare professionals and policy-makers interpreted the vast body of social scientific and psychological literature as demonstrating a consensus among the ‘experts’ that contact, preferably arranged harmoniously by parents, benefits children, and lack of it causes them emotional and psychological harm.<sup>60</sup> In *Re F (Minors) (Contact: Mother’s Anxiety)* Balcombe LJ referred to “the risk, well documented by medical and legal literature and cases that the children could be damaged by not having the right to know their own father.”<sup>61</sup> Similarly Willbourne and Stanley (barristers) express the view that “most researchers agree that the long-term outcomes are better for children when they have contact with the non-residential parent.”<sup>62</sup>

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<sup>58</sup> See Michael King and Christine Piper, ‘Divorce Reform and the Image of the Child’ (1996) 23 *Journal of Law and Society* 364

<sup>59</sup> Judith Wallerstein and Joan Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (Basic Books 1980). See also E Mavis Hetherington, Martha Cox and Roger Cox, ‘The Aftermath of Divorce’ in JH Stevens and M Matthews (eds), *Mother-child, father-child relations* (National Association for the Education of Young Children 1979)

<sup>60</sup> See CASC (2002) (n 48) 3; Kaganas and Day Sclater (n 54) 3

<sup>61</sup> *Re F (Minors) (Contact: Mother’s Anxiety)* [1993] 2 FLR 830, 834 (Balcombe LJ)

<sup>62</sup> Caroline Willbourne and Gillian Stanley, ‘Contact Under the Microscope’ (2002) 32 *Family Law* 687-690, 687

However, law cannot directly import and reflect the complexities, ambiguities and differing theoretical perspectives found within scientific discourses on child health and development.<sup>63</sup> Behind the hegemonic status of the assumption that children ‘need’ contact with non-resident parents lies a contingent, complex, contradictory and ambiguous body of research and theoretical literature that reveals no firm conclusions on how children’s welfare on parental separation can best be served.<sup>64</sup>

Research from the late 1970s and early 1980s has been superseded by more methodologically sophisticated studies, some of which show “no correlation between child welfare and the amount of contact with the father.”<sup>65</sup> Elliott et al note, with respect to psychological research on children and divorce over the previous decade that: “The picture this research gives is a complex one with no simple answer of how children are affected. There are many different children and many kinds of divorce.”<sup>66</sup>

Much research yields contradictory or equivocal results.<sup>67</sup> While Dunn’s study<sup>68</sup> reported ‘unequivocal’ findings that more contact with non-resident parents was associated with fewer adjustment problems in children, Smith’s study<sup>69</sup> found no such effect at all. Amato and Keith examined fifteen studies on the outcomes of contact for children which pointed in different directions.<sup>70</sup> Pryor and Rogers

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<sup>63</sup> Michael King, *A Better World for Children* (Routledge 1997) 19

<sup>64</sup> See Rebecca Bailey-Harris, Gwynn Davis, Jacqueline Barron and Julia Pearce, *Monitoring Private Law Applications under the Children Act 1989. Report to the Nuffield Foundation* (University of Bristol 1998) 41 & 44

<sup>65</sup> Carol Smart and Bren Neale, *Family Fragments* (Polity Press 1999) 379

<sup>66</sup> Jane Elliott, Gay Ochiltree, Martin Sinclair and Fiona Tasker, ‘Divorce and Children: A British Challenge to the Wallerstein View’ (1990) *Family Law* 309, 309. See also Judith Wallerstein, and Sandra Blakeslee, *Second Chances: Men, Women and Children a Decade after Divorce* (Ticknor and Fields 1989); Robert Van Krieken, ‘The “Best Interests of the Child” and Parental Separation: on the “Civilising of Parents”’ (2005) 68(1) *Modern Law Review* 25-48, 38

<sup>67</sup> See Joan Hunt and Ceridwen Roberts, *Child Contact with Non-resident Parents, Family Policy Briefing 3* (University of Oxford 2004) 2

<sup>68</sup> Judy Dunn, ‘Contact and Children’s Perspectives on Parental Relationships’ in Bainham et al (n 26)

<sup>69</sup> Marjorie Smith, J Robertson, Jo Dixon, M Quigley and Z Whitehead, *A Study of Stepchildren and Step-parenting* (Thomas Coram Institute 2001)

<sup>70</sup> Paul R Amato and Bruce Keith, ‘Parental Divorce and the Well-being of Children: A Meta-analysis’ (1991) *Psychological Bulletin* 26. See also Frank Furstenberg, S Philip Morgan and Paul Allinson, ‘Paternal Participation and Children’s Wellbeing after Marital Dissolution’ (1987)

conclude that “the assumption that contact *per se* is measurably good for children does not stand up to close scrutiny.”<sup>71</sup>

A large number of studies have found that the quality of contact is more important for children’s wellbeing than frequency. Lewis concludes, from her review of the research, that “while the evidence that contact is good for children is mixed...it does seem that it is the nature and quality of the parenting by the contact parent that is important, rather than contact in and of itself.”<sup>72</sup> Some studies have found that even good quality contact is not likely to be the most significant factor affecting children’s overall welfare on parental separation. From the 1990s, some researchers and clinicians emphasised the quality and stability of a child’s care and relationship with the primary carer as factors of major influence. In particular, the primary carer’s own emotional and mental health and well-being were found to be crucial to children’s welfare.<sup>73</sup>

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52 *American Sociological Review* 695; Judith Trowell, ‘Marital Breakdown, Divorce and the Effects on Children’ (1988) *Family Law* 156; Joseph Healy, Janet Malley and Abigail Stewart, ‘Children and their fathers after parental separation’ (1990) 60(4) *American Journal of Orthopsychiatry* 531; Jane Elliott and Martin Richards, ‘Parental Divorce and the Life Chances of Children’ (1991) *Family Law* 481

<sup>71</sup> Jan Pryor and Brian Rogers, *Children in Changing Families: Life after Parental Separation* (Blackwell 2001). For similar findings see Janet Walker, P McCarthy, C Stark and Karen Laing, *Picking Up the Pieces: Marriage and Divorce: Two Years After Information Provision* (DCA 2004); Liz Trinder, Jo Connolly, Joanne Kellett, Caitlin Notley and Louise Swift, *Making Contact Happen or Making Contact Work? The process and outcome of in-court conciliation* (DCA, Research Series 3/06 2006)

<sup>72</sup> Lewis (n 43) 82. For similar findings see: Kevin Hewitt, ‘Divorce and Parental Disagreement’ (1996) *Family Law* 368, 371; Jan Pryor and Fred Seymour, ‘Making decisions about children after parental separation’ (1996) 8 *CFLQ* 229, 236; Bryan Rogers and Jan Pryor, *Divorce and Separation: The Outcomes for Children* (Joseph Rowntree Foundation 1998) 6; Ann Buchanan and Joan Hunt, ‘Disputed Contact Cases in the Courts’ in Bainham et al (n 26); Smith et al (n 69); Hunt and Roberts (n 67) 11; Trinder et al (n 71); Liz Trinder, ‘Conciliation, The Private Law Programme and Children’s Welfare: Two Steps Forward, One Step Back?’ (2008) 38 *Family Law* 338-342, 339; Vicky Peacey and Joan Hunt, *Problematic Contact After Separation and Divorce? A national survey of parents* (One Parent Families/Gingerbread 2008); Paul Amato, Catherine Meyers and Robert Emery, ‘Changes in non-resident father-child contact from 1976-2002’ (2009) 58 *Family Relations* 41

<sup>73</sup> See Peter G Jaffe, David A Wolfe and Susan Kaye Wilson, *Children of Battered Women* (Sage 1990); Toni L Thiriot and Eugene T Buckner, ‘Multiple Predictors of Satisfactory Post-Divorce Adjustment of Single Custodial Parents’ (1991) 17 *Journal of Divorce and Remarriage* 27, 43; Joan Kelly, ‘Children’s Post-Divorce Adjustment’ (1991) 31 *Family Law* 52, 54; Frank Furstenberg and Andrew Cherlin, *Divided Families: What happens to children when parents part* (Harvard University Press 1991); Louie Burghes, *Lone Parenthood and Family Disruption: the Outcomes for Children* (Family Policy Studies Centre 1994); Carol-Ann Hooper, ‘Do Families Need Fathers? The Impact of Divorce on Children’ in Audrey Mullender and Rebecca Morley (eds) *Children Living with Domestic Violence* (Whiting and Birch 1994); Judith Wallerstein and Tony Tanke, ‘To Move or Not to Move – Psychological and Legal Considerations in the Relocation of Children Following Divorce’ (1996) 30 *Family Law Quarterly* 305; Calvin Bell, ‘Domestic Violence and Contact: 10 Reasons Why’ (2008) 38 *Family Law* 1139-1143

What is also absent from legal/ political constructions of children's welfare are the negative or 'harmful' aspects of contact, despite the existence of substantial literature on this issue.<sup>74</sup> In their report to the Court of Appeal in *Re L*, Doctors Sturge and Glaser advised that: "Contact can only be an issue where it has the potential for benefiting the child in some way."<sup>75</sup> They list the benefits that can be derived from contact with fathers, as against the risks of contact, which include "failing to meet and actually undermining the child's developmental needs or even causing emotional abuse and damage – directly through the contact or as a consequence of the contact."<sup>76</sup>

Many participants in Fortin et al's research felt that there should be no contact if it did not positively promote children's welfare, and that "no contact was better than bad contact."<sup>77</sup>

"One of our clearest findings is that it depends entirely on the individual child and parents in question whether contact will benefit that child in the short or long term. Successful contact is associated with a number of complex and inter-related factors, including such matters as a good quality relationship between the non-resident parent and child, the absence of conflict or domestic violence, no serious concerns about the non-resident parent's caring abilities, the child's own willingness to have contact."<sup>78</sup>

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<sup>74</sup> Diduck and Kaganas (n 26) 318

<sup>75</sup> Claire Sturge and Danya Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) 30 *Family Law* 615-629

<sup>76</sup> *ibid* 620. See also Paul Amato, 'Children of divorce in the 1990s: An update of the Amato and Keith (1991) meta analysis' (2001) 15 *Journal of Family Psychology* 355; James Pirrie, 'Making Contact Safe' (2004) 34 *Family Law* 837-843, reporting on a speech by Brian Cantwell at 'Making Contact Safe' conference, London, September 2004; Gordon Harold and Mervyn Murch, 'Inter-parental conflict and children's adaptation to separation and divorce: theory, research and implications for family law, practice and policy' (2005) 17 *CFLQ* 185; Steve Adams, 'Parents' Rights v Children's Needs in Private Cases' (2007) 37 *Family Law* 257-261, 260; Gordon Harold and Leslie Leve, 'Parents as partners: How the parental relationship affects children's psychological development' in Andrew Balfour, Mary Morgan and Christopher Vincent (eds), *How couple relationships shape our world: Clinical practice, research and policy perspectives* (Karnac 2012); Jane Fortin, Joan Hunt and Lesley Scanlan, *Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth* (University of Sussex Law School 2012)

<sup>77</sup> Fortin, Hunt and Scanlan (n 76) xii. Fortin et al interviewed young adults who had experienced parental separation in childhood.

<sup>78</sup> *ibid* xvii. See also Jane Fortin, 'Taking a longer view of contact: forthcoming research' (2012) 42 *Family Law* 906-908, 907

This review of the varied research and clinical findings on children's welfare after parental separation supports Gilmore's observation that "it is difficult to find support in research evidence for the view that there should be an assumption that contact is beneficial."<sup>79</sup>

It should be made clear that it is not being asserted that the research discussed above presents a 'correct' or a 'truer' picture of children's welfare on parental separation, nor that the promotion of contact in individual cases is necessarily 'mistaken'. On the contrary, what is being explored is the contingent and provisional nature of the concept of 'the welfare of the child'. Once we accept that concepts like the 'welfare of the child' are constructed, it follows that there may be numerous constructions, no final arbiter of which is 'correct', and numerous reasons why particular constructions arise, become dominant, and achieve hegemonic status. The difficulty is that by designating as a scientific 'truth' that continued contact between non-resident parents and children is necessarily in their best interests, legal discourse can disadvantage many children by silencing other ways of talking about their interests.

The need for law to reduce the complexities of child welfare science does not in itself explain why the prevailing legal construction of 'the welfare of the child' arose and acquired dominant status in current family law. Law, as a generalised medium of communication for politics, incorporates dominant understandings of what is 'good' or 'bad' for children, which arise out of the social, political and ideological conditions that pertain at any historical moment, and which will be consistent with the interests, objectives and political imperatives of those forces and groups that dominate at particular periods.<sup>80</sup>

"Research studies recommending conflict-reduction and contact have articulated objectives that have been consistent with those of government, those of professional groupings such as mediators and court welfare officers, and those of the New Right and fathers'

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<sup>79</sup> Stephen Gilmore, 'Disputing contact: challenging some assumptions' (2008) 3 *CFLQ* 285-311, 305. See also Stephen Gilmore, 'Contact/Shared Residence and Child Well-being: Research Evidence and its Implications for Legal Decision-Making' (2006) 20 *International Journal of Law, Policy and the Family* 344, 358-359

<sup>80</sup> King (n 20) 113. See also Christine Piper, 'Assumptions about children's best interests' (2000) 22(3) *JSWFL* 261-276; Diduck and Kaganas (n 26) 317

lobbies: they fit neatly into the political and economic priorities that have dominated family policy since the 1980s.”<sup>81</sup>

This explains why “the law has constructed the modern ‘good father’ as a desirable presence in the family,”<sup>82</sup> and thus how the current legal construction of ‘the welfare of the child’ operates as a mechanism of power to regulate the lives of mothers after parental separation. Kaganas points out that law could have selected ‘other’ constructions of children’s welfare, for example, that ‘conflict’ could be avoided by refusing to order contact against the wishes of the resident parent or in ‘high conflict’ cases. “And on either of these views, it would be legitimate to abandon efforts to continue or to enforce contact where conflict is making it unworkable.”<sup>83</sup> The reasons for not doing so are that giving mothers a ‘veto’ over contact, and abandoning attempts at making contact ‘work’ would be “inconceivable in the context of a strongly pro-contact culture.”<sup>84</sup> For law to retain credibility, it could not construct a version of children’s welfare that runs counter to prevailing political, professional and popular discourses and familial ideologies. Law, in turn, re-affirms dominant understandings and discourses.

The current application of the welfare principle can have extremely problematic consequences for many children whose welfare is supposed to lie at the heart of current family law. The reluctance of courts to ‘abandon hope’ of contact taking place can mean that children are subjected to protracted, conflict-ridden court proceedings. In *Re S (Contact: Promoting Relationship with Absent Parent)* Thorpe LJ stated:

“Whatever the difficulties, however scant the prospects of success, the courts must not relent in pursuit of the restoration of what had been a natural relationship between father and daughter, absent compelling evidence that the welfare of the child requires respite.”<sup>85</sup>

Additionally, to ignore the care arrangements and responsibility for domestic labour prior to separation, and downgrade them in favour of the ‘theoretical

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<sup>81</sup> Kaganas (n 56) 115. See also Smart (n 11) 183-184

<sup>82</sup> Collier (n 2) 6

<sup>83</sup> Kaganas (n 30) 66

<sup>84</sup> Kaganas (n 30) 66

<sup>85</sup> *Re S (Contact: Promoting Relationship with Absent Parent)* (n 30) [46] (Thorpe LJ). See also [32] (Butler-Sloss LJ)

benefits' of contact could place children in unfamiliar, inexperienced and even abusive care regimes and make other difficulties for children invisible to courts and professionals. This can be seen in the way in which courts focus on 'long term gain', which disregards the interests of the child in the 'here and now' and can cause current harm to children of a nature and degree that would not be tolerated in a public law context, "and arguably demonstrates a lack of child-centred thinking."<sup>86</sup>

In *Re O (Contact: Imposition of Conditions)* Sir Thomas Bingham MR said:

"The courts should not at all readily accept that the child's welfare will be injured by direct contact. Judging that question the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems."<sup>87</sup>

We also find that the voices of children themselves are filtered through dominant constructions of their welfare, so that "frequently children who consistently say they do not want [contact] are ignored. Indeed it is likely to be assumed that the resident parent is behind the child not wanting contact."<sup>88</sup> Children's views are presented either as influenced by the resident parent, or as evidence that the child does not really know 'what is good for them'.<sup>89</sup> Despite the fact that courts are obliged to take into account the wishes and feelings of the child,<sup>90</sup> law "attends to those wishes and feelings only when they correspond to preconceived ideas of welfare."<sup>91</sup> Prevailing constructions of children's welfare have even led, paradoxically, to children's 'rights to contact' overruling their wishes and feelings. In *Re W (Contact: Joining Child as Party)*<sup>92</sup> Butler-Sloss P said: "The

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<sup>86</sup> Alison Perry and Bernadette Rainey, 'Supervised, Supported and Indirect Contact Orders: Research Findings' (2007) 21 *International Journal of Law, Policy and the Family* 21-47, 39

<sup>87</sup> *Re O (Contact: Imposition of Conditions)* (n 30), 129 (Sir Thomas Bingham MR). See also *Re J-S (Contact: Parental Responsibility)* [2002] EWCA Civ 1028, [2003] 1 FLR 399

<sup>88</sup> Adams (n 76) 261

<sup>89</sup> See, eg, Willbourne and Stanley (n 62) 689

<sup>90</sup> Section 1(3) Children Act 1989

<sup>91</sup> Diduck (n 19) 94. See also Christine Harrison, 'Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic Violence' (2008) 14(4) *Violence Against Women* 381-405, 399

<sup>92</sup> *Re W (Contact: Joining Child as Party)* (n 30) [16] (Butler-Sloss P)



child has a right to a relationship with his father even if he does not want it. The child's welfare demands that efforts should be made to make it possible".

#### 1.4 Encouraging agreement for contact

The current construction of children's welfare may be used by professionals to encourage 'agreements' for contact, so that it becomes a regulatory and disciplinary tool, an important part of the strategy to get parents, principally mothers, to agree to, and cooperate with contact.<sup>93</sup> This explains why judges rarely adjudicate on contact disputes,<sup>94</sup> and most orders are made 'by consent'.<sup>95</sup> The strong preference of courts and professionals for agreement rather than adjudication is based on the perception that agreements for contact are 'better' for children and more likely to 'succeed' and that adjudication encourages acrimony and conflict.<sup>96</sup>

The result of this emphasis on agreement is that parents, particularly mothers, encounter varying degrees of pressure from courts and professionals to permit contact, even in circumstances where serious welfare concerns are raised, and if they seek to 'renege' on previously 'agreed' orders, they may be treated even more harshly.<sup>97</sup> Such pressure is exerted mainly by lawyers, but also by the judiciary, fathers and Cafcass officers.<sup>98</sup> Hunt and Macleod found that in most of the cases in their study, "the impetus throughout was to try to move contact on,

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<sup>93</sup> Piper (n 80) 269. See also Bailey-Harris et al (n 64) 41

<sup>94</sup> Christine Piper and Shelley Day Sclater, 'Changing Divorce' in Day Sclater and Piper (n 13) 239

<sup>95</sup> Joan Hunt and Alison Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (Ministry of Justice 2008) 12. At least 85 per cent of contact orders were the result of agreements. See also Smart and May (n 57) 355 & 358; Judith Masson, 'What is the role of law, lawyers and the courts in post separation parenting?' (2006) [www.uea.ac.uk/swk/iccd2006/Presentations/masson29.pdf](http://www.uea.ac.uk/swk/iccd2006/Presentations/masson29.pdf), last accessed 13.04.10; Perry and Rainey (n 86) 24

<sup>96</sup> Hunt and Macleod (n 95) 169. See speech by Wall J (as he then was) reported in Newsline, 'Making Contact' (2003) 33 *Family Law* 275, 275. See also Piper and Day Sclater (n 94) 240; Masson (n 95); Diduck and Kaganas (n 26) 298-299.

<sup>97</sup> Ann Buchanan, Joan Hunt, Harriet Bretherton and Victoria Bream, *Families in Conflict: Perspectives of children and parents on the Family Court Welfare Service* (The Policy Press 2001) 23. See also Kaganas (n 56) 100

<sup>98</sup> Buchanan et al (n 98). See also Fran Wasoff, 'Mutual Consent: Separation Agreements and the Outcomes of Private Ordering on Divorce' (2005) 27(3) *JSWFL* 237-250, 245 & 247; Carol Smart, Vanessa May, Amanda Wade and Clare Furniss, *Residence and Contact Disputes in Court Volume 2* (DCA, Research Series 4/05, 2005) 29; Masson (n 95); Diduck and Kaganas (n 26) 323

sometimes in very inauspicious circumstances.”<sup>99</sup> If encouragement and persuasion of mothers failed to achieve the desired outcome of agreement for contact, a harsher, more coercive approach was adopted, including ‘robust’ homilies, ‘straight talking’ and criticism of mothers perceived as uncooperative or insufficiently ‘committed’ to contact and, on occasions, threats of change of residence.<sup>100</sup>

## 2. Legal constructions of parents

The mothers and fathers who come before the courts in contact cases are already imbued with images arising out of the legal, professional and political discourses that construct and sustain them, which have a profound impact on the ability of women to separate and protect themselves and their children from violent fathers.

Up until the early 1980s, courts were willing to look at the father’s behavior and consider whether the mother’s opposition to contact was justified. In *Sheppard v Miller* (1982) Ormrod LJ warned that “it is as well to bear in mind that such implacable opposition may have some justification in practice.”<sup>101</sup> However, the reinforcement of the perceived importance of the father’s position in the post-separation family following the enactment of the Children Act 1989 led to important changes in the construction of maternal subjectivities. A harsher, more punitive stance towards mothers developed at the same time as the interests of children and mothers were increasingly seen as separate.<sup>102</sup> A key factor in law’s construction of the ‘welfare of the child’ (and a product of the ‘gender-free’ concept of parental responsibility) is the notion that it is “possible to define children’s interests independently when they are conceptually separated and set apart from parental interests.”<sup>103</sup> This enables the child to be conceptually detached from the relationships in which she or he lives, resulting in the

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<sup>99</sup> Hunt and Macleod (n 95) 114; see also at 120 & 187

<sup>100</sup> *Ibid* 95, 120, 147-152; 158; 173. For similar findings see Perry and Rainey (n 86) 40; Trinder (n 72) 340

<sup>101</sup> *Sheppard v Miller* [1982] 3 FLR 124, 126 (Ormrod LJ)

<sup>102</sup> Smart and Neale (n 33)

<sup>103</sup> Martha Fineman, ‘The Politics of Custody and Gender’ in Smart and Sevenhuijsen (n 5) 28. See, eg, *Re O (Contact: Imposition of Conditions)* (n 30) 128

inscription of the carer-child relationship as “mere collections of individuals whose interests are often in conflict.”<sup>104</sup>

Furthermore, by emphasising the *status* of parental responsibility, it is seen by courts as “conceptually divorced from the practice of child care,” so the father’s ‘traditional’ decision-making role is enhanced as the value of caring for children is downgraded.<sup>105</sup> What the concept of parental responsibility has done, therefore, is not ‘make’ parents take more responsibility for their children but has created the ideological arena in which mothers’ ‘duty’ to allow contact with non-resident fathers can be more strenuously imposed.

Several commentators have written about the erasure of the ‘bad father’ from legal discourse on the family, and the predominance in family law of the ‘bad mother’.<sup>106</sup> The selected construction of the welfare of the child lies at the heart of these familial constructs and at the core of attempts by politics and through law to reconstruct the nuclear family. It is this process that silences ways of talking about familial relations that challenge the increasingly hegemonic status of the importance of the father within the modern family, and gives rise to dominant feminine and masculine subjectivities which structure legal decision-making and professional practice in this area – the ‘implacably hostile mother’ and the ‘safe family man’.

## 2.1 ‘Implacably hostile mothers’

The more law and politics have elevated and valorised fatherhood, the more invisible fathers’ conduct has become, and the more visible and under scrutiny are mothers, so that ‘the problem’ is reconstructed as primarily the mother’s opposition to contact.<sup>107</sup> This has given rise to, and reinforced, the predominant

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<sup>104</sup> Fineman (n 103) 37

<sup>105</sup> Felicity Kaganas, ‘Responsible or feckless fathers? *Re S (Parental Responsibility)*’ (1996) 8(2) *CFLQ* 165-173, 167

<sup>106</sup> See, eg, Smart (n 5); Fineman (n 103); Smart (n 16); Susan Boyd, ‘Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and discourse in Child Custody Law’ (1991) 10 *Canadian Journal of Family Law* 79; Boyd (n 14)

<sup>107</sup> See Kaganas and Day Sclater (n 54) 5; Smart (n 16) 497; see also Vivienne Elizabeth, Nicola Gavey and Julia Tolmie, ‘Between a Rock and a Hard Place: Resident Mothers and the Moral Dilemmas they Face During Custody Disputes’ (2010) 18 *Feminist Legal Studies* 253-274, 258-259

feminine subjectivity in the area of child contact – the ‘implacably hostile’ or ‘no-contact’ mother who, through selfishness and unreasonableness, damages her child by stubbornly refusing to allow contact with the father.<sup>108</sup> Because of the erasure of the father’s conduct, the mother’s fears and concerns are reconstructed as obduracy and irrational or pathological self-interest, reinforcing further the need to regulate and discipline mothers.<sup>109</sup> In this way, mothers are constructed in opposition to fathers *and* children, and are seen as selfishly unable to put their children’s needs before their own, because the dominant construction of children’s interests aligns them so closely with fathers.<sup>110</sup> In *Re O (Contact: Imposition of Conditions)* Sir Thomas Bingham MR said:

“Neither parent should be encouraged or permitted to think that the more intransigent, the more unreasonable, the more obdurate and the more uncooperative they are, the more likely they are to get their own way.”<sup>111</sup>

While both parents in ‘intractable contact disputes’ are frequently characterised as emotional and irrational, mothers tend to be singled out for particular criticism if they voice ‘unreasonable’ concerns about contact. As Smart observes:

“While *fatherhood* now represents equality (an element of higher moral reasoning) and *welfare* represents the interest of the child or weakest member, *motherhood* represents some atavistic, pre-new enlightenment claim which would drag us back into selfish emotion and a satisfaction of the sense rather than a meeting of objective needs.”<sup>112</sup>

It is therefore difficult for mothers to assert a contrary opinion to that expressed by the courts or professionals, who have the ‘rationality’ and ‘objectivity’ to know what is in the child’s best interests, which over-emotional mothers lack. So

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<sup>108</sup> Helen Rhoades, ‘The “No Contact Mother”’: Reconstructions of Motherhood in the Era of the “New Father”’ (2002) 16 *International Journal of Law, Policy and the Family* 71-94, 74

<sup>109</sup> See Collier N 34) 526; Rhoades (n 108) (Boyd (n 14)

<sup>110</sup> See Smart (n 16) 497; Kaganas and Day Sclater (n 54) 5; Susan Boyd, ‘Demonizing Mothers: Fathers’ Rights Discourses in Child Custody Law Reform Processes’ (2004) 6(1) *Journal of the Association for Research on Mothering* 52-74; Elizabeth et al (n 107) 258-259

<sup>111</sup> *Re O (Contact: Imposition of Conditions)* (n 30) 129-130 (Sir Thomas Bingham MR). See also *C v C (Access Order: Enforcement)* [1990] 1 FLR 462; *Re M (Intractable Contact Dispute: Interim Care Order)* [2003] EWHC 1024 (Fam) 853-854 (Bracewell J); *V v V (Contact: Implacable Hostility)* [2004] EWHC 1215 (Fam), [2004] 2 FLR 851

<sup>112</sup> Smart (n 16) 499, emphasis in original

where mothers may see “the courts requiring them to expose their children to bad fathers,” courts and professionals may see mothers as unreasonable.<sup>113</sup> Mothers are made to feel that they are making a “fuss about nothing” or being “unnecessarily difficult” if they raise even serious welfare concerns.<sup>114</sup> Yet research has found that concerns about contact raised by resident parents are frequently very serious, such as domestic violence, child abuse or neglect, drug or alcohol abuse and mental illness, but that courts and professionals sideline these concerns and ‘bend over backwards’ to try to achieve contact.<sup>115</sup>

The ‘implacably hostile mother’ may not only be irrational; she may even be pathological. In *Re H (A Child) (Contact: mother’s opposition)* [2001], the Court of Appeal found that the mother’s strong opposition to contact had no “objective foundation”, “and might well be indicative of a disordered personality or at least disordered emotions leading to disordered thinking.”<sup>116</sup> In the interestingly entitled *Re S (Unco-operative Mother)*<sup>117</sup> Thorpe LJ regarded the mother’s ‘unreasonable’ failure to engage in family therapy as grounds for a court to draw adverse inferences against her.<sup>118</sup> Even parents who are found to be ‘mentally sound’ are encouraged to engage in therapy. In *Re P (Children)*<sup>119</sup> both parents were urged to attend counselling, even though the court had given the mother a ‘clean bill’ of mental health. This was so that the father would feel ‘better’ about attending therapy himself, thereby, as the court saw it, reducing conflict. These views are entrenched in the professional discourse through articles by legal and child welfare professionals,<sup>120</sup> who even argue that the child should be removed from, and have no contact with the mother, so that her ‘pathology’ can be treated.<sup>121</sup>

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<sup>113</sup> Kaganas and Day Sclater (n 54) 13, referring to the mothers interviewed for their study.

<sup>114</sup> Perry and Rainey (n 86) 39.

<sup>115</sup> Hunt and Macleod (n 95); Peacey and Hunt. (n 72) 98 & 114

<sup>116</sup> *Re H (A Child) (Contact: mother’s opposition)* [2001] 1 FCR 59 [33] (Thorpe LJ). See also *Re L (Minors) (Access Order: Enforcement)* [1989] 2 FLR 359, 360-361 (Hollis J)

<sup>117</sup> *Re S (Unco-operative Mother)* [2004] 2 FLR 710

<sup>118</sup> See also *Re M (Intractable Contact Dispute: Interim Care Order)* (n 111)

<sup>119</sup> *Re P (Children)* [2008] EWCA Civ 1431, [2009] 1 FLR 1056. See also *Re W (Permission to Appeal)* [2007] EWCA Civ 768, [2008] 1 FLR 406

<sup>120</sup> See, eg, Terence Ingham, ‘Contact and the Obdurate Parent’ (1996) 26 *Family Law* 615; Janet Mitchell, ‘Contact Orders and the Obstructive Parent – A Third Way?’ (1998) 28 *Family Law* 678; Sarah Leigh, ‘A Legal Presumption in Matters of Child Contact’, 34 *Family Law* 533-535

<sup>121</sup> Caroline Willbourne and Lesley Cull, ‘The Emerging Problem of Parental Alienation’ (1997) 27 *Family Law* 807. See also Willbourne and Stanley (n 62) 689

A more condemnatory approach towards mothers can be discerned from 2004, at a time of visible protest action by fathers' rights groups, and a focus on the issue of contact by policy-makers. In *Re J (A Minor) (Contact)* [2004] the Court of Appeal stressed that "there are ... strong *policy reasons* for saying that a recalcitrant parent should not be allowed to frustrate what the court considers the child's welfare requires."<sup>122</sup> Although the father's appeal in that case was dismissed, Balcombe LJ said, obiter:

"[J]udges should be very reluctant to allow the implacable hostility of one parent (usually the parent who has a residence order in his or her favour), to deter them from making a contact order where they believe the child's welfare requires it. The danger of allowing the implacable hostility of the residential parent (usually the mother) to frustrate the court's decision is too obvious to require repetition on my part."<sup>123</sup>

Since *Re J (A Minor) (Contact)* [2004], the courts took an increasingly harsh, almost vengeful, attitude towards mothers who opposed contact. In the highly publicised case of *Re D (Intractable Contact Dispute: Publicity)* Munby J (as he then was) constructed the father as the 'victim' of both the mother *and* the court system's failure to get to grips with the mother's "threadbare excuses", "groundless assertions", and unwavering "sabotage" of contact arrangements.<sup>124</sup> Ward LJ was reported in the national press speaking about "child contact cases where the 'drip, drip, drip of venom' from vengeful mothers can leave good fathers helpless to see their children."<sup>125</sup>

Images of implacably hostile mothers unwittingly or deliberately 'poisoning' their children against their fathers are prominent in the case law, even in those cases where there is ample evidence to attribute the child's reluctance to see him to the father's own conduct. In *Re C (A Child)* [2008] Ward LJ referred to the

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<sup>122</sup> *Re J (A Minor) (Contact)* [2004] 1 FLR 729, 735 (Balcombe LJ)

<sup>123</sup> *Ibid* 736 (Balcombe LJ)

<sup>124</sup> *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam), [2004] 1 FLR 1226 [16] – [18] (Munby J). See also *V v V (Contact: Implacable Hostility)* (n 111)

<sup>125</sup> Georgina Vallance-Webb, 'Child Contact: Vengeful Mothers, Good Fathers and Vice Versa' (2008) 38 *Family Law* 678-681, 68, referring to Ward LJ in *The Times*, 1<sup>st</sup> May 2008

mother's "viciously corrupting influence" on the child.<sup>126</sup> However, Fortin et al found no evidence to support the contention that mothers commonly 'alienate' children against fathers,<sup>127</sup> and Herring points out that it is "far more common for non-resident fathers to seek to turn children against their resident mothers than vice versa."<sup>128</sup>

These messages radiating from the higher courts about mothers have had an impact on the lower courts and are "a powerful interpretive lens in shaping how family law professionals respond to mothers and fathers involved in custody disputes, as well as media representations of these disputes."<sup>129</sup> Hunt and Macleod found that both the courts and Cafcass officers demonstrated "a readiness to criticize resident parents who were seen to be uncooperative and/or not sufficiently committed to moving contact on, even where their original fears might seem to be well-grounded."<sup>130</sup> Professionals tended to 'blame' mothers for delay in proceedings, by "not co-operating with the court or more commonly 'spinning it out', 'playing the system', taking advantage of the court's duty to investigate allegations of potential risk to the child from contact."<sup>131</sup> Shaw and Bazley have a dim view of all parents in intractable contact disputes who they describe as "amongst the rudest and intransigent [sic] people you are likely to meet."<sup>132</sup> But their particular focus is on resident parents/mothers, who are repeatedly described as 'alienating', 'implacably hostile' and 'intransigent'.

Despite this perception that fathers are the victims of vengeful mothers and that the courts fail to deal with them robustly, the numbers of contact applications actually refused by courts have been steadily decreasing to the point where they

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<sup>126</sup> *Re C (A Child)* [20008] EWCA Civ 551; see also *Re T (Contact: Alienation: Permission to Appeal)* [2003] 1 FLR 531

<sup>127</sup> Fortin, Hunt and Scanlan (n 76)

<sup>128</sup> Jonathan Herring, 'Contact in a Private Law Context' in Bainham et al (n 26) 98, referring to research by Sandra Berns, 'Parents Behaving Badly: Parental Alienation Syndrome and the Family Court – Magic Bullet or Poisoned Chalice' (2001) *Australian Journal on Family Law* 6

<sup>129</sup> Elizabeth et al (n 107) 255

<sup>130</sup> Hunt and Macleod (n 95) 152. For similar findings see Smart et al (n 98)

<sup>131</sup> Hunt and Macleod (n 130) 182. For similar findings see Charlotte Dyer, Sophie McCrum, Ruth Thomas, Rachael Ward and Stephanie Wookey, 'Making Contact Work: Is the Children and Adoption Act 2006 Enough for Resident Parents and Children?' (2008) 38 *Family Law* 1237-1240

<sup>132</sup> Mike Shaw and Janet Bazley, 'Effective Strategies in High Conflict Contact Disputes' (2011) 41 *Family Law* 1129-1137, 1131-1132. See also Judith Rowe, 'Private Children Law Relating to Children An Update' (FLBA 2010)

are miniscule,<sup>133</sup> and direct contact is the expected outcome in the vast majority of cases, even when mothers have serious welfare concerns.<sup>134</sup> Furthermore, when contact does not ‘work’, Diduck and Kaganas point out that “there is no evidence to support the suggestion that it is malevolent mothers who constitute the primary obstacle to contact.”<sup>135</sup> Walker et al found that there are many complex reasons why contact does not happen,<sup>136</sup> and Elizabeth et al’s study indicated that “accusations of mothers’ hostility by some fathers and family law professionals are seldom likely to be in keeping with a much more complex reality”.<sup>137</sup> On the contrary, Fortin et al found that:

“a strong and consistent theme...[of their research] was the extent to which resident parents had encouraged the relationship between their children and non-resident parents, and in some cases even when they had themselves suffered from the non-resident parent’s violence and even when the children themselves opposed contact.”<sup>138</sup>

Indeed, in the combined appeals of *Re B (A Child); Re O (Children)*,<sup>139</sup> Wall LJ pointed out that it was far more common for contact to break down because of the father’s behaviour than because of the attitude of the mother, and was at pains to dispel the ‘myth’ that the family justice system was biased against fathers. This attempt to ‘redress the balance’ appears to have had little effect on the lower or higher courts.

Despite these statistics and findings from research that courts invariably accede to fathers’ claims for contact, and that mothers are generally supportive of such contact, the demonised figure of the implacably hostile mother enables courts to enforce contact orders against women more punitively, while still maintaining

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<sup>133</sup> See Ministry of Justice, *Judicial and Court Statistics 2011*, (Ministry of Justice 2012). Of 111,300 contact disposals made in 2011, only 333 resulted in orders for contact being refused – less than 0.3 per cent of the total.

<sup>134</sup> See Carol Smart and Vanessa May, ‘Residence and Contact Disputes in Court’ (2004) 34 *Family Law* 36; Hunt and Macleod (n 130) 54; Peacey and Hunt (n 72)

<sup>135</sup> Diduck and Kaganas (n 26) 329

<sup>136</sup> Walker et al (n 71)

<sup>137</sup> Elizabeth et al (n 107) 269. For similar findings see Smart et al (n 98); Fortin et al (n 76) xii

<sup>138</sup> Fortin et al (n 76) xiv; see also at xviii. For similar findings see Smart et al (2005) 36; Laura Cardia-Voneche and Benoit Bastard, ‘Why Some Children see their Father and Others do not; Questions Arising from a Pilot Study’ in Maclean (n 2) 30

<sup>139</sup> *Re B (A Child); Re O (Children)* [2006] EWCA Civ 1199, [2007] 1 FLR 530



that the welfare of the child is being advanced.<sup>140</sup> Before the Children Act 1989 was introduced, courts held that imprisoning mothers could harm children and do nothing to foster a relationship between father and child, so that enforcement of contact by committal should be rarely, if ever, be used.<sup>141</sup> From the mid to late 1990s, however, a distinct sea-change could be observed in the courts' attitudes towards imprisoning mothers, viewing it as no longer harmful to the child as the mother has made herself inimical to the child's interests by her selfish hostility to contact. In the leading case of *A v N (Committal: Refusal of Contact)*, the Court of Appeal held that any harm caused to the child by imprisoning the mother is caused by the mother herself.

“[I]t is perhaps appropriate that the message goes out in loud and in clear terms that there does come a limit to the tolerance of the court to see its orders flouted by mothers even if they have to care for their young children. If she goes to prison it is her fault .”<sup>142</sup>

So 'bad' mothers pose a threat to their children's welfare and have to be dealt with robustly.<sup>143</sup> In doing so, juridical power has to be invoked to retain law's authority, which takes precedence over children's immediate welfare. The intensified focus on contact enforcement during the contact 'reform' process initiated in 2000, responding to the demands of the FRM for stronger enforcement measures, led to more 'robust' responses from the judiciary. In *Re D (Intractable Contact Dispute)* Munby J (as he then was) said: “A flabby judicial response sends a very damaging message to the defaulting parent.”<sup>144</sup> An

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<sup>140</sup> See Miranda Kaye, 'Domestic violence, residence and contact' (1996) 8(4) *CFLQ* 285; Smart and Neale (n 33); Julie Wallbank, 'Castigating Mothers: The Judicial Response to Wilful Women in Cases Concerning Contact' (1998) 20 *JSWFL* 357-377; Smart and Neale (n 65)

<sup>141</sup> See *Sheppard v Miller* (n 101); *Churchyard v Churchyard* [1984] FLR 635; *Patterson v Walcott* [1984] FLR 408; *Thomason v Thomason* [1985] FLR 214; *Re M (Minors) (Access: Contempt: Committal)* [1991] 1 FLR 355

<sup>142</sup> *A v N (Committal: Refusal of Contact)* [1997] 1 FLR 533, 541 (Ward LJ); see also judgment of Beldam LJ. It should be noted that in this case, the father had served a term of imprisonment for assaulting the mother. See also *Re W (A Minor) (Contact)* [1994] 2 FLR 441; *Re S (Contact: Grandparents)* [1996] 1 FLR 158; *Z v Z (Refusal of Contact: Committal)* [1996] 1 FCR 538; *F v F (Contact: Committal)* [1998] 2 FLR 237

<sup>143</sup> Felicity Kaganas and Shelley Day Sclater, 'Contact and Domestic Violence: The Winds of Change?' (2000) 30 *Family Law* 630-636, 632

<sup>144</sup> *Re D (Intractable Contact Dispute: Publicity)* (n 124) [56] (Munby J as he then was)

increased willingness to change children's residence when mothers were perceived to be thwarting contact could also be detected.<sup>145</sup>

Barnett found that barristers, too, adopted a punitive approach to the enforcement of contact orders on unwilling mothers.<sup>146</sup> Most barristers interviewed indicated that they could understand why a court may be justified in imprisoning an 'implacably hostile' mother: "Because it's sick and tired of mothers running implacable hostility cases and the message had to be sent to mothers that it's for the court to decide, and not for the mother to decide, about contact."<sup>147</sup>

## 2.2 'Good' mothers

Abstract notions of 'welfare' and 'equality' informing legal discourse have rendered the importance of the work of 'caring for' children invisible and valueless, and mask the gendered dimensions of parenting experiences.<sup>148</sup>

Drawing on the work of Tronto, Smart identifies two modes of caring – caring *about* and caring *for* – and argues that "in orthodox moral theory caring for is not seen as a moral activity, whilst caring about...is. [In this way] if fathers care *about* they are treated as good moral actors who merit recognition."<sup>149</sup> As a consequence of 'caring for' being taken for granted and disregarded, fathers' abilities to care in the future are not questioned.<sup>150</sup>

A number of researchers have found that mothers *do* regard the work they undertake in caring for children as a moral practice, as 'counting for' something. Day-Sclater and Kaganas found, in their study of parents who had been involved in protracted contact disputes that, for the mothers:

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<sup>145</sup> See *Re M (Intractable Contact Dispute: Interim Care Order)* (n 111); *V v V (Contact: Implacable Hostility)* (n 111); *A v A (Shared Residence)* [2004] EWHC 142 (Fam), [2004] 1 FLR 1195

<sup>146</sup> Adrienne Barnett, 'Contact and Domestic Violence: The Ideological Divide' in Jo Bridgeman and Daniel Monk (eds), *Feminist Perspectives on Child Law* (Cavendish 2000)

<sup>147</sup> *ibid* 146 (Mr T, Barrister)

<sup>148</sup> See Wallbank (n 14); Diduck (n 19)

<sup>149</sup> Smart (n 11) 176-177

<sup>150</sup> See Smart (n 11) 195; Diduck (n 19); 86; Van Krieken (n 66) 37; Collier, 'Fathers 4 Justice, Law and the new politics of fatherhood' (n 13) 524; Collier, ' "The Outlaw Fathers Fight Back"' (n 34) 66

“[C]ontact is a moral issue that has its roots in the practical realities of relationships and childcare...Motherhood, in this talk, is about ‘caring for’, with all that that entails, on an everyday basis. Fatherhood, by contrast, is about ‘caring about’ – something that is emotional, not necessarily devoid of self-interest, and that lacks evidence of any practical engagement or commitment.”<sup>151</sup>

In the same way as the work of caring for children is devalued in/by law, similarly the work of sustaining contact between children and non-resident fathers is rendered invisible. Reece points out that not only do mothers remain responsible for the work that they performed during the relationship, they are also primarily responsible for a new kind of work – oiling the wheels of post-separation parenting.<sup>152</sup> Indeed, the father’s relationship with the children may deteriorate simply because the mother is not prepared to shore it up.

The alter ego, then, of the ‘implacably hostile’ mother is the ‘good’, ‘reasonable’ mother who is prepared to allow and facilitate contact between father and child, irrespective of the particular circumstances.<sup>153</sup> “The ‘good’ post-separation family needs a ‘good’ post-separation mother to sustain it... When mothers refuse to take on this additional task, they become identified as bad or vindictive mothers.”<sup>154</sup> Women’s positioning as ‘good’ moral agents is increasingly seen “in terms of the woman’s responsibility to ensure contact happens.”<sup>155</sup>

“It would seem that the work of sustaining access is like housework: it is only visible when it is not done. When it is done it is expected, like virtue, to be its own reward, but when it is not done, the mother becomes morally blameworthy or denounced as emotionally immature.”<sup>156</sup>

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<sup>151</sup> Day Sclater and Kaganas (n 26) 162. For similar findings see Smart (n 11) 193; Smart and Neale (n 65) 170-171; Neale and Smart (n 42) 195

<sup>152</sup> Reece (n 15). See also Diduck (n 19) 121; Van Krieken (n 66) 37; Vanessa May, ‘On being a “good” mother: The moral presentation of self’ (2008) 42 *Sociology* 470-486; Elizabeth et al (n 107) 257

<sup>153</sup> Boyd (n 14) 512. See also Boyd (n 110); Kaganas and Day Sclater (n 54); Elizabeth et al (n 107) 257-258

<sup>154</sup> Diduck and Kaganas (n 26) 314-315. See also Brid Featherstone, ‘Writing fathers in but mothers out!!!’ (2010) 30(2) *Critical Social Policy* 208-224, 212

<sup>155</sup> Eriksson and Hester (n 16) 787

<sup>156</sup> Smart (n 16) 496

‘Good’ mothers must not only permit contact, they must encourage and facilitate it, and ‘go the extra mile’ to ensure that contact not just happens, but ‘works’, whatever the behavior of the father might be.<sup>157</sup> In this way they are expected to be “self-denying, to sacrifice their interests to those of their children and to cope with the vicissitudes that contact may bring them.”<sup>158</sup> In *Re T (Parental Responsibility: Contact)* Butler-Sloss LJ expressed the view that:

“The courts generally set their face against depriving a child of such contact and urge reluctant caretaking parents to make contact work, however difficult it may be for that parent who very often does not understand the importance of that continuing contact.”<sup>159</sup>

In *Re P (Contact: Supervision)* the Court of Appeal said that, although the mother has a “special burden” because of her mental state and her abusive treatment at the hands of the father, what was being asked of her was “very limited”:

“She should be able to cope. Whatever she does, these children will want to know their father as they grow up, and if she continues to obstruct contact she will in my judgment simply be storing up trouble for herself.”<sup>160</sup>

However, in some cases even facilitating and encouraging contact is not enough if women wish to earn the title of ‘good mother’. In *Re O (Contact: Withdrawal of Application)*,<sup>161</sup> the trial judge and the appellate court were highly critical of the father’s conduct and firmly laid the blame on him for his failure to achieve contact. The mother, on the other hand, had taken ‘responsibility’ for her ‘behaviour’ during the marriage and was willing to promote and encourage contact. It may, therefore, be thought that this mother fulfilled every criterion for the ‘good’ post-separation mother. However, the trial judge still criticised her

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<sup>157</sup> See *F v F (Contact: Committal)* (n 42); *Re S (Contact: Promoting Relationship with Absent Parent)* (n 30)

<sup>158</sup> Kaganas (n 56) 113. See also Diduck (n 19) 94-95; Elizabeth et al (n 107) 257

<sup>159</sup> *Re T (Parental Responsibility: Contact)* (n 29) 459 (Butler-Sloss LJ). See also *Re S (Contact: Promoting Relationship with Absent Parent)* (n 30) [33] (Butler-Sloss LJ); *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494 per McFarlane LJ at Para 75

<sup>160</sup> *Re P (Contact: Supervision)* [1996] 2 FLR 314, 332 (Wall J as he then was)

<sup>161</sup> *Re O (Contact: Withdrawal of Application)* (n 31)

because “she does not push it as far as she properly might,”<sup>162</sup> and Wall J (as he then was) questioned whether the mother was being:

“[A]s helpful and as positive towards the reintroduction of contact between her son and her former husband as she could be? Is she doing it as a distasteful duty or is she recognising that this child would gain if he could renew a contact arrangement with his father in which he had pleasure in the past?”<sup>163</sup>

So we can see that even active encouragement of contact is insufficient to constitute the ‘good’ mother; to earn this accolade she must embrace the benefits of contact with the ‘right’ attitude. So strong are images of ‘implacably hostile mothers’ that even the ‘good’ mother could be ‘better’.

So an enormous responsibility is placed on mothers to reconstitute the post-separation ‘good’ family and “there is little scope for mothers within contemporary family law to legitimately contest the terms and form of father-child contact.”<sup>164</sup> As Eriksson and Hester observe: “motherhood has come under continual scrutiny, with the role of the good-enough mother probably impossible to fulfill and easily open to criticism and blame.”<sup>165</sup>

### **2.3 ‘Good’ fathers**

In contrast to the difficult and sometimes impossible task of fulfilling the role of the ‘good’ mother in family law, the role of the ‘good’ father demands very little of fathers involved in contact proceedings. As Kaganas points out: “If a father seeks a contact order, the fact that he wishes to see his child suffices to place him in the category of ‘good’ fathers.”<sup>166</sup>

Since the ‘benefits’ of contact are ‘obvious’ and unquestionable, the simple fact of biological parenthood is considered sufficient for ‘good’ fatherhood, and “virtually any involvement by fathers with their children increasingly has come

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<sup>162</sup> *ibid* [23] (Wall J, quoting the trial judge)

<sup>163</sup> *ibid* [43] (Wall J)

<sup>164</sup> Elizabeth et al (n 107) 258

<sup>165</sup> Eriksson and Hester (n 16) 791

<sup>166</sup> Kaganas (n 56) 113

to be considered good-enough fathering.”<sup>167</sup> In *Re J-S (Contact: Parental Responsibility)* Ward LJ held that: “There are reasons why, since contact has to be restored, in my judgment, this father should be entitled to play the natural role which fatherhood ordains for him by the very fact of his being a father.”<sup>168</sup>

Resident mothers interviewed by Smart et al reported feeling powerless, because “fathers could get whatever they wanted, even if they had never shown an interest in the children before the separation...[but] there was no means of complaining about this because the ‘pro-contact’ ethos was so strong.”<sup>169</sup>

This means that to “warrant description as ‘bad’, fathers must have behaved in exceptionally callous or irresponsible ways, be practically a ‘monster’, for his behaviour to deserve the court’s attention.”<sup>170</sup> In *Re S (Contact: Promoting Relationship with Absent Parent)* [2004], despite the father having an almost non-existent relationship with the child, and the Recorder and the Court of Appeal describing him as “aggressive” and “unrealistic in his approach to contact,” he still earned the title of ‘good enough father’ simply by virtue of his biological parenthood, and his “genuine” and “impressive” desire for contact.<sup>171</sup> This illustrates Collier’s observation that, as in fathers’ rights discourse, in law a ‘good’ father is one who fights for his children.<sup>172</sup> So a father is positioned as ‘good’ if he rigorously pursues his own agenda, but a mother is ‘bad’ if she does so, because fathers’ agendas are taken to be synonymous with children’s interests.

Even in those cases where the father is found to fall short of the role of ‘good’ father, courts tend to downplay his shortcomings, or portray the mother as equally ‘deficient’. In *Re O (Contact: Withdrawal of Application)*<sup>173</sup> the trial judge was highly critical of the father, describing him as ‘irrational’ in his

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<sup>167</sup> Eriksson and Hester (n 16) 791. See also Smart (n 16); Diduck (n 19) 97

<sup>168</sup> *Re J-S (Contact: Parental Responsibility)* (n 87) [53] (Ward LJ)

<sup>169</sup> Smart et al (n 98) 29

<sup>170</sup> Kaganas and Day Sclater (n 54) 5, referring to *Re T (Parental Responsibility: Contact)* (n 29). See also Kaganas and Day Sclater (n 143) 631

<sup>171</sup> *Re S (Contact: Promoting Relationship with Absent Parent)* (n 30) [33], [35] (Butler-Sloss P). See also *Re M (Contact: Supervision)* [1998] 1 FLR 727; *Re K (Children: Refusal of Direct Contact)* [2011] EWCA Civ 1064, where a decision to refuse contact to a father who had been convicted of sexual offences against children was described by the Court of Appeal as ‘finely balanced’.

<sup>172</sup> Collier, ‘Fathers 4 Justice’ (n 13)

<sup>173</sup> *Re O (Contact: Withdrawal of Application)* (n 31)

attitude, and castigating him for blaming the mother and ‘the system’ for his failure to achieve contact, rather than accepting responsibility himself.

Nevertheless, Wall J (as he then was) tried to ‘equalise’ the position of the parents:

“It would not do the father any harm to wonder – as all grown ups ought to wonder – whether their own perception of themselves is necessarily the perception of others. That also applies to the mother. Is she being as helpful and as positive towards the reintroduction of contact between her son and her former husband as she could be?... Both parents need to re-examine themselves; everybody does, and they particularly need to do so in the context of this case.”<sup>174</sup>

## **2.4 Autonomy for mothers and fathers?**

One of the harshest consequences for women of the new familial order in law is the restriction on the ability of mothers to control their own lives as a consequence of law’s efforts to sustain the post-separation family, and the differential ability of men to do so. Smart and Neale suggest that different forms of power in relationships relate to different ideas of the self.<sup>175</sup> They draw a distinction between debilitating power, where a partner is prevented from exercising personal growth and autonomy, is stopped “from becoming a new self or from rediscovering their old selves”,<sup>176</sup> and situational power, which is “depicted as one having control or mastery over one’s situation.”<sup>177</sup> Within current legal, political and popular discourses informing the issue of post-separation parenting, it is the father who is constructed as having lost ‘situational’ power and accordingly “divorce law takes seriously only the balancing of situational power, and fails to understand or recognise the issues of debilitating power.”<sup>178</sup> So family law constitutes women who resist the gendered relations of power that constrain their articulation of an autonomous, independent subject position, as unreasonable and selfish.

“This means, for example, that a woman’s need, on separation from her partner, to reconstitute herself with a fresh start and some

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<sup>174</sup> *ibid* [43] (Wall J, quoting Butler-Sloss P in the Court of Appeal)

<sup>175</sup> Smart and Neale (n 65)

<sup>176</sup> *ibid* 139

<sup>177</sup> Diduck (n 19) 64

<sup>178</sup> *ibid* 65

measure of independence...cannot be seen as also in her child's welfare, rather it is rephrased as the selfish attitude of a bad mother."<sup>179</sup>

It is through current constructions of 'the welfare of the child' that debilitating power is exercised against mothers and constrains them from realising an autonomy that is readily available to fathers.<sup>180</sup> Ideologies of motherhood, involving self-sacrifice and unconditional love, mean that: "It has become taboo to emphasise women's issues when the interests of children are being addressed, especially in the face of expectations that mothers should be selfless in relation to children."<sup>181</sup>

Research findings demonstrate how mothers involved in post-separation parenting experience the restrictive effect of debilitating power exercised by fathers through the courts and professionals. Kaganas and Day Sclater found that:

Some mothers find that the emphasis on contact exists in profound and continual tension with their own need to break free altogether from the past, from a failed or even abusive relationship, and from the former partner. For these mothers, the meaning of the welfare discourse takes shape against a background of their own practical and emotional needs.<sup>182</sup>

Fathers, however, are allowed "a capacity for self-determination and ambivalence in relation to their parenting that is denied to the child's primary carer."<sup>183</sup> This means that the coercion experienced by mothers in contact proceedings is not applied to fathers, who can 'opt in' or 'opt out' of their children's lives without legal or moral sanction.<sup>184</sup> Indeed, if children's welfare were best served by relationships with fathers after parental separation, it should follow that children and resident parents should be able to apply for orders

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<sup>179</sup> Diduck (n 19) 119. See also Wallbank (n 17) 198

<sup>180</sup> See Brid Featherstone, 'Why gender matters in child welfare and protection' (2006) 26(2) *Critical Social Policy* 294-341, 307. See also Susan Boyd, 'Autonomy for Mothers? Relational Theory and Parenting Apart' (2010) 18 *Feminist Legal Studies* 137-158, 138

<sup>181</sup> Boyd (n 180) 142. See *Re S (Contact: Promoting Relationship with Absent Parent)* (n 30) [35] (Butler-Sloss LJ), who criticised the mother for seeing the father as an unwelcome 'intrusion' into her new marriage and family.

<sup>182</sup> Kaganas and Day Sclater (n 54) 17.

<sup>183</sup> Rhoades (n 108) 80

<sup>184</sup> Wallbank (n 17) 204; see also at 212. For similar observations, see Herring (n 128) 100; Boyd (n 180) 140



requiring the non-resident parent to have contact with the child. However, despite the importance ascribed to contact, the law does not enforce contact on unwilling fathers.<sup>185</sup> Eriksson and Hester, drawing on Nordborg, call this inability to impose contact on unwilling fathers a “lawless space”.<sup>186</sup> “[T]he implication of this lawless space is that fatherhood is voluntary and further underlines that the child’s right is, in fact, the father’s right.”<sup>187</sup>

Findings from research suggest that mothers are often unhappy about fathers’ ability to ‘opt out’ of their children’s lives and their own inability to compel fathers to see their children.<sup>188</sup> Yet this is not questioned by the courts, professionals or policy-makers.<sup>189</sup> The New Labour government expressed concern “about the implications that would arise if contact orders were to be used to force someone, against their wishes, to have contact with a child.”<sup>190</sup> Similar concerns have been expressed by professionals. According to a barrister participating in Barnett’s study of barristers’ representation of women involved in contact disputes:

“I don’t see how the court could order a man to have contact with his children ... And I think that, if somebody really does not want to see their children, well, that is something the child is going to have to come to terms with.”<sup>191</sup>

As Wegelin observes: “[W]here the father doesn’t bother with access, no-one else bothers either.”<sup>192</sup>

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<sup>185</sup> Kaganas (n 56); Rhoades (n 108)

<sup>186</sup> Eriksson and Hester (n 16) 791, referring to G Nordborg, ‘Om juridikens kon [The gender of law]’ in G Nordborg (ed), *Makt & kon: Tretton bidrag till feministisk kunskap* (Symposium 1997)

<sup>187</sup> *ibid.* See also Herring (n 128) 100

<sup>188</sup> Alison Blackwell and Fiona Dawe, *Non-resident parental contact: Final report* (ONS 2003). See also Smart et al (n 98) 80-81

<sup>189</sup> See, eg, CASC (2001) (n 48) 23

<sup>190</sup> DCA, DFES, DTI (n 51) 2

<sup>191</sup> Barnett (n 146) 146 (Ms S, Barrister)

<sup>192</sup> Kaganas (n 56) 112, citing Wegelin (1984), a Dutch writer cited by Gwynn Davis and Marion Roberts, *Access to Agreement* (OUP 1988)

### 3. Conclusions

We have seen how, during the twentieth and twenty-first centuries, the father has lost his legal authority whilst being regarded as more and more central to the family in emotional and psychological terms, and the ‘welfare of the child’ is constructed almost entirely in terms of the importance for children of maintaining contact with non-resident fathers after parental separation. The proposition that contact with a non-resident parent is generally in children’s best interests has “passed into the realms of uncontestable truth”<sup>193</sup> so that arguing against contact is now equivalent to “arguing against virtue” and therefore outside the permitted terms of the debate.<sup>194</sup> The current selectively constructed version of children’s welfare operates as a mechanism of power to sustain the post-separation family by constraining women’s autonomy, and gives rise to the discursively constructed subjectivities of mothers and fathers that dominate current family law.

The valorisation of fatherhood in political, legal and popular discourses, reinforced by images of the democratic, equal family, has reinscribed motherhood as a selfish, atavistic domain, which has led to increasingly disciplinary policy initiatives designed to regulate and control mothers. This has had the effect of silencing moral claims based on the work of childcare and domestic labour, and of rendering invisible the burden on mothers to facilitate and sustain post-separation contact between children and fathers. Such claims are even reconstructed as evidence of hostility and self-interest because mothers no longer have a “legitimate language in which [they] can frame moral claims based on this work.”<sup>195</sup>

The strong presumption of contact, and the images of ‘hostile’ mothers and ‘good’ fathers to which it gives rise, means that mothers’ concerns about, or opposition to contact are rendered ‘illegitimate’ and constructed as evidence of selfishness, or of irrationality or pathology,<sup>196</sup> generating a harsh response from

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<sup>193</sup> Kaganas and Day Sclater (n 54) 4

<sup>194</sup> See Smart and Neale (n 33) 332

<sup>195</sup> Diduck and Kaganas (n 26) 295

<sup>196</sup> Elizabeth et al. (n 107) 254

the courts and professionals.<sup>197</sup> Consequently, it is extremely difficult for mothers to oppose orders for direct contact, as judges rarely deny or curtail contact, which is demonstrated by the negligible number of contact orders refused.

The prescriptive application by the courts of the welfare principle could have serious implications for the safety and wellbeing of mothers who are subjected to domestic violence from fathers seeking contact, and of the children who are exposed to that abuse. The impact of domestic violence on legal and political discourses informing the issue of post-separation contact, and the effect of this on judicial and professional perceptions and practice prior to the implementation of the Practice Direction, will now be considered.

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<sup>197</sup> See Featherstone (n 154) 212

# CHAPTER 3

## DOMESTIC VIOLENCE AND THE PRESUMPTION OF CONTACT

A threat to the promotion of the ‘safe family man’, the construct which underpins familial masculinity and the equivalence discourses, is his alter ego, the domestic violence perpetrator. As Collier points out:

“In order to reinstate fathers at the centre of the family, it has been necessary to render fatherhood ‘safe’. ... For fathers to be equal partners in the family, it is important that they do not embody the ‘threat of the undomesticated male’.”<sup>1</sup>

It is through the discursive and ideological separation, in family policy and law, of domestic violence and father-involvement, both pre- and post-separation, that the figure of the ‘safe family man’ has been constructed.

### 1. The prevalence of domestic violence and its effect on children

Domestic violence is highly prevalent in the general population, irrespective of race and class,<sup>2</sup> accounting for between 16 percent and 24 percent of all recorded violent crime.<sup>3</sup> Victims of domestic violence are more likely to experience repeated violence than victims of any other types of crime.<sup>4</sup> Furthermore, despite attempts by violent men and fathers’ rights groups to portray women as just as likely to be perpetrators

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<sup>1</sup> Richard Collier, *Masculinity, Law and the Family* (Routledge 1995). See Felicity Kaganas, ‘Domestic Violence, Men’s Groups and the Equivalence Argument’ in Alison Diduck and Katherine O’Donovan (eds), *Feminist Perspectives on Family Law* (1<sup>st</sup> edn, Routledge-Cavendish 2006) for a discussion of the array of strategies utilised by fathers’ rights groups to downplay and shift the focus away from men’s ‘dangerousness’.

<sup>2</sup> Pat Mayhew, Natalie Aye Maung and Catriona Mirrlees-Black, *The 1992 British Crim Survey* (Home Office Research Study 132, HMSO 1993); Jayne Mooney, *The Hidden Figure: Domestic Violence in North London* (Islington Police and Crime Prevention Unit 1994); Felicity Kaganas and Christine Piper, ‘Divorce and Domestic Violence’ in Shelley Day Sclater and Christine Piper (eds), *Undercurrents of Divorce* (Ashgate 1999) 187-188; Catriona Mirrlees-Black, *Domestic Violence: Findings from a new British Crime Survey self-completion questionnaire* (Home Office Research Study 191, 1999); Sylvia Walby and Jonathan Allen, *Domestic violence, sexual assault and stalking: Findings from the British Crime Survey* (Home Office Research Unit Study 276, 2004)

<sup>3</sup> Home Office Violent Crime Unit, *Developing Domestic Violence Strategies – A Guide for Partnerships* (Home Office 2004); Tricia Dodd, *Crime in England and Wales 2003-2004* (Home Office 2004); Home Office, *British Crime Survey* (Home Office 2010),

<http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1210.pdf> last accessed 05.03.12

<sup>4</sup> Home Office, *British Crime Survey* (n 3)

of domestic violence as men, research and statistics demonstrate clearly that it is a gendered issue, perpetrated predominantly by men against female partners or former partners.<sup>5</sup> Nearly one million women experience at least one incident of domestic abuse each year.<sup>6</sup> CPS spot figures for domestic violence cases in 2006 found that 89 per cent of victims were females and 94 per cent of defendants were males.<sup>7</sup> Indeed, the actual numbers of women experiencing domestic violence are likely to be higher than ‘official’ statistics indicate because of under-reporting.<sup>8</sup> The nature and severity of domestic abuse is also seen to be gendered, with women being subjected to more repeat incidents of violence than men,<sup>9</sup> being more likely to sustain more serious injuries than men, and demonstrating higher levels of fear.<sup>10</sup> Women are also far more likely than men to end relationships because of domestic violence, and to raise domestic violence as a contact-related problem.<sup>11</sup> The gendered nature of domestic violence was highlighted by Wall LJ (as he then was):

“[D]omestic violence is a largely male problem. ... The overwhelming number of those inflicting domestic violence on their spouses and partners and children are men. The first step to sweeping domestic violence under the carpet is for men to make the statement that it is a problem which affects both sexes. Of course it does, but the statistics are a chilling reminder of the fact that the overwhelming majority of

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<sup>5</sup> Catriona Mirrlees-Black, Pat Mayhew and Andrew Percy, *The 1996 British Crime Survey England and Wales* (Home Office Research and Statistics Directorate 1996); Carol Smart, Vanessa May, Amanda Wade and Clare Furniss, *Residence and Contact Disputes in Court Volume 2* (DCA, Research Series 4/05, 2005) 14-15; Christine Harrison, ‘Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence’ (2008) 14(4) *Violence Against Women* 381-405, 384; Marianne Hester, *Who does what to whom? Gender and domestic violence perpetrators* (University of Bristol 2009); Newline Extra, ‘Violence Against Women’ (2009) 39 *Family Law* 987, 987; Crown Prosecution Service, *Violence Against Women and Girls: Crime Report 2011-2012* (CPS 2012); Office for National Statistics, *Focus on: Violent Crime and Sexual Offences 2011/2012* (ONS Statistical Bulletin 2013)

<sup>6</sup> Home Office (n 3)

<sup>7</sup> See Gavin Thompson, *Domestic Violence Statistics March 2010* (House of Commons Library 2010).

<sup>8</sup> See further Miranda Kay and Julia Tolmie, ‘“Lollies at a Children’s Party” and other Myths: Violence, Protection Orders and fathers’ rights groups’ (1998) 10 *Current Issues in Criminal Justice* 52-62, 55; Walby and Allen (n 2); Hester (n 5); ONS (n 5)

<sup>9</sup> Walby and Allen (n 2); Marianne Hester and Nicole Westmarland, *Tackling Domestic Violence – Effective Interventions and Approaches* (Home Office 2005); Nicole Westmarland and Marianne Hester, *Time for Change* (University of Bristol 2006); CPS (n 5)

<sup>10</sup> Catherine Humphreys, ‘Domestic violence and child abuse’ (DfES, Research and Practice Briefings, 2006). See also Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press 2002); Liz Trinder, ‘Dangerous Dads and Malicious Mothers’ in Mavis Maclean (ed), *Parenting After Partnering* (Hart 2007) 88; Hester (n 5); Heather Douglas and Tamara Walsh, ‘Mothers, Domestic Violence and Child Protection’ (2010) 16(5) *Violence Against Women* 489-508

<sup>11</sup> Liz Trinder, Jo Connolly, Joanne Kellett and Caitlin Notley, *A Profile of Applicants and Respondents in Contact Cases in Essex* (DCA Research Series 1/05, 2005) 35

perpetrators are men...This is predominantly a male problem and men must face up to the fact.”<sup>12</sup>

The incidence of domestic violence is particularly high in families with children. Mullender notes that: “The presence of children in the household is associated with nearly double the risk of domestic violence for women.”<sup>13</sup> These findings are attested to by the very high numbers of children on child protection registers where domestic violence is a reason for the registration or at least a feature of the household, estimated eight years ago at approximately 75 per cent.<sup>14</sup>

It is also apparent that while legal and political discourses portray domestic violence as a feature of ‘the past’ relationship and therefore irrelevant to the future arrangements for children, research and statistics demonstrate that the risks of domestic violence are particularly high on or after relationship breakdown. Buchanan et al’s study of children’s and parents’ experiences of the court welfare service found that 78 per cent of parents experienced domestic violence or fear, which continued after the relationship in 64 per cent of cases.<sup>15</sup> Not only does domestic violence tend to continue after separation, but there is substantial research revealing that it can intensify and increase in severity.<sup>16</sup> Humphreys notes that “the

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<sup>12</sup> Wall LJ, ‘Enforcement of Contact Orders’ (2005) 35 *Family Law* 26-32, 30. See also Butler-Sloss LJ, ‘Contact and Domestic Violence’ (2001) 31 *Family Law* 355-358, 355

<sup>13</sup> Audrey Mullender, *Tackling Domestic Violence: providing support for children who have witnessed domestic violence* (Home Office 2004) 1; Walby and Allen (n 2); Harrison (n 5) 384; Belinda Fehlberg, ‘Legislating for shared parenting: how the Family Justice Review got it right’ (2012) 42 *Family Law* 709-713, 709

<sup>14</sup> Women’s Aid, NSPCC and Barnado’s, *Joint charities briefing on the Children and Adoption Bill* (Women’s Aid 2005). See also Lorraine Radford, Sarah Sayer and AMICA, *Unreasonable Fears? Child Contact in the Context of Domestic Violence: A Survey of Mother’s Perceptions of Harm* (Women’s Aid Federation of England 1999); Jeannine Bossy and Stephen Coleman, *A Research and Literature Review: Protection and Accountability* (HMCPSP 2004) 22; Elizabeth Butler, ‘Safer Contact Arrangements?’ (2006) *Childright* 12, 13

<sup>15</sup> Ann Buchanan, Joan Hunt, Harriet Bretherton and Victoria Bream, *Families in Conflict: Perspectives of children and parents on the Family Court Welfare Service* (The Policy Press 2001) 15. See also Catherine Humphreys and Ravi Thiara, *Routes to Safety: Protection issues facing abused women and children and the role of outreach services* (The Policy Press 2002); Ophelia Mills, ‘Effects of Domestic Violence on Children’ (2008) 38 *Family Law* 165-171, Harrison (n 5) 385; Paulette Morris, ‘Screening for Domestic Violence in Family Mediation Practice’ (2011) 41 *Family Law* 649-651, 650; Catherine Humphreys and Audrey Mullender, *Children and domestic violence: a research overview of the impact on children* (Research in Practice, undated [www.rip.org.uk](http://www.rip.org.uk) last accessed 04.08.13) 8

<sup>16</sup> Douglas and Walsh (n 10) 492. See also Susan Edwards, *Policing Domestic Violence* (Sage 1989); Martha Mahoney, ‘Legal images of battered women: Redefining the issue of separation’ (1991) 90 *Michigan Law Review* 1-94; Graycar and Morgan (n 10); Humphreys (n 10) 7; Brid Featherstone and Sue Peckover, ‘Letting them get away with it: Fathers, domestic violence and child welfare’ (2007)

most recent study of police domestic violence incidents in the UK indicated 50% were post-separation and most occurred around arrangements for child contact.”<sup>17</sup>

These findings strongly suggest that a large proportion of child contact arrangements take place within a context of domestic violence, and that women and children may be even more at risk from violent men than they were during the subsistence of the parents’ relationship.<sup>18</sup> Estimates by Cafcass officers indicate that the prevalence of domestic violence in the contact cases in which they are involved may be even higher than that found by other research. A parliamentary inquiry into domestic violence found that: “Up to 50% to 60% of Cafcass’s caseload is domestic violence, and those figures increase every year as domestic violence is better identified.”<sup>19</sup> HMICA estimated the proportion to be up to 70 per cent or more,<sup>20</sup> and observed that, anecdotally, “CAFCASS practitioners place the incidence of domestic violence in the region of 90% or more of cases they deal with.”<sup>21</sup>

It is clear, therefore, that many children live with domestic violence, both before and after parental separation. A large body of clinical and research findings and literature has been available since the early 1970s on the profound effects on children of living with domestic violence and of sustaining contact with the perpetrator.

Children are frequently witness to, or in some other way aware of, the violence and abuse perpetrated against their mothers. Hughes found that in 90 percent of cases of

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27(2) *Critical Social Policy* 181-202, 182; Harrison (n 5) 385; Calvin Bell, ‘Domestic Violence and Contact: 10 Reasons Why’ (2008) 38 *Family Law* 1139-1143, 1139

<sup>17</sup> Catherine Humphreys, ‘Crossing the Great Divide: Response to Douglas and Walsh’ (2010) 16(5) *Violence Against Women* 509-515, 511, referring to Nicky Stanley, Pam Miller, Helen Richardson Foster and Gill Thomson, *Children and families experiencing domestic violence: Police and children’s services responses* (NSPCC 2009)

<sup>18</sup> Bell (n 16) 1139. See also Buchanan et al (n 15); Ann Buchanan and Joan Hunt, ‘Disputed Contact Cases in the Courts’ in Andrew Bainham, Bridget Lindley, Martin Richards and Liz Trinder (eds), *Children and their Families: Contact, Rights and Welfare* (Hart 2003); Pascoe Pleasence, Nigel Balmer, Alexy Buck, Aoife O’Grady, Mavis Maclean and Hazel Genn, ‘Family Problems – What Happens and To Whom’ (2003) 33 *Family Law* 497-501, 501; Trinder et al (n 11); Trinder (n 10) 85

<sup>19</sup> Newline Extra, ‘Domestic Violence Commons Inquiry’ (2008) 38 *Family Law* 269-271, 270

<sup>20</sup> HM Inspectorate of Court Administration, *Domestic Violence, Safety and Family Proceedings: Thematic review of the handling of domestic violence issues by the Children and Family Court Advisory and Support Service (CAFCASS) and the administration of family courts in Her Majesty’s Courts Service (HMCS)* (HMICA 2005) 17

<sup>21</sup> *ibid* 17

domestic violence children are in the same or the next room.<sup>22</sup> Children can sustain physical injuries when they try to intervene to stop the violence or get caught in the crossfire.<sup>23</sup> There is also substantial evidence that “a high proportion of domestically violent men also physically and emotionally abuse their children.”<sup>24</sup>

Children can also be used by violent men to control and physically abuse mothers, by threats to abuse or abduct children, hurting or killing pets or using children to relay abusive messages.<sup>25</sup> Some children are forced to participate in physical assaults, while many try to be ‘good’ and ‘quiet’ to protect themselves and their mothers, and may feel they have failed if a violent incident occurs.<sup>26</sup>

Living with domestic violence can impact seriously on children’s development. A range of psychological, behavioural, developmental and emotional problems, disorders and traumas is associated with children’s experiences of violence against their mothers. These range from emotional disturbances which can result in problems such as wetting and soiling, anxiety, depression and sleeping and eating disorders to behavioural problems in toddlers as well as older children, such as aggression, truancy, suicidal behavior, bullying, hyperactivity, and speech delay.<sup>27</sup> Studies have

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<sup>22</sup> Albert R Roberts (ed), *Battered Women and their Families* (Springer 1984); H Hughes, ‘Psychological and Behavioural Correlates of Family Violence in Child Witnesses and Victims’ (1988) 58 *American Journal of Ortho-Psychiatry* 77; Jane Morgan and Lucia Zedner, *Child Victims* (OUP 1992); Miranda Kaye, ‘Domestic Violence, Contact and Residence’ (1996) 8(4) *CFLQ* 285; Buchanan et al (n 15); Mullender (n 13); Hester (n 5)

<sup>23</sup> Rebecca Morley and Audrey Mullender, ‘Domestic Violence and Children: What do we know from Research?’ in Audrey Mullender and Rebecca Morley (eds), *Children Living with Domestic Violence* (Whiting and Birch 1994). See also J G Moore, ‘Yo-yo children: Victims of matrimonial violence’ (1975) 43 *Child Welfare* 557; Mildred Daley Pagelow, *Woman-battering: Victims and their experiences* (Sage 1981); L F J Smith, *Domestic Violence: An Overview of the Literature* (HMSO 1989); Radford and Sayer (n 14); Audrey Mullender, *Reducing domestic violence ... what works? Meeting the needs of children* (Home Office, Crime Reduction Research Series No. 4, 2000); Mullender (n 13) 1-2; Humphreys (n 10) 2

<sup>24</sup> Bell (n 16) 1139. For similar findings see Jeffrey L Edleson, ‘The overlap between child maltreatment and woman battering’ (1999) 5(2) *Violence Against Women* 134-154; Humphreys and Thiara (n 15); Shazia Choudhry and Jonathan Herring, ‘Righting Domestic Violence’ (2006) 20 *International Journal of Law, Policy and the Family* 95-119; Nicola Harwin, ‘Putting a stop to domestic violence in the United Kingdom: Challenges and Opportunities’ (2006) 126 *Violence Against Women* 556-567

<sup>25</sup> Morgan and Zedner (n 22)

<sup>26</sup> Roxanne Agnew-Davies, ‘Children who Experience Domestic Violence’ (‘Making Contact Safe’ Conference, London, September 2004)

<sup>27</sup> Pagelow (n 23); Alan Rosenbaum and Daniel O’Leary, ‘Children: The Unintended Victims of Marital Violence’ (1981) 51 *American Journal of Orthopsychiatry* 692; Margaret Elbow, ‘Children of Violent Marriages: The Forgotten Victims’ (1982) 63 *Social Casework* 465; Roberts (n 22); Michael Hershorn and Alan Rosenbaum, ‘Children of Marital Violence: A Closer Look at the Unintended Victims’ (1985) 55 *American Journal of Orthopsychiatry* 260; Evan Stark and Ann Flitcraft,



shown that some children show signs of post-traumatic stress disorder “particularly when there are high levels of fear associated with on-going incidents,”<sup>28</sup> and that children exposed to domestic violence “may be the most distressed in the population.”<sup>29</sup> The adult daughter of an abused mother interviewed by Hague and Wilson described the devastating effect on her life: “It dominated my life. I feel that my childhood was destroyed...Unable to complete my own healthy development, emotionally scarred...and guilty all the time.”<sup>30</sup>

Children can, however, recover from the effects of domestic violence when they are in a safer environment,<sup>31</sup> but ongoing contact with the abusive parent can create difficulties for children’s ability to recover and sustain recovery.<sup>32</sup>

Domestic violence can also have a significant effect on the mother’s ability to care for the children. This can take the form of directly undermining the relationship between the mother and children by “criticising and insulting the mother in front of the children, encouraging the children in abusive behaviour towards their mothers, and involving children in secrecy about the abuse within the family.”<sup>33</sup> The mother’s

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‘Woman-battering, child abuse and social heredity: what is the relationship?’ in Norman Johnson (ed) *Marital Violence* (Routledge 1985); Peter Jaffe, David Wolfe, Susan Wilson and Lydia Zak, ‘Similarities in behavioural and social maladjustment among child victims and witnesses to family violence’ (1986) 56 *American Journal of Orthopsychiatry* 142; John Fantuzzo and Carol Lindquist, ‘The Effects of Observing Conjugal Violence on Children: a review and analysis of research methodology’ (1989) 4 *Journal of Family Violence* 77 (which comprised a review of 29 research papers on the effects on children of witnessing domestic violence, covering 1,069 children); Smith (n 23); Louise Silvern and Lynn Kaersvang, ‘The Traumatized Children of Violent Marriages’ (1989) 68 *Child Welfare* 421; Peter Jaffe, David Wolfe and Susan Wilson, *Children of Battered Women* (Sage 1990); Alex Saunders, Gill Keep and Thangam Debonnaire, ‘It Hurts me too: Children’s Experiences of Refuge Life’ (Women’s Aid Federation England 1995); Jeffrey L Edleson, ‘Children witnessing of adult domestic violence’ (1999) 14 *Journal of Interpersonal Violence* 839-870; Caroline McGee, *Childhood Experiences of Domestic Violence* (Jessica Kingsley Publishers 2000); Katherine Kitzman, Noni Gaylord, Aimee Holt and Erin Kenny, ‘Child witnesses to domestic violence: a meta-analytic review’ (2003) 71(2) *Journal of Consultative Clinical Psychology* 339-352; Mills (n 15)

<sup>28</sup> Humphreys (n 10) 3

<sup>29</sup> Harrison (n 5) 386. See also Janet Johnston, Marsha Kline and Jeanne Tschann, ‘On-going post-divorce conflict: Effects on children of joint custody and frequent access’ (1989) 59 *American Journal of Orthopsychiatry* 190-199

<sup>30</sup> Gill Hague and Claudia Wilson, *The Silenced Pain: Domestic Violence 1945-1970* (The Policy Press 1996)

<sup>31</sup> Janet Johnston, ‘Domestic violence and parent-child relationships in families disputing custody’ (1995) *Australian Journal of Family Law (Special Edition)* 12-25; Humphreys (n 10) 4; Humphreys and Mullender (n 15) 19

<sup>32</sup> Peter Jaffe, Nancy Lemon and Samantha Poisson, *Child custody and domestic violence: A call for safety and accountability* (Sage 2003); Humphreys (n 10) 4; Harrison (n 5) 385-386

<sup>33</sup> Humphreys (n 10) 2

ability to parent her children can also be adversely affected because of the impact of the abuse on her emotional and mental health and functioning, and continuing post-separation violence can impact on the mother's recovery.<sup>34</sup>

## 2. Family policy on domestic violence and contact

Despite the gendered prevalence of domestic violence and its effects on women, numerous researchers have pointed to the problems women have had in gaining official recognition of the violence that they sustain at the hands of male partners, as well as the culture of silence and shame that surrounded the issue of domestic violence during much of the twentieth century.<sup>35</sup> From the end of the 1960s, however, work began to emerge from feminists which revealed that the family is a place where abuse occurs, and had a significant impact on law reform in the area of domestic violence protection.<sup>36</sup> Yet these changes occurred entirely separately from policy on the family, and male violence towards women was seen as entirely separate from children's welfare.<sup>37</sup> The large body of clinical and research findings and literature discussed above, on the profound effects on children of living with domestic violence and sustaining contact with the perpetrator, failed to find any expression in debates surrounding, and Law Commission reports concerning, the Children Act 1989 or the Family Law Act 1996.<sup>38</sup>

Under the New Labour government, concern over family breakdown and the 'loss' of fathers for children predominated in family policy and in legal and popular discourses, rather than the heightened awareness of domestic violence and its

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<sup>34</sup> Butler-Sloss LJ (n 12) 355; Catherine Humphreys and Christine Harrison, 'Squaring the Circle – Contact and Domestic Violence' (2003) 33 *Family Law* 419-423, 421; James Pirrie, 'Making Contact Safe' (2004) 34 *Family Law* 837-843, 841, referring to speech by Dr Oyebode Adesida, Child and Family Psychiatrist; Humphreys (n 10) 2; Lorraine Radford and Marianne Hester, *Mothering Through Domestic Violence* (Jessica Kingsley Publishers 2006); Bell (n 16) 1140; Featherstone and Peckover (n 16) 182; Harrison (n 5) 397; Mills, O. (n 15) 166

<sup>35</sup> See, eg, R Emerson Dobash and Russell P Dobash, *Women, Violence and Social Change* (Routledge 1992); Martha Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence* (Routledge 1994); Hague and Wilson (n 30)

<sup>36</sup> For example, The Domestic Violence and Matrimonial Proceedings Act 1976. See Isabel Marcus, 'Reframing "Domestic Violence": Terrorism in the Home' in Fineman and Mykitiuk (n 35); Hague and Wilson (n 30)

<sup>37</sup> Maria Eriksson and Marianne Hester, 'Violent Men as Good-enough Fathers?: A Look at England and Sweden' (2001) 7(7) *Violence Against Women* 779-798, 784

<sup>38</sup> This is discussed further in this chapter

consequences for women, children and society.<sup>39</sup> As a consequence, fathers within family policy continued to be constructed entirely separately from the ‘dangerous masculinity’ of domestic violence discourse.

The New Labour Government placed the issue of tackling domestic violence relatively high on its agenda. In 2003 it issued a consultation paper setting out government strategy regarding domestic violence.<sup>40</sup> This led to the enactment of the Domestic Violence, Crime and Victims Act 2004 which reformed the law on injunctive relief.<sup>41</sup> Further, in 2009, as a result of a concerted campaign by the End Violence Against Women Coalition,<sup>42</sup> the government initiated a consultation exercise on ending violence against women and girls.<sup>43</sup> Absent from these government documents was any recognition of, or attempts at tackling the problem of violence and abuse in the context of post-separation parenting. Work towards eradicating domestic violence took place entirely separately from the government’s promotion of paternal involvement in the pre- and post-separation family.

However, during the 2004-2005 ‘Making Contact Work’ consultation, the government and policy-makers were compelled to confront and respond to the problem posed by domestic violence for post-separation parenting, as a result of strong and sustained campaigning and work by feminists and academics which highlighted the risks for children and mothers of continued contact with violent fathers.<sup>44</sup> However, the consultation took place within the context of dominant familial discourses and ideologies which underpinned and were reinforced by the political imperative to reconstitute ‘the family’ after parental separation. As a consequence, images of hostile mothers and victimized fathers, which were promoted by men’s groups and pro-father MPs, flourished, so that ‘the problem’ was

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<sup>39</sup> Harrison (n 5) 381

<sup>40</sup> Home Office, *Safety and Justice: The Government’s proposals on domestic violence* (Cm 5847, 2003)

<sup>41</sup> See further Elizabeth Lawson, Melanie Johnson, Lindsay Adams, John Lamb and Stephen Field, *Blackstone’s Guide to the Domestic Violence, Crime and Victims Act 2004* (OUP 2005)

<sup>42</sup> Maddy Coy, Jo Lovett and Liz Kelly, *Realising Rights, Fulfilling Obligations: A Template for an Integrated Strategy on Violence Against Women for the UK* (End Violence Against Women 2008)

<sup>43</sup> HM Government, *Together we can end violence against women and girls: a consultation paper* (Home Office 2009). See also the subsequent strategy document: HM Government, *Together we can end violence against women and girls: a strategy* (Home Office 2009)

<sup>44</sup> DCA, DfES & DTI, *Children’s Needs and Parents’ Responsibilities* (Cm 6273, 2004) 20 Para 46; DCA, DfES and DTI, *Parental Separation: Children’s Needs and Parents’ Responsibilities, Next Steps* (Cm 6452, 2005) 10

reconstructed in parliamentary debates as one of ‘tactical delays’ and false allegations by devious mothers to exclude fathers.<sup>45</sup> The result was a watered down compromise by the government to side-step the opposing demands of women’s groups and academics, who were seeking stronger safety measures, and the fathers’ lobby which opposed such measures.<sup>46</sup>

### **3. Legal discourse on contact and domestic violence prior to *Re L***

Just as domestic violence has been systematically effaced from political discourses informing the (pre and) post-separation family, legal and professional discourses have, until relatively recently, virtually ignored the issue of domestic violence in the arena of child contact proceedings. The connection between the welfare of children on parental separation, and the perpetration of domestic violence by fathers was almost totally absent in family law. The perceived importance for children of maintaining contact with non-resident parents, and the consequent images of ‘implacably hostile mothers’ and ‘safe family men’, reinforced the invisibility of domestic violence in private law proceedings concerning contact and residence.

A number of commentators have pointed to the separate and distinct ways in which men and masculinities are constructed in different legal contexts, and sometimes even in the same context, which can “serve to obscure men’s multiple identities.”<sup>47</sup> So in the criminal justice context, violent men are constructed as perpetrators and offenders, while in private law Children Act proceedings men are primarily constructed as caregivers, underpinned by safe, familial masculinities.<sup>48</sup> “[T]he authority of law is ‘challenged’ when the external world produces reality constructions that are difficult for law to reconstruct and, thereby, absorb into its ‘thinking’.”<sup>49</sup> Men’s violence in the child contact sphere was for many years ‘noise’

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<sup>45</sup> House of Commons Select Committee on Constitutional Affairs, *Fourth Report: Family Justice: The Operation of the Family Courts* (TSO, HC 116-1, 2005)[126]-[129]. See Trinder (n 10) 85

<sup>46</sup> The only measures introduced were the amendment of Section 31 of the Children Act 1989 to include, in the definition of ‘harm’: “impairment suffered from seeing or hearing the ill-treatment of another”, and ‘gateway’ forms to enable domestic violence to be identified at the outset of proceedings.

<sup>47</sup> Featherstone and Peckover (n 16); Richard Collier, ‘Waiting Till Father Gets Home...’: The Reconstruction of Fatherhood in Family Law’ (1995) 4(1) *Social and Legal Studies* 5-30

<sup>48</sup> Eriksson and Hester (n 37) 785-786

<sup>49</sup> Christine Piper, ‘Assumptions about children’s best interests’ (2000) 22(3) *JSWFL* 261-276, 268

to law because it cannot easily be accommodated within dominant constructions of children's welfare.

Many contact cases that involved serious physical violence contained no mention of the father's behaviour in the judgments, focusing instead on the mother's 'hostility', and failing to consider her safety.<sup>50</sup> Additionally, courts often minimised the violence, describing it as "difficulties" between the parents<sup>51</sup> or as "mutual conflict."<sup>52</sup> There was also an increasing refusal to recognise domestic violence as a reason for opposing contact. In *Re M (A Minor) (Contact: Conditions)* Wall J (as he then was) asserted that the father's severe violence against the mother, which was witnessed by the child "[does] not amount to cogent reasons for denying all future contact."<sup>53</sup>

The erasure of violence perpetrated by fathers was so pervasive that it was even dangerous for mothers to resist contact on the basis of such violence because they risked being constructed as implacably hostile.<sup>54</sup> In *Re P (Contact: Supervision)*, it was not the father's extremely violent conduct that was considered harmful but the 'danger' that if contact was not ordered, "the intransigent parent would get her own way."<sup>55</sup> Even in cases where courts refused fathers contact because of their violent behaviour, they still exhorted mothers to keep the 'door open' to contact, appealing to their wish to be seen as 'good' mothers.<sup>56</sup> Courts also failed to understand how violent and controlling men could use the court process itself to continue to harass mothers.<sup>57</sup> This is not to say that, before *Re L*, courts never focused on the father's

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<sup>50</sup> See, eg, *Thomason v Thomason* [1985] FLR 214; *Re S (Minors)(Access Appeal)* [1990] *Family Law* 336

<sup>51</sup> *Re BC (A Minor) (Access)* [1985] FLR 639; *Re H (A Minor) (Contact)* [1994] 2 FLR 776; *Re F (Minors) (Contact: Appeal)* [1997] 1 FCR 523

<sup>52</sup> *Re P (Contact: Supervision)* [1996] 2 FLR 314; *D v N (Contact Order: Conditions)* [1997] 2 FLR 797. See further Catherine Humphreys, 'Judicial alienation syndrome – failures to respond to post-separation violence' (1999) 29 *Family Law* 313-316

<sup>53</sup> *Re M (A Minor) (Contact: Conditions)* [1994] 1 FLR 272, 280 (Wall J). See also *Re F (Minors) (Contact: Mother's Anxiety)* [1993] 2 FLR 830; *Re T (Parental Responsibility: Contact)* [1993] 2 FLR 450; *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124; *Re P (Contact: Supervision)* (n 52); *A v L (Contact)* [1998] 1 FLR 361

<sup>54</sup> Marianne Hester and Chris Pearson, 'Domestic Violence and children – the practice of family court welfare officers' (1997) 9(3) *CFLQ* 281, 284. See also Kaye (n 22)

<sup>55</sup> *Re P (Contact: Supervision)* (n 52) 330 (Wall J). See also *Re O (Imposition of Conditions)* (n 53). See further Felicity Kaganas, 'Contact, Conflict and Risk' in Day Sclater and Piper (n 2)

<sup>56</sup> See *Re A (Contact: Domestic Violence)* [1998] 2 FLR 171, 179 (Connell J)

<sup>57</sup> Helen Rhoades, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *International Journal of Law, Policy and the Family* 71-94, 77

violence, or condemned his behaviour. But it seemed that the father had to be excessively physically violent, practically a ‘monster’, to deserve this attention.<sup>58</sup>

A shift was first detected in the case law in 1997, with the judgment of Hale J (as she then was) and Staughton LJ in *Re D (Contact: Reasons for Refusal)*<sup>59</sup> in which the Court of Appeal upheld a decision of the trial judge to order no contact on the basis of the father’s violence towards the mother, which, it was held, posed a risk to the child. Hale J warned against applying the term, ‘implacable hostility’ to cases where the mother’s fears may be “genuinely and rationally held.”<sup>60</sup>

The increased willingness of the courts to consider domestic violence as capable of constituting a ‘cogent reason’ for denying contact emerged in a number of post-1997 cases. In *Re P (Contact: Discretion)*<sup>61</sup> Wilson J (as he then was) held that the mother’s hostility to contact in circumstances of domestic violence could provide a reason for contact to be refused, even if her fear was ‘irrational’, if it could create a serious risk of emotional harm to the child. These decisions by the appellate courts sent strong messages to the lower courts not to view mothers as ‘implacably hostile’ for opposing contact if they feared violence from the father.<sup>62</sup> The Court of Appeal also urged the lower courts to focus more directly on the father’s behaviour and to consider properly the effect of that behaviour on the child and mother. In *Re M (Contact: Violent Parent)* Wall J (as he then was) held:

“It is often said that, notwithstanding the violence, the mother must none the less bring up the children to be available for contact. Too often it seems to me the courts neglect the other side of the equation, which is that a father, like this father, must demonstrate that he is a fit person to exercise contact; that he is not going to destabilise the family; that he is not going to upset the children and harm them emotionally.”<sup>63</sup>

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<sup>58</sup> See *Re T (Parental Responsibility: Contact)* (n 53)

<sup>59</sup> *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48

<sup>60</sup> *ibid* 53 (Hale J). See Felicity Kaganas and Shelley Day Sclater, ‘Contact and Domestic Violence: The Winds of Change?’ (2000) 30 *Family Law* 630-636, 633

<sup>61</sup> *Re P (Contact: Discretion)* [1998] 1 FLR 696

<sup>62</sup> See, eg, *Re K (Contact: Mother’s Anxiety)* [1999] 2 FLR 703; *G v F (Contact: Allegations of Violence)* [1999] *Family Law* 809; *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42

<sup>63</sup> *Re M (Contact: Violent Parent)* [1999] 2 FLR 321, 333 (Wall J). See also *Re M (Interim Contact: Domestic Violence)* [2000] 2 FLR 377 [14] (Thorpe LJ)

In *G v F (Contact: Allegations of Violence)* [1999]<sup>64</sup> Wall J went even further and held that contact should not be ordered without allegations of domestic violence being fully investigated. The father's motivation, ability to change and to recognise the effects of his violence, were also highlighted by Wall J in a number of cases.<sup>65</sup>

Despite the significant change in the attitudes of the appellate courts to domestic violence at this time, they continued to endorse unequivocally the overriding importance of contact, even where 'serious' domestic violence was found to have occurred,<sup>66</sup> and demonstrated a reluctance to 'give up' on contact.<sup>67</sup> Additionally, in many cases the focus remained on the mother and her opposition to contact as the determinant to whether contact should take place, rather than on the father and his conduct, even where that conduct was found to be reprehensible.<sup>68</sup>

#### **4. Research on contact and domestic violence prior to *Re L***

What research tells us about the prevalence of domestic violence in families with children, and the effects of that violence on women and children should encourage us "to question our cultural norm that it will always be good for children to have a relationship with their father."<sup>69</sup> It is perhaps because that 'cultural norm' grew in strength from the early 1990s that research was initiated in 1992 which looked specifically at how the courts and professionals manage contact and residence cases where allegations of domestic violence are made. Hester and Radford explored "women's experiences of negotiating and making arrangements for contact in circumstances of violence from male partners."<sup>70</sup> In particular, they focused on the practices and perceptions of the professionals involved in such contact arrangements and court proceedings.<sup>71</sup>

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<sup>64</sup> *G v F (Contact: Allegations of Violence)* (n 62)

<sup>65</sup> See, eg, *Re H (Contact: Domestic Violence)* (n 62)

<sup>66</sup> See, eg, *Re A (Contact: Domestic Violence)* (n 56); *F v F (Contact: Committal)* [1998] 2 FLR 237; *Re P (Contact: Discretion)* (n 61)

<sup>67</sup> See *Re S (Violent Parent: Indirect Contact)* [2000] 1 FLR 481

<sup>68</sup> See *Re K (Contact: Mother's Anxiety)* (n 62); *M v M (Parental Responsibility)* [1999] 2 FLR 737

<sup>69</sup> Pirrie (n 34) 838, referring to a speech by Roxanne Agnew-Davies, Director of Refuge

<sup>70</sup> Marianne Hester and Lorraine Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (The Policy Press 1996) 1. 53 women in England participated in the research.

<sup>71</sup> Hester and Radford interviewed 77 professionals in England, including 19 solicitors, 14 mediators, 17 court welfare officers, 18 refuge workers, and contact centre staff.

All professionals (although not usually refuge workers) endorsed the presumption of contact even when the mother's safety was in jeopardy; the quality of contact, and the child's relationship with the father, were rarely examined by professionals. Despite most women making great efforts to set up contact, professionals interviewed believed that mothers were generally resistant to, and obstructive of contact.<sup>72</sup> Thus efforts of professionals were focused on persuading mothers to cooperate, rather than on the father's behaviour, or on women's and children's safety. Women's accounts of violence by fathers and concerns over children's safety were at best minimised, or even treated as evidence of the mother's 'hostility'.

Most professionals were not aware of, and did not understand, the experiences of women and children living with domestic violence, nor the effects on children of witnessing violence towards their mothers.<sup>73</sup> Even if women were able to make professionals aware of abuse they had sustained, these experiences "often disappeared as they went through the process of negotiating contact."<sup>74</sup> Most of the professionals interviewed by Hester and Radford did not consider domestic violence relevant to current contact and "saw women's experiences of violence and abuse as separate from the impact of the violence on the welfare of children."<sup>75</sup> They rarely questioned how a man's use of violence might impinge on the quality of contact for the child, and saw children's opposition to contact as stemming from the mother's influence.

Women felt under pressure from their solicitors to agree to unsafe contact arrangements, rather than be viewed as 'hostile' or 'unreasonable' by courts.<sup>76</sup> Very few of the contact arrangements made by mothers were ultimately safe, for mother and/or child,<sup>77</sup> and many women reported that the onus of making contact safe fell on them. Professionals were unwilling to support the mother in stopping contact

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<sup>72</sup> See also Leslie Anderson, *Contact between children and violent fathers* (Rights of Women 1997)

<sup>73</sup> See Marianne Hester, Julia Humphries and Chris Pearson, 'Separation, divorce, child contact and domestic violence' in Mullender and Morley (n 23)

<sup>74</sup> Hester and Radford (n 70) 4

<sup>75</sup> *ibid* 5

<sup>76</sup> *ibid* 29. See also Bren Neale and Carol Smart, ' "Good" and "bad" lawyers: Struggling in the shadow of the new law' (1997) 19(4) *JSWFL* 377-402, 394; Carol Smart and Bren Neale, *Family Fragments* (Polity Press 1999)

<sup>77</sup> Hester and Radford (n 70) 8



unless there was clear, ‘professional’ evidence that the child had been abused because of the strong perception that courts did not consider violence towards the mother as constituting grounds for the cessation of contact.

Hester, Pearson and Radford followed up their 1996 research with a study of (what were then called) court welfare officers and mediators.<sup>78</sup> They found that, largely as a result of their earlier research, there had been a greater focus on domestic violence by both groups of professionals (though to a lesser extent by mediators). Court welfare officers “were seeing an increasingly wide range of behaviours as constituting domestic violence” and showed more awareness of the gendered power relations underpinning domestic violence and of its impact on children.<sup>79</sup> Mediators were still minimising the existence and impact of domestic violence, and neither court welfare officers nor mediators had systematic screening policies. Some court welfare officers even considered that “any emphasis on screening would only ‘invite’ unnecessary and malicious allegations.”<sup>80</sup> Although court welfare officers showed an increasing awareness of the need for safety in contact arrangements, this was not being translated into practice, since most still operated from the position of the paramountcy of contact, and felt that it was pointless to raise the issue with the courts.<sup>81</sup>

Subsequent research supported the findings made by Hester et al, and suggests that there was little change in professional and judicial practice during the subsequent years. In a small-scale study of barristers’ representation of mothers involved in contact disputes where domestic violence was an issue, all but one barrister supported the presumption of contact, or at least did not query it; violence by the father did not, in itself, alter the beliefs of most barristers in the benefits of contact.<sup>82</sup> Although barristers did not perceive ‘domestic violence’ as limited to physical abuse,

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<sup>78</sup> Marianne Hester, Chris Pearson and Lorraine Radford, *Domestic Violence A National Survey of Court Welfare and Voluntary Sector Mediation Practice* (The Policy Press 1997)

<sup>79</sup> *ibid* 9

<sup>80</sup> *ibid* 17

<sup>81</sup> Many court welfare officers said they did not include their misgivings about contact in their reports.

<sup>82</sup> Adrienne Barnett, ‘Contact and Domestic Violence: The Ideological Divide’ in Jo Bridgeman and Daniel Monk (eds), *Feminist Perspectives on Child Law* (Cavendish 2000). A representative sample of 39 barristers specialising in family law completed a postal questionnaire, and a further small selected sample were interviewed.

they tended to see it on a scale of severity, and some barristers doubted the truth of their client's allegations of violence.<sup>83</sup>

With regard to the disclosure of domestic violence, research undertaken by Piper and Kaganas found that while a few solicitors were prepared to be persistent and patient in finding out about domestic violence from clients, many others took few active steps to encourage it, as they considered that they would 'know' if domestic violence was an issue.<sup>84</sup> Similarly, most barristers in Barnett's study relied on domestic violence 'coming up' spontaneously in discussions with the client, and some would even avoid asking about such issues for fear of 'putting ideas' into the client's head.<sup>85</sup> A few barristers showed a marked reluctance to raise issues of domestic violence with the court, for fear of being thought confrontational, not wishing to be contaminated by the mother's hostility.<sup>86</sup>

Most barristers in Barnett's study felt that the mother's safety was only relevant if it was directly linked to the child's welfare, while a significant minority considered domestic violence to be wholly irrelevant to issues of contact. Similarly, comments made by some of the solicitors interviewed by Kaganas and Piper implied that domestic violence was an obstacle to be overcome on the way to agreeing contact, rather than "in terms of the client's safety or freedom from intimidation."<sup>87</sup> Anderson found that mothers' and children's wishes and fears about contact were generally ignored or discounted by solicitors and court welfare officers.<sup>88</sup>

As a consequence, women involved in contact disputes could continue to find themselves subjected to unsafe contact arrangements. Women's Aid reported that women's solicitors frequently persuaded them to agree to contact arrangements

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<sup>83</sup> *ibid*

<sup>84</sup> Christine Piper and Felicity Kaganas, 'Family Law Act 1996, Section 1(d) – how will "they" know there is a risk of violence?' (1997) 9(3) *CFLQ* 269. Piper and Kaganas interviewed 36 solicitors specialising in family law about their practices in relation to new divorce clients with children. See also Kaganas and Piper (n 2) 194 - 196

<sup>85</sup> See also Christine Piper, 'Assumptions about children's best interests' (2000) 22(3) *JSWFL* 261-276, 263

<sup>86</sup> Barnett (n 82); Adrienne Barnett, 'Disclosure of domestic violence by women involved in child contact disputes' (1999) 29 *Family Law* 104.

<sup>87</sup> Kaganas and Piper (n 2) 195

<sup>88</sup> Anderson (n 72). See also Buchanan et al (n 15) 47 – 49; in two cases, domestic violence was not even mentioned in the court welfare reports.

which resulted in women and children experiencing further threats and abuse, and in some cases being traced to a refuge.<sup>89</sup> While barristers understood that mothers should not have to come into direct contact with violent fathers, they did not appear to be aware of how contingent and hard to sustain many ‘standard’ safety measures, such as contact centres or third party handovers, can be.<sup>90</sup>

Research findings also reveal that women continued to experience difficulty persuading courts and professionals to stop contact. Anderson found that women only managed to stop contact where the children themselves had been physically or sexually abused.<sup>91</sup> Similarly Barnett found that barristers did not consider a threat to the mother’s safety arising out of contact as sufficient reason to stop contact.<sup>92</sup>

## **5. The Children Act Sub-Committee: Report and Guidelines**

As a result of the research by Hester et al and pressure from women’s groups, in 1999 the Children Act Sub-Committee of the Advisory Board on Family Law (‘the CASC’) initiated a consultation process, which resulted in recommendations to the Lord Chancellor’s Department in April 2000.<sup>93</sup> The CASC’s principal recommendation was that there should be ‘good practice’ guidelines for the judiciary setting out the approach to be taken when domestic violence was put forward as a reason for denying or limiting parental contact, which should be introduced by way of a Practice Direction. The CASC was not, however, persuaded that there was a need to amend the Children Act 1989 to introduce a legislative presumption against contact where domestic violence was established.

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<sup>89</sup> Women’s Aid, *Women’s Aid Federation Briefing Paper on Child Contact and Domestic Violence* (Women’s Aid Federation of England 1997). Women’s Aid conducted a survey of 54 refuges. See also Radford and Sayer (n 14) 20; Buchanan et al (n 15) 47; Rosemary Aris, Christine Harrison and Catherine Humphreys, *Safety and child contact: An analysis of the role of child contact centres in the context of domestic violence and child welfare concerns* (TSO 2002)

<sup>90</sup> Barnett (n 82). See also Rebecca Bailey-Harris, Jacqueline Barron and Julia Pearce, ‘From Utility to Rights? The Presumption of Contact in Practice’ (1999) 13 *International Journal of Law, Policy and the Family* 111-131

<sup>91</sup> Anderson (n 72)

<sup>92</sup> Barnett (n 82)

<sup>93</sup> Lord Chancellor’s Advisory Board on Family Law: Children Act Sub-Committee, *A Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence* (TSO 2000)

The main guidelines published by the CASC include:<sup>94</sup>

- the court should, at the earliest opportunity, consider allegations of domestic violence and decide whether the nature and effect of the violence is such as to make it likely that the order of the court for contact will be affected if the allegations are proved or admitted
- if the court's order is likely to be affected by proven allegations of domestic violence, the court should consider whether there should be an initial fact-finding hearing, which should be heard as speedily as possible
- where findings are made, the court should consider the conduct of both parents towards each other and towards the child and in particular, the effect of the violence on the child and the resident parent; the motivation of the parent seeking contact and their capacity to appreciate the effect of past and future violence on the child and the other parent; the likely behaviour of the parent seeking contact during contact and its effect on the child; whether the parent seeking contact has the capacity to change.

## 6. The decision in *Re L*

Shortly after the CASC reported, the Court of Appeal heard four combined appeals against orders refusing fathers' applications for direct contact.<sup>95</sup> In each case, the fathers had perpetrated severe physical violence on the mothers. The Court of Appeal in *Re L* laid down a novel precedent for how courts should determine contact cases where allegations of domestic violence are made, and sent a clear message to the lower courts to recognise the importance of domestic violence in terms of harm to children and risk to both children and primary carers. However, this was done with a simultaneous endorsement of the presumption of contact and a concern not to elevate domestic violence too highly as a factor that could militate against contact. It is not surprising, then, that in the ensuing years, an ambivalence on the part of the Court of Appeal to the issue of domestic violence in private law Children Act cases

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<sup>94</sup> Lord Chancellor's Advisory Board on Family Law: Children Act Sub-Committee, *Guidelines for Good Practice on Parental Contact in cases where there is Domestic Violence* (TSO 2001). It should be noted that the government subsequently endorsed the guidelines and said that it would ensure that they were widely distributed and their effectiveness monitored – see DCA and Dfes, *The Government's Response to the Children Act Sub-Committee ('CASC') Report: 'Making Contact Work'* (DCA & Dfes 2004) 9,

<http://www.dfes.gov.uk/childrenandfamilies/docs/CASC%20Final%20Version.doc> last accessed 17.06.12

<sup>95</sup> *Re L, V, M, H (Contact: Domestic Violence)* [2000] 4 All ER 609, [2000] 2 FLR 334, CA

could be discerned, with repercussions for the application of the guidelines by the lower courts.

The Court of Appeal was materially assisted by a report by Dr. Claire Sturge and Dr. Danya Glaser, child and adolescent psychiatrists ('the experts' report'), which highlighted the effects on children of living with domestic violence.<sup>96</sup> Sturge and Glaser questioned, as a moral and child welfare issue, whether children should be encouraged "to have relationships with fathers who have behaved criminally and in a way that specifically denigrates the mother and specifically undermines and distorts the caring and protective roles of parents?"<sup>97</sup> They argued forcefully that there should be an assumption against contact where the non-resident parent was violent to the other parent, which should only be offset if the non-resident parent can show positively why contact is in the child's interests,<sup>98</sup> and emphasised that:

"Domestic violence involves a very serious and significant failure in parenting – failure to protect the child's carer and failure to protect the child emotionally (and in some cases physically – which meets any definition of child abuse.)"<sup>99</sup>

They set out a list of requirements that violent parents should fulfil in order to tip the balance in favour of contact, including acknowledgement of the violence and acceptance of responsibility for it; a wish to make reparation to the child; an expression of regret; and an understanding of the impact of their behaviour on the resident parent.

The Court of Appeal endorsed the experts' report and issued strong pronouncements in the judgments about the harm caused to children and resident parents by domestic violence and the need for there to be a greater awareness of these issues. They also recognised the effect that the presumption of contact may have had in such cases.

"There has, perhaps, been a tendency in the past for courts not to tackle allegations of violence and to leave them in the background on the

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<sup>96</sup> Claire Sturge and Danya Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) 30 *Family Law* 615

<sup>97</sup> *ibid* 621

<sup>98</sup> *ibid* 623

<sup>99</sup> *ibid* 624

premise that they were matters affecting the adults and not relevant to issues regarding the children. The general principle that contact with the non-resident parent is in the interests of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence has occurred. It may not necessarily be widely appreciated that violence to a partner involves a significant failure in parenting – failure to protect the child’s carer and failure to protect the child emotionally.”<sup>100</sup>

However, all three Court of Appeal judges strongly affirmed what Thorpe LJ described as “the assumption of contact”,<sup>101</sup> of which he had “no doubt of the secure foundation,” a view that was, he said, “shared by the majority of mental health professionals”.<sup>102</sup> As a consequence, Butler-Sloss and Thorpe LJ both expressed concern that a heightened focus on domestic violence should not “move the pendulum too far and thus to create an excessive concentration on past history and an over-reflection of physical abuse within the determination of individual cases”.<sup>103</sup> Nor, they said, should there be “any presumption that, on proof of domestic violence, the offending parent has to surmount a prima facie barrier of no contact”.<sup>104</sup>

In dismissing all four appeals, the Court of Appeal laid down the following guidance:

- domestic violence does not, in principle, create a bar to, or presumption against, contact; it is one highly material factor to put into the delicate balancing exercise in applying the welfare principle and the welfare checklist;
- where allegations of domestic violence are made which might have an effect on the outcome, then they ought to be adjudicated on and findings of fact made;
- the resident parent’s justified fears of domestic violence, where it is proved, must be distinguished from cases of implacable hostility;
- on an application for interim contact, when the allegations have not yet been adjudicated on, the court should give particular consideration to the likely risk of harm to the child if contact is granted or refused;

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<sup>100</sup> *Re L* (n 95) 341 (Butler-Sloss LJ)

<sup>101</sup> *ibid* 367 (Thorpe LJ)

<sup>102</sup> *ibid* 365 (Thorpe LJ)

<sup>103</sup> *ibid* 370 (Thorpe LJ)

<sup>104</sup> *ibid* 341-342 (Butler-Sloss LJ)

- in assessing the weight to be given to past domestic violence, it is highly material whether the perpetrator has shown an ability to recognise the wrong, to acknowledge the need to change and make genuine efforts to do so, and to correct the behaviour;
- the court should consider the conduct of the parties towards each other and towards the child, the effect on the child and the resident parent, and the motivation of the parent seeking contact;
- the court should take steps to ensure that the risk of harm is minimised and the safety of the child and resident parent is secured before, during and after contact.

By laying down these guidelines and endorsing the government's view that neither legislation nor a Practice Direction was necessary, implementation of the recommendation of the CASC for a Practice Direction to be issued was delayed for over eight years.

## **7. Post-*Re L* case law on contact cases where allegations of domestic violence are made**

Following *Re L*, the Court of Appeal dealt with a number of appeals in which they were critical of the lower courts' failure to follow the *Re L* and CASC guidelines. The cases also reveal how the professionals at times also disregarded the CASC and *Re L* guidelines, exacerbating the courts' failure to do so. At the same time, the Court of Appeal's bifurcated approach in *Re L*, together with the importance ascribed to the involvement of fathers in families after parental separation in legal, professional and political discourses, led to an inconsistent application of the guidelines by the lower courts, and an ambivalent attitude towards them by the higher courts.

### **7.1 Failure to hold fact-finding hearings**

In a number of cases the Court of Appeal criticised trial judges for not conducting fact-finding hearings. In *Re M and B (Children)*<sup>105</sup> the father had been extremely violent towards the mother, was convicted of rape, indecent assault and actual bodily harm against her and was committed to prison for breaches of injunctions. The Court

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<sup>105</sup> *Re M and B (Children: Domestic Violence)* [2001] 1 FCR 116

of Appeal held, *inter alia*, that the judge erred in not following the CASC guidelines and that the importance of conducting a fact-finding hearing had not been sufficiently brought to the judge's attention by the parties' representatives.<sup>106</sup>

Similarly in *Re K and S (Children) (Contact: Domestic Violence)*,<sup>107</sup> no fact-finding hearing was held and direct contact was ordered. Although the Court of Appeal dismissed the mother's appeal, it was held that the failure to hold a fact-finding hearing and to have any regard to *Re L* was a serious deficiency, as was the failure of the parties' representatives' to draw the judge's attention to *Re L*.

Even if fact-finding hearings are listed, they could 'disappear' during the course of proceedings, mainly because the judges did not consider the violence to be relevant to contact, or because they ignored the violence and blamed the mother for 'thwarting' contact. In *Re C (Children Proceedings: Powers of Transfer)*<sup>108</sup> fact-finding hearings on the mother's allegations of violence against the father were listed on two occasions. On the first occasion, the magistrates declined to conduct the hearing on the basis that the allegations were not relevant; on the second occasion the fact-finding hearing was vacated by the trial judge on his own motion. The Court of Appeal was highly critical of the judge's actions, allowed the appeal and ensured that a fact-finding hearing was listed before a different judge. However, a contradictory approach was taken by the Court of Appeal in *Re C (Contact: Conduct of Hearings)*, where the trial judge's refusal to hold a fact-finding hearing because of her "preference to look forward rather than backward" was approved.<sup>109</sup>

It would seem, therefore, that fact-finding hearings were not held either because the judiciary and the professionals were not aware of the *Re L* and CASC guidelines, or because they did not consider fact-finding hearings to be necessary as they did not consider the father's conduct to be relevant to the issue of contact.

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<sup>106</sup> See also *Re J (Children)* (Lawtel, 25<sup>th</sup> July 2000) for the Court of Appeal's criticism of the trial judge for failing to conduct a fact-finding hearing.

<sup>107</sup> *K and S (Children) (Contact: Domestic Violence)* [2006] 1 FCR 316. See in particular [27] (Thorpe LJ)

<sup>108</sup> *Re C (Children Proceedings: Powers of Transfer)* [2008] EWCA Civ 502, [2008] 2 FLR 815

<sup>109</sup> *Re C (Contact: Conduct of Hearings)*[2006] EWCA Civ 144, [2006] 2 FLR 289, 301 (Wilson LJ). See also *Re G (Children)* [2005] EWCA Civ 1283, [2006] 1 FLR 771



Despite the criticisms by appellate judges of the lower courts failure to hold fact-finding hearings, from 2005 the Court of Appeal started to express concern that fact-finding hearings were ‘clogging up’ the court system. In *Re F (Restrictions on Applications)* Thorpe LJ said that *Re L* hearings were burdening “the already stretched resources of the trial courts with difficult factual investigations into past events and past relationships. That has undoubtedly had an impact on the productivity and speed of the family justice system.”<sup>110</sup> It is difficult to reconcile this view with the simultaneous concern of the Court of Appeal about the lower courts’ failure to hold fact-finding hearings where appropriate, and the findings of Hunt and Macleod, HMICA and other researchers of the rarity of fact-finding hearings.<sup>111</sup>

## 7.2 Judicial perceptions of domestic violence

A number of reported cases demonstrate the way in which the courts continued to minimise and ‘neutralise’ domestic violence, even in cases of extremely severe physical violence. In *Re L (Contact: Genuine Fear)*,<sup>112</sup> there was a history of severe physical violence by the father towards the mother, as well as towards his previous wife, her boyfriend and even her solicitor some years previously, for which he had served a five-year prison sentence for grievous bodily harm. The Recorder described the father’s violence as “fairly low level and sporadic” compared to “what one often hears of in these courts.”<sup>113</sup> Similarly in *Re S (Contact: Promoting Relationship with Absent Parent)*<sup>114</sup> both the Cafcass officer and the trial judge minimised the father’s violence and portrayed it as ‘mutual conflict’. The Cafcass officer expressed the view that the child “might be at greater risk of emotional damage from the conflict between her parents than from the overspill of physical violence”,<sup>115</sup> and the recorder concluded that the “incidents complained of by the mother were basically at a very minor level,”<sup>116</sup> despite the fact that the mother had obtained two non-molestation orders against the father.

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<sup>110</sup> *Re F (Restrictions on Applications)* [2005] 2 FLR 950, 955 (Thorpe LJ)

<sup>111</sup> These research findings are discussed further below.

<sup>112</sup> *Re L (Contact: Genuine Fear)* [2002] 1 FLR 621. See also *Re W (Contact)* [2007] EWCA Civ 753, [2007] 2 FLR 1122

<sup>113</sup> *Re L (Contact: Genuine Fear)* (n 112)[11] (Sir Bruce Blair QC), quoting the Recorder

<sup>114</sup> *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18, [2004] 1 FLR 1269

<sup>115</sup> *ibid* [4] (Butler-Sloss P)

<sup>116</sup> *ibid* [8] (Butler-Sloss P)

However, in a few cases, judges in the lower courts demonstrated a greater insight into domestic violence and its effects than before *Re L*, and appeared more willing to confront the father's conduct. In *Re A (Contact: Risk of Violence)*<sup>117</sup> Black J (as she then was) made findings against the father after a fact-finding hearing and demonstrated a rare insight into the problems for women leaving abusive relationships and being able to provide medical and police evidence.

### 7.3 The presumption of contact

The extent to which the 'presumption of contact' continued to impact on the courts' application of the *Re L* and CASC guidelines was demonstrated in a number of post-*Re L* cases. In *Re L (Contact: Genuine Fear)* the trial judge said that the father's "wholly unacceptable" violence did not justify the mother's "fervent opposition" to contact.<sup>118</sup> The courts' relentless pursuit of contact, even in circumstances of severe domestic abuse, can be seen in *Re W (Contact)*.<sup>119</sup> The father had been sentenced to a suspended prison sentence for breaching a non-molestation order obtained by the mother. A consent order for direct contact, including staying contact, was varied to indirect contact because of the father's aggressive behaviour and the children's resistance to contact. The Court of Appeal allowed the father's appeal to enable him to seek a referral to a family support service, so that "the relationship which endured between father and children up to June 2006 could be restored in some way."<sup>120</sup>

The desire to avoid 'conflict' and promote contact meant that, in some cases, the lower courts actively discouraged mothers from pursuing allegations of domestic violence, with the approval of the Court of Appeal. In *Re G (Children)*<sup>121</sup> Ward LJ commended the mother for withdrawing her allegations of serious domestic violence on the day of the fact-finding hearing so that some agreement could be reached; the issue was then 'simply' one of whether or not contact should be supervised. He also

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<sup>117</sup> *Re A (Contact: Risk of Violence)* [2006] 1 FLR 283. See also *Re J-S (Contact: Parental Responsibility)* [2002] EWCA Civ 1028, [2003] 1 FLR 399; judgment of District Judge Glenn Brasse in *H v H*, 1<sup>st</sup> February 2001, Lawtel

<sup>118</sup> *Re L (Contact: Genuine Fear)* (n 112) [11] (Bruce Blair QC), quoting the Recorder. See also *Re S (Contact: Promoting Relationship with Absent Parent)* (n 114) [25] (Butler-Sloss P)

<sup>119</sup> *Re W (Contact)* (n 112)

<sup>120</sup> *Ibid* [17] (Thorpe LJ)

<sup>121</sup> *Re G (Children)* (n 109)

implicitly criticised the mother for ‘insisting’ on supervised contact.<sup>122</sup> So on the basis of these judgments, the ‘good’ mother is potentially one who fails to protect herself and her children from the father’s violence. The discouragement to pursue allegations of domestic violence and the encouragement to look ‘to the future’ and not ‘the past’ indicates that courts considered even extremely severe abuse to be less important than contact.

#### **7.4 Courts’ attitudes towards fathers and mothers**

The cases demonstrate that the belief in the ‘benefits’ of contact, and images of implacably hostile mothers, continued to dominate judicial perceptions after *Re L*, so that the father’s violence, and his attitude towards it, were marginalised and the ‘problem’ continued to be portrayed in numerous cases as the mother’s opposition to contact.

In a number of cases the Court of Appeal was highly critical of trial judges for failing to follow the *Re L* guidelines by not taking into account the father’s attitude towards the violence perpetrated by him. In *Re M and B (Children)*<sup>123</sup> the Court of Appeal held that the judge should have paid far greater regard to the father’s past misdeeds, his absence of contrition and his failure to acknowledge that he was the one who needed psychological help. Similarly, in *Re J (Children)*<sup>124</sup> the Court of Appeal held that the judge had paid little attention to a combination of factors that might have suggested that the father had difficulty meeting the children’s emotional needs, such as his views on women and on his own violence.

The most serious failure to follow the *Re L* guidelines in this respect can be found in the case of *Re H (A Child) (Contact: Domestic Violence)*,<sup>125</sup> in which Judge Cockcroft found some of the mother’s allegations of very severe physical violence against the father proved. After extremely protracted proceedings, Judge Cockcroft ordered six sessions of supervised contact. The Court of Appeal condemned the judge’s hostility towards the mother and held, allowing the mother’s appeal, that it was wholly

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<sup>122</sup> See also *Re C (Contact: Conduct of Hearings)* (n 109) where the Court of Appeal approved of the trial judge’s approach in discouraging the parents from seeking findings so that matters could move forward ‘constructively’.

<sup>123</sup> *Re M and B (Children)* (n 105)

<sup>124</sup> *Re J (Children)* (n 106)

<sup>125</sup> *Re H (A Child) (Contact: Domestic Violence)* [2006] 1 FCR 102

unacceptable for the judge to have ignored *Re L* and the Sturge/Glaser report in his judgments, and that this was all the more inexcusable because the Cafcass officer had set out the principles of the experts' report in her report. The critical area of the guidelines which the judge did not appear to have addressed were: "the capacity of the parent seeking contact to appreciate the effect of past and future violence on the parent and the children concerned" and "the attitude of the parent seeking contact to past violent conduct by that parent." Wall J (as he then was) attached the CASC guidelines to his judgment:

"[I]n the hope that this court will not again be presented with a case such as the present, which not only ill-serves the parties and the child, but does the system discredit, and helps to devalue the valuable and conscientious work which courts up and down the country are undertaking in an attempt to tackle the scourge of domestic violence and to minimise the effect which it has on parties and children."<sup>126</sup>

On the other hand, some judgments reveal an increased focus by the lower courts on the father's behaviour and attitude. In *M v A (Contact: Domestic Violence)*,<sup>127</sup> HHJ Cryan rejected the father's appeal against an order of the Family Proceedings Court refusing him direct contact and found that the father "showed little insight into the impact of past events and the difficulties which these are likely to give rise to if direct contact is to be embarked upon in the near future."<sup>128</sup> In *Re O (Contact: Withdrawal of Application)*,<sup>129</sup> the trial judge was highly critical of the father, whom he described as 'irrational' in his attitude, and castigated him for blaming the mother and 'the system' for his failure to achieve contact, rather than accepting responsibility himself.<sup>130</sup>

However, in a number of cases both the lower *and* appellate courts downgraded the *Re L* factors relating to the father's conduct and attitude so that the mother's opposition to contact was the focus of attention. In *Re L (Contact: Genuine Fear)*<sup>131</sup>

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<sup>126</sup> *ibid* 146 [142] (Wall LJ)

<sup>127</sup> *M v A (Contact: Domestic Violence)* [2002] 2 FLR 921

<sup>128</sup> *ibid* [23] (HHJ Cryan)

<sup>129</sup> *Re O (Contact: Withdrawal of Application)* EWHC 3031 (Fam), [2003] 1 FLR 1258

<sup>130</sup> See also *Re M and B (Children: Domestic Violence)* [2001] 1 FCR 116. See also Wall LJ (n 12), where he refers to the failure of courts to follow the *Re L* and CASC guidelines as "major problems" that he has encountered in hearing contact disputes.

<sup>131</sup> *Re L (Contact: Genuine Fear)* (n 112)

the Recorder criticized the father for his propensity for violence, his inability to show remorse for his behaviour, and his clear contempt for the mother. Despite this, the entire focus of the case was on the mother, both in relation to whether her fears were ‘genuine’ and whether she was mentally able to cope with contact. The court, professionals and experts downplayed and sidelined the father’s violence so that, as a consequence, the mother’s opposition to contact was ‘irrational’ and even ‘pathological’, and attention was therefore on attempting to ‘treat’ her ‘pathology’. The father, on the other hand, had “genuine” motivation for seeking contact, and a “genuine commitment” to the child.<sup>132</sup> Sir Bruce Blair QC expressed “a great deal of sympathy” with the father because of the mother’s opposition to contact.<sup>133</sup> Similarly in *Re S (Contact: Promoting Relationship with Absent Parent)*<sup>134</sup> despite the Recorder acknowledging that the father came across as aggressive, belligerent and insensitive, he had no doubt that “his desire for contact was genuine and the failure of contact was to be laid principally on the shoulders of the mother who had no intention of making contact work.”<sup>135</sup> The mother, he found, had influenced the child against the father so that “the child’s beliefs were a direct result of the beliefs of the mother.”<sup>136</sup> So the father’s ‘genuine motivation’ and commitment constituted him as a ‘good father’ and counted for more than his violence; the mother inevitably, then, became the ‘problem’. The readiness of courts to accept fathers’ bare assertions that they have ‘changed’ was also seen in *Re E (Children)*.<sup>137</sup> Despite findings of serious violence having been made against the father, the judge accepted his ‘door of the court’ conversion as evidence that the father had sincerely ‘reformed’. The judge’s approach was approved by the Court of Appeal.

In *Re J-S (Contact: Parental Responsibility)*<sup>138</sup> the father’s abusive behavior was even reconstructed as evidence of his ‘commitment’ and ‘positive motivation’ towards contact. The trial judge found the mother’s allegations of serious physical violence, harassment and abuse proved, and concluded that the father was using contact as a means of controlling the mother. At a later hearing the judge terminated

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<sup>132</sup> Ibid [35] (Sir Bruce Blair QC)

<sup>133</sup> Ibid [42] (Sir Bruce Blair QC)

<sup>134</sup> *Re S (Contact: Promoting Relationship with Absent Parent)* N 114)

<sup>135</sup> ibid [33] (Butler-Sloss P). Butler-Sloss P agreed with this view of the father.

<sup>136</sup> ibid [9] (Butler-Sloss P)

<sup>137</sup> *Re E (Children)* (Lawtel, 11<sup>th</sup> April 2005)

<sup>138</sup> *Re J-S (Contact: Parental Responsibility)* (n 117)

contact following the father’s repeated complaints to social services about the mother, which were found to constitute a malicious and controlling attempt to harass her. On the father’s appeal, Ward LJ reframed the father’s conduct as evidence of a concerned, ‘good’ father, by describing him as “over-anxious” and “over-protective” rather than malicious, and as a man of “intensity and passion.”<sup>139</sup> On the other hand, Ward LJ was highly critical of the mother, and gave her no credit for agreeing to direct contact, and implicitly portrayed her as scheming and obstructive.

In conclusion, we have seen that the cases reveal on the one hand, an increasing frustration by the Court of Appeal at the failure of the lower courts and professionals to apply the guidelines, and on the other hand an affirmation of the very approach that the Court of Appeal criticised in *Re L*. Concern about the failure of the courts and professionals “to recognize domestic abuse and deal with it in an appropriate way” was expressed by Wall J (as he then was) in 2004,<sup>140</sup> and by Elizabeth Lawson QC who criticised the courts:

“[F]or the inappropriate lengths to which they go to encourage agreement, which in effect presents the abused mother with a steeplechase to the goal of protection that many cannot complete. Too often the real issue of domestic abuse is swept under the carpet despite the needs of the victim and the children: ‘he may be violent but he is still a good dad’.”<sup>141</sup>

## 8. Post *Re L* research

Monitoring of the *Re L* and CASC guidelines by the Lord Chancellor’s Department supports the findings of this review of the case law.<sup>142</sup> It was found that their application was inconsistent and ‘patchy’ and that the guidelines were frequently ignored, that fact-finding hearings were not always held where appropriate, and that issues of safety were frequently not addressed. “Despite *Re L*, it appeared that the

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<sup>139</sup> *ibid* [38] (Ward LJ). See also *Re P (Children) (Contact)* [2008] EWCA Civ 1431, [2009] 1 FLR 1056

<sup>140</sup> Reported by Pirrie (n 34) 837

<sup>141</sup> Reported by Pirrie (n 34) 840

<sup>142</sup> DCA and DfES (n 94)

courts continued to assume contact was in the child's best interests and to order it without a thorough analysis of the risks to the child and carer."<sup>143</sup>

These concerns were supported by research undertaken into contact proceedings following *Re L*, which encountered similar concerns to those found in the pre-*Re L* research. The promotion of post-separation contact and the preference for agreed outcomes by courts and professionals continued to lead to women being pressurised into agreeing to unsafe contact arrangements,<sup>144</sup> and courts being reluctant to restrict contact. Her Majesty's Inspectorate of Court Administration ('HMICA'), in their evaluation of how Cafcass deal with private law cases involving domestic violence, found that the presumption of contact and the preference for agreement drove and constrained Cafcass practice, even where Cafcass officers did not necessarily agree with it.<sup>145</sup> Some women reported being under pressure to agree contact, and then being accused of accepting that the violence could not have been that bad because they had 'agreed'. Mediation was often suggested by Cafcass officers, irrespective of the presence of domestic violence. Solicitors themselves told Hunt and Macleod that they participated in the pressure on clients to reach agreement, for example by 'using' Cafcass reports to persuade clients of the 'inevitable' outcome.<sup>146</sup>

Domestic violence continued to be minimised or 'equalised' by courts and professionals which meant that it continued to be disregarded, screened out of Cafcass reports, and considered irrelevant to contact.<sup>147</sup> There was a "systemic failure" to appreciate the impact of persistent post-separation abuse on women.<sup>148</sup> As a consequence, fact-finding hearings continued to be inconsistently and rarely

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<sup>143</sup> Judith Masson, 'Facilitating and Enforcing Contact: The Bill and the Ten Per Cent' (2005) 35 *Family Law* 548-554, 548-549. See also Joan Hunt and Ceridwen Roberts, *Child contact with non-resident parents, Family Policy Briefing 3* (University of Oxford 2004) 8, who make similar observations regarding the first evaluation of the guidelines by the LCD in 2002

<sup>144</sup> See Chris Humphreys and Christine Harrison, 'Squaring the Circle – Contact and Domestic Violence' (2003) 33 *Family Law* 419-423; Alison Perry and Bernadette Rainey, 'Supervised, Supported and Indirect Contact Orders: Research Findings' (2007) 21 *International Journal of Law, Policy and the Family* 21-47, 24, 30, 34 & 40; Joan Hunt and Alison Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (Ministry of Justice 2008)

<sup>145</sup> HMICA (n 20). Inspectors found that this was "evident in all the practice sessions observed during this inspection." (28) Similar findings were made by Harrison (n 5)

<sup>146</sup> Hunt and Macleod (n 144)

<sup>147</sup> HMICA (n 20); Harrison (n 5) 389

<sup>148</sup> Harrison (n 5) 400

held.<sup>149</sup> Hunt and Macleod found a general ‘coolness’ to fact-finding hearings; despite allegations of domestic violence featuring in half of the sample cases, fact-finding hearings were extremely rare.<sup>150</sup> The courts’ reluctance to hold such hearings appeared to be due to the perception by the judiciary that “there were few cases in which findings would be relevant to contact; doubts about the quality of the evidence available; a general preference for settlement over adjudication; concerns about the inevitable ‘mud-slinging’ exacerbating the conflict; and pressure on court time.”<sup>151</sup>

“The only group not implicated in this ‘nobody wants finding of fact hearings’ scenarios were Cafcass officers, some of whom voiced their disquiet at the rarity of these hearings and their frustration at asking for hearings which were either not listed or did not happen.”<sup>152</sup>

Images of ‘safe family men’ and ‘implacably hostile mothers’ continued to influence the perceptions of professionals, who often misunderstood the behavior of violent men, so that perpetrators of domestic violence could be perceived as reasonable, plausible and charming.<sup>153</sup> As a consequence, “even proven histories [of violence] were disregarded by courts, professionals and contact centres,”<sup>154</sup> fathers’ motivation was rarely questioned, and the parenting capacity of violent men was over-estimated.<sup>155</sup>

On the other hand, the post-*Re L* research commonly found that women who raised allegations of domestic violence continued to be viewed with suspicion, disbelieved and treated as obstructive.<sup>156</sup> Harrison found that if the father denied the violence, solicitors, Cafcass officers and contact centre staff tended to frame it as “one person’s word against another,” usually giving fathers the “benefit of the doubt”.<sup>157</sup> Alternatively, mothers’ fears could be trivialised and not taken seriously,<sup>158</sup> and if mothers were viewed as ‘implacably hostile’ they could be

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<sup>149</sup> See HMICA (n 20); Perry and Rainey (n 144); Hunt and Macleod (n 144)

<sup>150</sup> Hunt and Macleod (n 144) 88

<sup>151</sup> *ibid* 184. See also at 88, 158, 168 & 184

<sup>152</sup> *ibid* 185

<sup>153</sup> HMICA (n 20); Harrison (n 5)

<sup>154</sup> Harrison (n 5) 395

<sup>155</sup> *ibid* 397

<sup>156</sup> HMICA (n 20) 22 & 50

<sup>157</sup> Harrison (n 5) 394

<sup>158</sup> Perry and Rainey (n 144) 32



threatened with enforcement proceedings, even in cases where men had breached non-molestation orders or had convictions for violence.<sup>159</sup>

Additionally, very rarely did courts refuse to order direct contact. Research by the National Association of Probation Officers “found that in the vast majority of cases, fathers were granted contact with their children regardless of their violent and abusive behaviour.”<sup>160</sup> This continued to lead to unsafe contact arrangements that put women and children at risk of harm from violent fathers.<sup>161</sup> HMICA found that Cafcass did not assess risk sufficiently and that some of the routine approaches used by Cafcass officers were “dangerous”.<sup>162</sup> Practitioners’ practices were no different, whether or not domestic violence was alleged. Hunt and Macleod also found that it was unusual to find a risk assessment in Cafcass reports.<sup>163</sup> As a consequence, a number of research studies found that, despite very high levels of domestic violence, orders for supervised contact were rare; the most common final outcomes were for direct, unsupervised contact.<sup>164</sup>

## 9. Genesis of the Practice Direction

Following the publication by Women’s Aid of a report about 29 children in thirteen families who were killed between 1994 and 2004 as a result of contact arrangements in England and Wales,<sup>165</sup> Wall LJ presented a report to the President of the Family Division in February 2006 on the five cases where contact was ordered by the court with the agreement of the parties.<sup>166</sup> Wall LJ recommended that the guidelines in *Re*

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<sup>159</sup> Hilary Saunders, ‘Making Contact Worse?’ (Women’s Aid Federation of England 2001). See also Hunt and Macleod (n 144)

<sup>160</sup> Humphreys and Harrison (n 144) 420. See also Hunt and Macleod (n 144)

<sup>161</sup> Saunders (n 159). For similar findings see Liz Trinder, Jo Connolly, Joanne Kellett and Caitlin Thoday, ‘Families in Contact Disputes: A Profile’ (2004) 34 *Family Law* 877-881, 880

<sup>162</sup> HMICA (n 20) iv & 26

<sup>163</sup> Hunt and Macleod (n 144). See also Liz Trinder, ‘Conciliation, The Private Law Programme and Children’s Welfare: Two Steps Forward, One Step Back?’ (2008) 38 *Family Law* 338-342, 340

<sup>164</sup> Trinder et al (n 11) 90 - 91; Hunt and Macleod (n 144). See also Perry and Rainey (n 144) 30 who found that 57 per cent of the cases involving allegations of physical violence or harassment resulted in an order for unsupervised direct contact, compared with 66 per cent of cases where no such allegations were made.

<sup>165</sup> Hilary Saunders, *Twenty-nine Child Homicides: Lessons still to be learnt on domestic violence and child protection* (Women’s Aid Federation of England 2004). Ten of these children were killed in the last two years, and one of the cases involved a residence order to the father; domestic violence was involved in 11 of the 13 families.

<sup>166</sup> Wall LJ, *A Report to the President of the Family Division on the Publication by The Women’s Aid Federation of England entitled ‘Twenty-Nine Child Homicides: Lessons still to be learnt on domestic violence and child protection’ with Particular Reference to the Five Cases in which there was*

L should be reinforced, and requested the Family Justice Council to advise on the approach the courts should adopt to proposed consent orders, and to consider whether parties were being pressurised by their lawyers into reaching agreements which they did not believe to be safe.

Following these recommendations, Resolution undertook a postal survey of its membership, at the request of the Family Justice Council, which found that: orders for no contact were only made in two per cent of cases; fact-finding hearings were extremely rare and courts were very reluctant to hold them; there was a wide divergence in practice in seeking disclosure of domestic violence from clients; courts very rarely refused consent orders and in some cases consent orders were made which participants thought put children at risk of harm; a third of participants thought that there was too much pressure on parties to agree contact arrangements; courts did not enquire into the safety and suitability of arrangements for children when making consent orders.<sup>167</sup>

The subsequent report produced by the Family Justice Council found that, in general, the guidelines in *Re L* were more honoured in the breach than in the observance.<sup>168</sup> Fact-finding hearings were rare, and in applications for consent orders the *Re L* guidelines were virtually ignored. The assumption that contact is in a child's best interests and that it will inevitably be ordered by the court "sometimes results in pressure being put on victims of domestic violence by lawyers, or by perpetrators of that domestic violence, to agree to an order."<sup>169</sup> As a result, unsafe contact agreements were often made because of the advice given to parents. The report concluded that: "Seeking agreement should never take priority over safety in cases involving domestic violence or any other form of child abuse."<sup>170</sup> The main recommendation of the FJC was that:

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*Judicial Involvement* (2006)

[www.judiciary.gov.uk/resources/JCO/documents/reports/report\\_childhomicides.pdf](http://www.judiciary.gov.uk/resources/JCO/documents/reports/report_childhomicides.pdf), last accessed 05.08.13

<sup>167</sup> Judith Masson, 'Consent Orders in Contact Cases: A Survey of Resolution Members' (2006) 36 *Family Law* 1041

<sup>168</sup> A summary of the FJC findings and recommendations is provided by Jane Craig, 'Everybody's Business: Applications for Contact Orders by Consent' (2007) 37 *Family Law* 26

<sup>169</sup> *ibid* 28, referring to Hunt and Roberts (n 143)

<sup>170</sup> Craig (n 168) 30

“A cultural change is required, with a move away from ‘contact is always the appropriate way forward’ to ‘contact that is safe and positive for the child is always the appropriate way forward’.”<sup>171</sup>

It was also recommended that the message of Drs Sturge and Glaser, that domestic violence constitutes a significant failure in parenting, “needs to be repeated again and again, loud and clear, until it gains widespread acceptance.”<sup>172</sup> Solicitors and barristers should be cautious when advising clients to agree arrangements for contact in cases where there are allegations of domestic violence, and the safety of any proposed arrangements should be paramount. Risk assessments should be undertaken in every case in which domestic violence has been alleged or admitted, before a consent order is made.

The Family Justice Council recommended that a Practice Direction should be issued embodying the CASC and *Re L* guidelines and the recommendations of the FJC. Accordingly, Practice Direction 12 J, which forms the subject of this study, was issued by the President of the Family Division in May 2008.<sup>173</sup>

## 10. Conclusions

The relations of power that underpin and are played out in family law led to the position whereby “fatherhood...replaced marriage as the social institution maintaining men’s control of women”,<sup>174</sup> and the ‘welfare of the child’ became constructed almost entirely in terms of the importance for children of maintaining contact with non-resident fathers after parental separation. This constructed and reinforced an ideological divide between domestic violence and post-separation parenting, which rendered fatherhood ‘safe’ by relegating ‘dangerous masculinity’ to territory “outside the realm of fathering”.<sup>175</sup> So men as perpetrators of domestic violence were constituted separately from men as fathers. In the arena of post-

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<sup>171</sup> *ibid* 27

<sup>172</sup> *ibid* 30

<sup>173</sup> Potter P, *Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* [2008] 2 FLR 103, reissued as amended at [2009] 2 FLR 1400 to reflect the decision of the Supreme Court in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 3, [2009] AC 11, in which Baroness Hale of Richmond confirmed that a case remains part-heard after a fact-finding hearing and therefore subsequent hearings should be heard before the same trial judge.

<sup>174</sup> Eriksson and Hester (n 37) 792

<sup>175</sup> Jonathan Scourfield and Mark Drakeford, ‘New Labour and the “problem of men”’ (2002) 22 *Critical Social Policy* 619 – 640, 625

separation parenting, it was images of ‘safe family men’ that dominated political and popular discourses and family policy, because of the strong political imperative to reconstitute ‘the family’ across households and maintain a place for the father after parental separation. Underpinning parental responsibility is the image of safe, familial masculinity, which makes it so difficult for mothers to raise ‘other’ images of ‘dangerous’ masculinity.

The gendered relations of power that gave rise to, and reinforced, the perceived importance for children of maintaining a relationship with non-resident fathers, worked to erase men’s violence against women in legal discourse, so that “in spite of the growing recognition of the gendered features of violence in adult close relationships, ... fatherhood [was] still to an overwhelmingly large extent constructed as essentially nonviolent.”<sup>176</sup> At the same time, images of ‘implacably hostile mothers’ focused attention on mothers’ opposition to contact.

The pre-*Re L* case law and research demonstrate that law’s selective construction of children’s welfare, with its minimal expectations of fathers, “masked the gendered separation of men into good fathers and violent men”,<sup>177</sup> and reinforced the invisibility of male violence in the private law arena.<sup>178</sup> This erasure of domestic violence meant that ‘father-absence’ and the denial of contact were perceived as a more serious and damaging ‘social harm’ than fathers’ violence towards mothers.<sup>179</sup> As a consequence, the moral and ethical dimension of men’s violence to women was masked, thereby condoning the violence. Risks to women’s and children’s safety were also marginalised or rendered invisible.<sup>180</sup> So the selective construction of children’s welfare did not “necessarily mean privileging their safety and well-being but, instead, [was] used to legitimate the scrutinising and disciplining of women who

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<sup>176</sup> Eriksson and Hester (n 37) 780

<sup>177</sup> *ibid* 788

<sup>178</sup> *ibid* 791. See also Rhoades (n 57) 82-83; David Mandel, ‘Child Welfare and Domestic Violence: Tackling the Themes and Thorny Questions that Stand in the Way of Collaboration and Improvement of Child Welfare Practice’ (2010) 16 *Violence Against Women* 530-536

<sup>179</sup> See Kaganas and Day Sclater (n 60); Rhoades (n 57) 83; Richard Collier, ‘“Outlaw Fathers Fight Back”: Fathers’ Rights Groups, Fathers 4 Justice and the Politics of Family Law Reform – Reflections on the UK Experience’ in Richard Collier and Sally Sheldon (eds), *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Hart 2006) 64

<sup>180</sup> See Carol Smart, ‘Losing the Struggle for Another Voice: The Case of Family Law’ (1995) 18 *Dalhousie Law Journal* 173-195, 195; Eriksson and Hester (n 37) 780

[were] trying to protect their children.”<sup>181</sup> The perceptions and practices of courts and professionals were both shaped by, and reinforced, the ideological separation of contact and domestic violence, so that domestic violence barely impinged on the ‘presumption of contact’. The result was that the mother’s voice was disqualified by professionals in contact cases, since she could not express a legitimate interest in her own protection without risking being constructed as selfish and hostile. In this way, both the courts and professionals worked to silence women’s attempts at seeking autonomy from violent men. This led to enormous pressure to agree to contact and to harsh consequences for mothers if they resisted contact between violent fathers and children. The increasingly hegemonic status of the equal, democratic family, underpinned by discourses of individual responsibility, masked and reinforced not only the gendered division of labour, but also the risks for women of sustaining contact with abusive fathers.

In the context of the strength of the dominant familial discourses and the gendered subjectivities to which they gave rise, feminist campaigners and academic researchers in the late 1990s achieved remarkable success in putting domestic violence on the agenda in private law Children Act proceedings, and compelling policy makers and the judiciary to take domestic violence more seriously. The CASC recommendations and the decision in *Re L* attest to the possibilities for shifting the discursive terrain in which contact between violent men and children is considered and decided. However, these developments were simultaneously undercut by the endorsement of the presumption of contact, as well as the powerful familial discourses already in circulation, which continued to resonate with large sectors of the judiciary and family law professionals. This meant that even after *Re L*, and despite strong encouragement by some members of the senior judiciary for the lower courts to take domestic violence seriously, the *Re L* and CASC guidelines failed to have a significant impact, and many judges and professionals disregarded them because they continued to perceive contact as more important than domestic violence. Even severe physical violence continued to be minimised and neutralised by many courts and professionals, and women continued to be pressurised into agreeing to unsafe contact arrangements.

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<sup>181</sup> Harrison (n 5) 401

The downgrading of domestic violence meant that risk was rarely and inconsistently assessed, and little thought was given by courts and professionals to the safety of children and resident parents. The demonised figure of the ‘implacably hostile mother’, together with discourses of maternal ‘irrationality’, continued to lead to women’s fears of domestic violence being portrayed as unreasonable and illogical, and therefore harmful to children.<sup>182</sup> The hallmark of the ‘good mother’ remained her willingness to promote and encourage contact with non-resident fathers, irrespective of his violence towards her, because “virtually any involvement by fathers with their children constitutes good-enough fathering.”<sup>183</sup> Mothers who opposed contact with violent fathers were likely to be perceived and treated as implacably hostile and denied a legitimate voice to express concern for their own, and their children’s safety and well-being.<sup>184</sup> The burden on mothers of facilitating contact between children and violent fathers, and the risks to their own safety and well being, continued to remain invisible to many courts and professionals. As Harrison observed:

“When a history of domestic violence remained unknown or became obscured, and women appeared reluctant to move on, a perception of them as hostile and obstructive was reinforced, and their real fears were left unacknowledged.”<sup>185</sup>

Furthermore, one of the principal recommendations of the Court of Appeal in *Re L* and of the CASC – for courts to hold fact-finding hearings on disputed allegations of domestic violence – was frequently ignored because domestic violence was considered irrelevant to contact and fact-finding hearings were seen as an unwelcome intrusion into the conciliatory, forward-looking ethos of family proceedings. Even if domestic violence was found to have occurred, simple expressions of the desire for contact were constructed as sufficient ‘motivation’ to justify ignoring the guideline factors, thereby failing to acknowledge that the pursuit of contact by fathers may itself be part of a process of abuse. As Lady Hale observed: “The most troubling aspect of my perception is that some women are

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<sup>182</sup> Eriksson and Hester (n 37) 791

<sup>183</sup> *ibid* 791. See also Harrison (n 5) 395

<sup>184</sup> See Eriksson and Hester (n 37) 789; Harrison (n 5) 382

<sup>185</sup> Harrison (n 5) 400

being pursued and oppressed by controlling or vengeful men with the full support of the system.”<sup>186</sup>

The issue that will be considered in the following chapters is the extent to which the Practice Direction has led to courts and professionals seeing beyond images of ‘safe family men’ and ‘implacably hostile mothers’ and acknowledging properly that ‘the family’ is not always a safe haven but a place where abuse can occur.

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<sup>186</sup> Hale LJ, ‘The View from Court 45’ (1999) 11 *CFLQ* 377, 385

# CHAPTER 4

## PERCEPTIONS OF DOMESTIC VIOLENCE, CHILDREN'S WELFARE AND PARENTS INVOLVED IN CONTACT PROCEEDINGS

### 1. Understanding domestic violence

#### 1.1 Introduction

The way in which the term, 'domestic violence', is defined and understood has varied over time and in different contexts. According to contemporary understandings and definitions, 'domestic violence' is a pattern of coercive, controlling behaviour, of which physical violence may form a part. So, for example, Women's Aid define domestic violence as:

“physical, psychological, sexual or financial violence that takes place within an intimate or family-type relationship and forms a pattern of coercive and controlling behaviour. This can include forced marriage and so-called 'honour' crimes. Domestic violence often includes a range of abusive behaviours not all of which are, in themselves, inherently 'violent' – hence some people prefer to use the term 'domestic abuse' rather than 'domestic violence'.”<sup>1</sup>

The encompassing, insidious nature of domestic violence was experienced by the women interviewed by Coy et al, who provided accounts of the broad range of abuse they had sustained from the fathers of their children.<sup>2</sup> Their findings demonstrated the way in which the violence and abuse constituted a pattern of coercive control embedded in the fabric of the women's everyday lives and parenting practices “by micro-managing the household and inculcating a constant state of anxiety and fear,” and systematically alienating children from their mothers.<sup>3</sup> These abusive behaviours were experienced by many of the women as more frightening and debilitating than the physical violence.

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<sup>1</sup> Women's Aid, [www.womensaid.org.uk/domestic-violence-survivors-handbook](http://www.womensaid.org.uk/domestic-violence-survivors-handbook), last accessed 09.11.13

<sup>2</sup> Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women 2012)

<sup>3</sup> *ibid* 51



## 1.2 Professionals' perceptions of domestic violence

In order to determine professionals' understandings of domestic violence, respondents' views were sought on the description of domestic violence in the Practice Direction; this question also provided helpful information on the adequacy of that description. The Practice Direction describes 'domestic violence' as including:

“[P]hysical 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.”<sup>4</sup>

The vast majority of professionals recognised that domestic violence is not limited to incidents of physical violence.<sup>5</sup> Many respondents described it as encompassing emotional abuse,<sup>6</sup> and a few respondents considered that financial control, denigration of the mother and alienation from their children were forms of domestic violence. None of the participants described domestic violence as arising out of anger, and only two referred to it as constituting a lack of control.

“You know, it isn't always physical, it's the emotional abuse and the erosion of self-esteem.” [Ms G, Barrister, SE]

“You know, the sort of alienation from family, they don't realise that it's happening until they start to talk to you and you go: right, I've come across this before, tell me exactly what happened.” [Ms P, Barrister, SW]

In light of the findings of earlier research discussed in Chapter 3, and the incident-based approach to domestic violence applied by many family lawyers in Hunter and Barnett's research,<sup>7</sup> it was encouraging to find that half of all respondents (although only two barristers), articulated a theoretical understanding of the power and control dynamics that characterise domestic violence, although it was less surprising to find that more Cafcass officers<sup>8</sup> than legal professionals understood those dynamics.

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<sup>4</sup> Paragraph 2. This description of domestic violence was endorsed by the Supreme Court in the case of *Yemshaw v London Borough of Hounslow* [2011] UKSC 3 [28] (Lady Hale)

<sup>5</sup> N = 21 comprising: Barristers = 7; Solicitors = 6; FCAs = 8

<sup>6</sup> N = 13

<sup>7</sup> Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council 2013) [www.familyjusticecouncil.org.uk](http://www.familyjusticecouncil.org.uk), last accessed 12.11.13

<sup>8</sup> FCAs = 7. Hunter and Barnett (n 7) also found that more Cafcass officers than family lawyers applied the broader, sociological understanding of domestic violence.

These respondents were able to see that what could have been constructed as one-off or ‘historic incidents’ formed part of a pattern of coercive control.

“I dealt with a case recently where there had been, sort of, I asked mother: would you say the relationship was characterised by violence, how often did the violence take place, probably three times a year...but actually it was because he only needed to raise his eyebrow to make it clear that if she went any further then she would be beaten...and we need to be aware that that control doesn’t need to be the physical; the emotional, the mental control can be just as effective, but just as corrosive to the victim.” [Mr J, FCA, NE]

“His control, well his control is different, if you’re constantly pregnant, short of money, he’s doing a criminology degree, putting you down, look at me I’m a brainbox,...The thing is domestic violence, the most worrying ones, are the controlling partners.” [Ms V, FCA, NW]

Ms P described a barrister in the case she had undertaken on the day of the interview saying:

“Oh well, the last incident of violence was in 2008, and I sort of said: yes, but he was abusive, he was quite violent then and she learnt not to challenge him because she obviously challenged him in 2008 and got what for, so he’s not gonna have to do it since.” [Ms P, Barrister, SW]

Two Cafcass officers commented on the manipulative way in which perpetrators can use charm to portray themselves as ‘reasonable’ and ‘safe’, and mothers as lying or irrational.

In contrast, Ms U [FCA, NW] distinguished between ‘genuine’ cases of domestic violence, characterised by the coercive use of control, in which victims may be “dreadfully disempowered”, and cases of ‘false’ allegations, where women “cry wolf”, which were, in her view, characterised by the failure of women to report the violence, thereby suggesting a lack of understanding of the difficulties for many women in disclosing abuse.

Although most professionals perceive domestic violence in wider terms than physical violence, and many understand its power and control dynamics, this does not mean that this necessarily translates into practice, as half of all participants still

consider that anything ‘less than physical’ is not serious or important. These professionals tend to see domestic violence on a scale of severity, minimising or considering less ‘relevant’ behaviours that do not constitute incidents of ‘severe’ physical violence.<sup>9</sup>

“They were allegations of pushes or shouting, um, and some low level threats if I can put it that way and, you know, we’re not wishing to minimise it in any way, you know, if it was true then it’s, you know, it’s not very pleasant, but it, you know, there was no allegation of injuries or, you know, a punch or a slap or anything of that sort.” [Ms T, Barrister, NW]

Ms E referred to a case in which the violence was “mid-level”, comprising “punching, kicking, pushing her over, slashing the flat, that sort of thing, nothing where she really needed much help from the hospital other than painkillers. No stabbings, or anything nasty, again I hate to minimise it.” [Ms E, Barrister, London]

The extent to which participants perceive domestic violence on a ‘scale of severity’ was highlighted by their responses to a scenario of a typical case, in which findings were made of threats, pushing and shoving, and one ‘historic’ incident of punching. Most respondents did not consider that to be at the ‘severe’ end of the spectrum.

Even Ms P, who understood the varied forms that domestic violence can take and the underlying power and control dynamics, nevertheless reverted to narrower assumptions when talking about a recent case which was, she said, a “typical case where you’ve got domestic abuse, not domestic violence because he wasn’t violent to her, he was, although, having said that, he wasn’t violent to her although he did rape her, um, but after they’d separated.” [Ms P, Barrister, SW]

It may be the case that the very ‘serious’ cases of domestic violence in which professionals are involved may inure them to what they perceive as the less ‘severe’ or ‘minor’ cases. This was articulated by Ms A1:

“And I think we come across some really severe stuff that when we get people come in that, it’s not really, it’s nowhere near as high as others,

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<sup>9</sup> N = 14 comprising: Barristers = 5; Solicitors = 4; FCAs = 5

because I think I do this a little bit, you've got to remember that to them this is very significant." [Ms A1, Solicitor, NW]

Only three respondents, all barristers, viewed domestic violence as capable of being construed as mutual conflict, thereby failing to apportion responsibility for it to the perpetrator.

"Because a lot of people will actually accept that there's been rows and it's been a relationship with lots of arguments and she's given as good as she's got or whatever, both will accept there's been verbal rows, and quite often people accept that, or worse when one or both of them has been drinking." [Ms S, Barrister, NW]<sup>10</sup>

However, two Cafcass officers considered that domestic violence could occur because of the 'toxic nature' of the relationship, thereby constructing it as arising from the mismatched personalities of the individual participants in the relationship.

"It's the toxic nature of the relationship, there are some people who, when they get into a relationship, it becomes toxic. They can go and meet somebody else...and it's not toxic...they're the harder ones, where you've got a toxic relationship." [Ms U, FCA, NW]<sup>11</sup>

On the other hand, three respondents recognised that perpetrators' violence can often be replicated in other relationships.

"I mean today, for example, the father had got previous, he'd got warnings for harassment and he'd got an assault from an ex-partner and that kind of, just think: Well, if he's behaved like that in those relationships then that sort of, you know, peaks your interest for this one." [Ms P, Barrister, SW]

A sizeable minority of respondents thought that domestic violence that 'only' occurs on relationship breakdown is less serious or important, and even understandable or

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<sup>10</sup> In *Re J (Costs of Fact-Finding Hearing)* [2009] EWCA Civ 1350, [2010] 1 FLR 1893, Wilson LJ was critical of leading counsel for the father referring to the case as "an example of what she calls the 'run of the mill' fact-finding inquiry in which the mother will exaggerate, the father will minimise almost, so she implies, in equal measure." [19] (Wilson LJ)

<sup>11</sup> These sentiments were echoed by Ms Y [FCA, London]

excusable,<sup>12</sup> despite the substantial body of research which indicates that domestic violence can increase in severity on or after relationship breakdown.<sup>13</sup>

“And you do kind of apply some common sense, and you do say, well, actually there might have been one or two slightly nasty incidents when Mr and Mrs So-and-So split up but that’s in the context of the split, they’re both a bit angry and hurt with one another and this will calm down and that’s probably fair enough, that probably isn’t that unsafe, but I don’t know that you can really take the chance on that.” [Ms O, FCA, SW]

It was not surprising to find that more Cafcass officers, with their background and training in child welfare, than family lawyers, understood the effects of domestic violence on children, including the effects of emotional abuse. However, three solicitors expressed an awareness of the harm that can be caused to children even if they do not witness domestic violence directly: “Even if it’s not seeing the, what happened, it’s seeing the upset that was caused by what happened, um, those kind of things...and not just witnessing, also seeing the, the sort of projected unhappiness in their parent.” [Ms B, Solicitor, London] On the other hand, Ms E thought that children who do not actually witness domestic violence are not harmed by it: “so it is actually harm deflecting on the children, um, which obviously is very different to children who luckily have never seen any of that and it all happened when they were in bed and, you know, they don’t know about it.” [Ms E, Barrister, London] Ms A even considered that it was the mother’s responsibility to shield the children from awareness of domestic violence, and that the harm caused to children arose from the mother making the children aware of it: “So if they see domestic violence, then children don’t necessarily have to be totally affected by it as much as it would be if it was put in their face every five seconds by the resident parent, which I think happens quite a lot.” [Ms A, Solicitor, London]<sup>14</sup>

### **1.3 Participants’ views on the description of domestic violence in the Practice Direction**

Half of all respondents did not consider that the description of domestic violence in the Practice Direction was adequate. The primary reason given was that it does not

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<sup>12</sup> N = 6 comprising: Barristers = 1; Solicitors = 3; FCAs = 2

<sup>13</sup> This research is discussed in Chapter 3

<sup>14</sup> Ms A demonstrated a condemnatory approach to mothers involved in contact cases generally.

make sufficiently clear that forms of abuse other than physical violence are included; nor does it make any reference to the power and control dynamics of domestic abuse, which a small number of respondents considered should be explicitly included.

“My issue with this has always been the emphasis on physical abuse, because it’s the first words that appear. And actually, I think that there’s a lacuna, you know, it isn’t always physical, it’s emotional abuse and the erosion of self-esteem, issues of control, manipulation.” [Ms G, Barrister, SE]

“ ‘And any other form of abuse’. But it’s almost as though it’s an afterthought by the way it’s phrased, isn’t it?” [Ms H, FCA, SE]

On the other hand, eleven respondents considered that the description in the Practice Direction is adequate, mainly because they thought it could be understood to include behaviours other than physical violence, and Ms B [Solicitor, London] observed that the problem is not the definition, but how it is understood and applied by the courts.

#### **1.4 Judicial perceptions of domestic violence**

Since it was not possible to interview judicial officers, their perceptions of domestic violence were gleaned from the review of the reported cases and respondents’ views on how judges and magistrates understand domestic violence. It is recognised that this method has its limitations, in particular because participants’ perceptions of judicial attitudes would invariably be filtered through their own views on domestic violence.

In *A v A (Appeal: Fact-finding)*<sup>15</sup> Mostyn J stated that domestic violence is “rightly” now regarded as the “great taboo”. This view is not apparent from the attitudes towards it shown by many judges (including Mostyn J), as the cases reported after the implementation of the Practice Direction demonstrate that many judges continue to minimise and neutralise domestic violence, and some judges continue to view it on a scale of severity. There is also a tendency for the father’s violence to be ‘normalised’ and portrayed as a ‘natural’ part of marriage break-down, or even as the understandable anger and frustration of the ‘ordinary man’. In *Re P (Children)* Ward LJ stated that domestic violence is “a term that covers a multitude of sins. Some of it

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<sup>15</sup> *A v A (Appeal: Fact-finding)* [2010] EWHC 1282 (Fam) [54] (Mostyn J)

is hideous, some of it is less serious, and it is probably into the latter category that this case fits.”<sup>16</sup> He stated of the father that:

“I can understand that this proud, intelligent father is humiliated by the findings of domestic violence against him, is humiliated by the prospect of having to attend a domestic violence course of anger management... It is enough to make any ordinary man just a little bit angry.”<sup>17</sup>

This downgrading of domestic violence can lead to the judgments of the lower and higher courts failing to describe the violence itself, which reinforces the erasure of domestic violence from judicial and professional discourses informing the issue of child contact, as the violence becomes, quite literally, invisible in the judgments. In *Re P (Children)* Ward LJ referred to an “unseemly dispute” on handover, and the children being deeply upset by “the altercation” between the parents.<sup>18</sup> Similarly in *Re H (Contact Order)* the parents’ marriage was described as “running into difficulties” and Sir Scott Baker referred to an “unfortunate incident” which occurred at the mother’s house to which the police were called and the father was arrested.<sup>19</sup> No account was given in either of the judgments of the mother’s allegations or of what happened on those occasions.<sup>20</sup>

The case law indicates that the senior judiciary have on occasions urged the lower courts to take domestic violence more seriously. In *Re R (Family Proceedings)*<sup>21</sup> Thorpe LJ took the opportunity to reinforce the reason for the decision in *Re L*: “Underlying the guidance given by this court and the President is a general social policy, given the prevalence of domestic violence in our society and the extent to which in the past it has been a submerged evil.”<sup>22</sup> Wall P (as he then was), in an address to Resolution, expressed concern that:

“domestic abuse...remains one of the hidden scourges of our society. We all know that it can take a myriad of forms from the physical assault

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<sup>16</sup> *Re P (Children)* [2008] EWCA Civ 1431 [5] (Ward LJ)

<sup>17</sup> *ibid* [36] (Ward LJ). See also *A v A (Appeal: Fact-finding)* (n 15) [19] (Mostyn J)

<sup>18</sup> *Re P (Children)* (n 16) [8] (Ward LJ)

<sup>19</sup> *Re H (Contact Order)* [2010] EWCA Civ 448, [2010] 2 FLR 866.

<sup>20</sup> See also *Re A (Residence Order)* [2009] EWCA Civ 1141, [2010] 1 FLR 1083; *Re M (Children)* [2009] EWCA Civ 1216, [2010] 1 FLR 1089; *Re B (Transfer of Residence to Grandmother)* [2012] EWCA Civ 858, [2013] 1 FLR 275; *Re W (Children)* [2012] EWCA Civ 1788

<sup>21</sup> *Re R (Family Proceedings)* [2009] EWCA Civ 1619, [2009] 2 FLR 82

<sup>22</sup> *ibid* [12] (Thorpe LJ). See also *Re J (A Child)* [2012] EWCA Civ 720 [4] (Thorpe LJ) 4

which results in murder or serious bodily injury to the psychological damage which can wreck lives. It remains an area cloaked by shame and secrecy.”<sup>23</sup>

The more recent reported cases suggest that more judges are starting to recognise the coercively controlling nature of domestic violence, as well as the many ways in which that control can be exercised. In *Re W (Children)* [2012]<sup>24</sup> findings were made by the trial judge against the father not only of physical violence towards the mother, but also of controlling her by not allowing her to return to work outside the home or go to university, and harassing her with constant telephone calls and messages. The trial judge, however, described these findings “as serious but not so serious that there should not be any contact at all.”<sup>25</sup> Black LJ, on the mother’s appeal, contextualised the father’s conduct, observing that an ‘incident’ in April 2011 “could not necessarily be isolated and treated as just an isolated event at the end of a course of conduct.”<sup>26</sup>

A case that merits close scrutiny for the way in which the trial judge demonstrated and applied her awareness of the power and control dynamics of domestic violence is *Re S (A Child)* [2012].<sup>27</sup> The father appealed against an order made by Judge Knowles granting residence of a young child to the mother; the father had sought sole or shared residence. The interesting feature of the case is that, whereas the father had not been physically violent to the mother, the mother admitted to having hit the father on a number of occasions. If the judge had applied an incident-based approach to this case, she might have concluded that the mother was the abusive parent. However, Judge Knowles opened up to scrutiny the father’s conduct towards the mother to reveal a pattern of domineering and controlling behaviour, and arrived at the conclusion that the father was the abusive parent.<sup>28</sup> “All in all, I find a constant wearing down of the Mother by the Father and a desire to undermine her at every twist and turn. He has shown himself throughout these proceedings as wanting to

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<sup>23</sup> Wall P, ‘The President’s Resolution Address 2012’ (2012) 42 *Family Law* 817-825, 821

<sup>24</sup> *Re W (Children)* [2012] EWCA Civ 528

<sup>25</sup> *ibid* [17] (Black LJ)

<sup>26</sup> *ibid* [19] (Black LJ). See also *Re W (Children)* (n 20) [25] (McFarlane LJ)

<sup>27</sup> *Re S (A Child)* [2012] EWCA Civ 1031

<sup>28</sup> The father’s abusive, controlling behaviour was found to include following the mother in his car, sending her numerous bullying and derogatory text messages, refusing to give the mother details of what occurred during contact, insisting that the child be enrolled in a nursery of his choice, constantly attempting to prove that he was the better parent and restricting the mother from living and working where she chose.



dominate.”<sup>29</sup> The judge in this case recognised the father’s abuse of the mother as a course of conduct, woven into the fabric of the parties’ everyday lives, and made visible the way in which the father’s abuse of the mother was an inseparable aspect of his own parenting of the child.

The majority of respondents to this project<sup>30</sup> thought that their local judges have a good understanding of what constitutes domestic violence and ‘take it seriously’. Since most respondents considered that domestic violence constitutes wider behaviours than only physical violence, it follows that these respondents felt that judges, too, applied this wider perspective.

“In xxx County Court, generally I’m pretty happy with the way in which domestic violence is dealt with. It’s dealt with by and large seriously by the district judges who we see pretty much day in, day out and they understand it can take different forms and they understand the control element.” [Mr J, FCA, NE]

Ms P said that all the circuit and district judges in the large area of the South West in which she practices are “pretty clued up”.

“I think we are quite lucky here...the judges there do seem to be...very good with domestic violence...[one particular judge] is really good on this kind of power and control, and he will challenge...And also we used to have a local judge who would position the chairs in his room so that they were facing him, desk in the middle, chairs facing diagonally towards him, and would watch the parties come in and if the father turns the chairs towards the mother so that he could stare at her, you know, he’d lost his case basically.” [Ms P, Barrister, SW]

Three respondents observed that judges’ awareness of domestic violence had improved over the past few years. “It’s a lot better now. I can remember when I started there was no understanding. You got the odd judge who had been on some training and that was it. But now there is a much better understanding.” [Ms X, FCA, London]

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<sup>29</sup> *Re S (A Child)* (n 27) [46] (Sir Mark Potter), quoting the trial judge

<sup>30</sup> N = 17 comprising: Barristers = 5; Solicitors = 6; FCAs = 6

A cautionary note should be sounded, however, with respect to two family lawyers' positive views about their local courts' approach to domestic violence, since they themselves appeared to minimise or downplay it.

“I think if it's definitely at the lower end then they perhaps, you know, they will treat it for what it is really. You know, if they've had a spat because of, you know, he walked in on her with another man or something, they will probably say, well actually, they wouldn't say it but they'd be thinking: I would have done the same thing, so we'll overlook it if it was a one-off. You know, so they'll treat it for what it is, I think.” [Ms D, Solicitor, SE]

Professional approval of judicial understanding of domestic violence was, however, far from unanimous. Mr J expressed great concern about the attitude of the judiciary in the county court of a North East town in which he had recently started working, which he described as “like stepping back five years” and “the wild west.” [Mr J, FCA, NE]

Ms N felt that although judges generally do have some understanding of domestic violence, they “see so much of it” and, driven by the desire to “resolve matters,” they “lose patience” with the complexity of families. She gave a recent example of a mother who was “petrified” of the father:

“She said: the courts, it was so impatient with me, the judge was horrible to me...And she said, you know, [the judge] directed a question at dad and said: this must be very difficult for you. And she said: I sat there thinking: you know, how difficult it is for me and my children who have to continuously come back to court with my children.” [Ms N, FCA, SW]

Eight respondents<sup>31</sup> expressed concern that courts tend to focus on incidents of physical violence, and are not alive to, or take seriously, other forms of domestic abuse; indeed Ms O [FCA, SW] said that, not so many years ago, most practitioners would have had the same approach, herself included. “Most only really consider physical abuse most seriously, quite a lot of emotional abuse is brushed aside. I think this is mainly because it is harder to prove.” [Ms E, Barrister, London]

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<sup>31</sup> N = 8 comprising: Barristers = 4; Solicitors = 1; FCAs = 3. It should be noted that these did not include any of the respondents based in the North West city, who were all very positive about the attitudes of their local judiciary towards domestic violence.

“I’d say that the majority look at physical violence or strongly threatening behaviour as domestic violence, rather than the smaller forms of abuse or intimidation...I’d say more the physical violence is the thing that’s focused on more.” [Ms A3, Barrister, London]

Although Ms P [Barrister, SW] spoke favourably about her local county court judges, she expressed concern that they do not always have insight into the way in which ‘historic’ incidents of violence can have a continuing terrifying and controlling effect.

Three solicitors and three Cafcass officers considered that judicial understandings of domestic violence vary considerably between different courts and between different judges in the same courts. “Some are very switched on, some are less so.” [Ms Y, FCA, London] Three respondents considered that appropriate and regular training had a significant impact on judicial approaches to, and understandings of, domestic violence, while others thought that the broader life experiences of judges and magistrates had a greater impact than training.

## **2. When is domestic violence ‘relevant’ to contact?**

Professional and judicial perceptions of domestic violence have a significant impact on the way in which they consider it to be ‘relevant’ to contact. The Practice Direction provides that, as a general principle, 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... 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.”<sup>32</sup>

Although very few reported cases offer specific guidance as to when domestic violence may be relevant to contact, they suggest that many courts and professionals consider domestic violence to be ‘relevant’ to contact when it involves very ‘serious’ or ‘severe’ physical violence. In *Re E (Contact)* [2009], the trial judge made findings on all the mother’s allegations of physical and sexual violence against the father,

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<sup>32</sup> Potter P, *Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* [2008] 2 FLR 103, reissued on 14<sup>th</sup> January 2009 at [2009] 2 FLR 1400 [3] (emphasis added)

stating in his judgment that the findings were “of such a serious nature as to impact very substantially on the question of contact between the Father and...the child.”<sup>33</sup>

Those reported cases where the appellate courts have been critical of trial judges for failing to hold fact-finding hearings all involved allegations of serious physical violence.<sup>34</sup>

Conversely, in *Re C (Domestic Violence: Fact-Finding Hearing)* [2009]<sup>35</sup> the father had been convicted in the criminal courts for serious assaults on the mother, and Judge Copley did not consider that a fact-finding hearing was necessary because, during the following three years, the mother had not made any ‘substantial’ allegations of further violence, contact was already established at a contact centre, there was no alleged violence towards the child, and the father had completed an anger management course. This case suggests, therefore, that allegations will not be considered relevant if they are ‘old’ and/or not sufficiently ‘serious’, if contact is already happening at the time of the proceedings, if no violence towards the child is alleged, or if the father has been successfully ‘treated’.

Participants’ responses confirm these indications gleaned from the case law, namely, that the main circumstances in which courts appear to consider domestic violence *not* to be relevant is where it is ‘old’ or ‘historic’, where it is ‘minor’ or not sufficiently serious, where it occurs during the ‘heat’ of the relationship breakdown, and where the mother raises allegations of domestic violence after having allowed contact for some time. These circumstances mirror those in which participants considered that mothers who feared domestic violence would not be justified in opposing contact.

These were encapsulated by Ms S:

“That it may be very historic allegations, um, or very minor incidents, or scenarios where there are references to domestic violence but subsequently there has been ongoing contact and there’s been no issues about that in terms of the quality of the contact between parent and child, so it’s not, absolutely in terms of relevance to contact orders, but relevant to contact arrangements, safeguarding it would be relevant to, but not to actually whether or not there should be contact.” [Ms S, Barrister, NW]

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<sup>33</sup> *Re E (Contact)* [2009] EWCA Civ 1238, [2010] 1 FLR 1738 [5] (Ward LJ)

<sup>34</sup> These cases are discussed in Chapter 5.

<sup>35</sup> *Re C (Domestic Violence: Fact-Finding Hearing)* [2009] EWCA Civ 994, [2010] 1 FLR 1728

**Circumstances in which the fear of domestic violence  
may justify opposition to contact<sup>36</sup>**

	Barristers	Solicitors	FCAs	Total
Fear of DV almost always justifies opposition to contact	2	5	6	13
‘Seriousness’/extent of DV/‘severe’ physical only	5	7	2	14
Child witnessed/aware of DV	3	4	1	8
Effect on mother so severe that it affects her parenting	3	1	0	4
Not justified if safeguarding checks clear/no other independent evidence	0	1	3	4
Not justified if mother already allowed contact	2	0	0	2
Father does not acknowledge the DV	0	1	1	2
Not justified if allegations ‘old’/‘historical’ <sup>37</sup>	0	1	0	1

A significant majority of respondents<sup>38</sup> cited the ‘seriousness’ of the violence as one of the primary factors on which the courts would base ‘relevance’ and it was apparent that most professionals themselves considered that only ‘serious’ or ‘severe’ violence would be ‘relevant’ to outcomes. This mirrors the views of most family lawyers that ‘minor’ or ‘petty’ abuse, or ‘incidents’ arising from the heat and bitterness of the relationship ending would not justify the mother in opposing contact.<sup>39</sup>

“I have in the county court on occasion, but you know, the judge saying, you know: this really isn’t the sort of thing that the court will be concerned with, whether your client, you know, snatched a cup of tea out of the other person’s hand. Um, so yeah, that has happened, and I normally felt that those were sensible decisions.” [Ms E, Barrister, London]

<sup>36</sup> It should be noted that many respondents cited a combination of these factors.

<sup>37</sup> This low number may not be an accurate reflection of professionals’ views since many respondents agreed with their reported views of the courts’ perception that ‘old’ or ‘historic’ allegations of domestic violence are not ‘relevant’ to contact

<sup>38</sup> N = 22, comprising almost equal numbers of barristers, solicitors and FCAs

<sup>39</sup> Only two Cafcass officers qualified their views in this respect

“And you know, it’s in a spectrum, isn’t it? It’s that broad, but then you look at the spectrum as to how serious the violence is as to how it would affect the contact.” [Ms D, Sol, SE]

“Yeah, I mean obviously you’ve got to look at the, you know, violence is quite a wide term and it can mean all sorts of things...and you’re not wishing to minimise, you know, things that are at the end of the scale, you know, sometimes they’re not a good reason to obstruct contact. But equally if there’s very serious violence that can be a reason in itself.” [Ms T, Barrister, NW]

A number of respondents observed that courts rate non-physical forms of abuse as less relevant than physical violence.

“Someone taking someone’s phone and not allowing them to have it and being very controlling over money and being verbally abusive which the child may not have been aware of which doesn’t necessarily mean that their contact shouldn’t happen.” [Ms M, Barrister, SW]

The extent to which even Cafcass officers may minimise domestic violence was demonstrated by Ms O, who also confirmed that courts do not consider it to be relevant where it is ‘minimal’ or it occurred when the parties were “a bit heated” during the course of the relationship break-up, but clearly agreed with this approach:

“I think the court will [decide that domestic violence is not relevant] where it is generally very minimal, you know, where it’s, say for example, [the father] has a few convictions that might be a bit old, then nothing particularly serious, you know, the man’s perhaps grown up ... and at the time of separation that bit of temper has come up again and, you know, he may have said and done a few things he now regrets. The court will perhaps accept that it happened in the context of, and both parties were possibly, you know, a bit heated and whatever...I mean, it’s unusual for any of us to have gone through our whole lives without ever having got very cross with somebody and take a bit of a kick at someone, you know, and in those sorts of cases the court will say: well, come on, you’ve got to be, come on, that’s not, you know. It’s really when there is an indication that somebody could seriously lose it, or has got some very nasty habits and nasty friends.” [Ms O, FCA, SW]

In this way Ms O was neutralising and normalising domestic violence by portraying it as the ‘normal’ and understandable behaviour of the slightly irate parent, something that ‘any of us’ might do.

A number of other respondents also considered arguments or ‘squabbling’ on relationship breakdown not to be ‘real’ domestic violence and therefore not relevant, or less relevant to contact, and unlikely to justify the mother in opposing contact. “I mean, um, it’s the age old issue of what point does normal family squabbling and what one would expect at a family relationship breakdown need to be considered any more seriously.” [Mr R, Solicitor, NE]

“I often look at domestic violence, I look at the context of the violence within the relationship. Sometimes it’s very severe and the child could have witnessed it and I think in those cases where the child has witnessed domestic violence in whatever form, I can’t see how it can’t be relevant...I think though sometimes when relationships come to their conclusion and emotions are running very high, people act out of character sometimes. And you have one or two incidents of things which father, if it is the father, it normally is the father, can be very remorseful about...So I’m not minimising the violence I talk about at the end of relationships but I think the court needs to be mindful, and I think the court is mindful on that occasions [sic], because as I say, people can act out of character.” [Mr J, FCA, NE]

For these respondents, the perpetrator can continue to be constructed as the ‘safe family man’ by positioning his behaviour as ‘out of character’, rather than that of the ‘dangerous abuser’.

Eighteen respondents<sup>40</sup> suggested that courts would not consider domestic violence to be relevant if it was “old” or “historic”, happened “some years ago” or “long ago”, or was “in the past”, a view shared by a number of these respondents. Ms E provided an example of a case where the magistrates listed a fact-finding hearing on ‘historic’ allegations:

“Because they split up eight years ago...and he had had contact in the interim period, it had just broken down...and now she was saying, well amongst other things, he’s been violent...And so I couldn’t see why we needed a fact-finding at all, I mean, unless they’re the most serious, I couldn’t see how nine years old was helping us today, when he’s had contact in the interim.” [Ms E, Barrister, London]

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<sup>40</sup> Comprising equal numbers of barristers, solicitors and FCAs

Respondents' views were confirmed by their responses to the final case scenario;<sup>41</sup> many family lawyers indicated that the mother would not be able to successfully oppose contact because the 'real' violence happened some years ago.

However, a minority of family lawyers and Cafcass officers expressed concern about the tendency of courts to consider 'historical' allegations of domestic violence as irrelevant to contact. Ms O [FCA, SW] was critical of many judges who only "react" if they perceive "an immediate threat", and Mr V [FCA, NW] observed that domestic violence, in his view, is always relevant, whenever it happened.

Ms L gave an example of a case that caused her concern, in which the father attempted to strangle the mother two years prior to the relationship breakdown, and the mother provided an account of a history of "sort of intimidating and controlling behaviour" which Ms L found "quite worrying in terms of, you know, what it said about his state of mind."

"He was doing things like filming her at handovers...stuff that rings alarm bells...and the judge said that he felt that the violence that the mother had alleged was historical and even if found as proven would not affect the progression of contact." [Ms L, Solicitor, SW]

Because this judge perceived domestic violence in a legalistic way as comprising discrete 'incidents', the father's controlling behaviours were discounted by him, so that the 'real' violence was, for the judge, indeed historical.

Seven family lawyers (primarily barristers) but only one Cafcass officer<sup>42</sup> expressed the view that domestic violence would not be considered relevant by the courts if the mother had allowed contact to take place for some time before raising allegations of domestic violence, particularly if contact was "progressing well." Ms M considered that this was a common scenario:

"Or where mum has been supervising the contact, at her property, you know, between dad and child or, and then says: oh, but I'm really scared

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<sup>41</sup> See Appendix F

<sup>42</sup> N = 8 comprising: Barristers = 5; Solicitors = 2; FCAs = 1



of him and I don't think there should be any change to contact, or it should go to a centre, and the court says: no." [Ms M, Barrister, SW]

Ms M recalled a case where there were 'historic' allegations of domestic violence, following which the child had had staying contact with the father.

"They had fallen out over a whole variety of issues but not violence as such, she then of course was going back to that as an issue of his previous controlling behaviour and what she perceived to be that continuing...there had been such a pattern of staying contact in the interim it was hard to see how, there was no concern that had arisen from that, how then the violence was then going to suggest that this child should not be having contact with her father, the real question was how it could restart again." [Ms M, Barrister, SW]

Similarly, in the case referred to above by Ms L [Solicitor, SW], the mother's concerns were also filtered out because she had permitted the father unsupervised contact up to the issue of proceedings, "and I think that probably gave a lot of weight to what the other side were saying: if you're that worried then why did you allow us all that time?" Ms L was not happy with the decision and considered appealing it.

Ms T provided an example of a recent case in which the mother raised allegations of domestic violence midway through a two-year contact dispute, where contact was already taking place, "and I think nobody really took them seriously because she had already agreed to contact beforehand." [Ms T, Barrister, NW]

Six respondents<sup>43</sup> were of the view that domestic violence would be relevant if it was witnessed by the children and/or they were affected by it, and seven family lawyers and a Cafcass officer thought that domestic violence could justify a parent in opposing contact for this reason.

"You might have a ten-year-old child who's saying: I saw, you know, my dad being aggressive to my mum and violent to her and I never want to see him again. And in that case, even if it's what we term as low level violence, it's still hugely relevant to the issue of contact." [Ms T, Barrister, NW]

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<sup>43</sup> Comprising equal numbers of barristers, solicitors and FCAs

However, Ms X, [FCA, London] considered that if the child had not actually witnessed the violence they would not be affected by it and courts would not, therefore, consider it to be relevant.

Three barristers and a solicitor thought that domestic violence could justify the mother in opposing contact if the effect of it on her was extremely ‘serious’ or so severe as to affect her parenting capacity, although Ms K [Solicitor, NE] observed that such arguments no longer find any sympathy with courts. Indeed, this was not a factor mentioned by any respondents when considering the relevance of domestic violence.

Three Cafcass officers and a solicitor thought that courts would consider domestic violence to be relevant if there was ‘objective evidence’ of it, such as police and hospital reports, FWINs,<sup>44</sup> social services records and injunctions, but would take it less seriously and downgrade its relevance if the safeguarding checks were clear and there was no ‘concrete’ evidence.<sup>45</sup> These respondents were themselves of the view that in these circumstances, the mother must be unjustified in her opposition to contact.

“So I mean if after we’ve done these safeguarding or police checks and nothing comes back, I would say that a lot of the problems arise because one of the parents is just bitter, you know, somebody cheated on somebody with somebody and they found out...they’re using the children by not allowing them to have access to the children as a means of punishing the other person.” [Mr W, FCA, SW]

Only Ms N [FCA, SW] expressed the firm, unqualified view that domestic violence is *always* relevant to contact, and Ms M [Barrister, SW] observed that while in her view domestic violence is always relevant to contact, it may be less relevant, depending on the circumstances.

The majority of respondents considered that the FPCs are more ‘cautious’ or ‘mechanical’ in their approach than district or circuit judges, and therefore list fact-finding hearings without actively considering whether the allegations, if proved,

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<sup>44</sup> Force Wide Information Network

<sup>45</sup> See further Chapter 6

would be relevant to contact, whereas county court judges tend to be more ‘robust’ or ‘firm’ in considering relevance; in other words, county court judges are more likely to filter domestic violence out of cases. “I feel that I end up doing many fact-findings which perhaps could have been avoided in FPCs if a robust tribunal had seized itself of the matter.” [Ms E, Barrister, London] On the other hand, Ms A thought that family magistrates are less alert to domestic violence as a serious issue than district judges. She provided an example of a case where the magistrates ignored the allegations made by the mother, who was a litigant in person.

“I don’t think she hyped [the domestic violence] up enough...So they didn’t venture backwards as to the reasons why and whether that should be a factor in itself. So, I mean, in a different court I think that would have been dealt with a lot differently.” [Ms A, Solicitor, London]

The majority of family lawyers but only two Cafcass officers said that they had had experience of cases where allegations of domestic violence were made but the court determined at an early stage that they were not likely to affect the outcome of the case.<sup>46</sup> Only Ms N [FCA, SW] said that she had never encountered this situation, and Ms Q [Solicitor, SW] said that she had not encountered this recently. While two respondents commented that this was fairly uncommon, two Cafcass officers indicated that it happened very regularly. Mr V [FCA, NW] commented that the way in which domestic violence is filtered out as ‘irrelevant’ is by ignoring it and ignoring Cafcass reports that highlight its relevance.

While five respondents thought that *The President’s Guidance in Relation to Split Hearings* (‘the Guidance on Split Hearings’)<sup>47</sup> had had no effect on the way in which courts consider the issue of relevance, the majority were of the view that it has had a major effect, primarily by judges being more robust or proactive in ‘weeding out’ cases where domestic violence is considered to be irrelevant, being firmer in what they perceive to be ‘relevant’ domestic violence, and as a consequence being much less willing to order fact-finding hearings.<sup>48</sup> “I think there’s certainly, um, more

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<sup>46</sup> N = 16 comprising: Barristers = 7; Solicitors = 7; FCAs = 2

<sup>47</sup> Wall P, *The President’s Guidance in Relation to Split Hearings* [2010] 2 FLR 1897

<sup>48</sup> The effect of the Guidance on Split Hearings on fact-finding hearings is discussed further in Chapter 6.

examination of the issues, there's more sort of consideration as to how far it's actually going to take the case." [Mr Z, Solicitor, NW]

### **3. The 'presumption of contact'**

It is not only professional and judicial perceptions of domestic violence that inform their views on the 'relevance' of domestic violence. The 'presumption of contact' also has an important role to play in the way in which courts and professionals respond to domestic violence in contact cases.

All respondents were asked how important they think it is for non-resident parents to have some contact with their children. All but one participant considered that such contact is 'important', 'very important', or 'extremely important'. Thirteen of these respondents were unqualified in their support for post-separation contact, including five Cafcass officers; there were no overt differences in views, therefore, between family lawyers and Cafcass officers on the presumption of contact.

"On a scale of 1 to 10, I would say 10. With 10 being the exceptionally important, yes." [Ms H, FCA, SE]

"Oh, I think unless there is really really good reasons that they shouldn't, then I think it should be taken as read that they should." [Ms O, FCA, SW]

Only one respondent hesitantly disagreed with this proposition, appearing to be aware that her view was 'against the mainstream':

"I think it depends on the children. I think it's on a case-by-case basis. I think it's difficult to say that contact is always in a child's best interests and I think generally, just from my personal point of view, that's not necessarily what I believe. But I think it's, you know, it's very difficult." [Ms B, Solicitor, London]

Three respondents, all family lawyers, considered that, although theoretically contact is important, whether or not it would benefit specific children depends on the circumstances of the case.

"I think it's fact-specific to the case I think, it would very much depend on, if there were reasons why that would not be appropriate for that

particular child. ... But the presumption would certainly be that it would be important.” [Ms S, Barrister, NW]

Nine respondents indicated that post-separation contact is important, but only if it is ‘safe’, including emotionally safe. It was surprising to find that most of the respondents expressing this view were solicitors, who outnumbered Cafcass officers in this respect. “I think it’s essential so long as it’s safe and that means physically and emotionally safe.” [Ms L, Solicitor, SW]

On the other hand, Ms C [Solicitor, SE] expressed the view that even in circumstances where one parent has been abusive to the other parent, and the child may be afraid of the abusive parent and affected by witnessing the violence, that child still ‘needs’ to have a relationship with the abusive parent.

Two Cafcass officers were of the view that contact is beneficial as long as it is of good quality:

“It’s certainly hugely desirable from the child’s point of view on the basis that that contact is of a high, a good quality. So quality of contact is always a relevant issue for the court...The court starts with the presumption, Cafcass and we start from the presumption that contact is desirable. A million things can come in the way of that of course but we start from that presumption.” [Mr. J, FCA, NE]

Family lawyers (and presumably the remaining Cafcass officers) did not appear to consider the quality of contact important in determining its benefit to the child.

The reason articulated by most respondents as to why they considered contact to be important was the presumed benefits for children’s psychological welfare and ‘needs’ including, for four respondents, ‘identity’ issues: “But in terms of heritage, in terms of child’s identity, in terms of loving parents, in terms of having support network, for all those reasons contact is [important].” [Ms H, FCA, SE]

Four family lawyers and one Cafcass officer considered that the research and ‘experts’ on children’s welfare after parental separation support children’s ‘need’ to maintain contact with non-residential parents:

“I think there’s, you know, a huge body of psychological research, case law that, you know, establishes that children who don’t have that relationship with an absent parent really feel that they have some sort of emotional sense of loss.” [Ms T, Barrister, NW]

“Especially the more experts’ reports that I read, the more important I think I’ve realised it is as well as the years have gone on about the, um, the emotional attachment that children have a right to know where they’re from and both sides of their family, um, so yeah, important.” [Ms E, Barrister, London]

#### **4. Attitudes towards mothers and fathers**

As discussed in Chapter 3, dominant parental subjectivities of ‘implacably hostile mothers’ and ‘safe family men’ had a profound impact on professional and judicial perceptions and practices in child contact proceedings prior to May 2008. It was considered important, therefore, to ascertain the extent to which such images of parents may continue to underpin, impact on, and be reinforced by the practices and perceptions of professionals and judicial officers.

##### **4.1 ‘Implacably hostile mothers’?**

In order to glean an understanding of participants’ attitudes towards women who are involved in contact proceedings, and in particular of their perceptions of why mothers may oppose, or wish to limit contact, respondents were asked whether they had encountered parents who they believed were unjustifiably denying the other parent contact with the child/ren. Additionally, participants’ views of mothers could be discerned from their responses to other questions.

All respondents said that they had encountered resident parents who they believed had unjustifiably denied the non-resident parent contact.<sup>49</sup> Although all respondents viewed mothers as capable of obstructing contact for the ‘wrong’ reasons, and many demonstrated a suspicious or wary attitude towards mothers, Cafcass officers were less likely to express overtly hostile attitudes towards mothers than solicitors or barristers.

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<sup>49</sup> It was apparent from the responses that, even when not specifically stated, the ‘obstructive’ parent referred to was the mother as the resident parent.

Eight respondents, five of whom were Cafcass officers, indicated that such unjustified opposition was a “common” or “regular” occurrence, while four thought it “rare”, “exceptional” or “unusual”.<sup>50</sup> Ms G even thought that: “It’s very rare actually you get someone saying: because of – and then there is a cogent, worthwhile reason.” [Ms G, Barrister, SE] On the other hand, Ms Y considered that mothers are usually justified in opposing contact: “No, I wouldn’t say it was quite common, I would say it was the exception, you know, rather than the rule... On the whole I think that the resident parent is generally right to voice the concerns that they have.” [Ms Y, FCA London]

Most respondents thought that mothers’ emotional reactions to the breakdown of the parental relationship and/or their consequent negative feelings towards the fathers were the underlying reasons for their unjustified opposition to contact, causing them to lose sight of their children’s interests.

“It’s generally where their own negative experiences of the relationship and their strongly held negative views about the parent interfere with their own, er, decision-making and they lose focus from what’s in the best interests of the child and they’re thinking, you know, about themselves and sometimes imposing their own experiences on the children and being over-anxious and over-concerned that the children are going to...come to some harm.” [Ms L, Solicitor, SW]

“Anger, hurt, can’t accept that the relationship is over, uses the child in the hope that they are going to get back together. [Interviewer: *Is that quite common?*] Yes.” [Ms X, FCA, London]

For these respondents, because the value of contact was unquestioned, mothers were acting irrationally and selfishly by putting their own emotional needs and reactions before those of their children.

Two respondents were generally critical of parents involved in contact or residence proceedings for being over-emotional and irrational:

“The people who can be reasonable about contact aren’t the people that we see...when they’re in the public forum, they hate each other. They

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<sup>50</sup> 2 Cafcass officers and 2 family lawyers

both think that the other one is doing whatever they're doing deliberately to spite the other person, and neither of them are focused on the child, and there's no way that they would ever agree." [Ms G, Barrister, SE]

However, two Cafcass officers expressed an awareness and understanding of the complexity of the emotional context within which parents come to private law Children Act proceedings, and concern at the inability of courts to recognise this:

"I suppose in these situations you've got to, you know, you've got to take into account of the fact that these people's emotions are very, very heightened and churned and, you know, and they need some time to settle down, they need to feel that they're being listened to, they need to feel that they've got an opportunity to sort some of that out themselves and see where they want things to be." [Ms O, FCA, SW]

"A few judges that are rolled up who, in my view, don't have a world view, so wouldn't understand the complexity of the families that we understand and that we work with really." [Ms N, FCA, SW]

However, it is principally mothers who are singled out as particularly 'irrational':

"Although it seems perfectly rational to the parent themselves, actually from the court's point of view, and from Cafcass's point of view, and from the non-resident parent's point of view and from the child's point of view also at least, it's completely irrational what's being done." [Mr J, FCA, NE]

"Well, mainly because of the things that they bring up as to reasons why they don't think contact should go ahead...It's when you get things which just aren't logical." [Ms A3, Barrister, London]

These perceptions of over-emotional mothers acting irrationally and selfishly against their children's interests, together with their own beliefs in the benefits of contact, led many respondents to perceive the reasons given by mothers for their opposition to contact to be petty, trivial, irrelevant and/or illogical. Yet Coy et al found that the primary reasons why women attempted to stop or limit contact were "fear for their own safety; concern for children's welfare; perpetrators' failure to comply with agreements/arrangements."<sup>51</sup> The reasons given by clients to the family lawyers participating in this study appeared to be serious. Yet many respondents considered

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<sup>51</sup> Coy et al (n 2) 31; see also at 62



these trivial, or thought that they had discerned the underlying ‘real reasons’ for the mother’s opposition to contact, such as jealousy about the father acquiring a new partner, the mother hating the father, the mother wishing to punish the father. Unless there were ‘obvious’ serious welfare concerns, many family lawyers did not consider that any opposition to contact was justified.

“I suppose it’s those cases where there’s no alcohol, drug or violence problems. So none of the obvious risk factors but they still say, well, he doesn’t give me any money for the children is quite a usual one, you know, if they’ve had CSA problems they think that they can deny contact...or a lack of support in their relationship, um, or he was, he was a poor husband or a bad boyfriend. Quite often as well: he left me-type arguments, he left the family home, um, he’ll only see the children on my terms, those sorts of reasons as well, I suppose quite often when the split is quite raw, quite new, that that happens.” [Ms E, Barrister, London]

Two family lawyers considered that indications of obstructiveness were where mothers, in their view, provided inconsistent or constantly changing ‘excuses’ for opposing contact, so that what may at first appear to be ‘rational’ behaviour is gradually revealed as irrational:

“It’s usually, I mean, I say mothers, it’s usually mothers,...and it’s normally in circumstances where they clearly have a huge degree of hostility towards that other person. Sometimes you can understand where they’re coming from, from their own perspective, sometimes it’s just completely irrational but you realise sort of later on in the case, because initially they’ll put up objections to contact which might seem that they, you know, are fair.” [Ms T, Barrister, NW]

Since the ‘unjustified’ reasons for opposing contact given by respondents did not include domestic violence, it is reasonable to assume that professionals would consider the mother justified in such opposition if she feared domestic violence from the father. This was not necessarily the case.

Fewer than half of all respondents thought that the fear of domestic violence would almost always justify a parent in opposing contact. There was a marked difference in views between Cafcass officers and solicitors on the one hand, and barristers on the other on this issue. Just over half of the Cafcass officers, and half of the solicitors interviewed, thought that the fear of domestic violence would almost always justify a

parent in opposing contact, as opposed to only two barristers.<sup>52</sup> Ms B [Sol, London] and Mr J said that in their view, mothers should never be seen as implacably hostile to contact if they had sustained domestic violence; in those circumstances “implacable hostility doesn’t come into play.” [Mr J, FCA, NE] Mr J and Ms O indicated that such opposition was a positive factor because “at least it gives you the opportunity to look into it and assess it properly rather than just making an assumption that the child is going to be safe.” [Ms O, FCA, SW] Ms Y said that she would be worried if the mother did *not* express concern about contact in these circumstances:

“Certainly I would be concerned if a parent didn’t worry about domestic violence being a factor in how they thought that the contact should be, if there was domestic violence, clearly. It’s a factor about their parenting capacity, isn’t it?” [Ms Y, FCA, London]

Eleven respondents, of whom only two were FCAs, said that the fear of domestic violence could justify the victim in opposing contact “depending on the circumstances” or “to an extent”.<sup>53</sup> None of the participants indicated that the fear of domestic violence could *never* justify a refusal of contact, although Ms E demonstrated a reluctance to articulate this position to the court because “I don’t find that it’s often very attractive to argue for no contact on the basis of domestic violence.” [Ms E, Barrister, London]

As discussed above, the circumstances in which courts and professionals consider domestic violence to be relevant to contact are broadly the same as those in which the fear of domestic violence may justify opposition to contact, namely, in cases of recent, very severe primarily physical violence which was witnessed by the child, and preferably where the child has not had contact with the father for some time. Additionally, two solicitors and two Cafcass officers indicated that domestic violence could only justify opposition to contact if the fear was ‘genuine’, ‘rational’ or ‘objectively’ justified:

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<sup>52</sup> N = 13, comprising: Solicitors = 5; FCAs = 6; Barristers = 2

<sup>53</sup> Barristers = 4; Solicitors = 5; FCAs = 2

“Again, being objective about it, the issue of the fear of domestic violence, the perception of fear of domestic violence in one person doesn’t necessarily translate into evidentially made-out findings and something tangential for the court. But as a factor, of course, it’s part of the harm criteria, Section 31(9).” [Mr R, Solicitor, NE]<sup>54</sup>

It was concerning to find that three Cafcass officers and a solicitor thought that if mothers alleged domestic violence, but safeguarding checks on the father were clear, and/or if there was no other independent supporting evidence, the mother must be unjustified in her opposition to contact.

Although most professionals considered, to varying degrees, that mothers’ fears of domestic violence may justify them in opposing contact, a substantial minority (predominantly family lawyers)<sup>55</sup> appeared to view such allegations with suspicion or disbelief, or overtly expressed the view that mothers fabricate allegations of domestic violence for their own purposes.

“And all of a sudden, you know, these allegations, you know, revived and: but we must have a fact-finding! And it’s normally a delay tactic on the mother’s part because she didn’t want the court to be making a residence order.” [Ms T, Barrister, NW]

Three of these family lawyers thought that mothers may make allegations of domestic violence because they have learnt ‘through the grapevine’ that that is a good way to stop contact.

“Certainly at one stage, it could be years ago, I had, it would be a worrying trend of women raising the issue, um, and it going nowhere, but managing to go nowhere for quite a long time. And I got the feeling there were quite a lot of quite determined and relatively on the ball women who were getting advice, I don’t think from official sources but from friends of friends and blah blah blah, saying: listen, you want to just say he’s done this, and then it can take six months to get it sorted.” [Ms S, Barrister, NW]

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<sup>54</sup> Similarly Mr W [FCA, SW] thought that the mother would be justified in opposing contact if her allegations were corroborated by ‘objective’ evidence such as police records, convictions or other documented ‘real’ proof.

<sup>55</sup> Barristers = 4; Solicitors = 4; FCAs = 3

Only Ms B [Solicitor, London] and Ms M [Barrister, SW] recognised the way in which victims of domestic violence may be constructed as implacably hostile by courts if they do not conform with victim stereotypes. Ms M spoke of a client who was “very, very angry when she talks about him, because sometimes fear and anger go hand in hand and I think from her that’s probably not served her too well because then people see the anger and don’t always appreciate the fear that’s underlying.” [Ms M, Barrister, SW]

“I mean, it’s really, really difficult for those women to come into contact with the perpetrator. And I think sometimes victims can look like they’re being hostile when they’re not, they just really don’t want to see that person, and it’s fair enough really.” [Ms B, Solicitor, London]

The starkest example of the difference in judicial attitudes towards fathers and mothers was provided by Ms O [FCA, SW] who spoke about the only case of an ‘implacably hostile’ resident father, which revealed how differently from mothers courts and professionals may treat fathers who oppose contact and ‘flout’ orders. The four children resided with the father, who had “strongly influenced” them. He refused to allow the children to have contact with the mother on the basis that they did not want to see her.

“And nobody challenged him on it. I mean, you know, okay, I’m probably as bad as anyone else, I didn’t actually say: well actually, you should sling them in the car, you know...but you know, really it’s down to you, you really need to use your powers as a parent, you know. Beyond that you couldn’t do any more, there really wasn’t anything, you could not order him to do it and expect it to be done, it just didn’t happen.” [Ms O, FCA, SW]

Despite the pervasive views on the prevalence of unjustified opposition to contact by mothers, it was interesting to note that eight participants,<sup>56</sup> including a number who held highly critical views of mothers, indicated that mothers are, in fact, generally supportive of contact, including those who had sustained domestic violence:

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<sup>56</sup> Barristers = 5; Solicitors = 2; FCAs = 1. Only one respondent, Ms A3 [Barrister, London] thought that most mothers involved in proceedings are opposed to contact.

“I often ask them: Are you against the principle of contact? And by and large they say ‘no’. It’s quite unusual to say they’re against totally anything.” [Ms F, Barrister, SE]

“Even where domestic violence is an issue, increasingly women say: I’m not opposed to the kids seeing him, I just don’t want to have to come into contact with him.” [Ms S, Barrister, NW]

Ms P pointed out that mothers who have been subjected to domestic abuse can be *more* likely to agree to contact to appease the father. Ms P and Ms M [Barristers, SW] emphasised the lengths to which mothers will go to ‘make contact work’, including those who have sustained domestic violence:

“What I think generally, because the resident parent wants desperately for the kids to have a relationship with their father, so makes the contact work...and because they want that to happen and they do sort of bend over backwards to make it work, it does work.” [Ms P, Barrister, SW]

Two family lawyers even described cases where mothers wanted the children to have contact with violent fathers and they counselled the mothers *against* this.

“Quite often they will say: oh, he’s never hurt the child, you know, it’s a classic: the child’s fine, it’s not the child, it’s me, oh he’s a wonderful father. And so you spend some time explaining actually that is really harmful.” [Ms L, Solicitor, SW]

“I was for mum who, dad had been convicted of common assault, and she relied on a few other bits and bobs, saying he was a bit of a bully when they separated. And, um, she was a rare specimen of mother who said:...but he’s a good father. I said: well, you know, that’s a failure in parenting to do that to you.” [Ms E, Barrister, London]<sup>57</sup>

The reported cases reveal a harsher, more condemnatory attitude towards mothers who oppose contact by some members of the judiciary than by most of the professionals who participated in this study. This has even led to courts transferring the residence of children to fathers or paternal family members if they perceive that mothers are obstructing contact. In *Re A (Residence Order)*<sup>58</sup> the court transferred the residence of the children to the father, despite findings of domestic violence

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<sup>57</sup> Ms E was the only participant to refer to domestic violence as a “failure in parenting”.

<sup>58</sup> *Re A (Residence Order)* (n 20). See in particular judgment of Coleridge J who was particularly condemnatory of women generally who oppose contact.

having been made against him. Although the Court of Appeal allowed the mother's appeal, the father's conduct was minimised and even ignored, and the mother was strongly condemned for her "obdurate" opposition to contact. In *Re B (Transfer of Residence to Grandmother)*,<sup>59</sup> the Court of Appeal allowed the mother's appeal against an order transferring residence of the child to the paternal grandmother and agreed with her counsel who had criticised the trial judge "for treating the mother as implacably hostile when that lacked the ordinary, necessary foundation of clear findings following investigation of the relevant history, not only during the relationship but in its aftermath."<sup>60</sup>

The mother may also be constructed as hostile if she does not undertake the task of reducing the father's hostility. In *Re P (Children)*,<sup>61</sup> although the trial judge found that the mother did not have any mental health problems, Ward LJ suggested that she should undergo therapy or counselling as this "might go some little way to assuaging the father's implacable conviction that she is a woman with severe mental problems such as spill over to the detriment of his children."<sup>62</sup> The task of the 'good mother' to engage in therapy to enable her to support contact or reduce the father's hostility is also seen in *Re W (Direct Contact)*.<sup>63</sup> The trial judge did not consider the mother to be implacably hostile because she recognised that the mother's opposition to contact had a valid basis in the father's behaviour towards her. However, on the father's appeal, McFarlane LJ constructed the father as the 'good parent' because he accepted the need for therapeutic intervention and engaged in it, whereas the mother, he found, did not, thus earning her the title of 'bad mother'. Her inability to engage in therapy was constructed as more culpable than the father's abusive behaviour.

#### **4.2 'Safe family men'**

In order to explore professionals' attitudes towards fathers involved in contact disputes, respondents were asked whether they had encountered cases where non-resident parents were pursuing contact as a means of harassing or continuing to

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<sup>59</sup> *Re B (Transfer of Residence to Grandmother)* (n 20) [11] (Thorpe LJ). See also *Re W (Residence: Leave to Appeal)* [2010] EWCA Civ 1280, [2011] 1 FLR 1143; *M v M (Residence)* [2010] EWHC 3579 (Fam), [2011] 1 FLR 1951

<sup>60</sup> *Re B (Transfer of Residence to Grandmother)* (n 20) [11] (Thorpe LJ)

<sup>61</sup> *Re P (Children)* (n 16)

<sup>62</sup> *ibid* [37] (Ward LJ)

<sup>63</sup> *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494

control the resident parent.<sup>64</sup> General perceptions of fathers were also gleaned from participants' responses to other questions.

All respondents reported that they had acted in cases where fathers had pursued contact through the courts in order to harass or continue to control the mother. Similarly, solicitors and barristers who responded to Coy et al's survey "supported women's perception that child contact proceedings were used by perpetrators to continue to exert power and control."<sup>65</sup> However, only three respondents in this study (all FCAs) considered that it is not uncommon for fathers to pursue contact for this reason. Most participants were less decisive on this issue, and saw it as less prevalent than mothers unjustifiably opposing contact.

"That is actually less common...than the first instance where parents unreasonably don't allow contact. But it does happen, and it is a means of keeping control of, and monitoring who the other parent is with and seeing and trying to manipulate the situation." [Mr V, FCA, NW]

Respondents also thought that it was more complex and less clearcut than 'simply' a question of improper motivation, indicating a general reluctance to see fathers in a negative light.<sup>66</sup>

"Because I think certainly there is cases [sic] of harassment where there is domestic violence but equally the father does genuinely want a relationship...It's not always clearcut or straightforward at all, no." [Ms H, FCA, SE]

Indeed Ms Y seemed keen to 'make excuses' for violent fathers. While she thought that:

"there have been instances where parents have achieved contact when they don't really give a toss about the kids, only want to hurt the other partner...[my] optimistic head is that parents are pursuing contact when there's domestic violence because they love their children but they can't control themselves, that's my optimistic head." [Ms Y, FCA, London]

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<sup>64</sup> Respondents' views on this issue also emerged from their responses to the question asking whether courts consider the factors set out in Paragraph 27 of the Practice Direction.

<sup>65</sup> Coy et al (n 2) 78; see also at 33, 70 & 77

<sup>66</sup> Coy et al (n 2) 56, found that many legal professionals considered that perpetrators' primary motivation was seeking a 'meaningful relationship' with their children, but an almost equal number "reported that regaining power and control lay behind applications."

While Ms E [Barrister, London] was reluctant to impute improper motives to fathers because “it’s very difficult to allege something about the state of somebody’s mind”, the vast majority of respondents, including Ms E, had no difficulty theorising (negatively) on the mothers’ ‘state of mind’ in opposing contact.

Despite the general perception of most respondents that it was not common for fathers to pursue contact for dubious motives, respondents provided numerous examples of cases in which they considered that the father’s motivation was questionable.

Ms I spoke about a case where numerous findings were made against the father, who showed Ms I a diary he had written which he intended showing to the child when he was older, which was “damning” of the mother.

“I have no, no doubt, that his only reason and motivation for contact with his child is to be able to go on and control the child’s mother...I am really worried then for the child’s emotional wellbeing. And I can honestly say, hand on my heart, I know where my recommendations will be.” [Ms I, FCA, NE]

Ms N described a case in which she had just completed a risk assessment of a father who had told her that the mother “needs controlling.”

“So yeah, I recommended no contact in my risk assessment. I think the motivation was about power and control rather than what the real focus of the needs for his child. And that isn’t to say that he didn’t talk about the needs of his child because he was bright enough to be able to articulate it, but his motivation for me was about: I’m gonna get him, because it hurts her.” [Ms N, FCA, SW]

Ms N did not accept the father’s assertions of concern for his child at face value, because she understood the power and control dynamics of domestic violence and perpetrators’ manipulative behaviours. Nevertheless, she considered that fathers are not “always motivated on continuing the power and control” and that “generally people have a genuine desire to want to see their children.”



Ms X considered that:

“sometimes it’s quite clear that the parent seeking contact isn’t the least bit interested in the kids. What he wants to do is undermine the mother, you know, really harm her in another way, he can’t hit her so he tries to harm her in another way. So that’s always been in our thinking.” [Ms X, FCA, London]

It is hard to reconcile this with her view that “the resident parent will often say that’s the reason for the application but it soon becomes clear that it isn’t.” Implicit in these apparently contradictory views is the perception that it is the professionals, not the mother, who have the ‘rationality’ to determine whether the father’s motivation is genuine.

Three lawyers and a Cafcass officer pointed out that fathers sometimes apply for contact as a means of tracing the mother and/or to find out information about, or undermine, her: “Contact could be used as a way of getting to the parent, for example, when, I’ve had clients who, he’s basically sort of stalked them and found them.” [Ms B, Solicitor, London]

“Sometimes you get very manipulative fathers as well, you know, what’s mum doing, what’s mum been doing this week, who’s she seeing, who’s been round, and I think that makes the children feel very uncomfortable.” [Ms D, Solicitor, SE]

Ms D provided an example of a violent and controlling father “who does interrogate them, always asks them about what they’ve been eating.”

Since almost all respondents to this study endorsed the presumption of contact, and most considered that fathers with dubious motivations were the exception rather than the rule, it was not surprising to encounter views generally more sympathetic to fathers than to mothers, particularly from barristers.

“And when, you know, the father’s jumped through every hoop that he can and then there’s still new objections coming up and new things that have never been mentioned before, and you sort of realise, actually, you’re just coming up with anything to stop this guy seeing the child.” [Ms T, Barrister, NW]

“So I suppose I’m slightly more wary of the mums when I make agreements actually. So suppose normally the non-resident parent, dad normally, um, is so keen to get any time he can that, you know, he’s likely I suppose to turn up and be good but it’s quite often fine for the other side that something goes wrong.” [Ms E, Barrister, London]

Nevertheless, respondents revealed fairly low expectations of what constitutes a ‘good’ father, and even dismissive views of the fathers they had encountered. Two solicitors considered that applying for contact is itself evidence of positive motivation: “I think by the fact they’ve made the application and followed it through, they would see that as motivation in itself, I would have thought.” [Ms A, Solicitor, London]<sup>67</sup> Ms P expressed the view that if contact is “not going well, it’s normally because dad’s not stepping up to the plate, you know, he’s not turning up or he’s messing about.” [Ms P, Barrister, SW] Ms E went so far as to suggest that, with respect to risk assessments, “if the court had to offer certainty, then, um, probably very few fathers would have contact, I suppose, in these situations.” [Ms E, Barrister, London] However, these views did not seem to affect their general beliefs in the benefits of contact.

The women interviewed by Coy et al reported that social workers and Cafcass officers could be “taken in” by “abusive men’s presentation as charming and on “their best behaviour’,” without realising that they, too, were being manipulated.<sup>68</sup> However, three Cafcass officers interviewed for this study articulated an awareness of perpetrators’ behaviours and/or were willing to challenge fathers: “And we know about men who are perpetrators of domestic violence is that they can come across as charming, you know, so part and parcel of the definition of being a domestic abuser.” [Mr W, FCA, SW]

Judicial attitudes towards fathers could be discerned from participants’ reports of judges readily accepting expressions of contrition at face value, expressing sympathy for violent fathers, refusing to accept that the father had improper motives in seeking contact, being reluctant to accept that fathers could be abusive towards children (as

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<sup>67</sup> Similar views were expressed by Ms C [Solicitor, SE]

<sup>68</sup> Coy et al (n 2) 58

opposed to abusive towards mothers, which is considered by courts to be more ‘acceptable’), and being allowed back repeatedly on Domestic Violence Perpetrator Programmes (‘DVPPs’).

“And equally if they are admitting it then, you know, even if it’s just on the morning of the fact-finding hearing, you know, then sometimes judges will be much more gung ho and sort of say: well, you know, fine, he’s admitted it, let’s look at a way of resolving this without an expert assessment.” [Ms T, Barrister, NW]

Three family lawyers commented on how difficult it is to persuade courts that the father’s motivation may be questionable or improper: “I think the sort of motivation point is quite difficult to establish...it’s quite difficult to persuade a court that a contact application is motivated by anything other than a desire to see the children.” [Ms T, Barrister, NW]

“I don’t always come across judges, say, looking at the motivation because you often have a client saying: this is another element of control, wouldn’t you, and that’s not an argument that I’ve ever really been able to advance successfully with a judge.” [Ms K, Solicitor, NE]

Ms B recognised that judges generally tend to have a positive view of fathers’ motivation because of their belief in the benefits of contact:

“Obviously they’re coming from the stance that it’s best for the child to see the parent. So if someone’s expressing genuine concern to see their child, um, then they might err on the side of believing that.” [Ms B, Solicitor, London]

These views are supported by the case law, which shows that even where findings of domestic violence have been made, the simple desire for, and pursuit of contact is constructed as sufficient to constitute evidence of the ‘commitment’ of the good father, rather than as a means of exercising power and control. In *Re W (Contact: Permission to Appeal)* McFarlane LJ stated that he “admired” the father “for pursuing the matter in the way that he has, giving priority to his desire to re-establish his relationship with his young son”.<sup>69</sup> Even fathers with proven histories of abuse

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<sup>69</sup> *Re W (Contact: Permission to Appeal)* [2012] EWCA Civ 1214, [2013] 1 FLR 609 [31] (McFarlane LJ)

are frequently seen as important for their children's welfare. In *Re W (Children)*<sup>70</sup> a father against whom findings of serious violence and coercively controlling behaviour were made, and who was found to have made the mother's life intolerable, was considered by the trial judge to be a 'good enough' father to permit unsupervised contact, a view with which Black LJ, on the mother's appeal, disagreed.<sup>71</sup>

The higher courts also demonstrate a degree of latitude towards fathers which contrasts with the impatience that is shown to 'obstructive' mothers. In *Re M (Section 91(14) Order)*<sup>72</sup> the father "lost control" during a hearing, applied to withdraw his application and, when the judge refused his application, left court. The judge dismissed the father's applications for contact and parental responsibility and made a Section 91(14) order.<sup>73</sup> The Court of Appeal set aside the Section 91(14) order, Thorpe LJ stating: "Surely this was not the time to prohibit or inhibit the father. The proper course was to, as it were, draw him back into the proceedings and not to put a barrier on his further engagement with the system."<sup>74</sup>

Occasionally the senior judiciary acknowledge that the court process can be used by perpetrators as part of a course of abusive conduct. In *Re W (Family Proceedings: Applications)* Wall P (as he then was) said that "it should have been recognised that the children are living with their mother, who should have been supported in their care rather than faced with regular and potentially destabilising applications that they should live elsewhere."<sup>75</sup> Additionally, where the focus is maintained on the father's conduct, he is less likely to be viewed as a 'safe family man'. In *Re W (Children)*<sup>76</sup> the father was found to have behaved in an abusive, controlling and threatening manner towards the mother. McFarlane LJ stated that the trial judge was correct to indicate to the father that she wanted to see "movement on his part in his

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<sup>70</sup> *Re W (Children)* (n 24)

<sup>71</sup> See also *Re P (Children)* (n 16) [6] (Ward LJ); *Re W (Residence: Leave to Appeal)* (n 59)

<sup>72</sup> *Re M (Section 91(14) Order)* [2012] EWCA Civ 446, [2012] 2 FLR 758

<sup>73</sup> Section 91(14) Children Act 1989 enables courts to order that a party may not make any further applications without permission of the court.

<sup>74</sup> *Re M (Section 91(14) Order)* (n 72) [8] (Thorpe LJ)

<sup>75</sup> *Re W (Family Proceedings: Applications)* [2011] EWHC 76 (Fam), [2011] 1 FLR 2163 [11] (Wall P). See also *Re J (Costs of Fact-Finding Hearing)* (n 10) [4] (Wilson LJ); *Re G (A Child)* [2011] EWCA Civ 1147 [21] (Wilson LJ)

<sup>76</sup> *Re W (Children)* (n 20)

understanding and ability to just see that he may be part of the problem here rather than an innocent bystander to whom all these things have miraculously happened.”<sup>77</sup>

## 5. Discussion

The responses of professionals confirm the view of Ms Y [FCA, London] that courts and professionals have come a long way from the days when she started practice in the early 1980s, when the victim had to suffer “injuries or blood” before it was recognised that she had sustained domestic violence. Many family lawyers and Cafcass officers have a broad and insightful theoretical understanding of domestic violence and some understand its coercive, controlling nature, although fewer barristers understand these dynamics. The more recent reported cases demonstrate that the gendered pattern of coercive control underlying domestic violence is no longer ‘noise’ to law, and some judges are starting to recognise and give effect to this approach when deciding contact cases, giving true meaning to the view of Sturge and Glaser that domestic violence constitutes a significant failure in parenting.

However, there are still many family lawyers, particularly barristers, and a minority of Cafcass officers who continue to apply a narrow, legalistic approach to domestic violence,<sup>78</sup> which has also continued to dominate much of the post-Practice Direction case law, leading to domestic violence frequently being minimised and neutralised. At the same time, messages have emanated from the senior judiciary emphasising the importance of taking domestic violence seriously in contact cases. This has led to a bifurcated approach in many cases, with domestic violence being perceived on a scale of severity whereby severe physical violence is rightly condemned, but ‘lesser’ forms of abuse are considered insufficiently important or not ‘real’ violence. Although professionals felt that judicial awareness of the nature and extent of domestic violence has improved over the last few years,<sup>79</sup> a significant minority expressed concern about courts only taking severe physical violence seriously.<sup>80</sup>

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<sup>77</sup> *ibid* [21] (McFarlane LJ). See also *Re S (A Child)* (n 27)

<sup>78</sup> See Hunter and Barnett (n 7) who found a broad, though not consistent, demarcation in perceptions of domestic violence between legal professionals and judicial officers who tend to apply a legalistic, incident-based approach to domestic violence, and Cafcass officers who demonstrate a broader understanding of its power and control dynamics.

<sup>79</sup> These views were supported by research undertaken by Hunter and Barnett (n 7), who found that some judges do take domestic violence extremely seriously; see, eg, CJ474, NE at 70

<sup>80</sup> Similar findings were made by Coy et al (n 2) 60

Respondents' perceptions of domestic violence can have a marked impact on their practices. For example, regarding domestic violence as comprising discrete incidents of physical violence can lead to 'old' or 'historic' allegations of violence being seen as irrelevant to current issues of contact and therefore disregarded, because patterns of controlling behaviour, and their continuing effects on victims and children, are obscured.

The way in which professionals perceive and respond to domestic violence may be strongly affected by their views on the merits of post-separation contact. We have seen that nearly all professionals fully endorse the 'presumption of contact'. This can mean that the broad theoretical insights of professionals into the nature and effects of domestic violence do not necessarily translate into practice, and may narrow the range of circumstances in which domestic violence is considered 'relevant' to contact.

Because most courts, like many professionals, perceive domestic violence on a scale of severity, only recent 'severe', usually physical, violence, particularly if it is witnessed by the children, is seen as 'relevant' to contact, while less serious or 'minor' abuse may be relevant to how contact should be managed, and 'historic incidents' of abuse are seen as completely irrelevant. The predominant focus on severe physical violence may mean that mothers have to 'hype up' their allegations to persuade courts to recognise the seriousness of the father's conduct, which could invariably lead to accusations of exaggeration or lying.

The perception of many respondents that 'family squabbles' arising from the 'heat' and bitterness of the relationship breakdown are not 'real' domestic violence is underpinned by images of safe family men who are acting 'out of character'. It therefore appears inevitable to these professionals that 'minor' 'isolated' incidents of abuse, particularly at the end of the relationship, cannot have a bearing on contact because they fail to contextualise them within the gendered power and control dynamics of domestic abuse.

Many professionals think that courts only consider domestic violence to be relevant if it would affect the principle of contact, not the form or ‘mechanics’. However, neither the Practice Direction nor the Guidance on Split Hearings place this gloss on the meaning of ‘relevance’. Additionally, nowhere does the Practice Direction, the Guidance on Split Hearings, or the case law stipulate that only extremely ‘severe’ physical violence should be considered ‘relevant’ to contact.<sup>81</sup> Yet the Guidance on Split Hearings appears to have had the effect of domestic violence being more frequently ‘weeded out’ by raising the threshold of what is seen to be relevant, with increasingly abusive behaviours being construed as irrelevant to contact.

Underlying these views on the ‘relevance’ of domestic violence is the pervasive assumption of the benefits of contact, which has had the effect of narrowing the range of behaviours that may be construed as providing ‘cogent’ reasons to deny children these benefits and overriding the broad theoretical perceptions of most professionals of the nature of domestic violence, including its gendered power and control dynamics.

The effects of the strong presumption of the benefits of contact are also revealed by professional and judicial attitudes towards mothers and fathers and by the reluctance of professionals to countenance any opposition to contact including, for some, in circumstances of domestic violence. Because the benefits of contact are unarguable, and there is no valid means for expressing the moral value of the mother’s wellbeing and autonomy, almost any opposition to contact is filtered through images of implacably hostile mothers and safe family men, and seen as ‘irrational’, ‘petty’ and ‘unreasonable’.

Several Cafcass officers, some solicitors and a minority of barristers do recognise the fear of domestic violence as a justifiable reason for the mother to oppose contact. However, for many, women’s fears of domestic violence in all but the most extreme circumstances may be viewed as another obstacle to overcome in the pursuit of

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<sup>81</sup> See also Hunter and Barnett (n 7) who found that there were a range of views on the question of ‘relevance’, from those who considered that domestic violence is always relevant to contact, to those who placed such importance on the merits of post-separation contact that domestic violence was considered to be peripheral to the ‘main’ issues of contact and should have little effect on the court’s orders.

contact. Mothers' fears about their children having contact with the father may be met with suspicion, and their concerns for their own safety, well-being and autonomy may be seen as expressions of self-interest, particularly by barristers but also by some solicitors and Cafcass officers. While a significant minority of family lawyers acknowledge how supportive mothers generally are about contact,<sup>82</sup> this does not appear to affect the suspicion and distrust with which many family lawyers view women involved in contact proceedings.<sup>83</sup> Although most respondents to this study did not see mothers as deliberately malicious and hostile to contact, a significant minority perceived mothers as capable of manipulation, deceit and deliberate obstruction with the consequence that their allegations of domestic violence may be disbelieved.<sup>84</sup>

Women can find themselves in a 'no-win' situation whether or not they agree to contact – if the mother opposes contact, she may be seen as irrational, difficult or even implacably hostile; however, if she allows it but subsequently raises allegations of domestic violence, the abuse is likely to be seen as irrelevant and/or the mother as obstructive of contact.

Mothers may receive more understanding and support, however, from the minority of professionals who have a keen perception of the broad nature and gendered power and control dynamics of domestic violence. However, while a significant minority of professionals expressed concern about the pressure placed on women by contact proceedings brought by perpetrators, and some Cafcass officers understood the manipulative nature of abusive men, for many these problems remained invisible.<sup>85</sup>

Professional and judicial attitudes towards mothers contrast sharply with their attitudes towards fathers. There was a general reluctance, particularly by family

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<sup>82</sup> Most of the women interviewed by Coy et al (n 2) were keen for their children to see the fathers and made great efforts to facilitate contact, putting their own emotional and physical safety at risk.

<sup>83</sup> Similarly Hunter and Barnett (n 7) found that a generally suspicious attitude towards mothers who raised allegations of domestic violence pervaded many of the responses to the survey.

<sup>84</sup> Similar findings were made by Coy et al (n 2) who found that mothers' accounts were frequently disbelieved, particularly if professionals were 'taken in' by plausible perpetrators who denied the violence – see at 56 and 63. See also Hunter and Barnett (n 7) who found that some respondents, but no Cafcass officers, expressed the view that allegations of domestic violence were sometimes made for ulterior motives, most frequently as a delaying tactic and/or to disrupt the other party's relationship with the child.

<sup>85</sup> For similar findings see Coy et al (n 2)



lawyers and, according to some participants, by judges, to impute improper motives to fathers seeking contact and a willingness to accept expressions of ‘genuine’ motivation at face value, including in circumstances of domestic violence, despite numerous examples being given of cases where fathers were clearly pursuing contact as a means to harass and control the mother. The influence of, and desire to keep intact, the image of the ‘safe family man’ means that many courts and professionals are very unwilling to perceive fathers in a negative light. Coy et al point out that the fact that perpetrators are rarely, if ever, identified as vexatious litigants suggests that the family courts fail to recognise the way in which men may pursue contact as part of a strategy of harassment and control.<sup>86</sup>

The reported cases and the interviews demonstrate how the presumption of contact and an acontextual approach to domestic violence reinforce each other, resulting in the conceptual separation of the father’s conduct from his parenting practices. As a consequence, the father’s violence becomes increasingly invisible and the responsibility for the ‘problem’ with contact is laid solely at the door of the mother, who therefore deserves a ‘robust’ response.

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<sup>86</sup> *ibid*

# CHAPTER 5

## SEEKING AGREEMENT FOR CONTACT AND CONSENT ORDERS

### 1. Introduction

It is clear that the way in which family lawyers understand domestic violence and its ‘relevance’ to contact, and perceive the benefits of contact, may have a profound impact on how they represent parents in contact proceedings. As discussed in Chapter 3, a major concern of the Family Justice Council, which led to the Practice Direction being issued, was the extent to which unsafe consent orders were being negotiated by professionals and sanctioned by the courts, often as a consequence of pressure being put on mothers to compromise and/or agree to contact. This practice arises out of the assumption not only that children ‘need’ to maintain a relationship with non-resident fathers, but also that ‘conflict’ and litigation is bad for children and therefore that it is better for children for their parents to cooperate and agree contact than to ‘battle it out’ in court proceedings.

### 2. Seeking agreement for contact – advice or coercion?

The majority of family lawyers interviewed firmly signed up to the notion that agreements between parents for contact benefit children, rather than decisions by courts.<sup>1</sup> According to Ms F [Barrister, SE]: “If they can consent early it takes the heat and anguish out of litigation which is very stressful indeed.” [Ms F, Barrister, SE]

“I do believe that it’s much better if mum and dad can agree because then it’s a case of united front. And it also does stop problems in the future, I know children often do it as they get older, play one parent off against the mother, but if mum and dad are working together as a united front... it stops them from then saying one thing to mum, and one thing to dad and, you know, it can stop a lot of problems in the future I think.” [Ms C, Solicitor, SE]<sup>2</sup>

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<sup>1</sup> N = 12

<sup>2</sup> Similar views were expressed by many family lawyers.

However, a number of respondents qualified their responses by saying that agreements can be beneficial as long as there are no risks involved, or the agreements are not ‘forced’ or the result of a power differential.

“I would caveat what I’ve just said unless one parent is at a disadvantage in terms of their vulnerability and being manipulated because if there’s a power imbalance, yes, then actually, what they agree between themselves can sometimes, is not in the children’s best interests.” [Ms L, Solicitor, SW]

Two family lawyers thought that the notion of seeking ‘agreement’ in the context of contact proceedings is unrealistic, but approached this issue from different perspectives.

“The people who can be reasonable about contact aren’t the people that we see...So this idea of the judges saying: it’s far better that the parents can agree, and you think: no, actually what we’ve done is we’ve got them to court, legally represented, with Cafcass or a mediator playing umpire, effectively refereeing an argument that lets them vent their spleen and both walk away thinking that they’ve got what they wanted.” [Ms F, Barrister, SE]

For Ms F, parents involved in contact proceedings are so ‘irrational’ and ‘vengeful’ that they could not display the ‘civility’ and ‘reason’ necessary to reach agreement.

On the other hand, Ms B thought that the idealised notion of the civilised agreement is often unrealistic in light of parents’ understandable emotional distress or real and serious problems.

“You can’t really say yes or no, because obviously, yes, it’s better if they agree, but it’s better if they get on, and the parents we see don’t get on...so I think that the Legal Services Commission’s whole: oh, you have to agree it, doesn’t really fit with life. Because you can’t agree it if you’re all at each other’s throats, and you don’t agree on anything. And that’s why you’ve gone to see a solicitor. Or because there’s really serious problems between you, like violence, in which case, no, I don’t think you should be forced to agree, certainly not.” [Ms B, Solicitor, London]

Ms P [Barrister, SW] expressed grave concern about mothers agreeing to contact to appease fathers, thereby perpetuating patterns of domination and control, and about the ‘silencing’ effect that seeking agreement and avoiding hearings can have: “I worry that sometimes parents agree contact that’s not in the interests of the children just to appease the other or to make it, you know, for an easy life.” [Ms P, Barrister, SW]

Only one participant articulated the view that agreements may ‘break down’ because of the ‘hostile mother’ deliberately renegeing on them:

“I have had a few mothers, um, agree to contact but not actually do it. So they’ve agreed it at court, it’s a consent order, um, and then they haven’t implemented it...So I suppose it’s more mums...So I suppose I’m slightly more wary of the mums when I make agreements actually.” [Ms E, Barrister, London]

In order to explore the extent to which participants encourage agreements, solicitors and barristers were asked what general initial advice they give clients about contact and how the courts view it. The views of a few Cafcass officers on this issue were also gleaned from their responses to other questions.

The majority of lawyers<sup>3</sup> advised their clients on the ‘presumption of contact’, that contact is ‘the norm’ and that the courts generally expect and want children to have contact with non-resident parents, unless there are “exceptional”, “compelling” or “good” reasons against it. In the process, ‘irrelevant’ reasons raised by mothers have to be eliminated.

“I think that our local courts are very much of the view that contact should take place if at all possible, um...there will be an expectation that it should happen in some way or shape or form, be it direct, indirect, supervised, supported, and so on and so forth. And that there has to be exceptionally compelling reasons for the court to not order any contact.” [Ms G, Barrister, SE]<sup>4</sup>

Ms S said that although the client may not initially want to reach agreement:

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<sup>3</sup> N = 13

<sup>4</sup> The advice given to mothers by Ms G is typical of that expressed by most family lawyers.

“with the appropriate assistance and explanation they can understand why that is the appropriate outcome, um, in those circumstances...and having somebody give them very sensible advice and explaining why some things that they think may be extremely pertinent, or relevant, aren’t.” [Ms S, Barrister, NW]

Three solicitors indicated that they emphasise to parents the courts’ preference for a conciliatory approach, and two solicitors said that, as Resolution members, they saw court as a last resort and would encourage clients to avoid court and participate in mediation or collaborative law, as long as there was no risk involved.

Ms Y [FCA, London] perceived a “real tension” between the “legal” approach (of lawyers and judges) and that of Cafcass in terms of “moving things along” and between the focus on agreement and consensus (lawyers and the judiciary) and protection (Cafcass). However, this perceived difference in approach and focus was not apparent in the responses to the issue of seeking agreement; if anything, lawyers focused more on ‘safe contact’ than did Cafcass officers. Six lawyers indicated that they would advise clients on the courts’ preference for contact ‘as long as it is safe’.

“Putting violence to one side, that the courts, they want children to have contact with the non-resident parent and that it would be very unusual for them not to order any contact to take place...Um, but that’s really where there hasn’t been any violence, because that does change things quite considerably.” [Ms D, Solicitor, SE]<sup>5</sup>

Four solicitors and a barrister indicated that their advice to clients about the presumption of contact would be tailored to the circumstances of the case:

“Well, generally I think it depends on how long ago the, if I’m for a mother, how long ago the father saw the child, the relationship the father has with the child, whether it needs to start off as supervised, if

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<sup>5</sup> Similar views were expressed by Ms E [Barrister, London], Ms K [Solicitor, NE] and Ms B [Solicitor, London]

there are concerns about drugs or alcohol or domestic violence.” [Ms A3, Barrister, London]<sup>6</sup>

While it may be considered understandable and even necessary for family lawyers to advise their clients about the presumption of contact, some lawyers went further and were more openly coercive, using various strategies to push mothers into agreeing to contact. Two solicitors and a barrister indicated that they would impress on resident parents the child’s right to contact in order to progress them towards agreement. Four barristers and two solicitors indicated that they would employ the courts’ approach to contact in order to persuade and encourage mothers to ‘compromise’ and agree to some contact.

“Usually I ask them directly because normally we have instructions and then you go through what the court expects and often you can turn them round in ten or fifteen minutes. That they will lose, on the facts.” [Ms F, Barrister, SE]

“And I always say that in 99 per cent of cases the court would be allowing some form of contact. And it’s in the minority that they’ll say no. So I always start off on that basis so that they’re working towards that, rather than the other way around.” [Ms A, Solicitor, London]

Ms D explained how she would persuade both mothers and fathers to agree to contact, based on her understanding of children’s emotional needs:

“Certainly with resident parents...it’s very difficult and you have to try and get them to work past the bitterness from the breakup, etc. So it’s about trying to push on them that it’s in the child’s best interests to have contact with dad or mum...And if they’re younger children, they’re saying: oh, they saying they don’t want to go. Well, you’d make them go to school, wouldn’t you? You know, it is important to maintain the relationship with the parent...because I always say to parents: neither of you are going to get what you want, you’re going to have to compromise or the court will enforce something upon you that neither of you are going to like, nine times out of ten.” [Ms D, Solicitor, SE]

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<sup>6</sup> Similar views were expressed by Ms A1 and Ms A2 [Solicitors, NW], Ms A [Solicitor, London] and Mr R [Solicitor, NE]. Ms C [Solicitor, SE] was the only family lawyer who did not refer to the presumption of contact when describing her advice to parents.

Pressure to agree to contact does not only come from the parties' representatives; the courts and Cafcass also have a role to play in this respect. This can range from indirect, subtle steering towards agreement, to more overt pressure. Ms H articulated the 'subtle' approach:

“And actually it would be helpful and reassuring for the mother to have the case come back in three months' time to look at how we can progress from there. And it's too frightening for her at the moment to envisage overnight stays, she wants to test the waters, and...you say: why don't we just try for three months, see if any issues arise, and then we'll come back and we'll look at [it]...Solicitors really like working like that as well, and it's a really helpful approach.” [Ms H, FCA, SE]<sup>7</sup>

A more coercive approach was described by Ms U, who gave an example of a case where she made concerted efforts to get the mother to agree to contact and mediation:

“The child is now nine and she has categorically refused point blank for him to have contact. And despite lots of mediation it just isn't working. But I've not given up...The complication is that mum now has got really, doesn't trust anybody...And I'm thinking: we're gonna be at odds because I actually want the child to have contact with the dad, you clearly don't. So I've left it as: right, these are completely different people now, trying to reinvent themselves. I think you need to go to mediation.” [Ms U, FCA, NW]

In those reported cases where mothers have agreed to direct contact with violent fathers, it is not usually possible, from the judgments, to determine what led to such agreements. However, in *Re S (A Child)*<sup>8</sup> there are strong indications that the mother was pressurised to accede to contact by a Cafcass officer and the judge. Although findings were made against the father of “gratuitous” violence towards the mother and an older child, and the mother opposed all direct contact, a Cafcass officer recommended that the father should be reintroduced to the child by way of professionally supervised contact. As a consequence, she “did not pursue her objection in the light of an indication from the judge, no doubt

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<sup>7</sup> A similar approach was described by Ms O [FCA, SW]

<sup>8</sup> *Re S (A Child)* [2012] EWCA Civ 617

recognising the force of the then Cafcass recommendation.”<sup>9</sup> The mother subsequently changed her stance on contact when a second Cafcass officer strongly opposed any interim direct contact because of the father’s violence. This case demonstrates the powerful influence on mothers when courts and professionals together downgrade domestic violence in favour of the presumed importance of contact.

A minority of family lawyers and Cafcass officers articulated an awareness of, and concern about the pressure that can be put on resident mothers to compromise, often at the cost of their own and the children’s safety.<sup>10</sup> “I mean, I think they sometimes feel to a degree that they have been coerced into agreeing because there’s been a fair degree of pressure from either the court or Cafcass or even their own legal advisers.” [Ms T, Barrister, NW]

Ms Y expressed grave concern about this coercive approach towards mothers.

“The equal worry is that quite often resident parents will allow contact and agree contact arrangements because the pressure is very much on them to do that when it isn’t safe...I mean it feels to me like the impetus is very much from the judges that if there is a sniff of an agreement between parents that they will want to go for that, um, and it’s generally the Cafcass officer sort of saying: oh hold on a minute...I know you have to be so careful not to put pressure on people to reach agreement.” [Ms Y, FCA, London]

Ms X explained how she would alert the judge to the possibility that a mother may be under pressure to agree contact:

“When I was doing [first hearings] you would, you know, you might say to the judge...especially if there is two very pushy barristers and a very weak woman and a determined dad, I would say: can we just hold off on that one while I just have a word with mum and make sure she’s absolutely ok with this?” [Ms X, FCA, London]

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<sup>9</sup> *ibid* [30] (Black LJ)

<sup>10</sup> Lawyers = 4; FCAs = 3



Two barristers and a Cafcass officer expressed particular concern at the pressures that can be put on mothers who may be victims of domestic abuse and subject to coercive control.

“You have to be very careful when they agree things at court, especially, say, if you’ve acted for the victim of domestic abuse, that they’re not just agreeing things because that’s part of their trait, their character trait now, or a victim trait. Because they’re so used to trying to pacify or appease, that they will agree to things that aren’t in their best, well, in the child’s best interests, to be quite honest.” [Ms C, Solicitor, SE]

Ms P’s understanding of the power and control dynamics appeared to impact positively on her practice, as she recognised that victims of domestic abuse are more likely to agree to contact as part of a pattern of attempting to appease controlling perpetrators, and expressed an awareness of the need to avoid replicating the perpetrator’s behaviour.

“In one case I had a mini-pupil with me and I said: I have a view about where this case should go, have a view about this father and how controlling he is, but I also have to be careful as her professional adviser not to take the father’s place in that relationship because I didn’t want her to feel that I was putting pressure on her not, you know, to appease me...I think it can be quite abusive, the relationship that we sort of have with our clients if we, some part of our job is to sort of say: right, this is as far, this is where I think the threshold is...If my client’s not ready to come up to there then it’s my job to protect her and make sure that she is not pushed into anything and shoving her about. ” [Ms P, Barrister, SW]

Ms P was aware, however, that most other family lawyers do not share her insight in this respect. “And they’re quite bombastic and actually all they’re doing is taking the place of the perpetrator and they put pressure on them.” [Ms P, Barrister, SW]<sup>11</sup>

Cafcass officers expressed mixed views on the way in which solicitors and barristers represent their clients and protect their interests. Three Cafcass officers

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<sup>11</sup> However, as discussed in Chapter 7, when describing how she would advise mothers after findings have been made, Ms P indicated that she would persuade the mother to agree to some form of contact.

thought that family lawyers representing victims/mothers *do* attempt to protect their clients' interests and focus on their safety. "I can't think of anyone that I've actually had to say: now look, do you realise what danger that might put your client in, and I would if I thought that there was." [Ms O, FCA, SW] Ms N even felt that some family lawyers, particularly barristers, can be "pushy" and over-bearing in pursuing their clients' cases.

On the other hand, two Cafcass officers felt that family lawyers do *not* focus sufficiently on the mother's safety or protect her interests, and can push her, or allow her to enter into, unsafe agreements for contact. Ms I [FCA, NE] gave an example of a case where the mother's solicitor told her to agree to contact because she would "lose anyway" and was dismissive of the mother's concerns. Ms I felt that barristers are more likely to support mothers as clients than solicitors are. She gave an example of a case where the mother's barrister had stood up for her in the face of fierce opposition from the father, whereas solicitors, she felt, are more likely to 'encourage' their clients to agree to contact.

Ms Y also reported problems with lawyers trying to get agreements for contact instead of pressing for fact-finding hearings. In two cases she considered that the mother's representatives were behaving like the mother in failing to stand up to the father and were bullied by the father's representatives.

"And I don't know what the lawyers were doing but they kept getting to court and trying to set up agreements, and mum's lawyers were just not standing up to dad's lawyers and, you know,...they behaved as she did, and...it was just an absolute bloody nightmare." [Ms Y, FCA, London]

In another case, where the extremely abusive father was on probation for domestic violence, the mother's solicitor said: "oh, we're being really bullied and made out to feel that we're being an awkward mother...And then I went and spoke to dad...and they were running a real pushy, pushy, pushy case, and I could see how she felt bullied by it." [Ms Y, FCA, London]

Ms Y thought it was ‘wonderful’ when lawyers *do* stand up for the mother. “And I think there’s still a pressure on them, always a pressure on them to give contact even with domestic violence. It’s kind of, again, refreshing when a representative kind of puts forward no direct contact.” [Ms Y, FCA, London]

Even Cafcass officers may be bullied by the father’s representatives in their efforts to achieve contact for their clients. Ms O gave an example of a “keen young barrister” who badgered and bullied her to let the father have contact:

“But there was no way it was getting past me on the day and I think that is an example of an adviser who was overstepping the mark really... That was bullying me, that was, you know, it was dangerous, because if I’d been bullied into saying: well yeah, okay. And you’ve got a mother who might wobble and say ‘yes’, and I’m the one who’s saying ‘no’. But you’ve got to because you’re there for the child and you have to stand up for the child.” [Ms O, FCA, SW]

### **3. Consent orders**

If it is the case that victims of domestic violence may continue to be pressurised into agreeing to contact, it is important that courts carefully scrutinise proposed consent orders. The Practice Direction requires any proposed residence or contact order to be scrutinised by the court to ensure that it accords with Section 1(1) of the Children Act 1989 (the ‘welfare principle’).<sup>12</sup> The views of participants were sought on the manner and extent to which information about domestic violence is provided to, and sought by, the courts when agreements for contact are made, and the extent to which judicial officers scrutinise proposed consent orders.

#### **3.1 Informing the court about domestic violence**

Family lawyers were asked how courts would become aware of domestic violence if they were presented with a proposed consent order and there was no mention of it in the papers, and how much information about domestic violence, if any, they would provide to the court.

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<sup>12</sup> Potter P, *Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* [2008] 2 FLR 103, reissued on 14<sup>th</sup> January 2009 at [2009] 2 FLR 1400 [4]. Paragraph 5 states that the court must not make a consent order if the parties are not present in court unless it is satisfied that there is no risk of harm to the child.

Ten respondents said that the court would already be aware of domestic violence from the paperwork, including the safeguarding checks. However, this is not necessarily the case. Respondents confirmed that the father is unlikely to disclose in his application form that he has perpetrated domestic violence. Although most solicitors reported that they do complete the C1A forms when acting for victim parents, Ms T [Barrister, NW] commented that this was not always her experience. Additionally, respondents' views varied considerably about the degree of detail that is usually included in the C1A forms. Ms B [Solicitor, London] said she found it "really problematic that the court would use that as a guide," because of the way in which domestic violence gradually emerges. So the C1A form is only a starting point and cannot be relied on to ensure that a proposed consent order is safe.<sup>13</sup>

The initial safeguarding inquiries undertaken by Cafcass are an extremely important part of the disclosure process as they can provide vital information about the existence of serious domestic violence at the outset of proceedings which fathers, as applicants, are unlikely to disclose. However, respondents reported that the speed and reliability of the safeguarding information varies considerably nationwide. Additionally, most Cafcass officers and a few solicitors emphasised that the checks cannot be relied on because domestic violence is so frequently unreported, most perpetrators do not have criminal convictions, and the checks do not usually reveal the existence of Family Law Act injunctions. Ms X [FCA, London] pointed out that parents can be unknown to the police and local authority and yet Cafcass will discover "horrendous" domestic violence.

The parties' representatives therefore have an important role to play in making judges aware of domestic violence. Coy et al found that the extent to which legal representatives were willing to disclose the histories of violence to the court was

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<sup>13</sup> These views echo those found by Rosalind Aris and Christine Harrison, *Domestic violence and the supplemental information form* (Ministry of Justice 2007), which indicated that the C1A forms assist in alerting the judge to allegations of domestic violence at the earlier stages of proceedings, but should not be relied on as the only screening tool. See also Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women 2012)

critical; if such histories were discounted by professionals, this contributed in large part to rendering the violence invisible.<sup>14</sup>

Mr R thought that *all* practitioners would make the court aware of domestic violence when submitting a proposed consent order, particularly in the context of a power imbalance:

“I think any advocate would need to put to the court the circumstances surrounding this and particularly if you’ve got a domestically abused woman with the whole issue of the power imbalance between the perpetrator and the victim. For your own sake, let alone for your client’s sake, you’d be wanting to make sure the court was made aware of the context in which the agreement was being made.” [Mr R, Solicitor, NE]<sup>15</sup>

These perceptions were not necessarily borne out by other responses. While half of the family lawyers interviewed said that the court would become aware of domestic violence by the parties’ advocates raising it, the extent to which they would do so seemed to vary. Two barristers and a solicitor considered that not only would they inform the court about domestic violence, but that they had a duty to do so. “But I think the responsible thing to do really is to raise it...the court ought to be aware because I think you have a duty in children cases to, you know, furnish the court with that sort of information.” [Ms T, Barrister, NW] On the other hand, Ms D [Solicitor, SE] said that while *she* would inform the judge about domestic violence when submitting a consent order, other solicitors may not do so, principally due to heavy court lists. Ms S [Barrister, NW] indicated that she would tell the court about domestic violence only if she thought it was ‘relevant’ but would not do so if it was raised by a ‘hostile mother’ to delay the case. Ms A [Solicitor, London] went further and indicated that she would *not* inform the court about domestic violence when presenting it with a consent order, unless the client specifically instructed her to do so.

Seven participants pointed out that, in practice, the opportunities to inform the court about domestic violence when presenting a proposed consent order are

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<sup>14</sup> Coy et al (n 13)

<sup>15</sup> This view was confirmed by Ms X [FCA, London] who thought that lawyers always tell the court and Cafcass about domestic violence.

limited, and that courts may be unreceptive to such disclosure in case the consent order ‘unravels’.

“I mean most of the time when you go in with a consent order, judges don’t want to hear very much from you anyway. You’ve got it, that’s fine, you’re agreed, if there’s a problem come back at the next hearing.” [Ms A3, Barrister, London]

There was a wide variation in participants’ views on how much information about domestic violence they would provide to the court when submitting a consent order, ranging from those who would provide minimal information in order not to “open up a can of worms” or “raise the temperature”, to a sizeable minority who would provide enough information to explain the rationale and terms of the order, to those who considered it very important to make full disclosure to the court about domestic violence so that the client could not be accused at a later stage of fabricating allegations of domestic violence if the consent order broke down.

“You have to advise a client very carefully that if they don’t raise their allegations early on and it all breaks down and they later say: well, he was always violent to me, and you hadn’t said it from the outset, then ... often courts are not going to view those allegations as credible.” [Ms L, Solicitor, SW]

Indeed, as discussed in Chapter 6, many courts and professionals *are* suspicious of mothers who allow contact to take place and then raise allegations of domestic violence after it has broken down.

### **3.2 Scrutiny of consent orders by judicial officers**

Hunter and Barnett found that while most judicial officers thought that courts adequately scrutinise proposed consent orders always or very often, family lawyers and Cafcass officers were more likely to say that courts never or only occasionally scrutinise such orders adequately. Pressure of work and inadequate

information were identified by judges and barristers as reasons why proposed consent orders might not be scrutinised carefully enough.<sup>16</sup>

According to just over half of the respondents in this study, the extent to which judges and magistrates ‘scrutinise’ proposed consent orders depends entirely on the particular judge and/or the size of the court lists. Whereas some judges *do* enquire about domestic violence or ask for more information about it, others are happy simply to ‘sign off’ the order. Ms S [Barrister, NW] thought that there was more scrutiny and less ‘rubber-stamping’ over the last couple of years but that judicial practice still varies. Similarly Ms P said that while some judges will challenge aspects of the order, others would rather avoid it ‘unravelling’:

“There are some judges who would want to know, but there are other judges who take the view that the least they know the better when it’s a consent order because...it then starts to, once they start asking questions, it all starts to unravel and it’s very finely balanced.” [Ms P, Barrister, SW]

A sizeable minority of respondents across the professional groups considered that a great deal of “rubber-stamping” of consent orders still happens.<sup>17</sup>

“No, I think they’re quite happy to sit back and let us do all of that and the negotiations and reach the agreements and there’s a lot of rubber-stamping goes on, yeah...I can’t say that I’ve had a case where a judge has raised a concern about a consent order if the parties have agreed it, even where the court is aware that there’s a history of violence.” [Ms L, Solicitor, SW]

“Well, a lot of the time you don’t even go in anymore. I mean, I’ve found lately that if you’ve reached a consent order, the judges will just say: oh, we might not need to see you, and just tick it off, or ask: are you all agreed? I’ll sign that off, it seems fine.” [Ms A3, Barrister, London]

All but three of the respondents (all family lawyers) said that they had never experienced judges or magistrates enquiring whether domestic violence was an

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<sup>16</sup> Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President’s Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council 2013) [www.familyjusticecouncil.org.uk](http://www.familyjusticecouncil.org.uk), last accessed 12.11.13, 58

<sup>17</sup> N = 8

issue in a case if this was not raised by the parties, as it was unlikely that the court would go on a “fishing expedition.” [Ms A2, Solicitor, NW] Four family lawyers thought that judges would positively avoid asking about domestic violence if the parties had not mentioned it, two of whom agreed with this approach: “It’s usually bad enough without anybody putting the boot in, to raise the temperature.” [Ms F, Barrister, SE] “I think that they would take the view that that was giving someone a get out clause in an intractable dispute, when they haven’t raised it themselves.” [Ms M, Barrister, SW]

Despite the variability in practice reported by the majority of respondents, and the continued concerns about rubber-stamping expressed by a sizeable minority, twice as many respondents considered that there had been a positive change in judicial practice in terms of scrutinising proposed consent orders as a result of the Practice Direction than those who did not.<sup>18</sup> “Yes, yes definitely. They’ve questioned it and perhaps asked in more detail in terms of how it’s going to work and how the parties have considered to make the contact safe.” [Ms K, Solicitor, NE] However, Ms C [Solicitor, SE] thought that while courts were more willing to scrutinise proposed consent orders when the Practice Direction was first implemented, she had perceived a backward slide.

The majority of respondents<sup>19</sup> had never encountered a situation where a court had refused to make a proposed consent order, and most of them had never experienced the court adjourning the case to obtain further information because of concerns about domestic violence. Those respondents who had experienced this situation emphasised that this was rare or did not happen regularly.<sup>20</sup>

Five respondents said they had never encountered a consent order being approved by the court where a Cafcass officer raised concerns about domestic violence. However, five others said that they had, but indicated that this was uncommon, and nine participants responded with an unqualified ‘yes’. Five

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<sup>18</sup> Two FCAs thought that the Revised Private Law Programme, with the greater involvement of FCAs at first hearings had also had a positive impact.

<sup>19</sup> N = 16

<sup>20</sup> N = 13



Cafcass officers expressed concern that this may occur when the FCA is not present in court, has become distracted by other cases, or is too busy.

“I mean I go absolutely loopy if I see, if I’ve been distracted by somebody or had to see another case, and the parties and solicitors have sneaked into the court...without me being present and orders being made...and the judge shouldn’t really, the judge should wait for me to come into the room...But I’ve turned up at court and the solicitors for both parties have been chatting. And I often get: Don’t worry about it, I’ve already got the order agreed. And they’re really naughty.” [Ms H, FCA, SE]

A minority<sup>21</sup> of family lawyers even perceived the intervention of Cafcass in raising concerns about domestic violence when consent orders have been negotiated as obstructive or unnecessary ‘nitpicking’.

The difficulties that may arise when proposed consent orders are approved in the absence of the Cafcass officer were highlighted by Ms Y who gave an example of a recent case in which she was preparing an addendum Section 7 report and became very concerned when she spoke to the mother.

“We took it back to court and we had a consent order and I was horrified, I was absolutely horrified, and I wrote to the court immediately. She was saying: but I didn’t agree, I didn’t agree with what, you know, the consent order was, I wasn’t there...And the judge apparently had also voiced concerns at the time because it was clearly in my previous report that I thought this mother would agree to things under pressure from dad. And then I spoke to her again...and she said ‘no’, she felt confident saying ‘no’ to dad.” [Ms Y, FCA, London]

Mr V said that in situations where consent orders were approved about which he had concerns, he would write to the court, although when he did so in one case “it didn’t make any difference.” [Mr V, FCA, NW] Similarly Mr J reported that in one of the courts in which he practises, the judges either fail to seek his views or ignore them: “Oh, we don’t need to know that, Mr J, no, no, we’re not having that. These are two perfectly good people, this is all bureaucracy.” [Mr J, FCA, NE]

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<sup>21</sup> N = 3

On the other hand, two Cafcass officers provided examples of cases where they had voiced strong concerns about agreements for contact being made, which *did* have an effect on the outcomes, although Ms Y [FCA, London] commented that “it is an uncomfortable position to be in because then you have to start, you know, unpicking it.” Ms Y gave an example of an extremely worrying case:

“The worst one was with...this poor woman...you could see she was crying, and she had a full burka on and, you know, two lawyers, both men, both Asian, saying: we’ve got a consent order for residence to father.” [Ms Y, FCA, London]

Ms Y was concerned that the mother’s lawyer, who was interpreting for her, was not giving a true account of what the mother was saying, so she got one of the Cafcass staff, who spoke Sylheti, to interpret.

“Of course, then I got the full story and, you know, Dad sounded really scary and he’d thrown her out, he’d kept the child...So, you know, we unpicked the consent order and I had a go at the lawyer, actually. And then I referred it on to the local authority as well, so that she left the court with an order saying that the child should be with her and her family.” [Ms Y, FCA, London]

Ms N gave an example of a recent case:

“I’ve run into court in the end because they were just about, they said: it’s been agreed. I said: there’s issues of horrendous domestic violence here that haven’t been looked at and I’m recommending full welfare reports...I said: I’m here for the child’s voice, so if I’m saying in my experience that there were safeguarding issues, we don’t know why this agreement has been reached.” [Ms N, FCA, SW]

In that case, the mother had not voluntarily agreed to contact. “Her view was that she, um, wanted a quiet life, she didn’t want to make it difficult because if she makes things difficult he then becomes abusive...It drives me mad really. They must have known I wouldn’t agree to it...[but] they did listen.”

It is clear from these accounts that Cafcass officers may need to be particularly ‘robust’ and strong if they have concerns about agreements that have, or are

about to be made. Ms Y and Ms N, who are extremely experienced Cafcass officers, were able to intervene effectively in the cases they described, but there must be concern that less experienced or more timid Cafcass officers may not be able to withstand the pressure from all sides for agreements to be reached and approved.

#### 4. Discussion

By its very nature, the work of lawyers for clients is partisan; the lawyer serves and promotes her client's best interests.<sup>22</sup> The partisan nature of legal representation is confirmed as a core principle by the Code of Conduct of the Bar of England and Wales:

“A barrister (a) must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any colleague, professional client or other intermediary or another barrister...); (b) owes his primary duty as between the lay client and any other person to the lay client and must not permit any other person to limit his discretion as to how the interests of the lay client can best be served.”<sup>23</sup>

However, as a result of the strong influence of the dominant welfare discourse on courts and professionals, solicitors and barristers specialising in family law increasingly appear to have absorbed welfare and 'psy' concepts into their thinking, so that we can see what Roche describes as a 'welfare professionalism' creeping into the roles of the legal profession,<sup>24</sup> resulting in “the gradual assimilation of welfare ideology into family law” and the emergence of a developing 'hybrid' professional discourse.<sup>25</sup> Particularly since the introduction

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<sup>22</sup> See Katherine Wright, 'The evolving role of the family lawyer: the impact of collaborative law on family law practice' (2011) 23(3) *CFLQ* 370-392. See also John Eekelaar, Mavis Maclean and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart 2000) 187

<sup>23</sup> The Bar Council, *Code of Conduct of the Bar of England and Wales* (The Bar Council 2012) [303], [www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/](http://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/), last accessed 28.06.13

<sup>24</sup> Jeremy Roche, 'The Children Act 1989: Once a Parent Always a Parent?' (1991) 13(5) *Journal of Social Welfare and Family Law* 345-361. See also Helen Rhoades, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *International Journal of Law, Policy and the Family* 71-94, 80

<sup>25</sup> Bren Neale and Carol Smart, '“Good” and “bad” lawyers? Struggling in the shadow of the new law' (1997) 19(4) *Journal of Social Welfare and Family Law* 377-402, 396

of the Children Act 1989, parents “will find their solicitors and barristers sounding increasingly like mediators rather than partisans.”<sup>26</sup>

Indeed, family law solicitors’ professional codes have incorporated this hybrid welfarism, thereby formalising and solidifying this discourse. The Resolution Code of Practice provides that Resolution members are required to: “Conduct matters in a constructive and non-confrontational way...Encourage clients to put the best interests of the children first...Make clients aware of the benefits of behaving in a civilised way.”<sup>27</sup>

We have seen that many professionals have indeed adopted the ‘hybrid’ role of the ‘good’ family lawyer/child welfare professional and have absorbed the positive perception of consensus and agreement-seeking. This can have a profound impact on the way in which family lawyers use their authority to encourage parents to behave ‘sensibly’ in order to reach agreement for contact.<sup>28</sup> A number of studies support the findings of this project, which has demonstrated how family lawyers use the dominant welfare discourse to attempt to “divert clients away from pursuing their self-interest and towards compromise”, and ‘steer’ clients towards what they perceive to be the ‘reasonable’ outcome.<sup>29</sup>

Most family lawyers do not need to apply overt pressure on mothers to agree to contact; however, their general initial advice can inevitably steer clients towards agreement simply by spelling out the approach that courts undeniably take towards contact, thereby reinforcing that approach in a circular process. This means that advice can very easily become pressure, even if this is not intended by the lawyer. Many lawyers do, however, ‘use’ the presumption of contact, their

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<sup>26</sup> Carol Smart, ‘Losing the Struggle for Another Voice: The Case of Family Law’ (1995) 18 *Dalhousie Law Journal* 13-195, 190. This trend has been compounded since many family lawyers have trained as mediators – see Michael King, ‘“Being sensible”: Images and Practices of the new Family Lawyers’ (1999) 28 *Journal of Social Policy* 249; Wright (n 22) 370

<sup>27</sup> Resolution, ‘Codes of Practice’ in *Guides to Good Practice* (Resolution 2012) 2, [www.resolution.org.uk](http://www.resolution.org.uk), last accessed 13.10.12; see also at 6 & 71. These sentiments are echoed by the Law Society’s Family Law Protocol – see The Law Society, *Family Law Protocol* (The Law Society 2006) [1.1.20]; see also [1.1.22].

<sup>28</sup> For similar views, see Eekelaar et al (n 22) 52-53

<sup>29</sup> *ibid* 308; see also 124. See also King (n 26) 261; Christine Piper and Shelley Day Sclater, ‘Changing Divorce’ in Shelley Day Sclater and Christine Piper (eds), *Undercurrents of Divorce* (Ashgate 1999) 237-238

own interpretations of children’s emotional and psychological needs, and other strategies to steer clients towards agreement. What lawyers perceive as ‘irrelevant’ to contact, including, for some, concerns about domestic violence, are erased by ‘sensible’ advice; it follows, therefore, that clients who persistent in raising such issues cannot be ‘sensible’ or ‘rational’.

Overt pressure may be exerted on mothers by a sizeable minority of family lawyers, particularly by those who are more likely to perceive mothers generally as ‘hostile’ to contact. Further pressure can be exerted by the father’s representatives, not only on the mother but also on her representatives and on Cafcass officers, compounding the abuse already experienced by the mother. If this pressure does not ‘work’, the mother may also experience further ‘encouragement’ towards agreement from the Cafcass officer and the court. The strong presumption in favour of contact has led to the higher courts encouraging mothers to ‘shift their positions’ and allow contact with violent fathers, even in cases where it is recognised that direct contact is not appropriate at the time.<sup>30</sup>

The impact that ‘good’ legal advice can have on parents was articulated by Mr V:

“Good child care solicitors can make a big difference to a case, because not only are they talking reason to their clients, they’re talking reason on behalf of the child and trying to get them to see that there’s reasonable contact that can be had, that’s safe and that’s in the child’s interests, but their client has to move their position. So they can make a difference.” [Mr V, FCA, NW]

Similarly Ms H said that “more often than not solicitors have got the child’s welfare at heart.” [Ms H, FCA, SE] Although lawyers are, of course, advocating, in theory at least, on behalf of their own client, these Cafcass officers identified the ‘hidden’ client of many family lawyers – law’s construction of the ‘contact child’ at the heart of family proceedings. On this view, the ‘good’ family lawyer is one who puts the child’s interests before those of their client by promoting contact.

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<sup>30</sup> See, eg, *Re M (Children)* [2009] EWCA Civ 1216, [2010] 1 FLR 1089, per Thorpe LJ at Para 12; *Re A (Residence Order)* [2009] EWCA Civ 1141, [2010] 1 FLR 1083

The internalisation and operationalisation of the dominant construction of children's welfare is therefore the hallmark of the 'good' family lawyer. "Indeed, solicitors must ensure they do cause parents to act sensibly if they themselves are to be deemed sensible by judges ... and 'good' lawyers by their colleagues."<sup>31</sup> Family lawyers, therefore, need to be 'civilised' in the same way as parents do. The role of 'good' family lawyers means that most lawyers tend to reinforce, rather than oppose, current familial ideologies and thus further marginalise other ways of talking about familial relations that challenge the hegemonic status of the father within the modern family. It is the 'good' family lawyer on whom the court system relies in " 'producing the rational client', inculcating realistic expectations and guiding their clients to particular outcomes."<sup>32</sup>

It would therefore appear that the Practice Direction has not achieved the 'cultural shift' hoped for by its architects. Nevertheless, a strong minority of family lawyers and more Cafcass officers have a much greater appreciation of, and concern about the pressures that can be put on mothers to agree to unsafe contact. These family lawyers try to avoid replicating the role of the abuser in their practices, and make concerted efforts to 'stand up for' the mother and children.

The belief of most professionals and judges in the benefits of agreed outcomes, the pressures on judicial officers of lengthy court lists, and the time and effort that family lawyers put in to brokering agreements for contact, may inhibit consent orders being properly scrutinised by courts. Most family lawyers report that they would inform the court about domestic violence if they are representing the victim and a few consider that it is their duty to do so. This suggests some improvement from the days when many family lawyers were reluctant to disclose domestic violence to the court. However, a minority would actively avoid raising the issue and a larger number would be reluctant to provide much detail, to avoid derailing the proposed consent order. Additionally, in practice, there may not be

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<sup>31</sup> Christine Piper, 'Assumptions about children's best interests' (2000) 22(3) *JSWFL* 261-276, 263. See also Alison Diduck, *Laws Families* (LexisNexis UK 2003)

<sup>32</sup> John Dewar and Stephen Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *Australian Journal of Family Law* 96 at Pg. 111

much opportunity to disclose domestic violence to the court, particularly if this is discouraged by the judge, or the parties do not even go into court.

There appears to be a wide variation in the extent to which judges and magistrates scrutinise proposed consent orders, with some judicial officers being reluctant to enquire about domestic violence so that consent orders do not ‘unravel’, and many still ‘rubber-stamping’ them without any enquiry or even seeing the parties. It was extremely concerning to find that lawyers and judicial officers may not only ignore the concerns and advice of Cafcass officers, but actively avoid their involvement in cases in order to drive through agreements for contact. Despite the general perception that the Practice Direction has improved the extent to which proposed consent orders are scrutinised by courts, it seems that judges very rarely refuse to make consent orders on the basis of concerns about domestic violence. The extent to which they will approve consent orders if Cafcass officers express concerns seems to vary and may depend on how robust the Cafcass officer is in withstanding pressure from the courts and legal representatives.

## CHAPTER 6

# FACT-FINDING HEARINGS

The Practice Direction provides that:

“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.”<sup>1</sup>

Research undertaken prior to the implementation of the Practice Direction revealed the very low numbers of fact-finding hearings held in private law Children Act proceedings, despite the high prevalence of domestic violence in such cases.<sup>2</sup> A significant aspect of this project was to determine whether this is currently the case and if so why, by examining how often fact-finding hearings are held, the willingness of family lawyers and Cafcass officers to request them and the courts to hold them, whether they are held where appropriate, and the factors that may militate against holding them. In addition, this project explores participants’ perceptions of the nature of ‘evidence’ and ‘findings of fact’, the effect of these perceptions on their practices, and the consequences for children and parents.

### 1. Frequency of fact-finding hearings

Participants were asked whether they had noticed any increase in the numbers of fact-finding hearings held following the implementation of the Practice Direction.

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<sup>1</sup> Potter P, *Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* [2008] 2 FLR 103, reissued on 14<sup>th</sup> January 2009 at [2009] 2 FLR 1400 [13]

<sup>2</sup> See Alison Perry and Bernadette Rainey, ‘Supervised, Supported and Indirect Contact Orders: Research Findings’ (2007) 21 *International Journal of Law, Policy and the Family* 21-47; Joan Hunt and Alison Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (Ministry of Justice 2008)



**Whether any increase in numbers of fact-finding hearings following the Practice Direction – by region**

	<b>London</b>	<b>SE</b>	<b>SW</b>	<b>NE</b>	<b>NW</b>	<b>Total</b>
<b>Increase</b>	4	4	3	4	5	<b>20</b>
<b>No increase</b>	1	1	2	0	2	<b>6</b>
<b>Not know</b>			1			<b>1</b>
<b>Total</b>						<b>27</b>

**Whether any increase in numbers of fact-finding hearings following the Practice Direction – by professional groups**

	<b>Barristers</b>	<b>Solicitors</b>	<b>FCAs</b>	<b>Total</b>
<b>Increase</b>	5	11	4	<b>20</b>
<b>No increase</b>	2 <sup>3</sup>	0	4	<b>6</b>
<b>Not know</b>			1	<b>1</b>
<b>Total</b>				<b>27</b>

The majority of solicitors and barristers interviewed,<sup>4</sup> including all the five family lawyers interviewed in 2010, across all regions said that they had noticed an increase in the numbers of fact-finding hearings since the Practice Direction was implemented in May 2008. “I think that since the Practice Direction there’s just been more fact-finding hearings, so they deal with that really early on, which is the difference.” [Ms A, Solicitor, London, interviewed in 2010]

Ms S clearly saw this increase in negative terms:

“I think it had a significant impact after it initially came out, um, not least because it seemed that it was being an issue raised in every single private law application, and everything’s going off. Cafcass wouldn’t do section 7 reports, everything was going off, finding of fact hearings, and so there was this very significant backlog...if there were any allegations of violence at all, everything was being listed and the backlog and the delays in proceedings were immense.” [Ms S, Barrister, NW]

<sup>3</sup> These barristers included Ms T [NW] who responded ‘no’ to this question but then appeared to be talking about the more recent period following the Guidance on Split Hearings

<sup>4</sup> N = 16

She said that she was constantly doing fact-finding hearings “back-to-back” but had a “horrible sinking feeling” that much of this was caused by devious women requesting them to “put the brakes on contact progressing” because of advice they had received from “associates”.

Despite these views on the increase in fact-finding hearings following the Practice Direction, Ms B, who was interviewed in 2010, felt that they would soon be on the decline:

“I think it might have a reverse effect soon because I think that courts are starting to think: oh God, we can’t actually cope with the amount of fact-finding hearings, and they’re all really long and so I think...there might be an effect now where it’s just starting to go back the other way and they can try and avoid them because they can’t cope with the demand of them. For the moment you get six-month waits for a fact-finding hearing.” [Ms B, Solicitor, London]

As Ms B had predicted, five respondents who were interviewed in 2011 observed that despite the initial increase, the numbers of fact-finding hearings appeared to have slowed down over the past year: “I suppose because I came to the Bar in 2007 and so just before the Practice Direction came in...they were coming in left, right and centre. Um, but it’s definitely slowed since last year...across the board, yeah.” [Ms P, Barrister, SW] Ms P thought that this was a ‘sensible’ development.

Although four Cafcass officers thought that there had been some increase in fact-finding hearings following the implementation of the Practice Direction (including both Cafcass officers in the North East), four others from all other regions did not perceive any increase at all, and Ms H [FCA, SE] thought that the reverse was the case.<sup>5</sup>

So we can see that a higher proportion of family lawyers than Cafcass officers observed an increase in the numbers of fact-finding hearings following the Practice Direction. Additionally, different Cafcass officers from the same region<sup>6</sup>

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<sup>5</sup> Mr W [FCA, SW] said that he did not know whether or not there had been an increase.

<sup>6</sup> For example, Ms X and Ms Y [FCAs, London]

held opposing views on this issue. A number of factors may have influenced participants' perceptions such as the extent to which fact-finding hearings impinged on their own practices, and their ability to recall what was happening three years prior to the interviews. For these reasons, it is suggested that the five family lawyers interviewed in 2010<sup>7</sup> may have had more accurate recollections of the situation during the two years following the implementation of the Practice Direction, although these respondents were all based in London and the South East, which is where Hunter and Barnett found the biggest impact of the Practice Direction.<sup>8</sup>

Hunter and Barnett found that a small majority of respondents thought that there had been an increase in fact-finding hearings following the implementation of the Practice Direction and over a quarter thought that there had been no change. Circuit Judges, District Judges and barristers were more likely to say that there had been a substantial increase, while magistrates and Cafcass officers were less likely to observe such an increase.<sup>9</sup> These findings are broadly similar to those of this study, although the larger proportion of those respondents interviewed for this project reporting an increase in the incidence of fact-finding hearings following the Practice Direction may be attributable to most of the interviews being conducted earlier than Hunter and Barnett's survey. Nevertheless, it is possible that, because considerably higher numbers responded to the survey than were interviewed, the survey data may well be more representative of professional and judicial views on this issue.

Despite these views on the increase in the numbers of fact-finding hearings, the case law reveals that in a number of cases that went to appeal after the Practice Direction came into effect, the Court of Appeal was highly critical of trial judges for failing to conduct fact-finding hearings, for abandoning them when they had been listed, or for accepting compromises when the full history of domestic violence should have been investigated. In *Re Z (Unsupervised Contact:*

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<sup>7</sup> All five family lawyers interviewed in 2010 perceived an increase in the frequency of fact-finding hearings following the Practice Direction.

<sup>8</sup> Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council 2013) [www.familyjusticecouncil.org.uk](http://www.familyjusticecouncil.org.uk), last accessed 12.11.13, 58

<sup>9</sup> *ibid*

*Allegations of Domestic Violence*)<sup>10</sup> fact-finding hearings were listed on three separate occasions but were never held. On the third occasion the judge of his own initiative abandoned the fact-finding hearing after the first day and ordered unsupervised contact, despite the duty Cafcass officer reminding him of the Practice Direction. Wall LJ (as he then was), on the mother's appeal, castigated the trial judge in the strongest terms.

“I make it as clear as I can that the practice direction is there to be obeyed...Above all, it seems to me that the Practice Direction places proper and firm emphasis on the importance of the fact-finding exercise, and in my judgment that process cannot be short-circuited.”<sup>11</sup>

In *Re R (Family Proceedings)*<sup>12</sup> the trial judge terminated a fact-finding hearing before the father gave evidence, having made an adverse assessment of the mother's credibility. Allowing the mother's appeal, Thorpe LJ emphasised that:

“The importance of preliminary fact finding hearings in domestic violence cases was emphasised by this Court in the conjoined cases of *Re L, V, M, H*...some years ago now, and the importance of this judicial task has been subsequently emphasised by direction from the President.”<sup>13</sup>

Despite these strong criticisms of trial judges for failing to hold fact-finding hearings, the message emerged from the higher courts that the numbers of fact-finding hearings had increased to such a point that the court system was unable to cope and, by implication, that fact-finding hearings were being held unnecessarily. In *SS v KS*<sup>14</sup> Hedley J referred to increased delays in the court system occasioned by the rise in public law cases since the ‘Baby P’ case, and to the increase in fact-finding hearings because of *Re L* and the Practice Direction. “The combination of these factors is testing the family justice system in London

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<sup>10</sup> *Re Z (Unsupervised Contact: Allegations of Domestic Violence)* [2009] EWCA Civ 430, [2009] 2 FLR 877. The mother alleged that the father had been very violent towards her and had threatened to abduct the children. He had also breached non-molestation and occupation orders.

<sup>11</sup> *ibid* [27] (Wall LJ)

<sup>12</sup> *Re R (Family Proceedings: No Case to Answer)* [2009] EWCA Civ 1619, [2009] 2 FLR 82. See also *Re B (Transfer of Residence to Grandmother)* [2012] EWCA Civ 858, [2013] 1 FLR 275; *Re K (A Child)* [2012] EWCA Civ 1306

<sup>13</sup> *Re R (Family Proceedings)* (n 12) [12] (Thorpe LJ)

<sup>14</sup> *SS v KS* [2009] EWHC 1575 (Fam), *S v S (Interim Contact)* [2009] 2 FLR 1586

to the limit and one inevitable consequence is greater delay.”<sup>15</sup> He also intimated that fact-finding hearings may be being held where they are not necessary, by the courts “playing for safety.”<sup>16</sup> In *Re C (Domestic Violence: Fact-finding Hearing)*<sup>17</sup> Thorpe LJ gave a confused account of the genesis of the Practice Direction and its amended version which led him to arrive at the extraordinary view that the evil being addressed by the Practice Direction was the increasing number of unnecessary fact-finding hearings. As a consequence, he exhorted the courts to be more circumspect in holding fact-finding hearings which, he suggested, were “wasteful both of judicial resources and of public funding in publicly funded cases”.<sup>18</sup>

The case law discussed above does not, however, suggest that unnecessary fact-finding hearings are being held, rather, the opposite appears to be the case. Furthermore, in a number of instances the Court of Appeal has explicitly approved the holding of fact-finding hearings, or has implicitly done so by not criticising the decision to hold such hearings.<sup>19</sup>

Only one reported case, *A v A (Appeal: Fact-finding)*,<sup>20</sup> has been identified where the appellate court was critical of the trial judge for holding a fact-finding hearing, on the basis that it would serve no purpose because the parties had already agreed interim shared residence, despite the trial judge having found all the mother’s very serious allegations against the father proved.<sup>21</sup>

## 2. Effect of the Guidance on Split Hearings

*The President’s Guidance in Relation to Split Hearings* [‘the Guidance on Split Hearings’] was issued as a direct consequence of the perception that, following the Practice Direction, fact-finding hearings were “taking place when they need

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<sup>15</sup> *ibid* [3] (Hedley J)

<sup>16</sup> *ibid* [5] (Hedley J)

<sup>17</sup> *Re C (Domestic Violence: Fact-finding Hearing)* [2009] EWCA Civ 994, [2010] 1 FLR 1728

<sup>18</sup> *ibid* [18] (Thorpe LJ)

<sup>19</sup> See *Re A (Fact-Finding: Disputed Facts)* [2011] EWCA Civ 12, [2011] 1 FLR 1817; *Re J (Costs of Fact-Finding Hearing)* [2009] EWCA Civ 1350, [2010] 1 FLR 1893; *Re W (Children)* [2012] EWCA Civ 528; *Re S (A Child)* [2012] EWCA Civ 617

<sup>20</sup> *A v A (Appeal: Fact-finding)* [2010] EWHC 1282 (Fam)

<sup>21</sup> Mostyn J demonstrated an extremely hostile attitude towards the mother and overturned all the findings made by the trial judge.

not do so; and...[were] taking up a disproportionate amount of the court’s time and resources.”<sup>22</sup> The Guidance on Split Hearings stipulates that the decision to direct and/or conduct a separate fact-finding hearing “is a *judicial* decision. It is not a decision for *Cafcass* or for the parties. It is a decision to be taken by the court.”<sup>23</sup> The Guidance further provides that: “a fact finding hearing should only be ordered if the court takes the view that the case cannot properly be decided without such a hearing.”<sup>24</sup> Nor should a separate hearing necessarily be directed if the fact-finding exercise is considered necessary. “In my judgment it will be a rare case in which a separate fact finding hearing *is* necessary.”<sup>25</sup> So the clear intention of the Guidance on Split Hearings was to limit the number of separate fact-finding hearings held.

Participants in this study were asked whether they had observed any change in the numbers of fact-finding hearings following the Guidance on Split Hearings being issued in May 2010. A total of 22 useable responses were obtained.

**Whether any change in numbers of fact-finding hearings following the Guidance on Split Hearings – by region**

	London	SE	SW	NE	NW	Total
<b>No change</b>	0	3	2	1	1	<b>7</b>
<b>Not know</b>				1	2	<b>3</b>
<b>Decrease</b>	3	0	4	2	3	<b>12</b>

**Whether any change in numbers of fact-finding hearings following the Guidance on Split Hearings – by professional groups**

	Barristers	Solicitors	FCAs	Total
<b>No change</b>	3	0	4	7
<b>Not know</b>		2	1	3
<b>Decrease</b>	4	4	4	12

<sup>22</sup> Wall P, *The President’s Guidance in Relation to Split Hearings* [2010] 2 FLR 1897 [1]

<sup>23</sup> *ibid* [5], emphasis in original

<sup>24</sup> *ibid* [6]

<sup>25</sup> *ibid* [7], emphasis in original

While twelve respondents said that, since the Guidance on Split Hearings was issued in May 2010, they had observed a decrease in fact-finding hearings, seven respondents<sup>26</sup> reported no change, and three indicated that they did not know.<sup>27</sup> Those who indicated no change were relatively evenly distributed geographically, apart from London, where the three participants who responded to this question noticed a decrease in the numbers of fact-finding hearings. These London respondents were all interviewed more than a year after the GOSH had been implemented and therefore may have had the best opportunity to assess its longer-term impact.

The twelve respondents who reported a decrease in the incidence of fact-finding hearings following the Guidance on Split Hearings were evenly divided amongst solicitors, barristers and Cafcass officers.<sup>28</sup> However, more Cafcass officers than other groups reported no change or did not know,<sup>29</sup> which may be because more Cafcass officers than family lawyers thought there was no increase in the numbers of fact-finding hearings following the Practice Direction in the first place.

Ms C [Solicitor, SE], who was interviewed in May 2010, observed a recent change in practice by the courts, which suggests that judges were already trying to limit the numbers of fact-finding hearings even before the Guidance on Split Hearings was implemented:

“And so I’ve noticed an extreme change from first of all there being absolute, complete to the letter compliance with the Practice Direction, to now them saying: is it actually necessary? Do we actually need to deal with things by way of fact-finding hearings and referring off to the FPC, can we not just agree something here?”

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<sup>26</sup> These respondents include Ms E [Barrister, London] who was interviewed in May 2010 and therefore would not yet have experienced the effect of the Guidance on Split Hearings.

<sup>27</sup> Similar findings were made by Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women 2012) and by Hunter and Barnett (n 8); the latter found that respondents were almost evenly divided on whether there had been a decrease, or no change, in the incidence of fact-finding hearings following the Guidance on Split Hearings.

<sup>28</sup> N = 4 from each group

<sup>29</sup> Barristers = 3; solicitors = 2; FCAs = 5

Ms L reported that courts are now more ‘robust’ and far less willing to order fact-finding hearings as a direct consequence of the Guidance on Split Hearings. “I think I can remember having a case where...the judge specifically said:...I’m not obliged to list it simply on the basis of this opinion, it is a matter for me to consider that, you know, on the guidance.” [Ms L, Solicitor, SW]

Not only has the numbers of fact-finding hearings reduced following the Guidance on Split Hearings; a few respondents such as Ms Q [Solicitor, SW] reported that the length of the hearings has also decreased because of the courts limiting the number of allegations to be tried: “Or the trial judge takes a view and gets you in and says: out of your 482 allegations, I’m interested in six, pick your best, and then he says: is that it? I’m not interested. OK then.” [Ms G, Barrister, SE] Mr V gave an example of a case where the fact-finding hearing was listed for five days but the barristers “whittled it down” to one day by limiting the number of allegations.

Ms P expressed concern about this tendency to limit the number of allegations to be tried because this can result in a partial picture of the abuse:

“My experience from today is that the judge was obviously trying to restrict the evidence to something that was manageable for the court system rather than something that was actually going to get to the bottom of the case. You know, um, I mean, when you read judgments about people having schedules of facts, you know, 40 odd facts, and I’ve got the judge today saying six each, like well, it doesn’t really do the job, does it, when there’s more than six.” [Ms P, Barrister, SW]

This problem was expressly recognised by the trial judge in *SS v KS*.<sup>30</sup> The parties’ representatives attempted to ‘carve up’ the fact-finding hearing, which involved numerous allegations of very serious physical and psychological violence by the father towards the mother and children, on the basis of limited admissions by the father, “but the judge was of the view that a fair picture could only be obtained by considering all [the allegations]”.<sup>31</sup> This case suggests that

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<sup>30</sup> *SS v KS* (n 14)

<sup>31</sup> *ibid* [5] (Hedley J), who concurred with the approach of the trial judge. It should be noted that the researcher, in her professional capacity, represented the father in this case.



fact-finding hearings may not be held as a result of professionals' eagerness to avoid them even in circumstances when courts *would* consider them 'necessary'.

Some family lawyers, particularly barristers, considered that the decrease in the numbers of fact-finding hearings held was a positive development. Ms K commented that the judges have "sensibly curtailed the number of fact-findings":

"I think at one time the courts were prepared to list a fact-finding on a very limited basis and now you find that the judges are saying: is this going to make any difference to the final decision? Does there need to be two separate hearings?" [Ms K, Solicitor, NE]<sup>32</sup>

"In my own practice I'm actually finding less of them...I think there was once a statement, somebody raised domestic violence and people just assumed that that meant you were on the road to a fact-finding whereas now I think there is this early stage analysis when you look at it and say: do we need fact-finding? Is that going to be helpful? Is that actually going to change the ultimate-." [Ms T, Barrister, NW]<sup>33</sup>

Other participants, particularly Cafcass officers, expressed concern about the reduction in the incidence of fact-finding hearings, and Ms N [FCA, SW] was worried that fact-finding hearings would become even rarer.<sup>34</sup>

### **3. Are fact-finding hearings held when listed?**

Respondents were asked whether they had encountered cases where fact-finding hearings were listed, but on the day of the hearing they did not take place or were cut short. All but one of the solicitors and barristers interviewed, but only five Cafcass officers<sup>35</sup> reported that they had experienced this situation, although a few participants commented that this was not a frequent occurrence. There were no significant regional differences to these responses. Six respondents said that they had never encountered this situation, of whom five were Cafcass officers.<sup>36</sup>

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<sup>32</sup> Similar views were expressed by Ms S [Barrister, NW]

<sup>33</sup> For similar views expressed by judicial officers, see Hunter and Barnett (n 8) 23

<sup>34</sup> Similar concern was expressed by some of the respondents to Hunter and Barnett's survey.

<sup>35</sup> N = 23, comprising: Barristers = 7; Solicitors = 10; FCAs = 5

<sup>36</sup> Cafcass officers do not usually attend fact-finding hearings so they may not always be aware of this happening.

The most common reason cited for fact-finding hearings not going ahead on the day they were listed was that the perpetrator made ‘sufficient’ admissions of domestic violence so that, as Ms E [Barrister, London] observed, the matter is “carved up.”<sup>37</sup> “Well, one party for whatever reason withdraws their allegations, or partially withdraws their allegations or where the other party makes admissions, quite often usually a combination.” [Ms M, Barrister, SW] Ms L [Solicitor, SW] said that the father may make “concessions” in order to avoid a “raft of findings” against him. Many respondents said that the outcome in these circumstances was frequently an ‘agreed’ schedule of findings, although Ms T [Barrister, NW] considered that this is “always a bit of a fudge” and Ms Y [FCA, London] described them as “watered down compromises.”

The second most common reason for fact-finding hearings not going ahead was lack of resources, namely, insufficient court time, heavy court lists, other cases over-running, double listing, or evidence not yet being available.<sup>38</sup>

Four respondents said that fact-findings may not proceed on the day of hearing because the parties had agreed contact and/or settled their differences in the interim: “They’ve moved on, they’ve become friends, um, and they can deal with their problems and they don’t want any more trouble.” [Ms F, Barrister, SE]

“I have had a couple of cases where we’ve lined everything up for a fact-finding hearing and by the time we got to the fact-finding contact has already sort of started off on a supervised basis, you know, grown better and better...And we’ve actually got to the fact-finding hearing and said: we don’t need this now, you know, because we are in a position where contact is moving, it’s progressing smoothly, everyone’s happy with it, child’s content, it’s safe, Cafcass officers are aware of the issues, but it’s not impacting on contact. So we don’t need the fact-finding, you know, so, yeah.” [Ms P, Barrister, SW]<sup>39</sup>

Other, less frequent, reasons given why fact-finding hearings may collapse were: a party withdrawing their allegations;<sup>40</sup> lack of evidence;<sup>41</sup> and counsel advising

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<sup>37</sup> N = 13, comprising: Barristers = 4; Solicitors = 7; FCAs = 2

<sup>38</sup> N = 7

<sup>39</sup> Ms T [Barrister, NW] gave an example of a similar case and outcome

<sup>40</sup> Reported by Ms M [Barrister, SW]

on the day that the allegations will not be proved.<sup>42</sup> Ms P [Barrister, SW] provided an example of a case where a psychologist had assessed the father as a serious risk to the mother and child and recommended no direct contact. The father accepted this assessment and recommendation and therefore the fact-finding hearing was unnecessary.

It would seem that the situation revealed by previous research, where a fact-finding hearing listed by one judge was terminated by another judge on the day of the trial, is no longer a common concern. Seven respondents said that they had not experienced this happening, one respondent said it may happen but is very unusual, and five family lawyers<sup>43</sup> said they had experienced this situation, although at least two of them observed that this is now much less common. Where this does happen, the judge may put pressure on the parties to reach agreement:

“I think courts, once they list it, are more anxious to have it dealt with but it does, the judge changing their mind or whatever, trying to persuade the two parties that do we really need one...So where they list it for a day fact-finding and both parties turn up on the day and the judge just says: ‘is this really necessary?’...and the judge puts pressure on both sides...and we’ll agree supervised contact to take place.” [Ms A, Solicitor, London, interviewed in 2010].

Mr. J reported wryly that if a fact-finding hearing ended up being listed on a Friday afternoon, “you’ve got no chance of that being heard.”

“They’ve always got something better to do. I’m being slightly, maybe a bit unfair but you know, the number of times, finding of facts on a Friday morning is always a floating case which means no one is allocated to it and it doesn’t go ahead or: I’m sure you can sort something out, says the judge.” [Mr. J, FCA, NE]<sup>44</sup>

These examples demonstrate how allegations of domestic violence can ‘disappear’ during the course of proceedings. However, those participants interviewed in 2010 were more likely to have encountered this situation than

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<sup>41</sup> *ibid*

<sup>42</sup> Reported by Ms L [Solicitor, SW]

<sup>43</sup> These five family lawyers were interviewed in 2010.

<sup>44</sup> Mr J did point out that that scenario is less common now than in the past.

those interviewed after the Guidance on Split Hearings was implemented, which suggests that the listing of fact-finding hearings was considerably narrowed thereafter to those rare cases where they are ‘obviously’ necessary, so that they are far less likely to be aborted on the day.

#### **4. What happens to disputed allegations of domestic violence if separate fact-finding hearings are not held?**

As the picture emerged of the decrease in the numbers of separate fact-finding hearings, some respondents were probed as to what happens to disputed allegations if they are not tried separately, and in particular, whether are they litigated at final hearings or simply disappear. Half of the respondents to Hunter and Barnett’s survey considered that the allegations would more appropriately be determined as part of the substantive hearing.<sup>45</sup> However, no clear picture emerged from the participants to this study.

Ms I [FCA, NE] and Ms E [Barrister, London] thought that there were more composite hearings in recent months, and Mr J [FCA, NE] reported one recent composite hearing in a county court in which he had recently started working.

Ms T [Barrister NW] indicated that courts ‘sometimes’ hold composite hearings although this was not necessarily a deliberate listing decision, and expressed concern about the effect of such hearings:

“Sometimes we have a fact-finding hearing and it ends up effectively being [pause] [Interviewer: *a final hearing?*] Well, not a final hearing, but **the** contested hearing and then you sort of come back for a review afterwards and you never recover.” [Ms T, Barrister, NW]

On the other hand, Ms S [Barrister, NW] and Ms Q [Solicitor, SW] considered that, if courts decide not to hold separate fact-finding hearings, the disputed allegations are effectively ‘weeded out’ and disappear. Ms S thought that this was a positive step:

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<sup>45</sup> Hunter and Barnett (n 8)

“I think they’re being weeded out so there isn’t a determination...I think in some circumstances they are being dealt with very promptly so the court has considered them resolved, or they are weeded out...and not dealt with and the court then makes recommendations about contact.” [Ms S, Barrister, NW]<sup>46</sup>

Mr R [Solicitor, NE] and Ms P [Barrister, SW] reported that courts employ a mix of strategies if discrete fact-finding hearings are not held, with composite hearings being held where the allegations are considered ‘serious enough’, or the allegations are ‘weeded out’ and ignored: “It’s a mixture of both, I have to say. Yeah, and sometimes that’s down to the judge...I think there’s pressure on the courts, there’s pressures of time-scales, to try to have it all concertina-ed into one.” [Mr R, Solicitor, NE]

Ms P observed that, while in the past six months she had noticed fewer split hearings and more composite ones, this was still fairly uncommon and in some cases domestic violence tends to “fizzle out” as contact gains momentum:

“It’s all being dealt with in one final hearing and I don’t think it’s because the court’s saying: ‘we’re not having any trial on the issues’...I think people really have taken on board what the, what effect will it have on contact and looked at it more of a welfare and capacity to parent issue than a, you know, a fact-finding per se. So the issues will still be litigated but not in every case because, you know, you do have cases where you get to, contact has momentum and they find a happy medium and, you know, things settle down, partners then move on and get new partners and so the heat goes out of it. And it’s a bit easier for everybody.” [Ms P, Barrister, SW]

Ms P thought that where the fact-finding exercise is listed to take place at the final hearing, “it all feels a bit artificial” if contact has progressed in the interim, particularly if the allegations are “historic” and the parties have “moved on” or become “litigation weary.”

Ms P was the only respondent to identify an important positive aspect of composite hearings – that they enable allegations of domestic violence to be contextualised within, and seen as part of, the ‘welfare’ issues of parenting. This

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<sup>46</sup> Similar views were expressed by Ms C [Solicitor, SE]

was one of the reasons why some judges and barristers who responded to Hunter and Barnett's survey expressed a preference for dealing with allegations of domestic violence in one composite hearing: "Fewer fact-findings and earlier final hearings. The allegations are almost always part of a more complex situation and to deal with them in isolation is not realistic and not in children's interests." (DJ 568)<sup>47</sup>

Another way in which disputed allegations may be dealt with if fact-finding hearings are not held is by courts expecting Cafcass officers to 'investigate' the allegations in their Section 7 reports:

"It's just very difficult to answer the question because there's hardly ever a fact-finding hearing agreed. I think judges are more inclined to recommend a Section 7, and my kind of conspiracy theory on that is that it then saves them the time...effectively we're becoming like investigators, and that's not our job, to have to determine the likelihood or not of domestic violence really, it shouldn't be our job."  
[Ms H, FCA, SE]

Mr J [FCA, NE] was adamantly opposed to composite hearings. [Interviewer: *how does it work?*] "Well, it doesn't." He pointed out that if courts rely on Cafcass reports to circumvent fact-finding hearings this can simply waste further time because he will inevitably end up saying in his report:

"Very serious allegations have been raised in this matter, although the court was minded to say they were not relevant, no findings were ordered and I'm unable to offer a way forward whilst these issues have not been resolved. You've just wasted three months." [Mr J, FCA, NE]

Mr J gave an example of a recent case where he was asked to report on alternative bases:

"Where the judge...said: what I want you to do Mr J is to consider what will be the impact if I do this, what will be the impact if I do that, what will be the impact if I do this, blah blah blah. How can you write a welfare checklist advising on what you don't know?...it's just not right to put a full hearing down the same time as a finding, to

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<sup>47</sup> Hunter and Barnett (n 8) 27

build findings in. There needs to be a findings [sic] and then you have the full hearing.”<sup>48</sup>

There is no indication from the case law that courts are holding ‘composite’ hearings. Rather, it appears from the reported cases that the approach of the lower courts is to ignore allegations of domestic violence altogether if they consider that they are not serious enough to warrant a separate fact-finding hearing. The only reported case in which it appears that a ‘composite’ hearing was held (although this is not stated in the judgment of Sir Mark Potter) is *Re S (A Child)*<sup>49</sup> in which findings of abusive and coercively controlling behaviour were made against the father at a final hearing.

## 5. How do fact-finding hearings get listed?

The responses discussed above provide a clear picture of courts actively restricting the numbers of fact-finding hearings listed and held. It was therefore considered important to explore the extent to which fact-finding hearings are requested by professionals, and how courts decide whether or not to list them.

Most of the family lawyers interviewed<sup>50</sup> expressed the view that courts list such hearings on their own motion or make the ultimate decision on whether a fact-finding hearing should be listed if a request is made by a party or the Cafcass officer. Seven family lawyers explained that the current practice is for courts to direct statements, Scott schedules<sup>51</sup> and sometimes police disclosure and other ‘independent’ evidence to be filed, and then list the matter for a directions hearing at which the court will decide whether a fact-finding hearing is ‘necessary’. This focus on itemised schedules and ‘concrete evidence’ means that, from the outset of the proceedings, women are compelled to construct and articulate the abuse they have sustained within the discursive framework of the legalistic, incident-based approach to domestic violence, which means that other,

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<sup>48</sup> Similar views were expressed by Mr V [FCA, NW], who gave an example of a case where he said he would ‘insist’ on a fact-finding hearing being held.

<sup>49</sup> *Re S (A Child)* [2012] EWCA Civ 1031

<sup>50</sup> N = 12 comprising: Barristers = 5; Solicitors = 7

<sup>51</sup> Scott schedules are tables setting out the dates and brief descriptions of the allegations that the victim seeks to prove. The alleged perpetrator files a schedule in response and a composite schedule is then prepared for the trial.

subtle forms of abuse and coercive, controlling behaviours become increasingly invisible.

Although it appears that courts are far more proactive in taking the ultimate decision on whether a fact-finding hearing should be listed, it was made clear that the issue often has to be raised in the first place by the parties or by the Cafcass officer. The willingness of family lawyers to request such hearings is therefore extremely important.

## **6. Do family lawyers request fact-finding hearings?**

The majority of family lawyers<sup>52</sup> said that if their client opposed contact on the basis of domestic violence, which the other parent disputed, they would request a fact-finding hearing. Ms T indicated that she was particularly proactive in this respect: “There are a whole lot of cases where I’ve been to where it hasn’t been listed and then I’ve gone along and said: well, I’m instructed, and I’ve had to sort of then raise it and say: let’s list this.” [Ms T, Barrister, NW]

Whether family lawyers *do* request fact-finding hearings to this extent is another matter. While Ms E [Barrister, London] said that she would certainly request a fact-finding hearing if her client relied on the allegations, she conceded that she had never, in fact, actually asked for one. Additionally, at another stage in the interview she indicated that she would ‘raise it’ but not ‘insist on it’ and would ultimately leave it to the court. Ms H [FCA, SE] commented that in her experience family lawyers rarely request fact-finding hearings. As discussed below, it is likely that the self-reported willingness of family lawyers to request fact-finding hearings on behalf of the victim/mother may only apply to those cases where they think that the allegations are ‘relevant’ to contact; there may also be an element of response-bias in their self-reports.

Both solicitors from the North East and Ms E [Barrister, London] indicated that they would be reluctant to request fact-finding hearings on behalf of the victim if there was a lack of ‘evidence’ as the allegations would be difficult to prove and

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<sup>52</sup> N = 12



would have a potentially negative impact on the mother's case if findings were not made. "It would depend on the level of domestic violence and I suppose also on how likely, how that person would be able to prove because it's so difficult for people, isn't it?" [Ms K, Solicitor, NE]<sup>53</sup>

Whether or not most family lawyers do, in fact, request fact-finding hearings when representing the alleged victim/mother, their responses suggest that they think they *should* do so. This contrasts with their marked reluctance to request or agree to fact-finding hearings if representing the father/perpetrator. Ms E [Barrister, London] said that she would never, or only very rarely, request a fact-finding hearing if representing the father, and if there was copious evidence against him she would actively try to avoid one:

"I don't think I've ever pushed for a fact-finding without knowing what disclosure's going to come because knowing my luck, it'll come with ten CRIS reports of damning evidence, witnessed by a neighbour, and the children, and a police officer, and, um, almost negligent I think, so I would never really push for it, no." [Ms E, Barrister, London]

When representing the alleged perpetrator, the majority of family lawyers indicated that they would assess his credibility and the strength of the evidence against him in deciding whether to request, or agree to a fact-finding hearing. They would also be influenced by whether the allegations, if proved, were likely to affect his contact.

"It would depend what the allegations were and the extent to which they were going to impact on contact. If there was a situation where they were working towards supervised contact anyway and there was a fairly reasonable timetable it might not be necessary to have a fact-finding hearing and also not necessarily in their best interests... You have to assess what the evidence is." [Ms M, Barrister, SW]

Indeed, Ms E gave an example of a case where she represented the father and was "relieved" that the judge decided not to hold a fact-finding hearing on the

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<sup>53</sup> Respondents' views on the nature and effect of 'evidence' is discussed further in this chapter.

mother's allegations "because I think they would have been proved." [Ms E, Barrister, London]

Conversely, family lawyers might agree to a fact-finding hearing when representing the father if they thought that he *could* successfully defend them.

"I mean, I have had the odd occasion where I've thought: these allegations aren't going anywhere, um, they're spurious, and undermined, and my client would make a good witness, let's knock these on the head now and be done with it." [Ms E, Barrister, London]<sup>54</sup>

Ms M said that if the allegations are very serious, she would agree to a fact-finding hearing, "because otherwise they are constantly raised against them, um, without it being proven and then the courts are always cautious and say: obviously there's a potential risk if you haven't given the other side opportunity to disprove it." [Ms M, Barrister, SW]

Three family lawyers observed that fathers are often keen for a fact-finding hearing to be held in order to 'clear their name', particularly if they have been acquitted of assault in the criminal courts. Ms E said that she usually tries to talk them out of it in those circumstances:

"I mean, I have had the odd client who's said: well, I'm not scared of a fact-finding, I'll prove my name, I've got nothing to fear, that sort of thing. And I'm normally try [sic] to talk them down and said, you know: okay, that's very bravado and all that but this is balance of probabilities." [Ms E, Barrister, London]

So we can see an implicit perception by these family lawyers that fathers against whom allegations of domestic violence are made are usually 'guilty' of them and fact-finding hearings are therefore best avoided if they are representing the father. The expressed willingness to request fact-finding hearings when representing the victim suggests that most family lawyers do not hold the same reservations about

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<sup>54</sup> Similarly Ms A [Solicitor, London] said that a fact-finding hearing could be in a father's interests if there is not much 'evidence' against him.

mothers, although a minority are understandably concerned about the consequences for victims if the allegations are not proven.

## 7. Willingness of judicial officers to list fact-finding hearings

Research by Coy et al revealed a reluctance by courts to hold fact-finding hearings. Only one respondent reported that judges “always” investigate allegations of domestic violence at the earliest opportunity, a third suggested that this happens “mostly”, half that it happens “sometimes” and twelve per cent that it happens “rarely”.<sup>55</sup> Similarly Hunter and Barnett found that fact-finding hearings are still the exception rather than the rule.<sup>56</sup> Most respondents to their survey reported that fact-finding hearings are held in 0 to 25 per cent of cases in which domestic violence is raised as an issue, with the largest group<sup>57</sup> saying that such hearings are held in less than ten per cent of cases.

It was therefore surprising to find that just over half of the respondents interviewed for this project,<sup>58</sup> comprising equal numbers of barristers, solicitors and Cafcass officers from all regions, indicated that judicial officers *are* usually willing to hold fact-finding hearings if asked to do so. However eleven respondents indicated that this “depends” and “varies”, is not “always” or “automatically” the case, and that there are wide differences amongst judicial officers in respect of their willingness to hold fact-finding hearings.<sup>59</sup> Ms S [Barrister, NW] had observed completely different approaches even by judges in the same county court.

Ms P said that courts are willing to hold such hearings as long as one can justify the request,<sup>60</sup> and that circuit judges are far more willing to do so than district judges, probably because they have more freedom to manage their own lists:

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<sup>55</sup> Coy et al (n 27) 53

<sup>56</sup> Hunter and Barnett (n 8)

<sup>57</sup> 42 per cent

<sup>58</sup> N = 15, comprising: Barristers = 5; Solicitors = 5; FCAs = 5

<sup>59</sup> N = 11, comprising: Barristers = 4; Solicitors = 5; FCAs = 2

<sup>60</sup> Ms O [FCA, SW] also said that her colleagues have reported that they have to argue strenuously for such hearings.

“I’ve had a judge do a fact-finding there and then, you know, say: well, the rest of today has gone and my case for tomorrow, so I’ll have you now, are you ready, alright, come on then...I think also because they can see that sometimes, you know, we kind of fanny around a lot, don’t we, around the issues and actually judges think: do you know what? I’ll just hear the evidence, yeah, just get it out in the open, I’ll make a fact-finding and then everybody’s gonna have to deal with it.” [Ms P, Barrister, SW]

Only six respondents said that courts were not usually willing to hold fact-finding hearings.<sup>61</sup> Mr J [FCA, NE] said that in one of the county courts in which he had recently started practising it was almost impossible to persuade judges to list fact-finding hearings, and Ms H commented that most judges are reluctant to hold such hearings, particularly since the implementation of the Revised Private Law Programme: “I can’t remember when a fact-finding hearing was listed recently...I’ve seen situations where parents are just sort of shouted at and told to get out and sort something out...there’s hardly ever a fact-finding hearing agreed.” [Ms H, FCA, SE] Similarly, Ms N [FCA, SW] commented that fact-finding hearings “are like gold dust these days.”

In order to increase the reliability of the responses, family lawyers were asked whether they had ever been refused a fact-finding hearing when a request had been made. Of those participants who responded to this question,<sup>62</sup> five said that they had, five said that they had not, and two barristers said “occasionally”. There was no geographical pattern to this response, but slightly more barristers than solicitors indicated that they had not or had only occasionally been refused a request for a fact-finding hearing. These responses therefore support the general views expressed by professionals about the willingness of courts to hold fact-finding hearings. The wide variation in judicial practice was confirmed by the responses of Ms F and Ms G [Barristers, SE] who practise in the same courts. Ms F said she had only occasionally been refused a fact-finding hearing, while Ms G said that this happened “all the time”.

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<sup>61</sup> Solicitors = 2; FCAs = 4

<sup>62</sup> N = 12

There are a number of possible reasons for the apparently greater willingness of family lawyers to request fact-finding hearings, and of courts to hold them, revealed by the findings of this study than was found by Coy et al and Hunter and Barnett. The slightly higher proportion of barristers compared with other professional groups to report that their requests for fact-finding hearings are rarely refused may be because barristers are more persuasive in their requests and/or tend to act in more ‘serious’ cases than solicitors. However, it is suggested that the primary reason for these findings lies in the narrow construction of ‘relevant’ domestic violence by judges and barristers. This means that barristers are only likely to request fact-finding hearings in the most ‘serious’ cases of recent physical violence, and it is not surprising, therefore, that courts would agree to hold such hearings in those circumstances.

Indeed, Ms S indicated that refusals to hold fact-finding hearings are quite common where the requests are made on the spurious instructions of the client who ‘misguidedly’ thinks that the abuse she has sustained is relevant to contact:

“I mean, for a court to refuse to list it, it would, in my experience, most likely be because it’s an unfounded request to list a finding of fact, and somebody may be acting on their client’s instructions, um, because the client feels it’s appropriate and it’s relevant and it’s necessary or whatever...But the court wouldn’t necessarily conclude that there needed to be a finding of fact.” [Ms S, Barrister, NW]

So it is ‘unjustified’ requests for fact-finding hearings that are refused by courts, which lends support to the suggestion that family lawyers only request such hearings, and courts are only willing to list them, in those rare ‘justified’ cases where domestic violence is considered ‘relevant’ to contact.

This was further borne out by professionals’ views on the extent to which fact-finding hearings are listed at the request of the Cafcass officer. Respondents were asked whether courts usually accede to requests by Cafcass officers to hold fact-finding hearings. This question produced the starkest divergence in views between family lawyers and Cafcass officers. Seven family lawyers but only three Cafcass officers indicated that courts would usually, although not always, and not automatically, follow a recommendation by an FCA for a fact-finding

hearing. Ms P [Barrister, SW] could not think of a case where the court had refused such a recommendation.

The remaining seven Cafcass officers said that courts would not, or “not always” accede to such a recommendation, or would only do so after a great deal of persuasion. “I would say probably 80 per cent of the time, if you insist on a finding of fact hearing, then they will do it, but you do have to fight your corner.” [Mr V, FCA, NW]

The majority of Cafcass officers<sup>63</sup> and a minority of family lawyers<sup>64</sup> indicated that courts are no longer as willing to accede to requests by Cafcass for fact-finding hearings as they may have been in the past. Ms K thought that courts and parties are deliberately trying to bypass Cafcass requests for such hearings altogether:

“I think everyone is aware of the guidance and shouldn’t be, in fact a hearing shouldn’t be listed because Cafcass say they can’t report without it or if one of the parties decide that they want it. So I think the judges are quite keen to get in before there is a Cafcass report and make that decision and then record that on the file so Cafcass is aware that the judge does not think a fact-finding hearing is necessary.” [Ms K, Solicitor, NE]

Four Cafcass officers were emphatic in their views that courts do not generally accede to their requests for fact-finding hearings. Ms H [FCA, SE] said that she regularly recommends fact-finding hearings in her Schedule 2 letters, but since they are so rare, those recommendations are obviously not being followed. Similarly Ms N [FCA, SW] expressed grave concern about the fact that the courts no longer follow her recommendations for fact-finding hearings. Ms N and Ms Y thought that this situation was getting worse and that there was a ‘backlash’ to the Practice Direction. These views give a strong indication of the antipathy of courts to fact-finding hearings, because Ms H and Ms N were clear that in other respects, the courts invariably follow their recommendations.

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<sup>63</sup> N = 7

<sup>64</sup> N = 3

It was very worrying to hear from Mr J that in one county court in which he works FCAs are extremely reluctant even to recommend fact-finding hearings because the judges usually refuse them and castigate the FCA:

“The difficulty, the dilemma is, in XXX, practitioners become deterred from making recommendations if they are going to get trashed. They shouldn’t do. They should still make the recommendation. The court has got to be told, told it like it is even if the court isn’t going to do it. But there is a certain wary reluctance.”  
[Mr J, FCA, NE]

Some of the respondents who indicated that courts would usually follow Cafcass recommendations for fact-finding hearings or that it ‘depended’, saw this in negative terms as they did not think such recommendations were ‘helpful’, leading to “more delay anyway, because it’s taken them 16 weeks or more to say that, so it’s rather infuriating in that sense.” [Ms A, Solicitor, London, interviewed in 2010]

Similarly Hunter and Barnett found that some judges and family lawyers considered that Cafcass officers insisted unnecessarily on fact-finding hearings, and even imputed selfish motives to Cafcass, suggesting that they request fact-finding hearings to avoid preparing reports or making recommendations and are therefore ‘passing the buck’.<sup>65</sup> It is notable, however, that survey respondents did not report most fact-finding hearings being initiated at the instigation of Cafcass officers, but by the alleged victim.

## **8. Reasons why fact-finding hearings may not be held**

The terms of the Practice Direction and the Guidance on Split Hearings together provide the rationale for decisions by courts not to hold preliminary fact-finding hearings. The Practice Direction provides that it should be ‘necessary’ to hold a fact-finding hearing if the nature and effect of the disputed allegations of domestic violence mean that they would be ‘relevant’ to contact, and would be likely to affect the court’s decision on contact.<sup>66</sup> The Guidance on Split Hearings encourages courts to construe these provisions as narrowly as possible by stating

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<sup>65</sup> Hunter and Barnett (n 8)

<sup>66</sup> The Practice Direction (n 1) [3], [11] & [13]

that “a fact finding hearing should only be ordered if the court takes the view that the case cannot properly be decided without such a hearing”<sup>67</sup> and that “it will be a rare case in which a separate fact finding hearing *is* necessary.”<sup>68</sup>

The narrow circumstances in which fact-finding hearings are considered appropriate also lie in their origins in care proceedings in relation to the local authority’s obligation to prove that the ‘threshold criteria’ are met.<sup>69</sup> Courts were encouraged to consider “whether or not there were questions of fact within a case which needed to be determined at an early stage.”<sup>70</sup> Bracewell J in *Re S (Care Proceedings: Split Hearing)* [1996] explained that cases suitable for such ‘split hearings’ “would be likely to be cases in which there is a clear and stark issue, such as sexual abuse or physical abuse.”<sup>71</sup> From its inception, therefore, the practice of the ‘split hearing’ has been based on the notion that such hearings are appropriate to determine specific allegations of physical or sexual abuse. This approach was expressly approved by Wall P (as he then was) in the Guidance on Split Hearings, so that the focus of fact-finding hearings on physical violence rather than on the many other forms that domestic abuse may take is further entrenched in legal discourse.<sup>72</sup>

The advantages of holding separate fact-finding hearings were explained by Bracewell J in *Re S (Care Proceedings: Split Hearing)*: resolution of the facts “would enable the substantive hearing to proceed more speedily” and the court to “focus on the child’s welfare with greater clarity.”<sup>73</sup> However, as discussed above, courts, professionals and policy-makers formed the view that such hearings were in fact having the opposite effect. The Guidance on Split Hearings was explicitly issued to curtail the number of preliminary fact-finding hearings

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<sup>67</sup> The Guidance on Split Hearings (n 22) [6]

<sup>68</sup> *ibid* [7], emphasis in original

<sup>69</sup> Section 31(2) of the Children Act 1989 provides that unless the court is satisfied that the subject child is suffering, or is likely to suffer significant harm attributable to the care given to the child by the parent, it cannot go on to consider whether the child’s welfare requires a care or supervision order to be made.

<sup>70</sup> The Guidance on Split Hearings (n 22) [11]

<sup>71</sup> *Re S (Care Proceedings: Split Hearing)* [1996] 2 FLR 773, 775

<sup>72</sup> The Guidance on Split Hearings (n 22) [11]

<sup>73</sup> *Re S (Care Proceedings: Split Hearing)* (n 71)773 (Bracewell J)



because of perceived concerns about the delay these have caused, exacerbated by lack of court time and resources.

These concerns were suggested by seven respondents as reasons why courts may decline to hold fact-finding hearings.<sup>74</sup> Indeed, Mr R intimated that courts may refuse to hold fact-finding hearings on the ostensible basis that they are not necessary, even where they are, because in reality they are trying to reduce delays:

“I think the courts currently need to be persuaded far more to hold a fact-finding. Now, you can be cynical and say that’s because, particularly here in the North-East, the lists are absolutely chockablock, um, you can be cynical and say that, or you can say perhaps that the judges are being more adept at picking up the more, the difficult cases. It really depends on your perspective. You could say in a lot of cases you could substantiate enough to hold a separate fact-find.” [Mr R, Solicitor, NE]

The vast majority of participants confirmed that judges would not consider it ‘necessary’ to hold a fact-finding hearing if they thought that the allegations were not ‘relevant’ to contact so that, even if proved, they would not affect the outcome.

“Initially I think the judges were quite keen on asking the parties if they thought there needed to be a fact-finding here and it’s been a more gradual change where the judges have gone back to think: well, it’s up to us to look at, you know, is it possible to make a decision on the basis of what’s in front of me and if so, is it going to impact on the contact and how is it going to impact on the contact?” [Ms K, Solicitor, NE]

The most common reason why courts may consider that domestic violence is not ‘relevant’ to contact and therefore decline to hold fact-finding hearings is if they do not consider the allegations to be sufficiently ‘serious’. Sixteen of the twenty respondents who had indicated that courts would consider serious physical violence to be ‘relevant’ to contact expressed their views by reference to the decision on whether or not a fact-finding hearing should be held, indicating that

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<sup>74</sup> N = 7, evenly spread among professionals and regions

‘minor’ or non-physical abuse would not justify a hearing as it would not affect the court’s orders, and only very serious allegations of domestic violence would be likely to lead to a fact-finding hearing.

“I think if there’s any aspect of physical violence, um, if there’s been injunctions, if there’s been police call-outs or involvements, or social services involvement. I think that’s more likely to tip the balance.”  
[Mr R, Solicitor, NE]

“In cases of serious and sustained physical violence, a fact-finding hearing is normally ordered – to allow any experts to consider risk appropriately. But in less serious cases, it is less likely to be ordered.” [Ms E, Barrister, London]

Ms T confirmed that her local county court judges would not direct fact-finding hearings to determine “fairly minor” allegations such as “pushes or shouting” which do not result in injuries:

“I mean like the one I was referring to earlier about where there had been allegations of domestic abuse and the other side are saying, you know, this is terribly serious and we can’t do anything about contact in the absence of determination and I’ve said: look, this is, I don’t want to use the word, ‘ridiculous’ because that minimises it, it’s not ridiculous, but, you know, in the context, in the wider context of serious allegations at one end and less serious, these are less serious, let’s get on with something even if it’s a contact centre. And, you know, that was a case in which the judge agreed, you know, there’s no need.” [Ms T, Barrister, NW]

Similarly, some of the 18 respondents who indicated that courts would not consider ‘old’ or ‘historical’ allegations of domestic violence to be ‘relevant’ to contact explained this by reference to decisions to hold fact-finding hearings. If the mother had allowed the child to have contact with the father for some time after the violence occurred, her allegations would be considered particularly ‘irrelevant’. “Unless, you know, there are very serious allegations”, judges would prefer to get contact established “rather than dwelling on what’s happened in the past.” [Ms L, Solicitor, SW]

“There was a situation where I think the parents had been split up for quite a long time, there were allegations of domestic violence, it was

disputed, but there had been a pattern of contact for quite some time afterwards...so where there were historic allegations the court had said: sorry, this is not going on now...there was no need to have a fact-finding hearing on it because there had been such a pattern of staying contact in the interim...the real question was of how it could restart again.” [Ms M, Barrister, SW]

Similarly Hunter and Barnett found that the most commonly cited reasons as to why a fact-finding hearing might not be held are that the allegations are not considered ‘relevant’ to the court’s decision about residence and/or contact,<sup>75</sup> and/or that the allegations are ‘old’,<sup>76</sup> and some respondents felt that fact-finding hearings should only be held where the allegations are of very ‘serious’ or ‘real’ recent violence.<sup>77</sup> For these respondents, allegations of domestic violence are a diversion from the ‘real’ business of promoting contact.

A few respondents in this project thought that courts may decide to hold fact-finding hearings if the child had, or was likely to have been, severely affected by the violence. Ms T [Barrister, NW], for example, said that even if there is a ‘low level of violence’, if the child saw the abuse and was so affected by it that they did not want to see the father, a judge may decide that a fact-finding hearing is necessary.

Three barristers and a solicitor considered that where the father already had convictions or cautions for domestic violence towards the mother and/or made admissions, it was unlikely that the court would consider a fact-finding hearing necessary. Ms E provided an example of a case in which the mother, who was in person, had made twenty allegations against the father, who made “partial” admissions not only of domestic violence but of “other slightly odd behaviour”, although he denied trying to strangle the mother:

“The point being we then went into court before a recorder in xxx [county court] who said: ‘look,...I don’t think the court needs to make findings on the rest, I think there’s enough damaging information here to cause the court concern.” [Ms E, Barrister, London]

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<sup>75</sup> 67 per cent

<sup>76</sup> 61 per cent

<sup>77</sup> Hunter and Barnett (n 8) 27. See also Coy et al (n 27) for similar findings

The issue of evidence also played a part in respondents' views on why courts may decline to hold fact-finding hearings.<sup>78</sup> On the one hand, three barristers and a Cafcass officer considered that if there was no 'independent' evidence of domestic violence so that the court was faced with "one person's word against the other", then the court would be less inclined to hold a fact-finding hearing.

"I think because the courts are so busy as well, they don't want to block out two or three days in the court diary, when actually when you get back there's no independent supporting evidence, you've got one person's word against the other...the court can then case manage appropriately and say: even if I find at its highest, it's not going to change my view about the way this should progress in terms of contact. That's the usual approach, isn't it?" [Ms G, Barrister, SE]

Conversely, three respondents<sup>79</sup> thought that if there was enough 'external' evidence, such as police reports, the court would *not* consider a fact-finding hearing to be necessary.

Ms C attributed the drive to promote contact as underlying the courts' reluctance to hold fact-finding hearings:

"I think that's something that does happen here in xxx actually, I think there's such a reluctance to actually bottom the issues from day one and say instead: look, let's just set up some supervised contact, get Cafcass involved and see if we can move matters on. There's a real kind of push for, yeah, rather than dwelling on what's happened in the past let's, unless, you know, there are very serious allegations and I think, I think actually in my experience that that's the sort of kind of pressure you feel." [Ms C, Solicitor, SE]

## **9. Are fact-finding hearings held where appropriate?**

The majority of family lawyers across all regions considered that fact-finding hearings *are* held where appropriate.<sup>80</sup> Only three Cafcass officers indicated, in response to other questions, that they shared this view. However, as discussed

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<sup>78</sup> Participants' understanding of the nature and effect of 'evidence' is discussed further below.

<sup>79</sup> A barrister, a solicitor and an FCA

<sup>80</sup> N = 13, comprising: Barristers = 5; Solicitors = 8. The figures by region are: London, South West and North East = 3; South East = 1; North West = 6

below, many Cafcass officers gave examples of cases where they thought fact-finding hearings should have been held, which suggests that most Cafcass officers, but not family lawyers or courts, are concerned about the over-limitation on such hearings.

**Are fact-finding hearings held where appropriate – by professional groups**

	<b>Held where appropriate</b>	<b>Held too often</b>	<b>Not held often enough</b>	<b>Total</b>
<b>Barristers</b> <sup>81</sup>	5	5	0	10
<b>Solicitors</b>	8	1 <sup>82</sup>	2	11
<b>FCAs</b> <sup>83</sup>	3	0	1	4
<b>Total</b>	16	6	3	25

The 16 respondents who said that fact-finding hearings are held where appropriate generally considered that ‘the balance is right’ and a number of them commented that they could not think of any that were ‘unnecessary’. These views suggest that most family lawyers approve of the very restrictive circumstances in which fact-finding hearings are held.

However, five barristers and one solicitor (who was interviewed in 2010) still thought that fact-finding hearings are held too often. Ms F and Ms G [Barristers, South East] were of the view that many fact-finding hearings are “a total waste of time” and “useless”, and Ms D [Solicitor, SE] thought that fact-finding hearings were “definitely” held where they are not necessary, for example, where the allegations are “minor” or “historical”. Similarly, Ms E considered that there were too many unnecessary fact-finding hearings, particularly in the FPCs. “I feel that I end up doing many fact-findings which perhaps could have been avoided in the FPCs if a robust tribunal had seized itself of the matter.” [Ms E, Barrister, London]

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<sup>81</sup> Two barristers gave ambivalent responses, indicating that generally fact-finding hearings are held where appropriate but they gave examples of cases where they thought fact-finding hearings were held where not necessary.

<sup>82</sup> Ms D [Solicitor, SE] who was interviewed in 2010 before the Guidance was fully effective

<sup>83</sup> A minority of Cafcass officers expressed a view on this issue

Ms E provided an example of an ‘unnecessary’ fact-finding hearing in a London court involving “mid-level” violence including “punching, kicking, pushing her over, smashing the flat, that sort of thing, nothing where she really needed much help from the hospital other than painkillers. No stabbings, or anything nasty, again I hate to minimise.” [Ms E, Barrister, London] Ms E described the trial as “going through the motions” because the mother was not opposed to contact in principle:

“So we went through the motions of this two-day fact-find, everything was proved because, you know, we had medical evidence, police evidence, we had, you know, everything, and so...everything was proved bar one or two things, about 18 things...But then the order the Justices made was to the contact centre anyway. It crossed my mind that if that’s what mum was agreeable to at the first appointment, why we really needed that.” [Ms E, Barrister, London]

However, Ms E then later recognised that there was, after all, a purpose to the fact-finding hearing, namely, that the father would not be “satisfied with that arrangement forever” and the court was therefore “thinking long-term” about the need to assess the risk. “I can understand, I suppose, why the court wanted to knock that on the head and just have those reasons in a document and the findings and, um, draw upon them in six or nine months’ time.” [Ms E, Barrister, London]

Only three respondents - both solicitors practising in the South West and a Cafcass officer - thought that fact-finding hearings are not held often enough.

Thirteen respondents, including eight Cafcass officers, were probed on whether they had encountered any cases where a fact-finding hearing was not held where they considered that it should have been. Seven Cafcass officers,<sup>84</sup> two barristers and two solicitors<sup>85</sup> reported that they had encountered such cases, while only one solicitor and one Cafcass officer said they had not.

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<sup>84</sup> Mr J [FCA, NE] said he had encountered this situation in the past but not recently

<sup>85</sup> By region, these eleven respondents comprised: South West = 4; North West = 3; North East = 1 [Mr J]; South East = 1; London = 2

Ms M spoke about a fact-finding hearing that was compromised but the allegations kept resurfacing a year later:

“Yeah, I had a case where the case had been for some time and they had had different lawyers representing them at a fact-finding hearing and they’d both come away with a very wishy-washy statement and the allegations were still being raised as an issue a year later and they should actually have gone through with a fact-finding hearing...and you just think if they’d held it earlier. For both parents, yeah, irrespective of what the findings are going to be it’s better to have it and then deal with it.” [Ms M, Barrister, SW]

Ms L provided two examples of such cases. In one, the judge declined to hold a fact-finding hearing and the mother still kept raising the allegations up to the time of the interview:

“But another six months on, because the court has never bottomed these allegations and really kind of, you know, thrashed them out once and for all she still, you know, she’s still anxious and she’s still raising them and still, to how they’re still relevant and actually, I think, you know, for both parents it would have been really helpful for there to have been that fact-finding.” [Ms L, Solicitor, SW]

In the other, the father subsequently disputed the concessions he had earlier agreed:

“We could never get past that. So actually what should have happened in that case is that the parties have their day in court, let the judge make the findings and then you’ve got something to work with the client and move on from, move on with it.” [Ms L, Solicitor, SW]

Ms T indicated that there were numerous cases in which she had been instructed late in the day, in which she considered that fact-finding hearings should have been held:

“I mean I’ve had cases in which I’ve, you know, I’ve met mum for the first time and had instructions and I’ve said, you know: we really need to determine all of this, and I know nobody else has thought at any stage in the past six months that all this was relevant but, you know, that’s my view.” [Ms T, Barrister, NW]

Ms X provided an example of a case where “it would have made everything much easier because mum still claims that dad was violent towards her, you know...at the school and everything, she tells the teachers that he was violent towards her, because it’s never been disproved.” [Ms X, FCA, London]<sup>86</sup>

## 10. Participants’ views on fact-finding hearings

Respondents’ views on fact-finding hearings revealed a wide divergence between the perceptions of barristers on the one hand and Cafcass officers and solicitors on the other. The majority of respondents,<sup>87</sup> including all ten of the Cafcass officers interviewed, as well as eight solicitors but only two barristers, considered that fact-finding hearings were generally “helpful” or “useful”, although a further four barristers and two solicitors held mixed views.

Several respondents felt that fact-finding hearings were helpful to “narrow the issues” or “resolve” matters by providing a factual basis for assessing risk and determining outcomes.<sup>88</sup> “But it’s, you know, you kind of think: well, what’s the value of a risk assessment when you don’t have a factual basis with something as serious as that?” [Ms T, Barrister, NW]

A number of respondents felt that if allegations remain unresolved, they can linger and impede ‘progress’, or resurface months and even years later. “I think pretty much, we sort of take the view that we don’t want it hanging around like a bad smell, so it’s better to get it out in the open.” [Ms P, Barrister, SW]<sup>89</sup>

“I think people are more aware of the situation you can get into where if there hasn’t been a fact-finding hearing, you can end up years down the line arguing over something that really should have been ruled in or out from the start, I think people are very aware of that.” [Ms O, FCA, SW]

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<sup>86</sup> Ms O [FCA, SW] said that colleagues of hers had worked on cases where courts refused to hold fact-finding hearings where the FCAs thought they should have done.

<sup>87</sup> N = 20

<sup>88</sup> N = 7

<sup>89</sup> Similar findings were made by Hunter and Barnett (n 8) 30. Respondents reported the benefits of fact-finding hearings as including: providing a factual basis on which the case can proceed; helping to move the parties and the case on; resolving issues which may continue to resurface if not addressed.



With respect to the case where the father denied having made concessions at what should have been the fact-finding hearing and totally disputed all the allegations, including those he had earlier admitted, Ms L observed: “I think it would have really helped both parties move on if findings had been made...But because the court had never actually made any findings against him he was still: I’ve never done anything wrong, you know.” [Ms L, Solicitor, SW]

Although Ms B had slight concerns about fact-finding hearings, she queried how disputed allegations could be resolved without one:

“If domestic violence did occur, and the child could be at risk, you need to work out one way or the other whether that’s the case...Because I think that there are cases where domestic violence should mean that there isn’t contact, and how you going to resolve that without a fact-finding, I suppose.” [Ms B, Solicitor, London]

Five respondents<sup>90</sup> understood the benefits of fact-finding hearings from the victim’s perspective.

“I think they can be useful, I think that, because although often in family we strive to avoid contested hearings because we think that, you know, they’ll just introduce some hostility between parents, I think sometimes actually, particularly for the victims, they feel that they have had their day in court and then it’s almost quite a cathartic experience for them although it’s obviously nerve-racking. And I think it really depends on the individual. For others, you know, the thought of giving evidence is horribly nerve-racking.” [Ms T, Barrister, NW]

Ms L spoke about a case where the mother was a “classic example of a victim of years and years and years of abuse” which was “normalised” in her mind, the father was highly dangerous with “psychopathic tendencies” and the fact-finding hearing enabled the mother to emerge as a “changed person”. “I was listened to, I was believed, you know, because the judge made findings on all of her allegations.” [Ms L, Solicitor, SW]

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<sup>90</sup> Barristers = 2; Solicitors = 2; FCAs = 1

Ms B recognised the benefits for the mother in being afforded the time prior to the fact-finding hearing to recognise the abuse she has sustained for what it is, instead of being rushed into conceding contact:

“I think sometimes it’s important to have the issue looked at and for the client to have the time to think about what they’ve been through because, as I said previously, when they first present and say there’s been violence, sometimes they do actually really minimise it and they can’t really address it. And so normally there’s kind of quite a gap for the evidence in the fact-finding hearing for them to actually think through everything that’s happened and rationalise it.” [Ms B, Solicitor, London]

On the other hand, Ms C considered fact-finding hearings helpful from the father’s perspective, seeing them as useful to eliminate ‘false’ allegations which can be misused by hostile mothers to delay the proceedings and prevent contact:

“So say, I act for a dad who the mother is saying has been abusive towards her, and she’s willing to...kind of put that to one side and agree to him having contact. But each and every time when she’s disgruntled she then raises allegations of domestic violence against him, um, because it might point-score, or whatever, you know, and it might help her case. I think the fact-finding, if findings are not made against him or her, we can draw a line under it, and we can turn round and say: well, stop raising that, the court have determined that this did not happen, leave that be. Or, conversely: the court determined that this did happen. And then you have to work forward from that, rather than there being this ambiguity and things not being sure.” [Ms C, Solicitor, SE]

Ms E also appeared to assess the merits of fact-finding hearings almost entirely from the father’s perspective, by seeing them as helpful to resolve the father’s contact and “move things on.” With respect to a recent case in which she thought that the allegations were spurious and untrue, she thought that a fact-finding hearing could help to “clear the air”.

The six family lawyers who held mixed views on fact-finding hearings highlighted the positive aspects in similar terms to the views of the respondents discussed above, namely, to ‘clarify the facts’ and provide a basis for risk assessment and decision-making, although these respondents tended to

emphasise that this was important in cases of ‘severe’ or ‘serious’ violence, and some of them saw the factual resolution as important in helping to ‘move contact on’.

Ms S [Barrister, NW] thought that fact-finding hearings could be “extremely useful” in providing a factual basis where the allegations are “relevant”, either to determine whether or not there should be contact, or because, “if you don’t knock them on the head”, they will impede contact from “progressing”.

However, these six family lawyers also saw fact-finding hearings in negative terms by increasing “acrimony” between the parents, being stressful experiences for the parties who can end up in a worse position if they are disbelieved, and because contact is likely to end up being ordered in any event.

“I think it can really increase the acrimony and possibly not make a difference to the outcome. But in cases where there are serious domestic violence [sic] and serious risk to the victim and the children, there is no other way of proving it.” [Ms K, Solicitor, NE]

For Ms M, unless domestic violence is bad enough to stop contact, a fact-finding hearing is unnecessary and unhelpful:

“Especially if contact has taken place some time prior to the issue coming before the court, because it doesn’t always help the issue because of some situations where domestic violence has been raised, contact is going to happen anyway...why then antagonise the relationship between both parents if they have to work together?...And then why put either parent through the, what is the stressful situation of being accused of lying on both sides and of exaggerating when actually both of them have to live with what they think happened and move on for the sake of their child.” [Ms M, Barrister, SW]

Similarly Ms E thought that although fact-finding hearings can help to “clear the air” so that “all parties can move forward with sensible proposals once the abuse has been ruled out”, the fact-finding exercise can be a “waste of resources” because contact usually happens and progresses in any event: “More often than not, even when findings have been made, contact will eventually be ordered,

either as supported/supervised, and then eventually unsupported. Thus, in some senses they do waste resources.” [Ms E, Barrister, London]

Images of implacably hostile mothers fed into Ms S’s perceptions of fact-finding hearings [Barrister, NW]. She felt that women may request fact-finding hearings deliberately to delay the proceedings, and thought they can be “incredibly unhelpful” by requiring the parties to “rehash history” and be accused of lying, particularly where contact is already taking place.

Only two barristers and a solicitor held entirely negative views of fact-finding hearings.<sup>91</sup> They were also among the respondents who thought that fact-finding hearings are held too often.

“A lot of them are useless, a complete waste of time...and the case deteriorates, the relationship could take months to recover, there would always be bitterness. My view is they need to be dealt with very carefully indeed as to whether they happen or not.” [Ms F, Barrister, SE]

Ms G agreed with these comments,<sup>92</sup> and added that she had only experienced one “really worthwhile” fact-finding hearing – an extreme case of very serious domestic violence by a father who was a “nutter” and was “kicked out of Fathers4Justice”, and the mother and children had to relocate under new names with wide-ranging orders to prevent the father locating them:

“And in that context it was really helpful, because the judge got a flavour of him from the outset, heard him in evidence, heard what he’d done to these children, which was just horrific and that quite rightly coloured the judge’s view...And it was fantastic for my client because it completely vindicated her, she dealt with things, the children were completely protected, it meant that we got the right result in the end.” [Ms G, Barrister, SE]

However, that case was very much the exception.

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<sup>91</sup> These respondents, particularly the barristers, were extremely pro-contact and held very negative views of mothers involved in contact proceedings generally.

<sup>92</sup> Ms F and Ms G were interviewed together.

“Nine times out of ten, even more than that, they are a complete and utter waste of time and energy for the parties, the court, for everyone, they just raise the temperature unnecessarily, because you have a winner and a loser, and that’s not what we’re meant to be doing in family law.” [Ms G, Barrister, SE]<sup>93</sup>

Despite these views, both these respondents had indicated earlier in the interview that they would request a fact-finding hearing if they represented the resident parent where allegations of domestic violence were disputed.

Ms D was also vehemently opposed to fact-finding hearings, because of the way she perceived they could be “manipulated” by devious mothers to delay proceedings:

“I don’t find them very helpful. Um, I think that they’re open to abuse and that it’s clogging up the court system that’s already overrun, it’s clogging up Cafcass that’s already overrun, it’s increasing the legal aid budget to the extent that it’s now,...it drags it out longer for mum and dad where he should be having some contact, he’s not having contact for a significant period of time.” [Ms D, Solicitor, SE]<sup>94</sup>

Similarly Hunter and Barnett found that some of the main negative aspects put forward by respondents to the survey was that fact-finding hearings cause delay, they polarise the parties and increase acrimony between them, they use up scarce resources, and they do not or will not affect the outcome of the case, since the courts’ strong pro-contact stance means that it is likely to be ordered in any event.<sup>95</sup> “The assumption seems to be contact will take place and so a fact find will not help – let’s just get on with it.” (S427, NE)<sup>96</sup> As with this study, Hunter and Barnett also found that respondents who thought that fact-finding hearings were held too often tended to have negative perceptions of such hearings, while those who thought they were not held often enough were more likely to emphasise their positive aspects.

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<sup>93</sup> Ms F agreed with these sentiments

<sup>94</sup> Ms T [Barrister, NW] also gave an example of a case where the mother “revived” allegations of domestic violence at the final hearing and requested a fact-finding hearing, which Ms T saw as a “delay tactic” on the part of the mother to avoid a residence order being made in favour of the father.

<sup>95</sup> Hunter and Barnett (n 8); see in particular views of B01, SW at 25

<sup>96</sup> *ibid* 25

## 11. The nature, effect and consequences of 'findings of fact' and 'evidence'

The way in which 'findings of fact' may be constructed and understood caused great difficulties for many of the professionals who participated in this study, and may constitute a further reason for the antipathy of some professionals and judges towards fact-finding hearings. It is suggested that autopoietic, or 'systems' theory, can be very helpful in explaining the problems that professionals and judicial officers have in attempting to rationalise how facts are 'proved', what those facts mean, and how their effects and consequences may be perceived and understood.

Two of law's principal internal procedures for determining whether something has 'happened' are the burden and standard of proof. The general rule in both criminal and civil proceedings is that the prosecution, applicant or claimant has the 'burden of proof', that is, they have to prove their case. In fact-finding hearings, the burden is on the party who asserts that domestic violence occurred to prove 'the truth' of her allegations on the balance of probabilities. The fact-finding exercise is not, therefore, an inquisitorial exercise with applicant and respondent presenting their cases on equal terms (although law would not 'observe' it in those terms). If judges cannot decide which parent is telling the truth and there is no 'hard' evidence to assist, they can 'fall back' on the burden of proof and find that the mother has not 'proved her case'.

An event, occurrence or process is treated by law as either having happened or not having happened; there are no 'grey areas' or room for possibilities. The systemic and self-referential nature and the consequences of this decision-making process were eloquently explained by Lord Hoffman in *Re B (Care Proceedings: Standard of Proof)*:

“If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a

rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.”<sup>97</sup>

If, therefore, the mother satisfies the burden of proof that the father was violent towards her then he is treated as having been violent towards her, and his continued assertions that he was not violent do not affect law’s decision.

Conversely, if the mother fails to prove that the father was violent, he is treated as not having been violent, and the mother’s assertions that he was, but that she was simply unable to prove it, are meaningless for law. As long as the judge follows the correct legal procedures, his decision is correct in law and therefore ‘just’ if that decision is observed from law’s gaze.

### **11.1 Evidence**

In order to determine whether a ‘fact’ is proved, law selects communications from its environment and reconstructs them as ‘evidence’. Those communications that enter law’s environment but are not selected as evidence remain ‘noise’ to law. Since the subject of law is the acontextual, atomistic individual, what amounts to ‘evidence’ is that which can provide corroboration that an incident, event or process in relation to the particular individuals who are the subject of the proceedings did or did not occur. ‘Other’ information, such as sociological studies on the gendered nature and prevalence of domestic violence, the manner in which perpetrators in general may behave, or which demonstrate that women very rarely fabricate allegations of domestic violence, is currently noise to law or has not even entered law’s environment. This means that a mother cannot rely on such information as evidence that the particular father against whom she has made allegations was violent to her.

What may constitute ‘evidence’ was explained by Lady Hale in *Re B (Care Proceedings: Standard of Proof)*:

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<sup>97</sup> *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 3 WLR 1 [2] (Lord Hoffman). See also [31] (Lady Hale)

“We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.”<sup>98</sup>

Despite the various ‘rules of evidence’ and ‘proof’ devised by law, its codes and procedures provide no way, at the end of the day, to assist judges in the task of evaluating the evidence (particularly oral evidence). So despite Lady Hale’s call to judges not to draw on ‘preconceived ideas’, judges do bring a complex combination of personal, discursive and ideological perceptions to the judicial task, which may be highly visible to the outside observer but are invisible to law. As the case law reveals, many judges *do* express views and opinions about ‘implacably hostile mothers’ and ‘victimised fathers’, and a few judges may draw on their knowledge about, for example, the difficulties for women in leaving violent relationships and adducing ‘independent’ evidence of the abuse they have sustained.<sup>99</sup> While they may articulate those views as influencing the way they assess the evidence, those views are not expressed *as* the evidence upon which facts are or are not found.

We can see how discourses of atomistic, decontextualised individualism and the narrow, incident-based approach to domestic violence, can exert a powerful influence on the perceptions of professionals and courts in determining the way in which ‘evidence’ is constructed and understood. This was demonstrated by the concern expressed by a number of respondents<sup>100</sup> about the ability of courts to determine whether domestic violence has occurred where the only evidence is the testimony of the parties, and there is no ‘real’ or ‘independent’ evidence,

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<sup>98</sup> *ibid* [31] (Lady Hale)

<sup>99</sup> See, eg, the judgment of Black J (as she then was) in *Re A (Contact: Risk of Violence)* [2006] 1 FLR 283

<sup>100</sup> N = 8



although law makes no such distinction about what constitutes ‘evidence’. This means that the contest is seen as a ‘he says, she says’ situation. In these circumstances, by excluding ‘other’ information from the remit of what constitutes evidence, the courts are indeed left with ‘one person’s word against another’, with both parents equally capable of lying or telling the truth.

“If [the courts] decline [to list a fact-finding hearing], you know, if it’s one of these that is so woolly that you can’t really do a fact-finding, you know, especially if it’s back in the mist of time or whatever, he says, she says sort of situation,...because it is incredibly, how can I put it, is nebulous, it’s quite sticky and difficult to wade your way through.” [Ms O, FCA, SW]

“You will always get judges saying: well, come on, how am I supposed to deal with his word against her word, but then on the other hand how are you supposed to deal with a contact dispute where one parent is saying: I’m too afraid to let my child go to him.” [Ms M, Barrister, SW]

Ms M provided an example of a fact-finding hearing that collapsed because there was no ‘real’ supporting evidence:

“Historically, you see, there was a fact-finding hearing that was set up, but it collapsed because possibly, because she was very angry, and because there was no real supporting evidence, because there were police logs that alleged that there were arguments, not there was violence by one parent on the other, um, there was I think very small admissions that were made because there was some medical evidence, but very minor, and again, supporting them both being argumentative...because of lack of evidence. I think partial evidence was given and then it collapsed. [Ms M, Barrister, SW]

While Mr J understood the difficulties for courts dealing with a ‘he says, she says’ trial, he did not see this as a reason to avoid a contested hearing, because the risk cannot then be assessed. “The court has to hear even where there is no medical, no police, no children’s services evidence of what mother says.” [Mr J, FCA, NE]<sup>101</sup>

Ms H recognised how Cafcass may collude in this process:

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<sup>101</sup> The ‘excruciating difficulty’ of the task of making findings was highlighted by Munby J in *Re A (Fact-Finding: Disputed Facts)* (n 19)

“I mean I can, I think the difficult cases are those ones where it’s not concrete, there’s no concrete, you know, you’ve got a mother who hadn’t reported it to the police, hadn’t necessarily been at A and E with any injuries and I imagine that that’s frustrating for solicitors who’ve got clients where it’s very difficult to prove. And certainly I’ve seen some mothers leaving court very dissatisfied that their issues have not been taken seriously. I suspect Cafcass, we possibly collude to an extent, with the judge in that, you know, it doesn’t fit into any category. And I think those are the toughest cases.” [Ms H, FCA, SE]

Mr R saw a particular difficulty in ‘quantifying’ or ‘evidencing’ cases of emotional abuse, recognising that the incident-based approach to domestic violence does not lend itself easily to findings being made on a process rather than on ‘facts’:

“I think it’s the issue as well of evidence that it’s far easier to go to court to try and obtain a finding on an issue of physical abuse, it’s a bit like a care case where there is one sole precipitative incident. If it’s neglect, it’s that horrible drip, drip, drip effect. Emotional harm can be like that as well. It’s not quite as substantial a concept...So actually, the evidence base is very often just isn’t there. It’s from what a judge makes of what he sees and hears.” [Mr R, Solicitor, NE]

It was also concerning to find that, for some respondents, the lack of ‘independent’ evidence was itself ‘proof’ that domestic violence had not happened, on the basis that if it had ‘really’ taken place, there *would* be ‘external’ evidence of it:

“But you would hope where there are cases of serious violence you would be able to obtain some sort of police disclosure. That there would be some kind of referral, or referral to social services, and that might obviate the need for a hearing as well if there was sufficient external evidence, I suppose.” [Ms K, Solicitor, NE]

Nevertheless, Ms K did recognise that women may not be in a position to report the abuse: “I think that happens a lot doesn’t it, and not just in certain communities, just across the board, I think.” [Ms K, Solicitor, NE]

Even more worrying was Ms X's expressed suspicion of mothers who do not report the violence. With respect to the first case scenario she observed:

“I would want to know why, the fact it's got to be a fact-finding hearing, is mum obviously hasn't reported the abuse to anybody. I would want to know why that was, why she never reported it to anybody.” [Ms X, FCA, London]

The views of these professionals are of great concern as they suggest that professionals and courts may avoid fact-finding hearings, or courts will not find the mother's case 'proved' when they perceive that there is no 'real' evidence despite the fact that oral testimony and the judge's perceptions of the parties when giving evidence are, of course, proper evidence for law. Indeed, the case law makes it clear that appellate courts should be slow to allow appeals against issues of fact *because* the trial judge has had the benefit of seeing and hearing from witnesses.<sup>102</sup>

Nevertheless, the ability of courts to make findings on the basis of the parents' evidence alone, and the importance that courts may attach to parents' oral evidence was highlighted by Lady Hale in *Re B (Care Proceedings: Standard of Proof)*<sup>103</sup> and was recognised by a number of participants.

“I think the majority of cases there are, you might have one or two calls to the police, but there are generally a lot of incidents where they're not reported. There are cases where there've been a long histories [sic] of domestic violence I've had, and there is no documentation to support it whatsoever, but at finding of fact hearing the judge has found that mum was telling the truth.” [Ms A2, Solicitor, NW]

Ms P [Barrister, SW] observed that “it is very telling when your client gives evidence.”

For three family lawyers, their client's 'credibility' was an important factor in determining whether to press for fact-finding hearings for this very reason:

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<sup>102</sup> *G v G* [1985] 1 WLR 647; *Re B (A Child)* [2013] UKSC 33

<sup>103</sup> *Re B (Care Proceedings: Standard of Proof)* (n 97)

“You have to assess what the evidence is...and how your client’s going to come across...it’s often an issue when it’s been listed, sort of what evidence do [sic] your client rely on in court, well, it’s going to have to be her word and you’re going to have to listen and decide whether you think there’s a real credibility to it.” [Ms M, Barrister, SW]

A number of respondents even saw a theatrical aspect to fact-finding hearings which they perceived as making it even more difficult for courts to find the ‘real truth’. Ms P indicated that parents can learn how to “play the game” so that “very often, you know, what we see isn’t what’s real”. [Ms P, Barrister, SW]

We can also see how those discourses that underpin current family proceedings which construct parents involved in contact proceedings, and particularly mothers, as irrational, unreliable or hostile feed in to the way in which the evidence is assessed. Ms A3 [Barrister, London] gave an example of a case where the judge found that the mother had been fabricating the allegations because, in Ms A3’s view, she was “a solicitor and very well dressed and came across very well.” Conversely, Ms L provided an example of a case where the mother was “a classic example of a victim of years and years and years of abuse:” “And she gave her evidence, she was *fantastic*...And this guy came across as, you know, the really dangerous violent man that he was.” [Ms L, Solicitor, SW] For Ms S, mothers who are ‘credible’ in their testimony should be able to provide a coherent narrative: “But there are some allegations that it’s self-evidently, well, someone’s description of the incidents is relatively poor or weak or confused, the court is unlikely to make those findings.” [Ms S, Barrister, NW]

We can therefore see how images of ‘real’ victims and perpetrators may underpin the way in which courts and professionals respond to parents’ evidence.

Additionally, the failure of many courts and professionals to understand why many women may not be able to adduce ‘independent evidence’, and the lack of awareness of the effect of domestic violence on the ability of women to attest to their experiences can undermine their credibility. In *A v A (Appeal: Fact-finding)*<sup>104</sup> Mostyn J overturned all the findings against the father made by the trial judge, who had found the mother to be an open, honest and truthful witness,

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<sup>104</sup> *A v A (Appeal: Fact-finding)* (n 20)

by finding ‘inconsistencies’ and ‘discrepancies’ between the mother’s oral evidence, her schedule of allegations and her account to the Cafcass officer, assuming that domestic violence emerges and is accounted for in a ‘rational’, chronological and coherent way. Similarly in *Re R (Family Proceedings: No Case to Answer)*<sup>105</sup> the trial judge, on the third day of a fact-finding hearing, accepted a submission by the father that the mother was blatantly lying, because of discrepancies between her written and oral evidence. He also impugned the mother’s credibility on the basis that there was an absence of contemporaneous reports, and criticised her demeanour in the witness box. So a fact-finding hearing may not be held if there is no evidence other than the mother’s testimony, and if she does testify, she can be disbelieved if she does not conform to expectations.

Two Cafcass officers expressed concern about how children’s testimony could or should be factored in to the forensic exercise in fact-finding hearings. It is clear from the substantial body of research discussed in Chapter 3 that children are frequently witnesses to, or aware of the violence, and could, therefore, provide ‘corroborative’ evidence. Yet it seems that images of children as vulnerable and fragile, who may be damaged if they become part of the ‘conflict’, or as immature and therefore unreliable or open to manipulation, mean that their experiences may be filtered out of the evidence. However, there is no legal reason why the children’s views set out, for example, in a Cafcass report, should not form part of the evidence.

“And I’ve often, you know, like that case we had, where the fact-finding was actively around what I got from the kids...[but] quite often there isn’t a Cafcass report until after the fact-finding, so where do you get the independent information about what the children are saying or, you know, what the parents are saying unless you’ve got something before the fact-finding on which the judge can hang, or counsel can hang, other questions...So I don’t, I mean I don’t think children can be witnesses and that’s not right.” [Ms Y, FCA, London]

Ms O gave an example of a case where the father disputed the mother’s allegations of domestic violence and she interviewed the children.

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<sup>105</sup> *Re R (Family Proceedings: No Case to Answer)* (n 12)

“And I have indications from the interviews with the children that in my opinion I think there *has* been. But do I, the court hasn’t asked me to report, so you know what I mean? Should the judge know that before he rules or should he be able to rule on the evidence that he’s looking at and then-?” [Ms O, FCA, SW]

### **11.2 The consequences of ‘findings of fact’**

Many respondents, particularly Cafcass officers but also some family lawyers, struggled with the binary nature of law’s construction of ‘the truth’ of the mother’s allegations and perceived a potential disjuncture between what judges have determined to be ‘the facts’ and what ‘really happened’, implicitly recognising the selectively constructed nature of law’s ‘reality’:

“I suppose you have to rely on the judge getting it right and there’s going to be times when you think: yeah, he was spot on, and there’s going to be other times you’re going to think: he missed half of that, and now all of that’s out the window and can never be brought back, you know. I’m generally in favour of fact-finding, but I do think it does risk that it is only the court’s opinion.” [Ms O, FCA, SW]

Ms O succinctly expressed the problem: “The truth is another, there is a difference between a finding of fact and the truth. Sometimes one sits on top of the other and sometimes it doesn’t, and you can never be [sure].” [Ms O FCA, SW]

Some participants expressed concern about the consequences of ‘unjust’ decisions, and the difficulties that can be caused for families between law’s world and the ‘real world’:

“And then of course there’s the directive that if a finding of fact is proven not to have taken place, then we are to behave as though it never happened, which is extremely difficult when you’ve got children who are saying: well, he kicked me, he did this, he did that, he hurt my mum, you know, those sorts of things.” [Mr V, FCA, NW]

Ms M gave an example of an unusual case where the mother feared that the father was responsible for an arson attack on her home, but because this had never been ‘proved’, “there is nothing that points that way other than her fear

that he did.” [Ms M, Barrister, SW] Because of this lack of ‘proof’, the court had to treat the case as if the father had not committed the arson. This meant that the court was blind to a very serious risk to the mother and children because it had to treat the case as if there was no such risk.

While a number of respondents recognised the enormous benefits for mothers of ‘justice’ having been delivered where findings *are* made, a number of professionals expressed great concern about the consequences for those who had failed to establish findings on their allegations.

“And it’s that kind of perverse: can you evidence it, is the judge going to find it? And, you know, there is a danger and I do advise clients about the danger of not having the fact found, you know, and on the day it can be devastating, can’t it? You know, clients for 12 months have said: this is what’s happened, then the judge says: actually, I don’t believe you. Devastating for them, you know.” [Ms P, Barrister, SW]

“Because I would see very little point in taking the mother’s case to court for it to be shot down at an early stage through effectively lack of evidence which only then colours her somehow as a, as a difficult woman, a difficult mother and a difficult witness...why on earth would you want to put somebody in the witness box to have chunks knocked out of them by an able advocate and to undermine their case through effectively lack of evidence?” [Mr R, Solicitor, NE]

Mr V pointed out that a court’s decision that domestic violence had not occurred could have very negative consequences for children as well as for mothers, and struggled with his professional role on those occasions when he perceived law’s decisions as unjust, expressing frustration at what he saw as his own forced complicity in this process:

“I say, usually to the mother: well, you know, I hear what you say, I can’t ignore [it]. Once you’ve heard that information...you can’t just dismiss it from your thought processes when you’re working, but you have to distance yourself from it and you have to tell them that you’re going to distance yourself from it, and sadly occasionally you have to tell children that you have to,...you have to say, you know, in terms of saying to a child: well, you know, the court doesn’t believe you, the court doesn’t believe what you said about your daddy or mummy, then, you know, occasionally that has happened and where

does that leave that poor child then...and you, you know, do your best to fight the corner for that, for that unheard voice, but you do feel like you've got your hands tied behind your back sometimes.” [Mr V, FCA, NW]

For these respondents, the ‘truth’ that law delivers may not necessarily be ‘fair’ if it does not ‘sit on top’ of ‘what really happened. Ms P saw no way out of this problem other than to accept law’s construction of ‘the truth’, recognising that if we observe the ‘justice’ that law delivers as ‘unjust’, law’s operations could potentially be blocked:

“And because we had all kind of been working on the fact that the findings would be fair and I think you just have to work on the basis that that’s the basis of the case. Um, because you can’t work on the basis that they’re not going to be fair.” [Ms P, Barrister, SW]

The harsh consequences for mothers if their allegations are not found proved is borne out by the case law, which shows how mothers risk being treated as particularly hostile and irrational by courts if they do not accept the court’s decision. In *M v M (Residence)*<sup>106</sup> the mother’s allegations of domestic violence against the father were not made out. At the final hearing the mother was clear that she did not accept those findings and continued to assert that the father was a violent man. As a consequence, she was treated as so hostile that residence of the child was transferred to the father in India. It is not suggested that the mother’s allegations were necessarily ‘true’; rather, this case illustrates the consequences for mothers of not accepting ‘the truth’ as constructed by law.<sup>107</sup>

Many professionals queried the purpose and effect of fact-finding hearings when parents failed to accept courts’ decisions. Ms M [Barrister, SW] pointed out that parents usually retain their own views on ‘what happened’, whatever the court’s findings may be. For Ms A3, this meant that findings of fact may serve no useful purpose:

“I personally don’t always see that they actually make, help in any way, because parents, even if the finding’s been made, aren’t likely

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<sup>106</sup> *M v M (Residence)* [2010] EWHC 3579 (Fam), [2011] 1 FLR 1951

<sup>107</sup> See also *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494



to accept it, it doesn't often change the view of the person who's gone through the fact-finding. If a woman is adamant that she's been beaten up and the court says that she hasn't, she's not going to turn around and say: oh okay, it probably didn't happen then, because in her mind, it did." [Ms A3, Barrister, London]

Some family lawyers (mostly barristers) observed fact-finding hearings entirely from a 'legal' perspective and the findings as conclusive of 'the truth', so it is the parents who must be 'irrational', difficult or awkward if they do not accept the findings. "The reality is though, that it provides a factual basis upon which everybody else is working on, it doesn't mean that either party has any acceptance of it." [Ms S, Barrister, NW]

Mr R recognised that whether or not the findings are 'true' or the parties accept them, law has provided a stabilising means for future decision-making, and in this sense he saw fact-finding hearings as useful.

"You know, to that extent it's a great assistance to the court and it's a very convenient peg to hang a decision on and give some rationale as to why there should or shouldn't be any contact but for the parties I think it just passes them by...[mothers who fail to prove their allegations] will continue to scream and say: it did, it did, it did! So I think it very much helps the lawyers and professionals working in the system but, you know, there's probably a point to make as to how much assistance it is to the parties is a moot point, I guess." [Mr R, Solicitor, NE]

Mr R has accurately identified that whether or not parents accept the findings is irrelevant for law because the purpose of the findings is to provide 'facts' for law on which further self-referential decisions can be made.

It is implicit in the views of those professionals who expressed concern about the consequences for mothers of failing to prove their allegations, that they believed the mother's allegations to be true, despite a contrary decision by the court. On the other hand, a number of family lawyers and Cafcass officers<sup>108</sup> reported that fathers frequently refuse to accept findings of fact against them, and in those

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<sup>108</sup> N = 7

cases professionals appear to accept that law has indeed produced a ‘just’ decision which the father would do well to accept.

“What you find that if domestic violence [has] been a feature, a significant feature and is being denied by, we would say the perpetrator, even if findings have been [made] against him,...I have found from my own experience in working in situations like this that the perpetrator actually denies any involvement or his role, blaming it always on, um, you know, the other person, the mother usually...What I’ve found as well really is that the perpetrator of domestic violence because they deny, and I’ve not come into a situation where anyone has accepted that they have been in some way responsible for it.” [Ms I, FCA, NE]

## 12. Discussion

Despite the small sample sizes and therefore the limitations on the ability to generalise from them, the findings of this study are strongly indicative of an increase in the numbers of fact-finding hearings held following the implementation of the Practice Direction in May 2008 across all regions but particularly in London and the South East, although fewer Cafcass officers perceived such an increase.<sup>109</sup> However, even before the Guidance on Split Hearings, some respondents observed an increasing reluctance by courts to hold fact-finding hearings, possibly influenced by judicial pronouncements in the reported cases about too many fact-finding hearings being held which are ‘clogging up’ the court system,<sup>110</sup> a view shared by many judges and family lawyers. According to the professionals interviewed, the Guidance on Split Hearings appears to have had the effect of further reducing the incidence of fact-finding hearings. Additionally, there is a wide variation in the extent to which different judges and courts are likely to direct fact-finding hearings, giving the appearance, according to some respondents, of a “post code lottery”.<sup>111</sup>

Underlying the origins of preliminary fact-finding hearings, the terms of the Practice Direction and of the Guidance on Split Hearings, as well as the perceptions of many family lawyers and judges, but fewer Cafcass officers, is the

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<sup>109</sup> These findings are supported to some extent by Hunter and Barnett’s research (n 8)

<sup>110</sup> See, eg, *SS v KS* (n 14)

<sup>111</sup> Hunter and Barnett (n 8). See also Coy et al (n 27) for similar findings.

narrow, incident-based approach to domestic violence, which fails to see it as the physical manifestation of the power and control dynamics that permeate parents' relationships. This approach, together with professional and judicial perceptions of the 'relevance' of domestic violence, mean that fact-finding hearings are usually restricted to cases involving 'incidents' of recent, severe physical violence, which are seen by most courts and professionals as the only type of abuse that would affect contact.

The expressed willingness of family lawyers to request fact-finding hearings if they represent the victim and of courts to hold them needs to be seen in the context of the extremely narrow circumstances in which those professionals and courts consider that domestic violence would be 'relevant' to contact in the first place; it is only 'unjustified' requests made at the instigation of misguided or obstructive mothers or Cafcass officers that may be refused. The antipathy of courts towards fact-finding hearings is demonstrated by the increasing reluctance of courts to accede to requests by Cafcass officers for such hearings and their willingness to do so only if the Cafcass officer 'fights their corner'.

So unless the father has perpetrated recent, very serious physical violence against the mother and/or the child has been severely affected by the violence, judicial officers will not consider a fact-finding hearing to be 'necessary', which suggests that many disputed allegations may be disregarded. Since the majority of family lawyers consider that fact-finding hearings are held where appropriate, and that the reduction in the number of fact-finding hearings is a positive development, it seems that they agree with the courts' restrictive approach to fact-finding hearings.<sup>112</sup> Only a very small minority of family lawyers, but most Cafcass officers, did not appear to agree with this approach, as they were far less satisfied that the courts have 'got the balance right' and expressed concern about cases where domestic violence is ignored and/or issues remain unresolved.<sup>113</sup>

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<sup>112</sup> Similar findings were made by Hunter and Barnett (n 8). Circuit judges and barristers were most likely to say that fact-finding hearings were held too often, while nearly three quarters (72 per cent) of Cafcass officers, as well as solicitors and Others thought that they were not held often enough.

<sup>113</sup> Just over a third of lawyers completing Coy et al's survey said that they had had experience of cases where fact-finding hearings were not held when, in their view, they should have been – see Coy et al (n 27)

Even if allegations of domestic violence are considered recent and ‘serious’ enough to warrant a fact-finding hearing, the trial may still not end up taking place, or may be severely curtailed. The desire to encourage contact ‘at all costs’ may mean that, by the date of the hearing, it is seen as redundant as the mother may have been pushed into allowing contact to ‘move on’ by then, and occasionally the judge may put pressure on the parties to agree to contact instead of conducting the hearing. This may happen, in particular, where a ‘composite’ hearing is held, although the findings of this study suggest that composite hearings are not very common. In this way we can see how domestic violence can progressively ‘fizzle out’ and ‘disappear’ during the course of the proceedings.<sup>114</sup>

The antipathy of some family lawyers to fact-finding hearings, particularly those who see them as inimical to establishing harmonious agreements for contact, means that they may attempt to avoid a fact-finding hearing by ‘carving up’ the dispute on the basis of limited admissions by the father which ends up with a ‘watered down’ compromise, and many courts appear to encourage this approach. Additionally, even if a hearing *is* held, the number of allegations to be tried may be restricted to a few ‘sample incidents’. Both these practices mean that the full extent of the risk posed to the mother and child is minimised or even invisible, and further decontextualises the abuse from the gendered power dynamics informing the parental relationship.

Respondents’ views on fact-finding hearings provide an insight into the extent to which the presumption of contact and dominant parental subjectivities resonate with professionals. For those family lawyers who hold negative views of fact-finding hearings, such hearings are an unnecessary and harmful impediment to the ultimate goal of achieving contact and the harmonious post-separation family, and even a further tool in the armoury of the vengeful, obstructive mother. The view of many professionals and courts that fact-finding hearings cause delay arises out of, and reinforces the perception that domestic violence is an

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<sup>114</sup> Coy et al (n 27) 50, found that women experienced the failure to hold fact-finding hearings “as a further silencing.”

unimportant obstacle to the progression of the really important business of promoting contact. The repeated judicial attempts to get contact established and progressing, often involving numerous hearings over months and years could be, but are not, constructed as ‘wasteful’ of resources because the presumption of contact constitutes them as ‘necessary’. Similarly, the need to hold fact-finding hearings could have been ‘blamed’ on the refusal of perpetrators to admit the violence, yet no participants suggested that such hearings could be avoided if the father admitted the abuse from the outset; rather, it is the mother who is at fault for bringing the ‘acrimony’ into the ‘rational’, conciliatory ethos of family proceedings.

Although law constructs parties to proceedings as atomistic, equal individuals, each theoretically capable of equal credibility, parents do *not* participate in fact-finding hearings on an equal footing because the burden of proof is on the complainant/ mother, so that if she fails to prove that domestic violence has occurred, in law it has not occurred. This burden is compounded by the presumption of contact and by dominant discourses and their ideological effects which construct women involved in contact proceedings as irrational, untrustworthy or even malicious. These processes, together with the inability of many courts and professionals to understand the power and control dynamics of domestic violence, mean that the mother’s uncorroborated oral testimony may be viewed with suspicion and discounted as not being ‘real’ evidence. Some participants indicated that courts and professionals may attempt to overcome this problem by avoiding fact-finding hearings altogether if there is no ‘independent’ evidence. This is reinforced by discourses of ‘rationality’ which construct credible witnesses as those who can offer a coherent, unambiguous account, images of ‘real’ victims and perpetrators which underpin how professionals and courts respond to parents’ evidence, and the inability by many to understand the effects of domestic violence on women.

Many respondents, particularly Cafcass officers but also some family lawyers, struggled with law’s selective construction of ‘reality’ because of the potential for a judge’s decision to be ‘unjust’ where there is a discrepancy between what they believe ‘really’ happened and what law has decided has happened. This is

not a problem for law, since the only alternatives from a 'legal' perspective are to accept the decision, appeal against it (but then risk another 'unjust' decision) or avoid a decision being made altogether. Professionals like Mr R recognised that the purpose of the fact-finding exercise, for law, is to provide the mechanism for further self-referential decisions to be made, thereby maintaining law's normative function. Yet this can lead to arrangements that may or may not be 'safe', 'risk-free' or benefit the child. Many participants observed not only the potential 'injustice' of law's decision-making but also the harsh consequences for parents and children of law 'getting it wrong'. These observations of legal decision-making may themselves inhibit lawyers from requesting fact-finding hearings.

For those professionals who observe decisions in fact-finding hearings from a 'legal' perspective and therefore cannot 'see' that 'justice' may produce 'injustice', parents must be irrational, difficult or, in the case of fathers, 'in denial' if they do not 'accept' the decision. Yet despite the view of many participants that fathers do not usually accept findings made against them, this does not seem to affect their firm beliefs in the benefits of contact.

# CHAPTER 7

## INTERIM AND FINAL ORDERS

### 1. Interim orders

The Practice Direction provides that, pending a fact-finding hearing, the court should consider whether an interim order for residence or contact is in the child's interests "and in particular whether the safety of the child and the residential parent can be secured before, during and after any contact."<sup>1</sup> In deciding on interim residence or contact, the court has to take into account the matters set out in the 'welfare checklist' and consider, in particular, "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."<sup>2</sup> In addition, the court needs to consider the arrangements required to minimise any risk of harm to the child and ensure the safety of the parties.<sup>3</sup> In determining this latter issue the court has to consider not only whether, where and by whom contact should be supervised or supported, but also "the availability of appropriate facilities for that purpose."<sup>4</sup>

Whether any interim contact is ordered to take place before a fact-finding hearing has important implications not only for the safety and well-being of the child and resident parent, but also for the final disposal of the case. Additionally, as we have seen in Chapter 6, if contact takes place prior to the fact-finding hearing it can even affect whether there is a hearing.

In order to increase the reliability of the responses of family lawyers, interviewees were presented with a case scenario ['the interim case scenario'] in which the mother alleged that the father was violent towards her when they lived together and had threatened her since they separated. She opposed all contact between the father and the child, who was aged seven. A fact-finding hearing was listed to take place in two months' time.

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<sup>1</sup> Potter P, *Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* [2008] 2 FLR 103, reissued on 14<sup>th</sup> January 2009 at [2009] 2 FLR 1400 [18]

<sup>2</sup> Ibid [19]

<sup>3</sup> Ibid [20]

<sup>4</sup> Ibid [20(a)(ii)]

## 1.1 What orders do courts make for contact pending fact-finding hearings?

Women participating in Coy et al's research reported that orders for contact were made in 81 per cent of cases, just over half of which were interim orders.<sup>5</sup> Hunter and Barnett<sup>6</sup> found that, pending fact-finding hearings, courts most frequently order supervised contact,<sup>7</sup> followed by indirect contact<sup>8</sup> or, slightly less commonly, supported contact.<sup>9</sup>

The views of the interviewees in this study were mixed on whether courts tend to order direct contact pending fact-finding hearings if the mother opposes such contact. Most participants, including all but one of the barristers interviewed, indicated that this would depend on the circumstances or would be judge-dependent.<sup>10</sup> Ms T observed that while some judges are very risk alert and will not order any direct contact until the fact-finding hearing is finished, others may be far more 'bullish' and say: "Well, you're going to have to give me a pretty good reason to deny some form of contact." [Ms T, Barrister, NW]

The majority of solicitors, but a minority of Cafcass officers and only one barrister, were clear and emphatic that courts *do not* tend to order any direct interim contact pending fact-finding hearings, and confirmed this in addressing the interim case scenario.<sup>11</sup> Ms A [Solicitor, London] thought that this happens "maybe too much so." Even if the father pressed for interim direct contact, Ms K has never encountered a judge ordering it because that would amount to the court pre-judging the issue, "because once contact starts, that's it, isn't it?...I mean, if contact was opposed on principle and a judge then orders it before a fact-finding hearing, what's the point of then having a fact-finding hearing?" [Ms K, Solicitor,

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<sup>5</sup> Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women 2012)

<sup>6</sup> Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council 2013) [www.familyjusticecouncil.org.uk](http://www.familyjusticecouncil.org.uk), last accessed 12.11.13

<sup>7</sup> *ibid*, 64 per cent quite or very often

<sup>8</sup> *ibid*, 58 per cent quite or very often

<sup>9</sup> *ibid*, 47 per cent quite or very often

<sup>10</sup> N = 16, comprising: Barristers = 7; Solicitors = 4; FCAs = 5

<sup>11</sup> N = 9, comprising: Barristers = 1; Solicitors = 6; FCAs = 2



NE]<sup>12</sup> Similarly, Ms A [Solicitor, London] and Ms B [Solicitor, London] reported that they had never come across a court ordering interim direct contact if this was opposed by the mother.

Conversely, a minority of each professional group considered that courts usually *do* order some form of interim direct contact,<sup>13</sup> but were more uncertain about this and tended to qualify their responses. All respondents who considered that courts would be likely to order interim direct contact reported that this would invariably take place in a supervised or supported contact centre.<sup>14</sup> It was thought very unlikely that the father would be awarded completely unsupervised contact.

“I’d say it depends on the circumstances of the case, but a lot of the time the courts do try to promote direct contact if it is going to be supervised, with provisos such as that mother is not to meet up with him, there’s somebody else doing the handover. As long as it’s carefully thought out. And if the mother is adamant that she really, really doesn’t want it, then they’ll probably say: let’s list a fact-finding as a matter of urgency.” [Ms A3, Barrister, London]

The perceived preference of courts for interim contact to be supervised is not necessarily borne out by the reported case law. In *Re Z (Unsupervised Contact: Allegations of Domestic Violence)*, the trial judge, on the third occasion that the mother’s allegations of extremely serious violence against the father were listed for a fact-finding hearing, prior to which the child had been having supervised contact, abandoned the fact-finding hearing on the second day and ordered unsupervised contact.<sup>15</sup> Wall LJ held on appeal that a full fact-finding hearing should have been held and that the order for unsupervised contact was, in the circumstances, premature.

All three Cafcass officers who thought that courts tend to order interim direct contact saw this as a risk to the child’s physical and emotional safety, possibly damaging to the mother’s relationship with the child and potentially confusing

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<sup>12</sup> Ms E [Barrister, London] expressed very similar views about courts not ordering interim direct contact because that would pre-judge the issue.

<sup>13</sup> N = 7, comprising: Barristers = 2; Solicitors = 2; FCAs = 3

<sup>14</sup> The problems caused by the availability and funding of contact centres are discussed below.

<sup>15</sup> *Re Z (Unsupervised Contact: Allegations of Domestic Violence)* [2009] EWCA Civ 430, [2009] 2 FLR 877

for the child if contact is stopped after findings are made. Ms X reported that courts “almost always” order interim direct contact:

“Well, that’s the problem really because, um, they will almost always order contact, um, possibly in a contact centre, safe contact, but you know, sometimes the case is so serious that, you know, at the end of the day dad isn’t going to see the children...so I wonder, the fairness on the children in having the contact and then having the contact stopped.” [Ms X, FCA, London]

The most commonly cited factors that courts take into account in deciding whether interim direct contact should be ordered against the wishes of the resident parent were whether contact was or was not taking place at the time of the proceedings and/or the state of the father’s relationship with the child.<sup>16</sup> If contact was taking place regularly at the time when the issue came before the court, these participants all reported that the court would invariably require contact to continue, usually supervised or supported, if that was not already the position. Conversely, if the father had not seen the child for some time and/or had no pre-existing relationship with the child, it was considered very unlikely that the court would instigate contact prior to the fact-finding hearing.<sup>17</sup>

“I think you’ll usually find if there is one parent that’s abruptly brought the contact to an end, and if there’s been a history of contact or ongoing contact, they are far more likely to order the interim hearing in order to get back on track, but if there’s been a long break in contact then no one will set it up.” [Mr R, Solicitor, NE]

The next most common factor cited by respondents as likely to affect the court’s determination on interim contact, sometimes in combination with the ‘status quo’ and other factors, was the ‘seriousness’ or ‘severity’ of the alleged violence.<sup>18</sup> If the allegations are of very ‘severe’ physical violence, then it is less likely that interim direct contact will be ordered if the mother opposes this, particularly if the child has not seen the father for a lengthy period. “Oh, if it’s very severe

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<sup>16</sup> N = 12, comprising: Barristers = 4; Solicitors = 3; FCAs = 5

<sup>17</sup> These views were confirmed by the participants’ responses to the interim case scenario.

<sup>18</sup> N = 10, comprising roughly equal numbers of each professional group. Again, these views were confirmed by family lawyers’ responses to the interim case scenario.

domestic violence. Like mum's been hospitalised or something like that, or dad's been charged." [Ms X, FCA, London]

"I think it depends on the judge you get and the level of violence in the allegations, what contact's been happening previously. Because if he hasn't seen them for a long time, well, that's a consideration in itself, isn't it, without any violence being present. So, um, it depends on the circumstances really, I think." [Ms D, Solicitor, SE]<sup>19</sup>

Ms D gave an example of a case which illustrates her views on this issue. There was a twelve-year history of very serious violence by the father towards the mother, including possession of firearms and threats to kill. The child had not seen the father for two years. The judge did not order any interim contact, the father having refused the mother's offer of indirect contact.

However, as we have already seen, fact-finding hearings only tend to be listed in 'extreme' cases of domestic violence. Indeed, for this reason, Ms Y [FCA, London] was of the view that indirect interim contact only is becoming the norm.

Other, less commonly cited factors were:

- whether the father could find out the mother's location from the children during contact [Ms M, Barrister, SW]
- whether the father has 'suitable' proposals for contact [Ms Q, Solicitor, SW and Ms D] If, for example, the father requested overnight contact, "then obviously that's ridiculous if he hasn't seen them for a long time." [Ms D, Solicitor, SE]
- the children's wishes and feelings [Ms N, FCA, SW]
- whether the father is likely to denigrate the mother to the children during contact [Ms C, Solicitor, SE, who said that she had successfully argued against interim direct contact on several occasions for this reason]
- if 'incidents' had occurred during contact [Ms D, Solicitor, SE]
- if the victim was too traumatised to cope with interim contact [Ms Q, Solicitor, SW]

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<sup>19</sup> These views were replicated in Ms D's response to the interim case scenario

Even though a significant minority of participants considered that courts are very unlikely to order interim direct contact if the mother opposes this, at least eight participants indicated that the mother will have to be particularly tenacious, “adamant” and steadfast in her opposition to contact to achieve this outcome because of pressure by the courts to agree to some contact. Ms T [Barrister, NW] observed that some judges, particularly District Judges, put a lot of pressure on parties to agree interim contact, but if there is no agreement, they will not “force the issue”.<sup>20</sup>

The case law indicates, however, that if the mother is perceived as ‘implacably hostile’ to contact it is more likely that interim contact may be ordered against her wishes.<sup>21</sup> Additionally, we can see how the perceived importance of contact can override all other considerations and compromise women’s and children’s safety and welfare pending fact-finding hearings. In *SS v KS*<sup>22</sup> the trial judge ordered interim supervised contact when a fact-finding hearing was adjourned for four months part way through the hearing in circumstances where, according to the views of the participants to this study, no interim contact of any description should or would be ordered – the allegations against the father were extremely serious, the mother opposed all direct contact, and the father had no ongoing relationship with the children. Indeed, the trial judge recognised that “to make an order now for other than indirect contact would be to fly in the face of the purpose of the hearing”,<sup>23</sup> and Hedley J, on the mother’s appeal, accepted her argument that supervised contact would not address issues of emotional harm to the children and mother.

“It is the essential reason why an order for interim contact should not be made in cases involving domestic violence where such allegations (if true) would be relevant to the issue of whether, and if so what, contact order should be made.”<sup>24</sup>

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<sup>20</sup> Similar views were expressed by Mr R [Solicitor, NE], Ms P [Barrister, SW], Ms L [Solicitor, SW] and Ms A3 [Barrister, London]

<sup>21</sup> See *Re W (Residence order: Leave to Appeal)* [2010] EWCA Civ 1280, [2011] 1 FLR 1143

<sup>22</sup> *SS v KS* [2009] EWHC 1575 (Fam), *S v S (Interim Contact)* [2009] 2 FLR 1586. See also *Re H (Contact Order)* [2010] EWCA Civ 448, [2010] 2 FLR 866

<sup>23</sup> *SS v KS* (n 22) [6] (Hedley J), quoting the trial judge

<sup>24</sup> *ibid* [10] (Hedley J)

Nevertheless Hedley J dismissed the mother's appeal because of the length of time before the fact-finding hearing could resume, despite the fact that nowhere does the Practice Direction state that the factors for the court to consider when determining interim contact should be compromised if there is a substantial delay in the proceedings.

The majority of participants considered that courts *do* focus sufficiently on minimising risk and securing the safety of the child when ordering or considering interim contact, although proportionately fewer Cafcass officers than family lawyers thought that this was the case.<sup>25</sup> For some respondents, this was because courts do not, in their view, tend to order interim direct contact. For others, this was because courts would only order such contact if it was supervised and therefore the children “would not come to any harm”. [Ms A3, Barrister, London] Some family lawyers, like Ms A3, Ms E and Ms D, did not question the safety of contact centre provision. “They’re relatively, they’re physically safe, um, and that’s the important thing, I suppose.” [Ms E, Barrister, London]

“I mean, contact centres are only supported, anyway. But it gives mum and dad a chance to get in and out without seeing each other. Um, and if there is anything obviously that comes to the attention of the contact workers and it’s brought to their attention...It would be done in a way that is protective for both of them really.” [Ms D, Solicitor, SE]

These views are very concerning in light of Harrison's research, which found that women frequently ended up coming into contact with their abusers at supported contact centres.<sup>26</sup> Additionally, low levels of vigilance meant that children's and mother's safety and welfare could be imperilled, by fathers making threats to, or denigrating mothers, asking children to pass notes on to mothers or to reveal women's addresses.<sup>27</sup> These problems were recognised by a number of respondents including Ms C [Solicitor, SE], who thought that the father's ability to denigrate the mother or pass subtle messages about her to the

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<sup>25</sup> N = 21, comprising: Barristers = all (8); Solicitors = 8; FCAs = 5

<sup>26</sup> Christine Harrison, ‘Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence’ (2008) 14(4) *Violence Against Women* 381-405

<sup>27</sup> *ibid* 392-393. See also Lynn Harne, ‘Violent fathers – “good enough” parents?’ (2004) *The Domestic Abuse Quarterly* 19

children was an unsafe, risky aspect of supported contact. Ms P pointed out that even when contact appears to be “going well” it can be problematic:

“But you also want everybody who’s involved in the process to be aware of how contact that is going quite well can still be quite difficult, sort of insidiously giving a message to the children that fathers wants to get across about mum or, you know, it can still be quite dangerous.” [Ms P, Barrister, SW]

Three Cafcass officers did not think that courts focused sufficiently on risk and safety when considering interim contact. Ms I [FCA, NE] considered that supported contact centres do not meet adequate safety requirements as they essentially provide unsupervised contact, and felt that if judges were better informed about domestic violence and its effects on children, they would be in a better position to assess risk and manage safety in the interim.

At least four Cafcass officers gave examples of cases in which they thought that interim orders made by courts, usually without their own input, had put children at risk. Ms Y [FCA, London] reported on a case where she advised the mother to stop contact because the father, who had convictions for domestic violence, was having regular contact but kept shouting at the mother at handovers in front of the child.<sup>28</sup>

## **1.2 Recommendations by Cafcass officers for interim contact**

All the Cafcass officers who expressed a view on their likely recommendations indicated that they would not usually recommend any direct contact pending fact-finding hearings if the mother opposed this, and may not do so even in some circumstances where the mother had agreed to some limited contact. However, for some Cafcass officers, the circumstances in which they would recommend no direct interim contact mirrored those in which the courts would be unlikely to order it in any event. Mr. J said that his “default position” would be to recommend no direct contact pending the fact-finding hearing if there was “severe” domestic violence or there had been no contact “for a while”: “Cautious is the word, and the courts are cautious as well, rightly so.” [Mr J, FCA, NE]

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<sup>28</sup> See also the example provided by Ms N [FCA, SW] discussed below.

It is not only mothers who may be subjected to pressure to concede contact; similar pressure may be put on Cafcass officers, who may need to fight hard to stand their ground. Ms O gave an example of a case where she recommended no interim direct contact because the father of a very young child had behaved so aggressively at the child's nursery that he frightened the staff, but Ms O was subjected to huge pressure and "badgering" from the father's barrister to alter her recommendation:

"And I actually had to sit down and say to him: now look, you know,...I have worries that your client would be out of control, wouldn't know what he was doing and this is the sort of case that you hear of in the media where somebody's gone off and done something and, you know, the children don't come back. And I mean they don't come back alive...But there was no way it was getting past me on the day and I think that is an example of an adviser who was overstepping the mark really." [Ms O, FCA, SW]

Ms N spoke about a case where she stopped contact between the child and a violent father. His solicitors "dragged" Ms N to court to complain about Ms N "overriding" a court order.

"And I said: in my view safeguarding is paramount and I've got evidence here to suggest that this little boy's welfare was a concern, and actually I think we need to sometimes think about that instead of just saying: there is a court order in place, this has to happen. Um, so the judge, you know, put me up on the stand and said: explain your position. I did, and he said: okay, yeah, I take that. And I came out of court thinking: did that just happen? The judge listened to me!" [Ms N, FCA, SW]

All these Cafcass officers confirmed that if they recommended no interim direct contact, the court would "go along" with that. The difficulty, as Ms I pointed out, is that in these early stages pending the fact-finding hearing, Cafcass are not usually fully involved:

"They don't go into the actual impact on the children or actually what it's doing by the contact and agreeing the contact albeit supervised that could still go on. They should, they make these orders in the interim, as they say, to have this contact but they don't see it until we

get on to do the work with the child or children in question that allowing this contact to take place at that stage could be so detrimental and again, if they [are] seeing [the child] in a contact centre or they might have a family member agree, you don't know how that, you know, how that contact is being managed.” [Ms I, FCA, NE]

Ms I gave an example of a case where 32 serious findings were made against the father who constantly ‘blamed’ the mother, and the court had ordered contact in a supported contact centre:

“So my concern is...the emotional harm that this can have on the child in turn...but they still gave him interim contact, this was before my involvement, interim contact, so it would have gone from working to first hearing, all of that in between when no FCA was involved...yes, it happens a lot.” [Ms I, FCA, NE]<sup>29</sup>

Ms O [FCA, SW] and Mr V [FCA, NW] gave examples of cases where interim orders were made for direct contact, without their knowledge, which they attempted to overturn by requesting their managers to write to the court. Mr V spoke about a case where the father had many convictions for violence, including stabbing the mother with a knife, but the court ordered unsupervised contact, so he wrote to the court about his concerns. However, Mr V was taken off the case because the father took a dislike to him; he subsequently learnt that the case was back in court because the father’s “drinking, aggressive, hostile behaviour re-emerged.” [Mr V, FCA, NW] Two other Cafcass officers referred to violent fathers making complaints against them, which may be another controlling strategy of abusive men.

These examples highlight the fact that Cafcass officers can have a crucial role in safeguarding children when interim contact is under consideration. It was therefore of concern to hear Ms O say that courts should not react too seriously to isolated domestic violence “in the heat of the moment”, and suggest that “a few words of advice” from the judge would stop the father from being dangerous:

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<sup>29</sup> Ms I gave another example of a case where interim direct contact was ordered before her involvement and she succeeded in getting it suspended.



“And often it’s a matter of having a few words of advice to somebody, you know, and it’s very effective if it comes from a judge, or you know: Mr So-and-So, you need to do so and so, you know, leave your car the other side of the road, let So-and-So walk to the pavement, don’t go to the front door, you know, . . . don’t put yourself in a position where you’re going to upset somebody, and generally when it’s kind of put that way a lot of them will resolve it, a lot of it does die down.” [Ms O, FCA, SW]

### 1.3 Lawyers’ advice to parents on interim contact

**Table 1: Family lawyers’ advice to clients about interim contact – general advice compared with courts’ likely order**

	<b>Courts tend to order interim direct contact</b>	<b>Courts not usually order interim direct contact</b>	<b>What courts order depends on the circumstances</b>	<b>Total</b>
<b>Advise client to agree contact</b>	Ms A1, Ms E	Ms A2	Ms A3, Mr R, Ms P	6
<b>Would not persuade M to agree contact</b>		Ms M, Ms A, Ms L, Ms B		4
<b>Advice depends on circumstances</b>	Ms C	Ms K	Ms F, Ms G, Ms S, Ms T, Ms Q, Ms D	8

**Table 2: Family Lawyers’ advice to clients about interim contact – general advice compared with advice to mother in interim case scenario [‘ICS’]**

	<b>Advise M to agree contact</b>	<b>Not persuade M to agree contact</b>	<b>Advice depends on circumstances</b>	<b>Total</b>
<b>ICS: Advise M to agree contact</b>	Ms A3, Ms A1, Ms A2		Ms C, Ms D, Ms G, Ms F	7
<b>ICS: Not advise M to agree contact</b>	Ms E	Ms M, Ms A, Ms L, Ms B		5
<b>ICS: Advice depends on circumstances</b>	Ms P, Mr R		Ms K, Ms Q, Ms T, Ms S	6

Table 1 shows that although six family lawyers thought that courts do not tend to order interim direct contact, only four would not persuade the mother to agree to

contact. Ms M [Barrister, SW] was the only barrister who held the firm view that courts do not generally order interim direct contact against the wishes of the resident parent and was also the only barrister who would not encourage the mother to agree to such contact. All the other barristers interviewed<sup>30</sup> indicated that they would encourage the mother to agree to some interim direct contact even if she was concerned for her own safety,<sup>31</sup> or their advice would depend on the circumstances.<sup>32</sup> Despite the majority of solicitors holding the view that courts do not usually order interim direct contact, or that the court's decision would depend on the circumstances, only three solicitors said that they would not try to persuade the mother to agree to such contact. These findings suggest that direct contact pending fact-finding hearings may take place because family lawyers persuade mothers to agree to it, rather than because it is ordered by courts against the case argued on behalf of the mother.

The four family lawyers who would not try to persuade the mother to agree to some interim contact if she feared for her own safety confirmed this in their responses to the interim case scenario. Ms M [Barrister, SW] indicated that she would strongly advise the mother not to agree to any interim contact, and Ms B said that she would not let *herself* “be pressured to advise her to agree to contact by the court or the other party.” Ms L [Solicitor, SW] pointed out that if the mother agreed to anything other than supported contact, this may undermine the credibility of her allegations and be potentially harmful to the child.

Five of the family lawyers who indicated that they would generally advise mothers to agree to interim direct contact confirmed this in their responses to the interim case scenario, and two solicitors whose general advice would depend on the circumstances indicated that they would persuade the mother in the interim case scenario to agree to some contact. These respondents indicated that they would use various means of persuasion ranging from ‘advice’ on the approach the courts would take, to ‘encouragement’, to more explicit coercion, and would only support the mother in opposing contact if she is “resolute” or “adamant.”

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<sup>30</sup> N = 6

<sup>31</sup> N = 3

<sup>32</sup> N = 4

“Well, you’ve got to take their concerns seriously. I think you’ve got to make it clear to them that some level of contact *should* take place and, you know, we have to meet their concerns but also the needs of the child and the rights of the other parent to see the child. We certainly wouldn’t be here saying: no, no, no, no, there should be no contact at all. That would go against Resolution guidance and everything else that we have. You’ve got to be constructive about it, and realistic.” [Mr R, Solicitor, NE]<sup>33</sup>

Ms A3 [Barrister, London] indicated that she would only be prepared to advise the mother in the interim case scenario to oppose direct contact if there was a threat to the child, not the mother: “Then I’d advise her that after the fact-finding, supervised contact *will* be the way that the court would be looking for the case to go, so she couldn’t stop contact forever.”

It was surprising to hear from Ms P, who had explained forcefully how careful representatives must be not to put pressure on mothers or replicate the perpetrator’s behaviour, that although she felt that in the interim situation, the “ball is in the mother’s court,” she would not tell her this but would advise her to agree to some contact to appear ‘reasonable’, although contact needs to be safe:

“As I said to my lady this morning, that at the final hearing you want them to be the sort of picture of reasonableness so, you know, you, it’s a fine balance for your client, about making sure if they want contact to take place...then knowing that the court will want contact to take place and it will take a dim view of contact not taking place.”  
[Ms P, Barrister, SW]

On the other hand, Ms E [Barrister, London], who would give general ‘advice’ to mothers pending fact-finding hearings about the way that contact could be ‘safely’ managed, was clear that she would not put any pressure on the mother in the interim case scenario to agree to any direct contact: “But if her instructions are: I’m not agreeing to anything, then I normally don’t, I’m not putting any pressure on, that’s for sure.”

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<sup>33</sup> When asked how he would advise the mother in the interim case scenario, he said that he would need more information.

Three solicitors whose general advice to mothers would depend on the circumstances indicated that they would encourage the mother in the interim case scenario to agree to some direct contact (although this may depend on the full circumstances). Ms K [Solicitor, NE] indicated that she would explain that, if there was ongoing contact at the time of the hearing, the court *will* want contact to happen if it can be made safe. This advice is surprising, since Ms K was firm in her view that courts do not order interim direct contact against the wishes of the resident parent. However, she did qualify her hypothetical advice to the mother by saying that if the court had decided that a fact-finding hearing was necessary it must mean that the violence was ‘serious’ and therefore direct contact should be opposed.

Ms T’s advice to the mother in the interim case scenario would depend on factors such as the “level of violence” and the effect on the child. “Sometimes you’ll have mums alleging that the child’s traumatised by what they’ve seen and just the fact of them coming into contact with that person will, of itself, be harmful for the child.” However, Ms T then queried whether mothers are ‘genuine’ when they assert that the child is traumatised:

“I’m finding more often actually, I’m getting mothers saying: this child’s been traumatised by this. And I don’t know whether that’s because the word has spread that, you know, this is the way of avoiding it or whether, it’s just that people are more aware of those issues and they’ve discussed it with Cafcass and they’ve discussed it with their solicitors and so they’re more on top of that.” [Ms T, Barrister, NW]

The preference of judicial officers for children to have the least ‘invasive’ type of contact with fathers pending fact-finding hearings, together with the reluctance of some family lawyers to ‘stand up for’ their clients was demonstrated by the case of *Re G (A Child)* [2011],<sup>34</sup> where the mother made allegations against the father of extremely serious physical violence and threats. Against the advice of a Cafcass officer, the judge concluded that interim contact should be supervised by the paternal grandmother, rather than take place in a contact centre. The mother’s solicitor accepted, on appeal, that she was not sufficiently ‘robust’ in presenting

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<sup>34</sup> *Re G (A Child)* [2011] EWCA Civ 1147

the mother's case to the judge. Wilson LJ was highly critical of the trial judge and allowed the mother's appeal. He suggested that the solicitor should have highlighted the seriousness of the allegations against the father and of bullying and collusion by the grandmother, and that "where there is a history of substantial domestic violence, the question of whether contact arrangements will generate anxiety and distress for the mother, indirectly damaging for the child, is itself an important feature."<sup>35</sup>

## **2. Assessing risk after the fact-finding hearing**

The Practice Direction provides that, where domestic violence is found to have occurred, the court should apply the factors in the 'welfare checklist' and consider, in particular:

"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."<sup>36</sup>

What Paragraph 26 requires is an assessment of the 'risk' to the child and resident parent posed by future contact with the perpetrator. In order to assist in exploring participants' perceptions of the assessment of risk and the way in which they advise clients on final orders, they were presented with a case scenario ['the final case scenario'] as follows: the mother alleged that the father had been violent towards her over a period of years, with allegations ranging from verbal abuse and threats through to kicking and punching. A fact-finding hearing was held and the judge made some findings against the father but not to the extent alleged by the mother: the father had been verbally abusive, had pushed and shoved the mother during arguments, and hit her once many years ago, and that all of this usually happened when he was drunk. The mother

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<sup>35</sup> *ibid* [21] (Wilson LJ)

<sup>36</sup> The Practice Direction (n 1) [26]

opposed all contact on the basis that she was frightened of the father and believed that he would never change. The father did not accept the findings.<sup>37</sup>

We have already seen that there is an ideological division between the ‘safe family man’ of child welfare discourses and the ‘dangerous perpetrator’ of domestic violence discourse. The ‘risk assessment’ provides the means for family law to resolve this ideological divide, for law and the psy discourses to attempt to make ‘knowable’ the ‘noise’ of the dangerous unknown by constructing the domestic violence perpetrator as ‘risky’ and therefore controllable rather than ‘dangerous’ and uncontrollable. This enables law to present the future as quantifiable and therefore predictable in order for law to fulfil its normative function. By keeping the violence separate and distinct from ‘the benefits’ of contact, the image of the ‘safe family man’ can remain intact because the child can continue to ‘benefit’ from contact as long as the ‘risk’ is controlled. This was articulated by Ms Q [Solicitor, SW] who considered that contact is very important for children if there are no risk factors; if there are, the risk has to be ‘reduced’ so that contact can be ‘safe’ and therefore beneficial.

Just over half of the respondents<sup>38</sup> reported that courts do tend to direct risk assessments if findings or admissions of domestic violence are made, and four respondents observed that this is more likely to happen now than before the implementation of the Practice Direction.<sup>39</sup> Their responses were validated by a number of participants’ comments on the final case scenario.

Respondents expressed a range of views as to which agencies courts would turn to for risk assessments. These included adult psychologists or psychiatrists, Cafcass officers, or domestic violence perpetrator programmes/assessors

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<sup>37</sup> This hypothetical case is fairly typical of outcomes following fact-finding hearings. At the stage when the interview schedule was prepared, no research findings were available on the typical outcomes of fact-finding hearings; the researcher therefore drew on her own professional experience of such hearings. Respondents to the pilot interviews confirmed that this was a ‘typical’ outcome, and this was subsequently confirmed by Hunter and Barnett’s research (n 6) and by some of the respondents to this study.

<sup>38</sup> N = 15, comprising: Barristers = 5; Solicitors = 6; FCAs = 4

<sup>39</sup> Similar findings were made by Hunter and Barnett (n 6). Respondents reported that perpetrators are referred for expert risk assessments quite or very often in 46.7 per cent of cases, and are never or only occasionally referred for such assessments in just over half of cases.

[‘DVPPs’], with a slight preference expressed for ‘experts’ (psychiatrists/psychologists).<sup>40</sup> However, a number of respondents considered that the costs and delay involved in expert risk assessments militated against courts ordering them.<sup>41</sup> Respondents’ views were mixed on whether DVPPs are or should be directed to undertake risk assessments, and the likelihood of this happening seemed to depend to some extent on whether such agencies were available locally.<sup>42</sup>

The most marked divergence of views centred on whether Cafcass has the necessary expertise to assess risk, or whether this is a task best left to ‘the experts’.<sup>43</sup> Not surprisingly, Cafcass officers considered not only that they were more likely to be requested to assess risk, but that they had the necessary tools to do so, while some family lawyers expressed scepticism about the ability of Cafcass officers to undertake this task.<sup>44</sup> Both Ms Y [FCA, London] and Ms N [FCA, SW] observed that Cafcass are being increasingly encouraged to assess risk, although both commented that it is ‘early days’ for Cafcass.

The preference by many courts and professionals for ‘experts’ to assess risk instead of DVPPs or Cafcass officers is concerning, since generic adult psychiatrists and psychologists may not have particular expertise in the dynamics of domestic violence. Coy et al found that such reports tend to blame the women for the violence, for example by ‘provoking’ the perpetrator.<sup>45</sup> It is suggested that the preference for ‘experts’ can be attributed to the generally increased reliance, by law, on expert ‘knowledge’ and to the pathologisation of domestic violence, which obscures the gendered power relations underlying it.

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<sup>40</sup> Coy et al (n 5) 54, refer to studies which found that psychologists and psychiatrists are the most commonly appointed ‘experts’ to undertake risk assessments .

<sup>41</sup> Psychiatrists/psychologists = 10; Cafcass officers = 9; specialist domestic violence agencies = 8

<sup>42</sup> Most respondents in the South West considered that Ahimsa, a local DVPP, would generally be considered the most appropriate agency to assess risk, and those in London reported a preference by courts for risk assessments by the Domestic Violence Intervention Project (‘DVIP’).

<sup>43</sup> Section 16A of the Children Act 1989 provides that if a Cafcass officer suspects that the subject child is at risk of harm they must undertake a risk assessment and provide it to the court.

<sup>44</sup> Ms U [FCA, NW] recognised that courts and family lawyers tend to query the expertise of Cafcass officers to assess risk.

<sup>45</sup> Coy et al (n 5) 54

Cafcass officers had available to them, when the interviews were undertaken, the Cafcass Domestic Violence Toolkit,<sup>46</sup> as well as the CAADA Risk Identification Checklist, which together provide detailed tools for undertaking a comprehensive risk assessment and which highlight the gendered dynamics of domestic violence.<sup>47</sup> It is of concern that in 2012 the Domestic Violence Toolkit was replaced with a Child Protection Policy which does not provide detailed tools for assessing risk.<sup>48</sup> Nevertheless, Cafcass officers, as well as specialist domestic violence agencies, should be better placed to assess ‘risk’ than the ‘experts’. However Coy et al found that women’s experiences of Cafcass interventions were mixed: while some Cafcass officers understood women’s concerns and the impact on children of having contact with abusive fathers, “[f]or many, however, reports failed to reflect women’s concerns and their accounts of violence,” and focused more on promoting contact than assessing risk.<sup>49</sup> Coy et al found that the risks associated with contact between children and perpetrators were more accurately and consistently identified by DVPPs than by Cafcass officers, social workers, or generic psychologists and psychiatrists.

## 2.1 How is risk ‘measured’?

A key ‘indicator’ of risk for the majority of participants<sup>50</sup> was the extent to which the father was able to admit the violence and accept the findings made against him. Fathers who remain ‘in denial’ after findings are made are generally seen by courts and professionals as not only ‘high risk’ but also incapable of reconstruction into ‘safe family men’, in particular because DVPPs will not accept perpetrators who do not admit their violent behaviour.

“I think if there is no acknowledgement judges tend to then form quite a strong view that: we’re not going to get anywhere with this person in terms of being able to promote safe contact...I think what the judge would tend to be saying is: the concern is the potential for continued future violence, isn’t there, and if there is no

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<sup>46</sup> The Domestic Violence Toolkit was first issued in 2005 and revised in 2007.

<sup>47</sup> See, eg, Cafcass, *Domestic Violence Toolkit, Version 2.1* (Cafcass 2007) 62, referring to Johnson and Hotton, ‘Losing control: Homicide risk in estranged and intact intimate relationships (2003) *Homicide Studies* 58-84

<sup>48</sup> See Coy et al (n 5) 57

<sup>49</sup> Coy et al (n 5) 55

<sup>50</sup> N = 17



acknowledgement we can't help someone address that behaviour so the risk remains." [Ms K, Solicitor, NE]

This view was validated by Ms K's response to the final case scenario. Although she felt that "the findings aren't especially at the serious end of the scale, as the capacity for that continues, the risk to the child [sic] because there is no acknowledgement of what has happened."

Acceptance of the findings was an important issue for Ms N, because she recognised the perpetration of domestic violence as a 'choice' by the perpetrator and therefore the denial of that violence as a deliberate decision to abdicate responsibility. In relation to the final case scenario, she observed that:

"there has to be some responsibility for that pushing and shoving because it's a choice, you choose to physically abuse, it doesn't matter whether you've lost control or you're in control...we are responsible for our own actions." [Ms N, FCA, SW]

For Ms E [Barrister, London], if the father denies the findings, it is so 'obvious' that he remains a high risk that "I don't need a psychologist to tell me that necessarily." For this reason, Ms E felt that some judges often assess risk, and are competent to do so. Indeed, she felt that if the father denies the violence, *anyone* with 'common sense' could assess risk:

"I don't think in my experience of working in XXX that I've ever had a DVIP direction, I've never had Judge XXX say: I need a risk assessment. Because I think Judge XXX or Judge YYY would do that risk assessment themselves. I think they would be competent enough to assess the risk themselves without needing somebody to assess it for them...and I don't need a psychologist to tell me that necessarily that, the thinking being that if somebody admits their wrongdoing they can learn from their mistakes and therefore guard against it." [Ms E, Barrister, London]

These views were supported by the Court of Appeal in *Re J (A Child)*<sup>51</sup> where it was held that the trial judge was "perfectly capable of making a fair and impartial assessment of the merits of the father's application".<sup>52</sup>

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<sup>51</sup> *Re J (A Child)* [2012] EWCA Civ 720

In light of the importance attached to the admission of domestic violence and the acceptance of the court's findings, it was not surprising to find that all family lawyers reported that they would advise the father in the final case scenario to accept the findings made against him so that contact could progress.

“Stop drinking, keep your hands by your sides, be contrite, say that you're willing to accept you've got problems and you're trying to address them...And actually facing up to your problems and being contrite is likely to get you a lot further than just going to court and behaving like a rampaging bull. That would all be put across in the usual legalise speak, of course.” [Mr R, Solicitor, NE]

Ms B reported, more generally, that she normally advises perpetrators to admit the violence:

“The court will look at whether you admit to things...If our clients come in and there's a sort of raft of accusations against them, and they're saying: no, I never even shouted at her, we say: no, that doesn't sound very realistic in terms of what's being explained, that the court will take into account your ability to accept what you've done and take steps to change.” [Ms B, Solicitor, London]

Implicit in these family lawyers' advice to fathers is their acceptance that it is law's construction of 'the facts' that will determine future decision-making, whether or not the father accepts 'the truth':

“That everybody treats, now treats those findings as truth and he has to, if he wants to move matters on, he's gonna have to accept the findings, acknowledge his behaviour and the harm it's caused and the expectation is likely to be that he will need to, you know, address and change his behaviour through some sort of input of some kind, if you can find it.” [Ms L, Solicitor, SW]

Despite the importance attached to the acceptance of the court's findings, seven respondents indicated that such acceptance is very rare, which suggests that the advice of family lawyers frequently falls on deaf ears.<sup>53</sup> It would also seem that

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<sup>52</sup> *ibid* [7] (Thorpe LJ)

<sup>53</sup> The rarity of admissions by perpetrators was confirmed by Hunter and Barnett's research (n 6) which found that most commonly, perpetrators would admit some or none of the allegations and

perpetrators tend to deny allegations in the first place: “it’s more likely than not the father will be saying: well, there wasn’t any.” [Ms A3, Barrister, London] Ms T [Barrister, NW] observed that if perpetrators are going to accept their violence, they will do so before any fact-finding hearing. Ms B indicated that fathers generally deny the violence and refuse to accept findings made. She would say to fathers:

“The court are going to focus on your capacity to change and your appreciation of the past violence, whereas they’ve made these findings, these are facts and your denying them is only going to make things worse for you, not better. But they still wouldn’t probably accept that.” [Ms B, Solicitor, London]

It was noticeable that of the many and varied examples of cases provided by participants in response to all questions, hardly any were given of fathers who had actually accepted findings made against them.<sup>54</sup>

Even where fathers appear to admit some violence, this may not be a true reflection of their attitude, and they may be quick to resile from any ‘concessions’ made. Ms L [Solicitor, SW] provided an example of a case where, at the fact-finding hearing, the parties had “cobbled together” concessions but when she later represented the father, he said that he had never perpetrated any violence and had never even agreed that he had done so.

The refusal of many fathers to admit the violence or accept findings was revealed by the extent to which fathers are considered suitable for DVPPs. Mr V [FCA, NW] commented that attendance on such programmes is “not very common” for this reason. Ms E observed: “Because DVIP said: well, this man denies it still. Well, of course he denies it, he had a fact-find, what do you expect? You know, if you get to a fact-find they normally still deny it.” [Ms E, Barrister, London]

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that it was rare for all of the allegations to be admitted. Yet it was also found that some or all of the allegations would be found proved.

<sup>54</sup> A couple of respondents referred to fathers who had accepted findings made against them and attended DVPPs but these were in public law cases.

The case law confirms that in most cases, fathers tend to challenge all or most of the allegations of domestic violence, and do not accept the findings made against them, or in some cases only partially accept the findings, usually those of less ‘severe’ violence.<sup>55</sup> Despite this, as discussed above, there is an increasing perception among the higher courts that ‘unnecessary’ fact-finding hearings, instigated by mothers, are clogging up the court system but in none of the reported cases where fact-finding hearings were held and the mother’s allegations found proved, have courts constructed the ‘problem’ as one of perpetrators challenging allegations against them.

For a minority of respondents, risk can also be ‘measured’ by the extent of the domestic violence:

“I think if there are findings of domestic violence, and serious, not that any domestic violence isn’t serious, but serious domestic violence which has involved, um, the children either seeing or being in earshot and there being serious physical injury, then that introduces a risk element and I think if there’s any lack of acceptance by the party of the finding made by the court, it does weigh in the balance.” [Mr R, Solicitor, NE]

Similarly Ms H, while acknowledging that acceptance of the findings is a “big issue”, struggled with the possibility of that factor alone militating against any direct contact:

“And I really struggle with that, it’s tough. It depends on the degree of domestic violence, of course. I mean if it’s slightly historical and there’s been a change of circumstances and there’s some sense of understanding by the perpetrator,” she would ‘test out’ the father at a supported contact centre. [Ms H, FCA, SE]

The difficulty of reconstructing ‘danger’ as ‘risk’ was articulated by a number of respondents:

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<sup>55</sup> See *Re A-T (Children)* [2008] EWCA Civ 652; *Re P (Children)* [2008] EWCA Civ 1431, [2009] 1 FLR 1056; *Re J (Costs of Fact-Finding Hearing)* [2009] EWCA Civ 1350, [2010] 1 FLR 1893; *Re M (Children)* [2009] EWCA Civ 1216, [2010] 1 FLR 1089; *Re S (A Child)* [2012] EWCA Civ 617; *Re J (A Child)* (n 51); *Re W (Children)* [2012] EWCA Civ 1788; *Re S (A Child)* [2012] EWCA Civ 1031

“So there’s a range of circumstances and I think we haven’t got enough assessment into, in place for those ranges of circumstances to feel confident about safety. And, you know, added to which are the ones where I felt children would be most at risk or where the worst has happened and mothers have been killed, have often been where there’s been no violence prior.” [Ms Y, FCA, London]

Ms N [FCA, SW] gave an example of a case where the risk posed by the father was incorrectly assessed as low by magistrates after they made findings against him. Ms N was unsure at the time but told the researcher that her “gut instinct” was proved right when the father subsequently assaulted his new partner.

Ms E thought that risk can never be ‘eliminated’, that is, it is impossible to guarantee a future free of ‘danger’:

“But I don’t think the court can ever be completely reassured and I think, I often say that to mums, you know...we can’t offer you certainty, the court can’t offer you certainty, the risk assessor can’t offer you certainty, it’s a leap of faith...that’s not what we’re here to do. You know, if the court had to offer certainty then, um, probably very few fathers would have contact, I suppose, in these situations.” [Ms E, Barrister, London]

Implicit in Ms E’s comment is the view that most violent fathers in contact proceedings are dangerous but are nevertheless beneficial to children’s welfare. For this reason, her solution to this uncertain, dangerous future is to make the risk ‘acceptable’ by keeping the parents apart physically.

### **3. Application of the Paragraph 27 factors**

In determining what, if any, orders to make if domestic violence is proved or admitted, the Practice Direction requires a wider enquiry than assessing the risk of further abuse. The way in which that wider enquiry should be undertaken is set out in Paragraph 27 of the Practice Direction which provides that:

“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.”

These factors give effect to Sturge and Glaser’s approach to assessing the overall effects and merits of contact between children and violent parents, by providing the means for determining not only whether contact can be ‘made safe’ but also whether it can be ‘beneficial’. This may mean that in some cases contact will not be considered beneficial, regardless of whether or not it can be made ‘safe’.<sup>56</sup>

The majority of family lawyers,<sup>57</sup> but only four Cafcass officers, reported that courts *do* consider the factors set out in Paragraph 27 of the Practice Direction when deciding on contact when domestic violence has been found, although most of these respondents observed that they would not usually be specifically referred to as a checklist but “in some shape or form”. [Mr R, Solicitor, NE] Ms P [Barrister, SW] observed that it was apparent from the questions that judges ask the parties that they have these issues in mind, and that some judges demonstrate an awareness of these factors even if the representatives do not raise them.

Two solicitors and five Cafcass officers (but no barristers) reported that courts *do not* consider the Paragraph 27 factors: “No, they just make the findings, that’s it, and then they leave Cafcass to decide on everything else.” [Ms A, Solicitor, London] Ms A was adamant that she had never seen these factors addressed by courts and that all the court considers is whether the father accepts the findings. Indeed, Ms H [FCA, SE] said that she did not find judgments particularly helpful, for this reason.

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<sup>56</sup> Claire Sturge and Danya Glaser, ‘Contact and Domestic Violence – The Experts’ Court Report’ (2000) 30 *Family Law* 615. Many of the opinions of Sturge and Glaser were adopted and approved by the Court of Appeal in *Re L*.

<sup>57</sup> Barristers = 6; Solicitors = 8

Three respondents<sup>58</sup> were unsure whether courts do consider the Paragraph 27 factors, or felt that they considered some of them but not others.

“It’s a bit like the welfare checklist, isn’t it, you don’t necessarily pull it out and say: I have considered the likely effect of, do you know what I mean? Perhaps you should. I think magistrates often do, maybe magistrates would do this. I haven’t, I don’t think I’ve actually seen a judge pull it out and go through it bit by bit but that doesn’t mean to say that they haven’t got it firmly fixed in the back of their minds.” [Ms O, FCA, SW]<sup>59</sup>

The factor that respondents most frequently mentioned courts taking into account was whether the father accepts the findings, followed by the impact and effect on the child and the resident parent of the father’s violence. Respondents’ views were far more ambivalent and mixed on the question of the father’s motivation. Of those who commented on this issue, four thought that courts *do* consider whether or not the father was motivated by a genuine concern for the child, but an equal number felt that courts either fail to question the father’s motivation, or are reluctant to believe that the father has ‘improper’ motives. Ms P reported having seen judges question the father about his motivation when giving evidence and Cafcass officers raising the issue in their reports:

“Yeah again, you know, during questions, when you’re cross-examining, if you haven’t covered that with them I’ve known judges say: what’s all this about then, you know, what are you really, do you really want this contact? Aren’t you just trying to see mum? So they’re aware of those issues, even if we’ve not raised them and, you know, generally we would.” [Ms P, Barrister, SW]

On the other hand, Ms K [Solicitor, NE] was of the view that neither the courts nor Cafcass consider the father’s motivation or the impact of his conduct on the resident parent, and observed that it is difficult to persuade courts that the father has suspect motives for seeking contact. Ms T [Barrister, NW] also indicated that

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<sup>58</sup> A barrister, a solicitor and a Cafcass officer

<sup>59</sup> These views were supported by Coy et al’s research (n 5). Three quarters of the lawyers reported that judges “partially” consider the factors set out in Paragraphs 26 and 27 when domestic violence is found to have occurred but only ten per cent reported full compliance with the Practice Direction in this respect.

it is very difficult to persuade courts that the father is “motivated by anything other than a desire to see the children.”<sup>60</sup>

Ms B [Solicitor, London] explained that while courts *do* consider the father’s motivation in seeking contact, they tend to approach it from the presumption of contact:

“I think they do [pause] but obviously they’re coming from the stance that it’s best for the child to see the parent. So if someone’s expressing genuine concern to see their child, um, then they might err on the side of believing that. [Interviewer: *How do courts decide that somebody has a genuine desire to see their child?*] They say they do in their statement [laughs].”

All respondents reported more than one source of information for courts to assess the Paragraph 27 factors, but the most common source cited by all groups of respondents was Cafcass reports.<sup>61</sup> This was followed by the parents’ statements and oral evidence given at the trial, and the findings:

“I’ve seen Cafcass officers’ reports with that theme, you know, giving a nod to those questions. But I’ve also, um, you know, when you’ve got people in the stand, judges ask the person a question as well, so you know, I think they’ve got it. And sometimes it’s not necessarily clear from the papers, but when they get in the witness box and start talking, then there’s a flavour of how they’re saying things and, you know, the demeanour and whatever.” [Ms P, Barrister, SW]

However, Ms B alluded to the danger of courts relying on the perpetrator’s demeanour in the witness box:

“I think judges often get a sense of how someone is as well from their oral evidence. Because you get some perpetrators who are very aggressive in their evidence. But some who don’t, and then I think that they might seem more reasonable...I think judges do tend to get a sense of people during their evidence, whether they’re right or wrong.” [Ms B, Solicitor, London]

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<sup>60</sup> Similar views were expressed by Ms E [Barrister, London]

<sup>61</sup> N = 14



Ms B's concerns were borne out by two decisions of McFarlane LJ. In *Re W (Children)*<sup>62</sup> McFarlane LJ approved of the trial judge's approach in deciding, on the basis of the mother's oral evidence, that there should be no direct contact between the father and the children:

“It does not require medical evidence before a judge can make the sort of finding that Judge Murfitt made on this occasion. She was particularly well placed to make the finding. She had sat through the fact finding hearing and had heard both of the parties give evidence to her and formed her own view as to the impact of the father's presentation upon the mother's ability to withstand it and the effect of it upon the mother's emotional and physical health.”<sup>63</sup>

However, in *Re W (Direct Contact)*<sup>64</sup> McFarlane LJ formed the view that the mother was implacably hostile to contact and this seems to have influenced his approach to the way in which the trial judge negatively assessed the father, holding that judges:

“must be cautious in undertaking a more profound assessment of a parent's psychological or emotional wellbeing on the basis of their presentation in court. Judges are not psychologists and the courtroom is a wholly artificial environment in which to carry out any form of sophisticated evaluation of personality or predictive behaviour.”<sup>65</sup>

It is suggested that McFarlane LJ's contradictory views on this issue demonstrate how images of dominant parental subjectivities may underpin judicial assessments of parents.

Although Cafcass reports were considered to be the most common source of information from which the Paragraph 27 factors are assessed, respondents were sharply divided by professional groups on the issue of whether Cafcass officers actually do consider the Paragraph 27 factors in their reports. Not surprisingly,

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<sup>62</sup> *Re W (Children)* (n 55)

<sup>63</sup> *Ibid* [26] (McFarlane LJ)

<sup>64</sup> *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494

<sup>65</sup> *ibid* [65] (McFarlane LJ). The trial judge in this case formed the view, on the mother's evidence and presentation in the witness box, and in particular on the way in which she “broke down” and confirmed that she would not be able to cope with contact, that the mother was “entirely genuine” and her evidence could be relied upon in this respect.

most Cafcass officers reported that they did so,<sup>66</sup> while the majority of family lawyers who responded to this question were clear that they had never seen these factors addressed in a Cafcass report.<sup>67</sup> The remainder of participants who responded to this question were not sure, or indicated that FCAs sometimes or partly addressed the Paragraph 27 factors.<sup>68</sup> Of this group, three family lawyers indicated that the quality of reports varies considerably, with some being “useless” while “good” reports would reflect the Paragraph 27 issues. Only three family lawyers (solicitors from the North West who were interviewed together) responded unreservedly that Cafcass officers do address these factors. It is possible that the self-reports of some Cafcass officers may be attributed to response bias, since it was clear during the interviews that a number of Cafcass officers had never even seen Paragraph 27 before and two FCAs requested copies of it, both of whom had initially said that they did consider these factors.

It would therefore seem that, if courts and professionals are relying on Cafcass to provide the information to enable courts to determine the factors set out in Paragraph 27, these issues may frequently be unaddressed, since it is highly questionable whether Cafcass officers regularly do so. The rarity of expert and DVPP reports as sources of information suggests that in most cases, if courts do indeed consider these issues, they are reliant on their own impressions of the parties from their statements and oral evidence, impressions which may well be underpinned by dominant images of ‘implacably hostile mothers’ and ‘safe family men’.

The case law demonstrates an inconsistent application of Paragraph 27 by the lower courts and by Cafcass officers. In some cases those factors appear to have been ignored because of the perceived importance of contact and the downgrading of domestic violence. The appellate courts on occasions have been highly critical of judges who failed to consider those factors, and have emphasised the importance of applying them. In *Re W (Children)* Black LJ held: “One is left in no doubt by those paragraphs [26 and 27] as to the matters that

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<sup>66</sup> N = 7

<sup>67</sup> N = 9

<sup>68</sup> FCAs = 2; Barristers = 2; Solicitors = 2

should be considered in every case.”<sup>69</sup> On the other hand, the reported cases suggest that some trial judges *do* have these factors in mind even if they are not expressly stated, and in those circumstances they are less likely to order direct contact where fathers have been unwilling to acknowledge their violent conduct and its impact on the mother and children and have been highly critical of fathers for failing to do so. In *Re E (Contact)*<sup>70</sup> the trial judge found that the physical and sexual violence perpetrated by the father against the mother was so serious that contact would impact on the mother’s capacity to care for the child, and could lead to the father discovering the mother’s whereabouts.

#### **4. Advice by family lawyers about outcomes where domestic violence is proved or admitted**

Most family lawyers indicated that even if domestic violence is proved, they would advise the mother to agree to contact, although many of them did focus on the safety and risk aspects of direct contact:

“I’ve had lots of cases which involve domestic violence and often the resident parent, or the victim, will deny contact because they’re concerned about that person’s behaviour. And it can be quite difficult to explain to them, the court always take a view that it’s in the child’s best interests to have a relationship with the other parent, but it has to be safe. I’ve not come across many cases where they have not ordered any contact, to be quite frank, save for a couple.” [Ms C, Solicitor, SE]

A number of respondents indicated that they would advise the mother on the presumption of contact and that if the judge gives an indication that contact should happen:

“it’s usually better for mum to take on board what the judge has said and come to the agreement herself, um, rather than have it imposed upon her, because you can usually put in place safeguarding, um, or

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<sup>69</sup> *Re W (Children)* [2012] EWCA Civ 528 [15] (Black LJ). See also Black LJ in *Re S (A Child)* (n 55)

<sup>70</sup> *Re E (Contact)* [2009] EWCA Civ 1238, [2010] 1 FLR 1738. Although the judge adjourned the final determination of the matter, he expressed the view that the father’s application for contact was almost bound to fail. See also *Re W (Children)* (n 55) [21] (McFarlane LJ), discussed in Chapter 4.

maintain the risk, manage the risk to mum. And it's just explaining to her that we can manage the risk to you, then it is in the best interests of the child to have a relationship with dad." [Ms A2, Solicitor, NW]

Some family lawyers indicated that they would persuade the mother to agree to contact by emphasising the advantages to them of maintaining some control over the outcome since the court will inevitably order contact:

"Just discussing with her what options she would be agreeable to really, and saying to her: look, if you don't agree something, in all likelihood the court will order something if they feel the children and you are safe, so it's better to try and agree something perhaps rather than have something imposed upon you." [Ms D, Solicitor, SE]<sup>71</sup>

Although most family lawyers did not ignore the risk and safety aspects of contact, they indicated that they would focus on 'reassuring' the mother that contact could be managed safely for her and the child, as a further means to persuade her to agree to it. For these lawyers, the mother's fear of the father is seen as an obstacle to overcome to enable contact to happen, rather than a consequence of the coercive control that the father may exercise over her, which illustrates how the theoretical understanding of many family lawyers of the controlling aspects of domestic violence may not translate into practice.

Most of these lawyers were not openly coercive in their advice. However, a few indicated that they would use more forceful strategies such as alluding to the court changing residence, or enforcement proceedings:

"I suppose you'd have to advise her, you know, that the courts with a view [sic] that contact should take place and obviously if she doesn't cooperate with contact orders you're looking at potentially enforcement proceedings, aren't you?" [Mr Z, Solicitor, NW]

It is only in very extreme circumstances that family lawyers would support the mother in opposing direct contact: "I suppose if the domestic violence was so severe it's been witnessed by the child, that child has been harmed emotionally and is at potential risk of serious harm in the future." [Ms C, Solicitor, SE]

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<sup>71</sup> Ms Q [Solicitor, SW] indicated that she would give similar advice.

Family lawyers' reports of the advice they would give to mothers if domestic violence is proven were confirmed by their responses to the final case scenario. The majority of family lawyers<sup>72</sup> said that they would advise the mother to agree to contact, primarily because they did not consider the findings made 'serious enough' to warrant the mother's opposition to contact. Ms F indicated that she would give forceful, almost coercive, advice:

“I would tell her to get real, and start thinking positively, not for her sake but for the child's sake because, from experience, this can backfire in later life and the child could turn on her and it has happened...and it is always a problem, that if this continues, this situation continues, then residence may be in question.” [Ms F, Barrister, SE]

The remaining family lawyers from this group indicated various strategies that they would use to persuade mothers to agree to contact. Most would point to the likelihood or inevitability of the court ordering some direct contact, emphasising to the mother that her most 'serious' allegations were not proved, and downplaying or minimising the findings that *were* made. Clearly, they perceived the father's behaviour in the final case scenario to be too low down the scale to warrant the mother's opposition to contact. Ms E, for example, said that as the findings made were "less than" those alleged, less weight would be placed on them and "so I'd probably say to her that contact is probably likely to be ordered, if it's verbal, pushing and shoving during arguments while under drink, and hit her once a long time ago." [Ms E, Barrister, London] Although some family lawyers did point out that the court would be likely to take "a dim view" of the father not accepting the findings, they would explain to the mother that this would be unlikely to prevent the court ordering contact, despite nearly all these family lawyers considering that fathers who do not accept findings made against them pose a high risk.

Family lawyers may also bolster their advice with their own understandings of children's psychological welfare:

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<sup>72</sup> N = 13

“The mother’s got to be aware that even with findings having been made, there is still a rationale for the children to grow up with a knowledge of their paternal family...so yes, I mean, the findings, as we know, are not necessarily the be all and the end all in terms of the relationship if the children have enjoyed contact with him.” [Mr R, Solicitor, NE]<sup>73</sup>

A minority of family lawyers focused on the father’s conduct and on the steps that he should take, seeing the findings that *had* been made as serious and the mother’s fear of the father as ‘justified’.<sup>74</sup> These respondents indicated that they would advise the mother that the father should either have a risk assessment and/or attend a perpetrator programme, including “an assessment of the impact upon mum if she is saying that she continues to be frightened and how that would affect her parenting.” [Ms K, Solicitor, NE] However, Ms K remarked rather despondently that “that has never really been an argument here... I mean, we’ve won cases before where we’ve said mum remains so scared that it’s going to impact on her parenting and her ability but I don’t think the judges have had a lot of sympathy for that argument.”

Two family lawyers, Ms D [Solicitor, SE] and Ms P [Barrister, SW], when speaking in general terms, had made it very clear that they would never advise or coerce a client to agree to contact where there is a history of domestic violence. Yet in relation to the final case scenario, both Ms D and Ms P indicated that they would advise the mother that the court would expect contact to take place and that she would therefore be better off agreeing to it.

Only three family lawyers, all solicitors, indicated that they would *not* try to persuade the mother to agree to contact.<sup>75</sup> Ms L’s view was that the father has “a mountain to climb” because he is not accepting the findings: “Certainly that’s the approach the court should take, so that’s the advice you’d give her.” [Ms L, Solicitor, SW] Ms B said that she would advise the mother that although it was

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<sup>73</sup> See also Ms F [Barrister, SE] above.

<sup>74</sup> Ms K [Solicitor, NE], Ms A3 [Barrister, London], Ms B [Solicitor, London]

<sup>75</sup> Ms A1 [Solicitor, NW], Ms L [Solicitor, SW], Ms B [Solicitor, London]

not a completely positive outcome, she would not push the mother to agree to contact:

“But I wouldn’t say: well now, there’ve been only half the findings been made, you’ve got to allow contact, I would never push someone into agreeing contact when it didn’t seem, when they thought they were at risk or the children were at risk.” [Ms B, Solicitor, London]

## 5. Orders when findings of domestic violence are made

Current court statistics reveal that, despite the prevalence of domestic violence in contact proceedings,<sup>76</sup> orders for no contact, or refusals of contact applications, are extremely rare.<sup>77</sup> In none of the cases in which the women interviewed by Coy et al were involved were orders for ‘no contact’ made.<sup>78</sup> Similarly most respondents to Hunter and Barnett’s survey agreed that orders for no contact are rarely made; the most common orders following findings of fact were supervised contact,<sup>79</sup> indirect contact,<sup>80</sup> or supported contact.<sup>81</sup> The reported cases demonstrate that even where findings of domestic violence are made, the lower courts may order direct contact against the wishes of the mother, or a less restrictive form of contact than that proposed or agreed to by the mother.<sup>82</sup>

It was not surprising, therefore, that many interview respondents indicated that, even where domestic violence is proved, this ‘hardly ever’ or ‘very rarely’ results in no direct contact. The majority of respondents considered that the court in the final case scenario would order some direct contact, if not immediately, but at some stage thereafter. “More often than not, even when findings have been made, contact will eventually be ordered either as supported/supervised, and then eventually unsupported.” [Ms E, Barrister, London] Indeed, Ms E had never

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<sup>76</sup> As discussed in Chapter 3, domestic violence may be prevalent in at least 70 per cent of contact cases. Ms U [FCA, NW] and Ms N [FCA, SW] both said that “most” and “a lot” of their private law cases involve domestic violence.

<sup>77</sup> Ministry of Justice, *Judicial and Court Statistics 2011* (Ministry of Justice 2012), which reveals that in 2011 less than 0.3% of applications for contact orders were refused by courts.

<sup>78</sup> Coy et al (n 5)

<sup>79</sup> Hunter and Barnett (n 6) 70 per cent quite or very often

<sup>80</sup> *ibid* 59 per cent quite or very often

<sup>81</sup> *ibid* 58 per cent quite or very often

<sup>82</sup> See, eg, *Re A (Residence Order)* [2009] EWCA Civ 1141, [2010] 1 FLR 1084; *Re W (Children)* (n 69); *Re S (A Child)* (n 55)

encountered a case recently where the court ordered indirect contact only after a fact-finding hearing.

“Many relationships have domestic violence in them but only a fraction of contact cases fail...When you look at how bloody awful some of our cases are and the experiences of the children, it’s remarkable how few cases no contact is ordered. It is remarkable given we deal with the toughest ten per cent of cases where relationships break down and there are children.” [Mr J, FCA, NE]

Despite these views and the continuing decline in the numbers of applications for contact that are refused, a significant minority of respondents<sup>83</sup> thought that the Practice Direction *has* had an effect on courts’ decisions on contact where domestic violence is found to have occurred.

“I think even with the guidance we haven’t reverted to a position where the judge has said: alright, there has been domestic violence but I still want contact to be established at this first hearing. They have been at least prepared to allow a Section 7 report to look at the issues and thereafter for there to be a hearing. Whereas possibly previously a judge would be saying: well, alright, there has been domestic violence but I still want something to be set up now.” [Ms K, Solicitor, NE]

All three solicitors based in the North West said that courts are less likely to order contact where findings of domestic violence have been made, and Ms A1 [Solicitor, NW] said that courts focus more on how contact can be made safe for the child. The four Cafcass officers who shared this view indicated that courts are now more “wary” or “cautious” and have a greater awareness of the issues involved.

“I think in cases where we’ve actually said: this really is too dangerous to proceed, I think I don’t feel so nervous I suppose these days about saying: no, I think there should be no contact, I think I feel more secure in doing that than perhaps I did a few years ago.” [Ms O, FCA, SW]

On the other hand, seven family lawyers thought that the Practice Direction has had no real effect on outcomes, although they approached this from different

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<sup>83</sup> N = 11



perspectives. Ms G [Barrister, SE] and Ms M [Barrister, SW] thought that judges have always considered domestic violence to be an important factor, while the remaining participants thought that domestic violence continues to be given a low priority. Ms B [Solicitor, London] considered that it is debatable whether outcomes have been affected by the Practice Direction because “it might well be the same outcome but a different way of getting there,” while Ms L thought that the courts “pay lip service” to the Practice Direction, and unless a Cafcass report makes very clear recommendations, “it’s quite difficult to persuade the court that they should limit contact.” [Ms L, Solicitor, SW]

Ms D approached this issue from the father’s perspective. She thought that the Practice Direction has had no impact on how courts determine contact, but that it has lengthened the process, thereby delaying contact for fathers: “Because it drags it out longer for mum and for dad where he should be having some contact, he’s not having contact for a significant period.” [Ms D, Solicitor, SE]

The lack of impact of the Practice Direction on the lower courts is demonstrated by the case of *Re W (Children)*<sup>84</sup> where the father, who was having contact in a contact centre, sought unsupervised contact. Findings of violence were made against him but the judge permitted the father to take the children out of the contact centre during contact visits, describing the findings “as serious but not so serious that there should not be any contact at all”.<sup>85</sup> Black LJ allowed the mother’s appeal and was highly critical of the trial judge for ordering unsupervised contact without a Cafcass or expert’s report, and discredited the judge’s evaluation of the seriousness of the findings.

The factors most commonly cited by the majority of family lawyers<sup>86</sup> that would militate against the court ordering direct contact are the severity of the violence and/or how ‘historic’ it is, so that only ‘recent’, extremely serious physical violence would lead to no contact being ordered.<sup>87</sup> Domestic violence that is

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<sup>84</sup> *Re W (Children)* (n 69)

<sup>85</sup> *ibid* [17] (Black LJ)

<sup>86</sup> N = 13

<sup>87</sup> These views are supported by the case law. See, eg, *Re J (A Child)* (n 51); *Re E (Contact)* (n 70); *Re W (Children)* (n 55)

considered to be “minor” or even in the “mid bracket” is not considered sufficient.<sup>88</sup> Additionally, the perpetrator’s failure to admit the violence or accept the findings was also cited as a factor that may persuade the court not to order any direct contact, although if the violence is not considered serious enough, such failure may not, in itself, be seen as a good enough reason.

The examples provided by respondents of cases where no direct contact was ordered by the court demonstrate the extreme circumstances where this might happen.

“I’ve had one recently where there has been a psychological assessment which says that he is quite dangerous and if there was to be even supervised contact, then if he was to be challenged in any way he could become quite violent. Um, so at the moment he’s having indirect contact where he’s been, the contents of his letters are inappropriate and they’re having to go through Cafcass, so it looks as though that’s going to be stopping as well.” [Ms C, Solicitor, SE]

“I had one case in xxx FPC at xxx where the...domestic violence was really at the most serious end I’ve ever seen. A broken jaw, two convictions for ABH, she was hospitalised whilst pregnant, in front of the children, you know, everything under the sun, and it was, um, obviously proved...but I completely expect dad not to get any direct contact because mother is terrified of him and it was visible in court, she couldn’t even barely speak when he’s there. He denies all of them so his risk is obviously high...I think that’s the sort of case where...it becomes a no direct contact case.” [Ms E, Barrister, London]

Ms S [Barrister, NW] gave an example of a case of extremely serious violence, including attempted rape and murder. The children were present when the mother was very seriously injured, and the judge ordered indirect contact only. However, it was concerning to hear Ms S report that she anticipated that “there will be direct contact in due course” because the children had a “very positive relationship” with the father, albeit “in a very disturbed way”.

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<sup>88</sup> Ms G [Barrister, SE]

These responses suggest that professionals perceive an ‘acceptable’ level of domestic violence which mothers and children should tolerate in the interests of promoting contact with fathers. This was implicitly recognised by Ms O:

“You may get a few solicitors that argue and say: oh, but it was only a bit of a slap or something. I think in general I think the courts accept that if we’ve said that this indicates there’s *a level of violence here that is unacceptable* then they would ask for further assessment and I don’t think they’ll get any further.” [Ms O, FCA, SW]

However, the level of abuse that mothers and children may be expected to tolerate because of the importance placed on contact can be seen in those cases where trial judges have made findings of severe physical violence and refused to order any direct contact but their orders have been overturned or modified on appeal.<sup>89</sup> These cases reveal the unrelenting messages from the appellate courts about the importance of persevering with contact, even in cases of proven domestic violence. In *Re P (Children)* Ward LJ concluded that contact should not be stopped unless it is the last resort for the judge, and allowed the father’s appeal, expressing concern that the trial judge had not “grappled with all the alternatives that were open to him” to enable contact to be resumed.<sup>90</sup>

A similar reluctance to ‘give up on’ contact was also demonstrated by some of the participants in this study. Ms M gave an example of a father she was representing at the time who was considered so dangerous that all his contact had to be fully supervised. He had a “history of significant offending” and was “a very, very aggressive man”.

“And he desperately wants to see his child and that is genuine, but the issue really is that actually he poses quite a significant risk to, to women in general, so the question is: what do we do from here?” [Ms M, Barrister, SW]

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<sup>89</sup> See *Re M (Children)* (n 55); *Re G (Restricting Contact)* [2010] EWCA Civ 470, [2010] 2 FLR 692; *Re K (Appeal: Contact)* [2010] EWCA Civ 1365, [2011] 1 FLR 1592; *Re W (Direct Contact)* (n 64)

<sup>90</sup> *Re P (Children)* (n 55) [36] (Ward LJ). See also *Re W (Direct Contact)* (n 64) [76] (McFarlane LJ)

One may query why it was considered beneficial to the child to have contact with a father who would require fully supervised contact indefinitely.

Ms I gave an example of a case that had been ongoing for three years before she became involved, in which the father had a problem with drugs and had been violent towards the mother, had failed to undertake drug testing or engage with the DVIP, and had not turned up for supervised contact. Ms I wrote to the court and said:

“Basically enough’s enough here, dad’s had ample opportunity in three years of his application which is publicly funded...I asked the court to withdraw the contact, to leave it indirect...and I go into the court and he says: Mrs I, I agree entirely with you.” [Ms I, FCA, NE]

The fact that the case had been ongoing for three years despite the father’s failure to engage at all gives an indication of the lengths to which the courts will go to promote contact, however reprehensible the father’s conduct, and however uncommitted he may be.

The age of the child and his/her wishes and feelings were cited by only three respondents<sup>91</sup> as factors that may affect the court’s decision when findings of violence have been made. While Mr R [Solicitor, NE] thought that “if they are nine or ten and have very clear recollections of mummy being beaten up then he may well have cooked his goose and it may be indirect contact”, Ms F [Barrister, SE] thought that a child’s wish to see a violent father could tip the balance the other way.

Four family lawyers said that the final order of the court after findings have been made would also depend on “what contact was happening” at the time of the hearing. If, therefore, some direct contact was established prior to the fact-finding hearing, it is unlikely that the findings would lead to that being stopped or even curtailed.

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<sup>91</sup> Two family lawyers and an FCA

The majority of family lawyers either approved of courts ordering direct contact after findings of fact have been made, or did not express a view on this. However, most of the Cafcass officers expressed concern about this, as did a minority of family lawyers.<sup>92</sup> Ms B half-jokingly observed that she has encountered some cases where the court ordered staying contact following findings of domestic violence being made.

What emerged from many of the responses was the incremental way in which contact ‘progresses’ and a fatalistic attitude towards the inevitability of contact being ordered. Ms E explained that contact would typically start as either supported or supervised and then eventually progress to unsupported which led her to query the purpose of fact-finding hearings:

“Because you go through all of that three days of evidence and so forth, and then the most likely outcome is that they order contact anyway, in a contact centre, supervised or supported, depending on what facilities are available.” [Ms E, barrister, London]

Ms P gave an example of a case of ‘historic’ domestic violence where contact was already taking place in a supported contact centre and after the findings the judge directed it to take place unsupervised because the contact had “moved on” by then.

“And I think that’s one of the problems in this sort of scenario is that by the time you get to the final hearing you’ve generally moved beyond the point that you started at, where there was a massive dispute...you’ve had quite a lot of professional input from Cafcass so the parties’ views then may be softened, there has mainly been a bit of insight into the other or they’ve learnt how to play the game, you know...you get to the point where it doesn’t make a huge amount of difference and it’s sort of inevitable that the contact is going to move on.” [Ms P, Barrister, SW]

The majority of Cafcass officers interviewed<sup>93</sup> reported that courts do generally follow their recommendations if findings of domestic violence are made:

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<sup>92</sup> Ms K [Solicitor, NE], Ms L [Solicitor, SW] and Ms B [Solicitor, London]

<sup>93</sup> N = 9

“I’ve never had a judge in either court turn round and say: oh, the Cafcass officer’s going a bit over the top here, isn’t she? You know, I’ve never had that. Certainly my personal relationship with the judges is very good and they will go along with what I’m recommending, what risks I’m identifying.” [Ms H, FCA, SE]

Ms N observed that if she recommends no direct contact, courts would follow that recommendation if she is very clear: “They would normally listen to us, I think, if we go very clear. If we go all woolly then they’re not going to listen to us, are they?” [Ms N, FCA, SW]<sup>94</sup>

Only Ms I remarked, rather, gloomily, that many judges do not even read Cafcass reports let alone follow their recommendations:

“You’ve got the family court adviser’s report. ‘Have I? Oh, I must have mislaid that.’ That happens. That happens so many times. And they don’t read them and I find that. Because then I feel they’ve got their views on what they’ve heard without looking at what I’ve got.” [Ms I, FCA, NE]

Since orders for no contact following findings of domestic violence are so rare, these views suggest that it must be unusual for a Cafcass officer to recommend no direct contact, and that they, too, are reserving such recommendations for the most ‘serious’ cases and/or where the father refuses to accept the findings made. Some support for this proposition was provided by Ms I [FCA, NE], a very experienced Cafcass officer, who said that she had only twice ever recommended no contact at all between the child and non-resident parent.

## **6. Ensuring safety if final orders for contact are made**

The majority of family lawyers and Cafcass officers thought that the most likely type of contact that the court would order following the making of findings would be supervised or supported contact, depending on the severity of the findings, with a slight preference for supervised contact.

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<sup>94</sup> Similar sentiments were expressed by Ms X [FCA, London]. Two family lawyers supported these views and observed that it is difficult to argue against a recommendation in a Cafcass report.

“I think it depends on the severity...If it’s in that mid-bracket, they may be looking at supervised contact, they may be looking at some sort of therapy, involving the child and the absent parent meeting...and then Cafcass becoming involved to do the reintroduction, to manage it.” [Ms G, Barrister, SE]

Whether such an order is safe and appropriate depends, of course, on what professionals and courts consider to be “mid bracket” domestic violence. Clearly Ms G did not think that the father’s conduct in the final case scenario fell within this category as she suggested that his contact would eventually move on to being unsupervised. Ms M [Barrister, SW] thought that, if the findings were of “minor” domestic violence, such as “pushing and shoving”, the court would be likely to order contact straight away.

In relation to the final case scenario, most family lawyers suggested that the court would be likely to order supervised or supported contact, although two thought it would probably progress more “slowly” or infrequently than if no findings of domestic violence had been made.<sup>95</sup>

“The court here, sadly, probably still supported contact, notwithstanding that the father doesn’t accept the findings because of this, you know, the underlying principle that the child has a right to have a relationship with the parents and the judge might well think: well,...I haven’t been persuaded that the mother’s proven all her allegations, um, whether that’s the right approach, you know, that’s another matter.” [Ms L, Solicitor, SW]

However, all respondents who commented on the issue of the availability of supervised and supported contact centres reported severe resource limitations, particularly for fully supervised contact but also, in many areas, for supported centres.<sup>96</sup> Large tracts of the South West, particularly rural areas, appeared to be completely bereft of any contact centres: “We have a dearth of supervised and supported contact and at the moment [the agency running the contact centres has] gone bust so there’s absolutely none whatsoever.” [Ms Q, Solicitor, SW]

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<sup>95</sup> Ms A [Solicitor, London] and Ms A3 [Barrister, London]

<sup>96</sup> Similar findings were made by Hunter and Barnett (n 6)

Six respondents commented on the very long waiting lists for supported, as well as supervised, contact; waiting lists of up to six months for supported contact were not uncommon. While supported contact may be free of charge, the cost of supervised contact, where it is available, appears to be prohibitive for the vast majority of families.<sup>97</sup> Six respondents said that Cafcass may have funding for blocks of six contact sessions as part of a contact activity, but this appears to be patchy and depend on local resources. Four family lawyers commented that judges may order supported contact, even where supervised contact is considered necessary, because of the lack of facilities for supervised contact, as “the next best thing”,<sup>98</sup> and even if supervised contact is directed, in reality it would end up at a supported contact centre because of the lack of available facilities and funding for supervised contact.

Eight family lawyers<sup>99</sup> but only one Cafcass officer<sup>100</sup> thought that supervised or supported contact centres *do* provide ‘safe’ contact in circumstances of domestic violence, with a slight preference for supervised contact, particularly if there is a risk to the child. However, a small minority of family lawyers but most Cafcass officers expressed concern about the safety of contact at a contact centre. Ms H [FCA, SE] and Mr V [FCA, NW] said that they would never recommend a supported contact centre for domestic violence cases,<sup>101</sup> and Ms I [FCA, NE] expressed great concern about the fact that supported contact centres do not monitor what the father may say to the child.

The unsuitability of even supervised contact in some cases of domestic violence was highlighted by Black LJ in *Re S (A Child)*,<sup>102</sup> where the trial judge made serious findings against the father of violence towards the mother and an older child, and of neglectful behaviour towards the subject child. Against the advice of a Cafcass officer, the judge ordered direct supervised contact on the basis that

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<sup>97</sup> Ms M [Barrister, SW] reported that one supported contact centre charges £30.00, which may be outside many people’s reach.

<sup>98</sup> Ms E [Barrister, London]

<sup>99</sup> Barristers = 3; Solicitors = 5

<sup>100</sup> Ms U [FCA, NW]

<sup>101</sup> Ms H qualified this by saying that she would never recommend supported contact centres in cases of “serious” domestic violence. Ms A3 [Barrister, London] also queried whether supported contact centres are appropriate in cases of “serious” domestic violence.

<sup>102</sup> *Re S (A Child)* (n 55)



there would be no risk of physical harm to the child. Black LJ allowed the mother's appeal, noting that the Cafcass officer's anxiety "was not confined to physical violence...but related to emotional damage that she considered could occur because of the mother's reaction to the contact starting and the father's attitude to the mother in the contact that he had with his daughter."<sup>103</sup>

A further problem with contact centres expressed by some participants is that they only provide temporary assistance:

"But that is very difficult because I think the message that the victim is receiving is that it's only a matter of time before that contact's going to progress into possibly unsupervised contact. And then how is it managed? Because by that time, often, it is out of the court arena, isn't it?...Because, you know, how someone behaves in a supervised setting where there are rules and how someone is going to behave on a doorstep when the case is closed effectively." [Ms K, Solicitor, NE]<sup>104</sup>

Seven respondents reported that courts may require Cafcass officers to supervise contact in the absence of any contact centre provision, although Ms N expressed concern about the pressure on Cafcass to supervise or observe contact:

"I think there is going to be more pressure on us and in recent times, because we've not been able to recommend any supervised contact because we haven't had anyone to recommend, and so: will Cafcass undertake the supervising? No, we haven't got time to do that!" [Ms N, FCA, SW]<sup>105</sup>

In the absence of formally supported or supervised contact, the most common 'safety' measures that appear to be recommended by Cafcass officers and directed by courts are supervision by family members, or contact 'handovers' being 'staggered' or managed by family or friends so that the parents do not need to come into contact with each other.<sup>106</sup>

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<sup>103</sup> *ibid* [33] (Black LJ)

<sup>104</sup> Ms T [Barrister, NW] and Ms D [Solicitor, SE] expressed similar views, and Ms X [FCA, London] said she would never recommend a contact centre if domestic violence has occurred for this reason.

<sup>105</sup> These sentiments were echoed by Ms P [Barrister, SW] and Ms C [Solicitor, SE]

<sup>106</sup> For similar findings see Coy et al (n 5). Nearly three quarters of the women reported that their concerns about safety did not lead to any restrictions or conditions placed on contact. Almost all

Six family lawyers<sup>107</sup> and two Cafcass officers thought that ‘third party handovers’ are a helpful safeguarding measure. However, Ms B expressed concern about the use of family members for contact handovers because “they could use that to follow the person and find out where they are.” [Ms B, Solicitor, London]

Another popular ‘safety’ measure suggested by Cafcass officers as well as family lawyers was contact or handovers taking place in a “public place” or a “neutral venue” such as McDonalds, supermarket car parks or outside a police station.<sup>108</sup> The various ‘safety’ measures that courts may consider in order to ensure that some contact takes place after findings of domestic violence have been made were summed up by Ms D:

“I think if they can order direct contact in a safe environment that they would. Um, I think certainly they would prefer some form of contact to go ahead than nothing at all. Whether that be through a contact centre or, you know, meeting outside the police station, outside Tesco’s, so that, you know, there’s cameras about and people about so that they don’t see each other. Or the involvement of a friend or family, just to get some form of contact going, really. But they would, you know, take into account that there has been violence in trying to do it in a safe way.” [Ms D, Solicitor, SE]

Ms D even suggested that the mother may supervise contact in somewhere like a children’s adventure playground: “so mum goes and sits by the tea and coffee things so that she’s in the building but dad goes off and plays with the child in the soft toy area or whatever, so that they’re in the same building in a secure environment.” [Ms D, Solicitor, SE] This cosy picture, underpinned by images of ‘safe family men’, sits uneasily with the violent behaviour that these measures are intended to address.

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the women relied on family and friends for handover arrangements and some women felt compelled to supervise contact themselves. While supervised contact was considered by women as the safest form of direct contact, this was rarely ordered.

<sup>107</sup> Barristers = 3, Solicitors = 3

<sup>108</sup> Mr V [FCA, NW], who thought that supported contact was “too risky”, suggested a supermarket car park with CCTV for the mother in the final case scenario, and observed that this is fairly common.

The problems inherent in using a ‘public place’ for contact or handovers were highlighted by Ms N and Ms B. Ms N [FCA, SW] spoke about a case where she stopped an arrangement for the parents to meet in a car park: “you know, park next to each other, but things still happen.”

“I had a client beaten up at the bus stop down the road so, you know, in front of loads of people, and they continuing contact now anyway...and they’re just thinking: well, what other option do we have? And there are no other options, I suppose.” [Ms B, Solicitor, London]

Other suggested safeguarding measures included: keeping the mother and child’s address and school confidential; conditions on contact and on communication between the parents; prohibited steps orders to prevent the father removing or not returning the child; undertakings or injunctions; “keep safe” work with the mother and child; and support for the mother from domestic violence agencies. Four family lawyers suggested Parenting Information Programmes [‘PIPs’] as a safeguarding measure and Ms U [FCA, NW] even suggested mediation as a “helpful” intervention following a fact-finding hearing. Ms F [Barrister, SE] thought that Family Assistance Orders may be helpful – “they can move mountains.”

Six family lawyers<sup>109</sup> expressed the view that the best way to address risk and safety is for the perpetrator to take steps to become safe by “addressing his behaviour”, accepting he has “done wrong” and “taking steps to change”. Ms Y [FCA, London] and Ms B observed that at the end of the day, contact may never be made completely safe:

“And I think that if you get to the end of contact proceedings and there has been violence found really the only really safe thing is for the perpetrator to have gone through DVIP to the point where they’ve completely addressed all of their issues, which, well, you never know whether that’s forever anyway, or for there to be no contact...I think there are some times where I definitely think that there’s no way that anything ordered would ever be safe contact.” [Ms B, Solicitor, London]

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<sup>109</sup> Barristers = 2; Solicitors = 4

Ms P pointed out that a “one size fits all” approach will not necessarily address risk and safety:

“Because it can be, you know, it can be quite low level violence but high level emotional control and the safeguards are different for each different scenario...I think with a lot of clients it’s not about what dads are going to necessarily do, it’s about what they’re going to say, how they’re going to say it, and just the way that they handle the children, whether there’s going to be favouritism, it’s all that kind of stuff.” [Ms P, Barrister, SW]

Hunter and Barnett<sup>110</sup> observe that the literature on contact arrangements where domestic violence has occurred suggests that different contact arrangements are appropriate depending on the level of risk, ranging from no direct contact with a very high risk parent, to supervised handover arrangements where parents should not come into contact with each other.<sup>111</sup> The responses of professionals participating in this study, and of the participants in Coy et al’s research suggest, however, that unsafe strategies may be used even in ‘medium’ and ‘high risk’ cases because of the absence of appropriate resources for safeguarding women and children, and/or because the violence is minimised by courts and professionals.

## **7. DVPPs and other interventions for perpetrators**

Women and family lawyers participating in Coy et al’s research reported that few Cafcass officers or social workers had any awareness of, or recommended domestic violence perpetrator programmes for fathers who were found to be violent.<sup>112</sup> In several cases, interventions such as anger management, couples counselling and parenting programmes were recommended, which clearly are not appropriate in cases of domestic violence. Similarly research by Hunter and Barnett<sup>113</sup> found that the most common form of service/assessment following

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<sup>110</sup> Hunter and Barnett (n 6)

<sup>111</sup> See Chris Newman, *Expert Domestic Violence Risk Assessments in the Family Courts* (Respect 2010), [www.respect.uk.net/data/files/domestic\\_violence\\_risk\\_assessment\\_in\\_family\\_court.pdf](http://www.respect.uk.net/data/files/domestic_violence_risk_assessment_in_family_court.pdf), last accessed 03.02.13

<sup>112</sup> Coy et al (n 5)

<sup>113</sup> Hunter and Barnett (n 6)

admissions or findings of domestic violence was referral to anger management programmes;<sup>114</sup> referral to a DVPP was considerably less likely to happen.<sup>115</sup>

It was therefore surprising to find that the majority of family lawyers participating in this study reported that judges and family magistrates would usually or often require the perpetrator to attend a DVPP if facilities and funding are available.<sup>116</sup> However, both solicitors from the South East reported that they had never encountered a court requiring a perpetrator to attend a DVPP,<sup>117</sup> and Ms A [Solicitor, London] said that she had only experienced this once. Four respondents indicated that it would depend on the particular judge as to whether or not the father was required to attend a DVPP. Ms E [Barrister, London] reported that the PRFD and Inner London FPC routinely refer perpetrators to the DVIP but that this is not court-wide practice, and she has never experienced a referral to a DVPP in two county courts in Essex that she frequently attends.

Similarly the majority of Cafcass officers reported that if domestic violence was proved or admitted, they would recommend that the perpetrator attend a DVPP.<sup>118</sup> Ms H reported that in her area of the South East, a DVPP had been established for the first time and was very enthusiastic about it:

“The classic one which is fantastic because we’ve now got this resource, this Domestic Violence Perpetrator Programme which we’ve been, you know, crying out for years. Because it’s always that dilemma I had as a Cafcass officer: what do you do with this man? So there’s this great programme...and they’re brilliant.” [Ms H, FCA, SE]<sup>119</sup>

Provision of DVPP resources and, in particular, funding for perpetrators to attend programmes, appeared to be very patchy and problematic, so that in many

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<sup>114</sup> *ibid* 49.1 per cent ‘quite often’ or ‘very often’

<sup>115</sup> *ibid* 35 per cent ‘quite often’ or ‘very often’

<sup>116</sup> N = 10. Three family lawyers observed that referral to a DVPP may not be necessary if a perpetrator has attended or is attending an IDAP programme, which is a DVPP that convicted perpetrators are usually required to attend as part of their sentence.

<sup>117</sup> As discussed below, this may have been because a DVPP provider had only just been established in their area at the time of the interviews.

<sup>118</sup> N = 7

<sup>119</sup> The willingness of Cafcass officers to recommend DVPPs for perpetrators was confirmed by four family lawyers.

instances, referral of a perpetrator to a DVPP may be more of an aspiration than a reality.<sup>120</sup> In some areas, such as the South East and the North East, DVPPs appear to be available, while Devon and the North West were reported to be ‘bereft’ of such services, with no funding for the few resources available. While in theory the DVIP offers a programme for perpetrators in London, all respondents based in London reported that neither Cafcass nor the Legal Services Commission<sup>121</sup> would fund it. Similarly, even in those areas where providers are available, most respondents reported difficulties with funding for perpetrators as well as for the programme providers. Many respondents also reported long waiting lists.<sup>122</sup>

Lack of availability of resources alone does not explain the low rate of attendance by perpetrators; it is likely that when some family lawyers referred to fathers attending DVPPs, they were actually referring to anger management. This is because a significant minority of family lawyers<sup>123</sup> and a small minority of Cafcass officers interviewed used the terms ‘anger management courses’ and ‘DVPPs’ interchangeably, not appearing to understand the differences between them. Ms F, for example, when asked whether courts are willing to refer perpetrators to DVPPs, responded: “Yes, anger management.” [Ms F, Barrister, SE] Similarly Ms L [Solicitor, SW] and Ms D [Solicitor, SE] commented that the father in the final case scenario should be required to go on an anger management course, but used the term interchangeably with a DVPP. This is not surprising, since the reported cases suggest that some senior judges are similarly confused about the differences between DVPPs and anger management courses.<sup>124</sup>

Additionally, the responses of a few participants suggest that they saw domestic violence as an anger problem and therefore that anger management was the

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<sup>120</sup> Funding for DVPPs should be available because in December 2008 Sections 1 to 5 and Section 8 of the Children and Adoption Act 2006 came into force, which amended Section 11 of the Children Act 1989 to include contact activity directions and conditions. Attendance at a perpetrator programme is included as a contact activity, for which government funding, through Cafcass, was made available.

<sup>121</sup> The Legal Services Commission has now been replaced by the Legal Aid Agency.

<sup>122</sup> Very similar findings were made by Hunter and Barnett (n 6)

<sup>123</sup> N = 6

<sup>124</sup> See *Re P (Children)* (n 55) [36] (Ward LJ); *Re W (Children)* (n 55) [5] (McFarlane LJ)

appropriate intervention, or that a DVPP delivered anger management.

According to Ms M:

“I think the real issue in cases of domestic violence...[is] the courts not providing the assistance to the perpetrator to change and make the changes that are needed...the risk is always that that parent has emotional problems that’s led to his anger management or her anger management and without addressing that root cause, it’s a problem in perpetuity, isn’t it?” [Ms M, Barrister, SW]

Even some senior members of the judiciary appear to consider that anger management is an appropriate intervention for domestic violence perpetrators, or that DVPPs deliver anger management. In *Re C (Domestic Violence: Fact-Finding Hearing)*<sup>125</sup> Thorpe LJ expressed the view that because the father had completed an anger management course, he could not understand why the Cafcass officer wanted the father to attend the DVIP.

“The modules in the DVIP programme include stopping physical violence, emotional abuse, effects of domestic violence on partners and children, responsible parenting, harassment and stalking, sexual abuse, jealousy and tactics of isolation. They may indeed be said to be separate ingredients but obviously the *control of passion* is part and parcel of each programme.”<sup>126</sup>

The appropriateness of anger management to ‘cure’ domestic violence is not a view shared by all the senior judiciary. In *Re Z (Unsupervised Contact: Allegations of Domestic Violence)* [2009]<sup>127</sup> Wall LJ criticised the trial judge for referring to anger management, which, he said, has been discredited in many circles.

Another reason for the low attendance of perpetrators to DVPPs is likely to be the requirement that they admit the violence, accept the findings against them, and want to change. Half of all respondents<sup>128</sup> articulated an awareness of this requirement and of the reasons for it, and a few Cafcass officers said that they

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<sup>125</sup> *Re C (Domestic Violence: Fact-Finding Hearing)* [2009] EWCA Civ 994, [2010] 1 FLR 1728. See also *Re A-T (Children)* (n 55) where the trial judge wanted the father to attend anger management.

<sup>126</sup> *Re C (Domestic Violence: Fact-Finding Hearing)* (n 126) [19] (Thorpe LJ), emphasis added

<sup>127</sup> *Re Z (Unsupervised Contact: Allegations of Domestic Violence)* (n 15)

<sup>128</sup> N = 14 comprising: Family Lawyers = 10; FCAs = 4

would not recommend a perpetrator to a DVPP if they refuse to admit the violence:

“Well, they wouldn’t get onto a programme without there being some acknowledgement as to what has happened otherwise it would be a very short lived programme, wouldn’t it, because the provider would be saying: I can’t get anywhere.” [Ms K, Solicitor, NE]

Only two respondents, both young barristers, did not appear to understand the requirement for perpetrators to acknowledge their abusive behaviour: “Well, I’ve had that in cases, where they don’t acknowledge it, but surely that’s the purpose of the DVIP course, to teach them to acknowledge it, they’re not going to just acknowledge.” [Ms A3, Barrister, London]<sup>129</sup>

Respondents’ views on the format and ‘success’ of DVPPs were mixed. While three participants, all Cafcass officers, thought that the length of the DVPP is appropriate, and understood the reasons for this, four other respondents, including a Cafcass officer, were of the view that the programmes (usually about six to nine months) are “too long.”<sup>130</sup> Ms A [Solicitor, London] gave an example of a case where findings were made against the father and the Cafcass officer recommended that he attend the DVIP, which she thought was “going overboard” because of the length of the programme and the risk, in her view, being “minimal”. Ms A3 [Barrister, London] also thought that DVPP programmes “slow down” the father’s contact unnecessarily.<sup>131</sup> This view suggests a lack of understanding of the purpose and operation of such programmes, which have been carefully developed and validated at their current length, and cannot be curtailed if they are to operate effectively.

Six respondents reported, to varying degrees, that programme outcomes can occasionally be successful. The most optimistic was Ms P: “I’ve had cases where the father has gone off and done a perpetrator’s programme and done

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<sup>129</sup> Similar views were expressed by Ms E [Barrister, London]

<sup>130</sup> DVPP programmes are typically 32 weeks long.

<sup>131</sup> For similar views see Hunter and Barnett (n 6) and *Re C (Domestic Violence: Fact-Finding Hearing)* (n 126) in which Thorpe LJ expressed the view that the 32-week programme run by the DVIP was an unnecessary drain on the public purse. See also *Re P (Children)* (n 55) (Ward LJ).



really well at it, and so he's come out the other side." [Ms P, Barrister, SW] On the other hand, four participants indicated that it is not uncommon for fathers to refuse to attend a DVPP, or if they do agree to undertake one, they commonly 'drop out' and fail to complete it. Ms B reported that she had never encountered any perpetrator completing the whole programme:

"And whether the other party can actually be bothered to stick it out that long and engage if they can, and they admit violence, then it's pretty likely that some contact will be ordered. But quite a lot of people drop out or they just won't admit anything...I've had people drop out at that stage a few times because they just get really angry [laughs]." <sup>132</sup>

Similarly 40 per cent of respondents to Hunter and Barnett's survey confirmed that they had experienced problems with perpetrators not attending or completing DVPPs, which most attributed to the long waiting lists to commence the programmes and the length of the programme itself, expressing some sympathy for the perpetrator in this respect. <sup>133</sup>

Ms C [Solicitor, SE] queried the efficacy of the programmes even if the perpetrator does complete it, commenting, in relation to the IDAP programme, that the outcomes are very negative as most perpetrators do not tend to change. Mr R [Solicitor, NE] went even further and observed that fathers may agree to attend a DVPP to be "mischievous" and/or "go through the motions". Mr R also remarked that frequently fathers "go to one or two sessions but get fed up with it". In those circumstances courts usually allow them the opportunity to go back on the programme. This demonstrates a lack of commitment by the perpetrator and a degree of latitude towards them by courts and professionals. <sup>134</sup>

As far as other interventions for perpetrators are concerned, three family lawyers and two Cafcass officers reported that PIPs may be utilised as interventions for perpetrators, and their responses suggest that this is happening because they are

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<sup>132</sup> Similarly Ms E [Barrister, London] said that she had never had a client who had completed a DVPP and was successfully 'rehabilitated'.

<sup>133</sup> Hunter and Barnett (n 6)

<sup>134</sup> Similar findings were made by Coy et al (n 5). See Hunter and Barnett (n 6) for the various consequences of non-attendance at DVPPs reported by respondents to the survey.

considered an appropriate safeguarding resource, rather than in the absence of anything else: “Yes, it can actually prevent domestic violence I think, post separation, because it’s helping parents establish a way of managing contact in a constructive way without resorting to abusive phone calls.” [Ms H, FCA, SE] It is extremely concerning that PIPs, with their strong pro-contact message, are considered an appropriate resource where domestic violence has occurred.

## **8. Discussion**

Prior to fact-finding hearings, before law has determined ‘the truth’ of the mother’s allegations, it is not known whether the father is a ‘dangerous perpetrator’ or a ‘safe family man’, or whether, if he turns out to be a ‘dangerous perpetrator’, that danger can be reconstructed as a ‘risk’. The mixed approaches of courts and professionals to the issue of interim contact reflect their difficulties in managing this unresolved ‘unknown’.

Since fact-finding hearings appear to be held only in the most ‘serious’ cases of recent, severe physical violence, particularly where there is no ongoing contact between the father and child, these findings indicate that in those cases where interim direct contact is ordered against the wishes of the mother, the presumed benefits of contact are considered to be more important than all other considerations, including the factors that courts are obliged to consider under the Practice Direction. Additionally, it would seem that courts are most likely to resolve the problem posed by the father’s as yet undetermined status by relying on the ‘status quo’, rather than the alleged violence. Ironically, therefore, if the ‘good mother’ permits the father to have contact, despite his violence, she may be penalised for this at the point when she wants the court and professionals to protect her and the child.

The preference of courts and professionals for contact centres as the solution to the ‘problem’ of interim contact suggests that the main perceived threat to the child and mother is from the father’s physical violence. Those professionals, particularly Cafcass officers and a few family lawyers, who understand the broader implications of contact between children and abusive fathers, did not

consider contact centres, particularly those offering supported contact, to be a safe or appropriate option for interim contact.

While a small minority of family lawyers (primarily solicitors) would strongly support mothers who oppose direct contact pending fact-finding hearings, most barristers but fewer solicitors appear to start from the premise that some direct contact will and should take place, and would not even attempt to argue a case for no interim direct contact, unless the mother is particularly ‘adamant’. So mothers may have to be very forceful and tenacious to resist the pressure from their own representatives. It is likely, however, that most of those family lawyers who indicated that they would advise mothers to agree to interim direct contact may not have appreciated how coercive their well-intended ‘advice’ could be.

The greatest concern about interim contact was expressed by Cafcass officers, who were particularly worried about arrangements being agreed and orders made in their absence or without their knowledge. The extreme circumstances of the examples of cases given by Cafcass officers where they felt compelled to intervene and reverse interim orders made, indicates not only the highly dangerous contact that courts may order but also the strength of the presumption of contact.

If domestic violence is proved at the fact-finding hearing (which appears to be the most likely outcome in the majority of cases), it would seem that the ‘risk’ posed by the father is most frequently determined by his ability to accept the findings made against him. The responses of participants to this study suggest that most fathers refuse to accept the findings and that they consider these fathers to be ‘in denial’ and therefore that law has determined ‘the truth’. Yet rarely are perpetrators held responsible for the need to hold fact-finding hearings; nor do these views seem to affect the firm belief of many of these respondents in the theoretical benefits to children of contact with non-resident fathers, including those who have perpetrated domestic violence. Additionally, these views suggest that most fathers against whom findings are made are ‘high risk’ (because they will not accept the findings), yet direct contact is the most likely outcome in such

cases. It would therefore seem that the bar for unacceptable risk is set extremely high.

However, the Practice Direction requires courts to assess the overall effects and merits of contact between children and violent parents, not simply whether the 'risk' can be managed and 'made safe'. The extent to which courts apply Paragraph 27 can have a profound impact on the orders made where domestic violence has occurred and in particular, on the extent to which courts are prepared to order no contact. Participants' responses, together with the case law, suggest that this enquiry may be underpinned by images of 'safe family men' and that many judges may lack awareness of the manipulative strategies of abusive men, so that they may be reluctant to accept that an abusive father is motivated by anything other than a desire to see the child. Furthermore, in the absence of Cafcass or 'expert' reports addressing the factors set out in Paragraph 27 of the Practice Direction, judges and professionals may ignore those factors and focus only on the immediate risk of further physical violence. Alternatively, judges may draw on their own impressions of parents in the witness box which, the case law suggests, may be filtered through images of implacably hostile mothers. On the other hand, the interviews and case law suggest that those judges and Cafcass officers who understand the coercively controlling nature of domestic violence and/or its effects on women and children are more likely to undertake the broader assessment required by Paragraph 27, and that their decisions and recommendations are more likely to reflect this.

The case law reveals opposing and contradictory tensions in the making of contact orders where domestic violence has been proved or admitted. While some courts appear willing to order no contact if the findings are considered sufficiently 'serious' and in particular, if the father refuses to accept the findings, other courts seem to find it difficult to envisage cases where domestic violence would constitute a 'bar' to contact, or do not consider the violence sufficiently 'serious' to warrant the type of restrictions proposed by the mother. Additionally, while the orders made by some judges reflect the considerable importance they have placed on the effect of the violence on the mother and on her ability to cope with contact, other courts ignore the impact of the violence in favour of the

perceived importance of contact.<sup>135</sup> These ambivalent approaches to the making of contact orders when domestic violence has occurred reflect the tensions between the ‘presumption of contact’ and the increased pressure put on trial judges by the Practice Direction and by some Court of Appeal decisions to take domestic violence seriously.

The interviews, and current statistics and research, all demonstrate, however, that even where domestic violence is found, some form of direct contact is almost always ordered, even if this is opposed by the mother. This suggests that most judicial officers consider the father’s conduct and its consequences to be less important than the presumed benefits of contact, so that women may experience enormous difficulty resisting orders for direct contact even where findings of domestic violence have been made. As Ms B [Solicitor, London] wryly observed: “I think the best chance of not getting any contact is by the non-resident parent getting angry and just giving up.”

If the court concludes, after findings have been made, that the child should have direct contact with the perpetrator, the Practice Direction requires the safety of the child and resident parent to be safeguarded.<sup>136</sup> It appears, however, that in the absence of resources for supervised or supported contact, courts and professionals may settle for what they see as the ‘next best thing’ rather than accept that no direct contact should take place, which may mean the nebulous support of family or friends, or mothers being left to fend for themselves in ‘public places’.

The very high rate at which contact is ordered with violent fathers may also be due to the way in which mothers are advised and represented in contact proceedings. Most family lawyers, including those with a good understanding of the power and control dynamics of domestic violence, would persuade mothers to agree to contact unless extremely ‘severe’ physical violence has been proved, some of whom would apply coercive pressure on mothers to agree to contact.

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<sup>135</sup> A similar contradictory approach can be discerned in Court of Appeal decisions.

<sup>136</sup> The importance of this was emphasised by Wall LJ (as he then was) in *Re Z (Unsupervised Contact: Allegations of Domestic Violence)* (n 15) [27]

Only a small minority of family lawyers appear to keep the father's conduct visible, acknowledge that the mother's fear of the father is justified, and support the mother in her opposition to contact. So even in circumstances where courts could potentially be persuaded to refuse, or impose greater restrictions on direct contact, family lawyers may persuade mothers to agree to contact because of their own perceptions of the inevitability of contact being ordered, and their desire to be seen as 'good' family lawyers. If the mother has already been persuaded to allow some interim contact, she is likely to find that, once her allegations are proved, the father will be permitted even less restricted contact than he was having on an interim basis.

It would seem that, despite the apparent willingness of courts to require perpetrators to attend DVPPs and Cafcass officers to recommend them, in reality this may turn out to be anger management or other inappropriate resources instead. This may be attributed to professionals and judicial officers not understanding the differences between anger management and domestic violence intervention, or considering anger management to be an appropriate intervention, based on the perception that domestic violence arises out of anger, 'passion' and lack of control. This reinforces those discourses that construct domestic violence as a mental or emotional problem that can be 'cured', thereby obscuring the power and control dynamics of domestic violence and its effects. However, as Hunter and Barnett point out:

“Anger management is rarely an appropriate intervention to reduce the risk of domestic abuse since in many cases, anger does not signify ‘loss of control’, but rather is the mechanism (or one mechanism) used by an abuser to exercise control by physically assaulting, threatening or intimidating the victim.”<sup>137</sup>

Additionally, seeing a DVPP as another 'hurdle' for the perpetrator to cross, and seeing that hurdle as too high, risks adopting the perpetrator's perspective, rather than that of the child and the victim.<sup>138</sup> However, as Hunter and Barnett point out:

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<sup>137</sup> Hunter and Barnett (n 6) 49

<sup>138</sup> *ibid* 51

“It is the perpetrator’s failure to acknowledge and address his violence, not the DVPP that impedes contact.”<sup>139</sup>

The failure of fathers to accept the violence and be willing to change, and/or the lack of availability and funding for DVPPs, may mean that courts and professionals turn to other resources to ‘mend’ the father on the basis that ‘something is better than nothing’, rather than accept that safe contact may be an unattainable goal.<sup>140</sup> While it is very positive that so many professionals consider that some intervention *is* necessary for perpetrators of domestic violence, the fact that this area of service provision is inadequate, and many fathers may not be suitable for attendance at a DVPP does not mean that children and mothers should be put at risk and have their safety compromised because there is no effective means of dealing with the perpetrator’s abusive behaviour.<sup>141</sup> Yet so strong is the presumption of contact that courts and professionals have great difficulty ‘giving up’ on contact.

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<sup>139</sup> *ibid* 51

<sup>140</sup> Ms T [Barrister, NW] thought that courts did not mind what intervention the father did as long as he “did something.” See also Hunter and Barnett (n 6)

<sup>141</sup> See also Hunter and Barnett (n 6)

## CHAPTER 8

# CONCLUSIONS AND RECOMMENDATIONS

Domestic violence has, until very recently, been perceived by courts and professionals working in the family justice system almost solely in terms of discrete incidents of physical violence. The views of the professionals who participated in this study and the recent case law suggest that understandings of domestic violence have started to shift as oppositional voices are beginning to be heard. Most professionals no longer view domestic violence as comprising physical assaults only and recognise the many, varied forms it can take. Increasing numbers of Cafcass officers and some family lawyers and judges understand its power and control dynamics, and few professionals consider violence ‘between’ parents as completely separate from children’s welfare. As Ms Y [FCA, London] pointed out:

“And what for me is positive is that it’s a currency, not everybody wants to buy into, but everybody knows what we mean by safeguarding and domestic violence and it’s there, it is at the forefront, and it’s a conscious decision to choose not to look at it, rather than ignoring it altogether.”

Despite this apparent ‘progress’, refusals of applications for contact by courts have steadily declined since the Practice Direction was issued and, during 2011, when most of the interviews were undertaken for this study, were at their lowest point recorded. This “suggests that the father’s role continues to be viewed as inalienable, even when there is known previous or continuing violence”.<sup>1</sup> Additionally, the case law and interviews reveal wide inconsistencies in the application of many aspects of the Practice Direction by courts, and suggest that many judges and magistrates are not applying or even considering the Practice Direction, mainly because they have been focusing on promoting contact rather than on the consequences of the father’s conduct.

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<sup>1</sup> Christine Harrison ‘Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic Violence’(2008) 14 *Violence Against Women* 381-405, 382. See also Ministry of Justice, *Judicial and Court Statistics 2011* (Ministry of Justice 2012), which reveals that in 2011 less than 0.3% of applications for contact orders were refused by courts; Elizabeth Butler, ‘Safer Contact Arrangements?’ (2006) *Childright* 12, 13; Brid Featherstone, ‘Writing fathers in but mothers out!!!’ (2010) 30 *Critical Social Policy* 208-224, 212



The theoretical perspectives informing this study have enabled us to understand why this is the case and what the possibilities are for transforming existing relations of power, by opening up to scrutiny the world constructed in and by current family law. We have explored the harsh regulation of women as mothers and have made visible the powerful discourses which construct the dominant gendered subjectivities that structure decision-making and professional perceptions and practices informing the issue of child contact.<sup>2</sup> We have seen that the parents and children who come to private law Children Act proceedings enter a social system that selectively simplifies and reconstructs the chaotic, contingent world ‘out there’ in ways that are consistent with, and advance, the prevailing political and ideological imperative to reinstate the father in the post-separation family. This creates a discursive and ideological terrain that downplays, trivialises and erases women’s concerns about continued contact with violent fathers and has a powerful normative influence on professional and judicial perceptions and practices.

## **1. The presumption of contact**

At the heart of private law Children Act proceedings lies ‘the welfare of the child’, a ‘civilising’ device that has been selectively constructed by and in family law at different times and in response to different social, political and cultural demands, and which currently works to place fathers at the centre of children’s well-being after parental separation. By locating this dominant construct in its historical, political and material context, we have seen how it operates as a mechanism of power to reinstate and maintain the father in the post-separation family, and how it regulates and disciplines mothers by constraining their self-determination. The gendered relations of power that construct, underpin and sustain law’s current construction of ‘the truth’ about children’s welfare constantly challenge and subvert attempts to focus professionals and courts on protecting children and women in private law Children Act proceedings, and deny mothers the autonomy after parental separation that is unquestioningly afforded to fathers. The strong belief of nearly all of the professionals

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<sup>2</sup> Vanessa Munro, *Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory* (Hart 2007) 11

interviewed in the benefits of contact shows how law's current construction of children's welfare has acquired almost hegemonic status. The dominant welfare discourse has become increasingly axiomatic and incontestable by marginalising and discrediting oppositional meanings about children's welfare, and by trivialising and rendering irrational women's reasons for opposing contact with non-resident fathers. This process is reinforced by unrelenting messages from the higher courts about the importance of contact, and the strenuous efforts made to promote it, even in cases of proven domestic violence.

Powerful familial ideologies of the equal, democratic family and the 'new fatherhood' which are built on abstract notions of 'welfare' and 'justice' reinforce the invisibility of care as a moral practice and domestic violence as a moral failure. This invisibility, together with the assumed benefits of contact, enables contact between children and violent fathers to be seen as not only possible but positively desirable.

“When the absence of men from children's lives is strongly, if erroneously, associated with a range of social problems, and the significance of domestic violence is underestimated, a 'contact at any cost' philosophy can flourish.”<sup>3</sup>

## **2. The 'relevance' of domestic violence to contact**

While many family lawyers (although fewer barristers) and Cafcass officers demonstrate a broad and insightful theoretical understanding of domestic violence and some understand its coercive, controlling nature, there are still many family lawyers and judges, and a minority of Cafcass officers, who continue to apply a narrow, legalistic approach to domestic violence and fail to understand how 'historic' violence can have a continuing controlling effect. The acontextual, incident-based approach to domestic violence that dominates Children Act proceedings and the strong belief in the benefits of contact reinforce each other and permeate every aspect of contact proceedings. This means that, even where courts and professionals acknowledge the seriousness of domestic violence, 'other' forms of abuse may be seen as less important or

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<sup>3</sup> Harrison (n1) 398. See Carol Smart, 'Losing the Struggle for Another Voice: The Case of Family Law' (1995) 18 *Dalhousie Law Journal* 173-195, 192

‘relevant’ than physical violence so that anything other than very ‘serious’ incidents of physical abuse are not ‘real’ violence or sufficient to deny children the ‘benefits’ of contact. The types of conduct that the women interviewed by Coy et al found most frightening and debilitating, such as manipulating, isolating and controlling behaviours, would not, therefore, have been seen as ‘relevant’ or have justified their opposition to contact.<sup>4</sup>

So we can see a bifurcated approach: while more judges and professionals are developing their understanding of domestic violence and taking it more seriously, the ambit of when and how it is relevant to contact has grown increasingly narrow. This means that, for most courts and family lawyers, and some Cafcass officers, there is an ‘acceptable’ level of abuse that mothers should be prepared to tolerate for the sake of their children; the professionals’ broader, theoretical perceptions of domestic violence do not necessarily translate into practice. So the parameters of what constitutes the ‘safe family man’ expand to include increasingly abusive, ‘dangerous’ and ‘irrational’ fathers to the point where the father has to be practically a monster for his conduct to be seen by courts as relevant to contact.

Additionally, we have seen that fact-finding hearings are usually restricted to cases involving ‘incidents’ of recent, severe physical violence, particularly if contact has continued or resumed by the time of, or during the proceedings.<sup>5</sup> The expressed willingness of family lawyers to request fact-finding hearings and of courts to hold them needs to be seen in the context of the extremely narrow circumstances in which judges and professionals consider domestic violence ‘relevant’ to contact and therefore requiring determination by the court. While most Cafcass officers and a small minority of family lawyers expressed concern about the ‘backlash’ against fact-finding hearings, most family lawyers agreed with the courts’ restrictive approach, and a significant minority of barristers

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<sup>4</sup> Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women 2012)

<sup>5</sup> Similar findings were made by Coy et al (n 2) and Rosemary Hunter and Adrienne Barnett, *Fact-Finding Hearings and the Implementation of the President’s Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council 2013) [www.familyjusticecouncil.org.uk](http://www.familyjusticecouncil.org.uk), last accessed 12.11.13

wanted them restricted even further. This suggests that the legalistic approach to domestic violence and the dominant welfare discourse resonates particularly strongly with barristers.

### **3. Dominant parental subjectivities**

A powerful effect of the dominant welfare discourse is the construction of parental subjectivities of ‘implacably hostile mothers’ and ‘safe family men’ which marginalise other subject positions, and are portrayed as natural and obvious. The construction of mothers as ‘hostile’ “is only possible when [there is] a gendered structure of moral accountability that holds mothers to higher standards of care and protection than fathers”,<sup>6</sup> and a differential ability of men and women to achieve autonomy after parental separation within the current regime of family law.<sup>7</sup> It is the invisibility and denial of these gendered processes in and by current family law that enable dominant parental constructs to be seen as unquestioningly obvious and acceptable.

The demonised figure of the implacably hostile mother has important implications for the way in which courts and professionals respond to mothers who oppose contact. We have seen that when women assert what are essentially moral claims to the value of their own self-worth, safety and autonomy, these may still be seen by many courts and professionals as selfishness, hostility and self-interest.<sup>8</sup> Despite a number of professionals expressing low opinions of fathers involved in contact proceedings, and a few recognising the efforts mothers make to sustain contact, most professionals still attribute the ‘problem’ with contact to the mother’s unjustified obstruction.

Although most respondents did not see mothers as deliberately malicious and hostile to contact, images of implacably hostile mothers continue to exert a powerful influence. This can be seen in the views of a significant minority of

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<sup>6</sup> Vivienne Elizabeth, Nicola Gavey and Julia Tolmie, ‘Between a Rock and a Hard Place: Resident Mothers and the Moral Dilemmas they Face During Custody Disputes’ (2010) 18 *Feminist Legal Studies* 253-274, 270

<sup>7</sup> See Susan Boyd, ‘Autonomy for Mothers? Relational Theory and Parenting Apart’ (2010) 18 *Feminist Legal Studies* 137-158, 146

<sup>8</sup> Julie Wallbank, ‘Getting Tough on Mothers: Regulating Contact and Residence’ (2007) 15 *Feminist Legal Studies* 189-222, 197; see also at 214

family lawyers who perceived mothers as manipulative and devious, and in the harsh, condemnatory approach to mothers demonstrated by some barristers and a few solicitors. Judges and professionals may continue to view women's complaints about domestic violence with suspicion, perceiving them to be a delaying tactic and/or designed to disrupt the other party's relationship with the child.<sup>9</sup> Because there is no valid discourse for expressing the moral value of the mother's wellbeing and autonomy, almost any opposition to contact may be seen as 'petty' or 'unreasonable'. This is exacerbated by the way in which domestic violence 'disappears' during the course of proceedings and judgments, so that the 'problem' of contact is laid at the door of the mother, who is constructed as irrational, pathological or malicious, and thus deserving of a 'robust' response.

While the majority of Cafcass officers, half of solicitors and a small minority of barristers did recognise the fear of domestic violence as a justifiable reason for the mother to oppose contact, for others, women's fears of domestic violence in all but the most extreme circumstances may be viewed as another obstacle to overcome in the pursuit of contact.

Law's self-referential procedures for determining domestic violence, and the binary nature of its decision-making place a particularly heavy burden on mothers to 'prove' their allegations, as their uncorroborated oral testimony may be viewed with suspicion and discounted as not being 'real' evidence. As a consequence, judges and professionals may avoid fact-finding hearings if the only evidence in support of the allegations is the mother's oral testimony. Additionally, stereotypes of 'real' victims and perpetrators may underpin the way in which courts and professionals respond to parents' evidence. The failure of many judges and some professionals to understand the difficulties for victims of domestic violence to provide 'hard' evidence and give 'rational', coherent

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<sup>9</sup> Similar findings were made by Coy et al (n 4) and Hunter and Barnett (n 53). Contrary to the suspicion with which mothers are viewed if they allege domestic violence, a recent study for the Director of Public Prosecutions revealed that 'false' allegations of domestic violence and rape are extremely rare – see Alison Levitt, *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations* (Director of Public Prosecutions and the Crown Prosecution Service 2013), [www.cps.gov.uk/publications/research/perverting\\_course\\_of\\_justice\\_march\\_2013.pdf](http://www.cps.gov.uk/publications/research/perverting_course_of_justice_march_2013.pdf) last accessed 02.08.13

accounts of abuse that are acceptable to law can undermine their credibility. Furthermore, the binary nature of law's decision-making means that if the mother fails to prove her allegations, in law the father has not been violent and is not, therefore, a 'risk', whether or not outside observers perceive the 'real truth' differently.

The valorisation of fatherhood in political, popular and legal discourses, reinforced by ideologies of the democratic, equal family, the 'new fatherhood' and the theoretical benefits of contact, mean that fatherhood continues to be seen as an essentially 'safe' domain, and "there remains an enduring distinction in legal and [child welfare] thinking between violent men and good fathers" which underlies the "separation of men's violence from their parenting capacity".<sup>10</sup> These discourses have so resonated with professionals, including Cafcass officers, that they rarely question or even consider the quality of parenting by non-resident fathers, even those who are perpetrators of domestic violence. Indeed, professionals and courts may treat violent fathers with more latitude, sympathy and understanding than the mothers who have been subjected to abuse.<sup>11</sup> Very few family lawyers or judges consider "the role of a domestic violence perpetrator as a parent and have focused on a father's emotional investment in caring about his children while overlooking his ability to care for them".<sup>12</sup> Harne warns that courts need to "look beyond violent fathers' expressions of love for their children, and their involvement in childcaring activities, since these are not necessarily indications that children will be safe from abuse or neglect."<sup>13</sup>

Images of safe family men can work to reconstruct fathers' violence as 'normal' or understandable behaviour, so that even fathers with proven histories of violence are seen as important for their children's welfare. The notion that domestic violence is morally reprehensible and violent fathers

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<sup>10</sup> Coy et al (n 4) 11

<sup>11</sup> *ibid*

<sup>12</sup> Calvin Bell, 'Domestic Violence and Contact: 10 Reasons Why' (2008) 38 *Family Law* 1139-1143, 1140, referring to Lundy Bancroft and Jay G Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Sage 2002)

<sup>13</sup> Lynn Harne, 'Violent fathers – "good enough" parents?' (2004) *The Domestic Abuse Quarterly* 19, 21

are ‘undeserving’ of contact, and that women’s desire for safety, wellbeing and autonomy is morally legitimate finds very little expression in current family law. However, where judges and professionals *do* recognise the conjoined and contextual nature of domestic violence and parenting, the masculine subjectivity of the safe family man is disrupted and the perceived importance of contact is less likely to take priority over the father’s conduct and its effects on the mother and child.

Despite the high rate of findings of domestic violence in disputed fact-finding hearings and the rarity of perpetrators accepting those findings, neither professionals nor judges blame fathers ‘in denial’ for what are perceived to be unnecessary fact-finding hearings ‘clogging up’ the court system. It is the mother who is at fault for bringing conflict into the conciliatory ethos of family proceedings. Additionally, courts and professionals are more than willing to reconstruct perpetrators as ‘risky’ rather than ‘dangerous’.

The desire to keep intact the image of the ‘safe family man’ means that many courts and professionals are very unwilling to perceive fathers in a negative light even when findings of domestic violence are made. Judges are very reluctant to accept that an abusive father is motivated by anything other than a desire to see the child, and are willing to accept expressions of ‘genuine’ motivation and contrition at face value. Coy et al point out that the fact that perpetrators are rarely, if ever, identified as vexatious litigants suggests that the family courts fail to recognise the way in which men may pursue contact as part of a strategy of harassment and control.<sup>14</sup> With a few notable exceptions amongst family lawyers, it was primarily Cafcass officers who seemed to have the keenest insights into the behaviours of abusive fathers but this did not appear to affect their endorsement of the presumption of contact.

#### **4. Pressure to agree to contact**

We have seen how mothers are, from the outset, propelled into a discursive arena in which their concerns about contact are constructed as at odds with the

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<sup>14</sup> Coy et al (n 4)

agreement-seeking ethos of contact proceedings. The responses of participants to this study suggest that more family lawyers and Cafcass officers understand the importance of not pressurising mothers to agree to contact, particularly where they have sustained domestic violence. However, so strong is the presumption of contact that, in practice, it seems that most family lawyers continue to persuade mothers to capitulate. This may go a long way to explaining why refusal rates of contact applications are so low.

The partisan aspect of safeguarding the client against violence from the other parent, and looking ‘backwards’ at past abuse rather than ‘forwards’ at future harmonious arrangements runs counter to prevailing images of ‘good’ family lawyers, which may inhibit their ability to ‘stand up for’ their clients. The ‘good’ family lawyer is one who puts dominant assumptions about children’s welfare before their own client’s interests by encouraging clients to be ‘sensible’ and implacably hostile mothers to agree to contact. As a consequence, advice can easily become pressure even if not intended by the lawyer, although more overt coercion may be exerted on mothers by a sizeable minority of family lawyers, particularly if they discern no good reason for the mother’s opposition to contact. The mother may also experience pressure to agree from the father’s representative, and ‘encouragement’ from the Cafcass officer and the court.

The drive towards ‘agreement’ to contact means that it is even more important for courts to scrutinise proposed consent orders. However, there appears to be a wide variation in the extent to which judges and magistrates do so, with some judicial officers being reluctant to enquire about domestic violence so that consent orders do not ‘unravel’ and many still ‘rubber-stamping’ them without any enquiry or even seeing the parties. Lawyers and judicial officers may not only ignore the concerns and advice of Cafcass officers, but actively avoid their involvement in cases in order to achieve agreements for contact. As a consequence, many women may continue to be pushed into unsafe agreements, sanctioned by the courts.



## **5. Fact-finding hearings**

The findings of this study are strongly indicative of an increase in the numbers of fact-finding hearings following the implementation of the Practice Direction in May 2008. However, there appears to have been a subsequent backlash against it, exacerbated by the Guidance on Split Hearings, as most professionals interviewed reported preliminary fact-finding hearings becoming rarer.<sup>15</sup> Although the Guidance on Split Hearings discourages the holding of split hearings, it does not encourage courts to disregard allegations of domestic violence. However, the case law and the interviews do not suggest that the lower courts regularly hold composite hearings; rather, it appears that the approach of the lower courts is to ignore allegations of domestic violence altogether if a separate fact-finding hearing is considered unnecessary. This suggests that many disputed allegations of domestic violence continue to be disregarded.

Even if allegations of domestic violence are considered recent and serious enough to warrant a fact-finding hearing, the number of allegations to be tried may be restricted, or the trial may not end up taking place at all if the father makes limited admissions, ending up with a ‘watered down’ compromise. Alternatively, the mother may have been pushed into ‘moving on’ and allowing contact by the time of the hearing so that the fact-finding exercise is considered unhelpful and unnecessary. In this way, we can see how domestic violence ‘fizzles out’ during the course of proceedings so that the full extent of the abuse is obscured and decontextualized from the gendered power dynamics informing the relationship.

## **6. Interim and final orders**

The dominant construction of children’s welfare that underpins current family law, together with the narrow, incident based approach to domestic violence can result in mother’s and children’s safety and welfare being compromised pending fact-finding hearings as well as after domestic violence has been proved, and women may find that their voices are increasingly silenced as the proceedings progress.

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<sup>15</sup> Research by Coy et al (n 4) supports these findings

Most participants to this study did not discern any clear judicial pattern if the mother opposed direct contact pending fact-finding hearings. Although the majority of solicitors were of the firm view that courts do not tend to order such contact, other professionals felt that mothers would have an uphill battle opposing interim contact and only three family lawyers indicated that they would *not* try to persuade the mother to agree.<sup>16</sup> So direct contact pending fact-finding hearings may happen because family lawyers persuade mothers to agree, rather than because it is ordered by the court against the expressed wishes of the mother.

The most common factor in deciding if direct contact should be ordered against the wishes of the mother was the ‘status quo’, that is, whether contact was or was not taking place at the time of the proceedings. So if the ‘good mother’ permits the father to have contact, despite his violence, or was persuaded by her lawyer from the outset to agree to it, she may be penalised for this at the point when she wants the court and professionals to protect her and the child.

Even where findings of domestic violence are made, it seems that some form of direct contact is invariably ordered by the court other than in ‘extreme’ cases, even for ‘high risk’ fathers who do not accept the findings against them. This suggests that even ‘justified’ opposition to contact may be fruitless or that, by the final stages of proceedings, mothers have been persuaded to ‘cave in’. Most family lawyers, including some of those with a good understanding of domestic violence, would try to persuade mothers to agree to contact and only a small minority would support them in opposing it. So even in circumstances where the court could potentially be persuaded to refuse direct contact, family lawyers may persuade mothers to agree because of their perceptions that any opposition is futile. Although Cafcass officers expressed concern about the courts’ restrictive approach they, too, may recommend no direct contact only in the most ‘extreme’ cases.

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<sup>16</sup> See Coy et al (n 4) and Hunter and Barnett (n 5) who found that some form of restricted direct contact is the most likely outcome in the interim.

So it seems that the circumstances in which lawyers would support mothers in opposing contact, Cafcass officers would not recommend direct contact, and courts would not order it seem to be getting more limited and extreme, and the courts appear to be increasingly reluctant to ‘give up on’ contact. This means that the bar of ‘acceptable’ domestic violence is being increasingly raised and the obligation of the ‘good mother’ can include putting up with very abusive behaviour. The incremental approach described by Hunt and Macleod appears to be a continuing feature of contact cases since the implementation of the Practice Direction,<sup>17</sup> and courts and professionals find it difficult to envisage circumstances where domestic violence could constitute a bar to contact, so that the possibility of no contact taking place has almost passed into the realms of the unimaginable.

If findings of domestic violence are made, the acontextual, incident-based approach to domestic violence leads to a focus on physical safety because the ‘bigger picture’ is lost and the wider implications of contact for children and mothers are marginalised or invisible. As a consequence, most family lawyers fail to understand that ‘standard’ safety measures such as contact centres may leave women and children vulnerable to further abuse.<sup>18</sup> Furthermore, the absence of facilities for both supervised and supported contact and the minimisation of domestic violence, result in unsafe strategies being used in what professionals would consider medium and even high risk cases, such as supervision by family members or friends, ‘staggered’ handovers or the parents meeting in ‘public places’.

It is primarily Cafcass officers (although not all) and a small minority of family lawyers who have a better understanding of the risks to children’s and mothers’ safety and wellbeing, and query the merits of contact between children and perpetrators of domestic violence, but their voices may be marginalised and discounted in the drive to promote contact.

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<sup>17</sup> Joan Hunt and Alison Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (Ministry of Justice 2008)

<sup>18</sup> Harrison’s research (n 1) revealed that women may continue to sustain violence, threats and intimidation at supervised and supported contact centres – see in particular at 392

## 7. Intervention for perpetrators

While it is very positive that so many professionals consider that some intervention *is* necessary for perpetrators of domestic violence, the fact that this area of service provision is inadequate, and many fathers may not be suitable for attendance at a DVPP, does not mean that children and mothers should be put at risk and have their safety compromised because there is no effective means of dealing with the perpetrator's abusive behaviour.<sup>19</sup> Perceiving the appropriate intervention for perpetrators to be anger management counselling or therapy minimises and misrepresents domestic violence by portraying it as a loss of control, rather than “the mechanism (or one mechanism) used by an abuser to exercise control by physically assaulting, threatening or intimidating the victim”.<sup>20</sup> It also reinforces those discourses that construct domestic violence as a mental or emotional problem that can be ‘cured’, thereby obscuring the power and control dynamics of domestic violence and its effects. Additionally, seeing DVPPs, rather than the father's violence, as impeding contact adopts the perpetrator's perspective and further erases his conduct.

## 8. Opposition and resistance

Despite the increasingly strong gendered relations of power informing current family law, it is not suggested that seeking to regain a valid and authoritative voice for women is a futile exercise. On the contrary, deconstructing legal and professional discourses can make visible “the range of points of resistance inherent in the network of power relations,” and the conceptual spaces where oppositional meanings have and may emerge and gain currency.<sup>21</sup>

Using gender as a tool for analysis, we have opened up for scrutiny the discursive and ideological claims to truth articulated in and through family law, and their consequences for the way in which women are currently regulated, controlled and governed – in the way in which judges and

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<sup>19</sup> See Hunter and Barnett (n 5)

<sup>20</sup> *ibid* 49

<sup>21</sup> Chris Weedon, *Feminist Practice and Poststructuralist Theory* (Blackwell 1987) 124. See also Susan Boyd, ‘Some post-modernist challenges to feminist analyses of law, family and State: ideology and discourse in child custody law’ (1991) 10 *Canadian Journal of Family Law* 79, 113

professionals understand domestic violence, perceive the importance of contact, constitute parents and children, and evaluate evidence and risk - as part of the strategy to shift discursive meanings and practices. Most importantly, by deploying 'oppositional truths' strategically, we have exposed the partial and ideological nature of the 'scientific truth' about children's welfare by raising 'other' ways of understanding children and their families. The fact that some judges and professionals have started to demonstrate a broader understanding of the coercively controlling nature of domestic violence and its implications for contact, even within the framework of the presumption of contact, demonstrates that dominant meanings are not immutable or inevitable and indicates the powerful potential of oppositional discourses.

We need to acknowledge that the purpose of fact-finding hearings for law – to provide a mechanism for further self-referential decision-making – may or may not lead to decisions that are safe or which benefit the child. The way in which separate fact-finding hearings currently reinforce the legalistic, incident-based approach to domestic violence may suggest that allegations of domestic violence would more productively be dealt with in 'composite' hearings, so that the father's conduct and behaviour could be situated within the broader 'welfare' context and recognised as a 'significant failure in parenting'.

It is suggested, however that, within the discursive and ideological context of current family proceedings, the abuse may end up being weeded out and disregarded altogether in the drive to promote contact. Fact-finding hearings, therefore, may serve an important function in keeping domestic violence visible. Accordingly, it is suggested that it is still strategically necessary for preliminary fact-finding hearings to be maintained. Indeed, their remit should be broadened to include all the varied ways in which the gendered power and control dynamics of domestic violence are exercised. This would assist in making visible 'other' knowledge such as the difficulties for many women in disclosing and reporting domestic violence and in providing a coherent account of it, and the charming and manipulative behaviours and other strategies of perpetrators.

Courts and professionals need to recognise that denial of the violence by perpetrators is itself a hallmark of domestic abuse, and to recognise that it is those denials, not the mother's allegations, that necessitate the holding of fact-finding hearings. We also need to acknowledge that reconstructing the 'dangerous abuser' as a 'safe family man' may contribute towards sustaining the image of law's 'ideal' post-separation family but will not make fathers 'safe', which may be an unattainable goal.

In order to achieve the 'cultural shift' called for by the Family Justice Council, we need to see beyond images of 'safe family men' and 'implacably hostile mothers' so that we can properly acknowledge that 'the family' is not always a safe haven but a place where abuse can occur. Until we are able to do so, many children may continue to be disadvantaged by a prescriptive application of the welfare principle, courts will continue to clash with 'implacably hostile mothers' and we will continue to do a disservice to non-abusive fathers who *do* undertake fully the tasks of caring for children, by conflating their efforts and experiences with those of fathers who simply express a desire to 'be there for' and 'care about' their children. In order to do so, we need to make visible the moral claims that parents are asserting through the only legitimate vehicle available to them in child contact law, 'the welfare of the child'.

## 9. Legal reform?

If law is part of the problem, and the consequences of system operations have infinite possibilities, is there a place for law reform within the theoretical perspectives informing this study? Munro questions whether even "strategic attempts to use law to bring about change, in the end, simply operate to reaffirm law's power",<sup>22</sup> and Diduck and O'Donovan query whether promoting law reform as a means of achieving gender equality both masks and reinforces law's gendering role.<sup>23</sup> From the perspective of autopoietic theory, we cannot 'use' law to solve social problems or create order out of chaos. "This is not to say, of course, that regulatory attempts

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<sup>22</sup> Munro (n 2) 64-65

<sup>23</sup> Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (1<sup>st</sup> edn, Routledge-Cavendish 2006) 3

produce no effects, only that those effects cannot properly be regarded as steering in the sense implied by traditional theories.”<sup>24</sup> This enables us to see how the effects of campaigns, legislation and guidelines aimed at improving protection for children and women from violent fathers can be highly contingent. Further, whether change achieves ‘progress’ will depend on the beliefs of observers about what constitutes progress.<sup>25</sup>

However, a number of theorists have suggested that it is not only possible, but desirable and necessary to use law reform to challenge “juridical or disciplinary forms of patriarchal power”.<sup>26</sup> Most importantly, while relying on law to achieve social change “remains a high risk strategy...it would be riskier still to abandon it to those who are unconcerned with, or opposed to, the goal of gender equality”.<sup>27</sup>

With these thoughts in mind, the following practical recommendations are made. It is recognised that some of these will involve additional resources which may prove challenging in the current economic climate. However, as Hunter and Barnett observe:

“It is important...to have a system which operates as effectively as possible within resource constraints, rather than one which adapts dysfunctionally to resource limitations by attempting to minimise the relevance of domestic violence.”<sup>28</sup>

### **9.1 Amendment of the Children Act 1989**

- The Children and Families Bill 2013, which the Coalition Government hopes to implement on 1<sup>st</sup> April 2014, will amend the Children Act 1989 to include a statement which provides for courts to presume that the involvement of both parents in the child’s life will benefit the child unless such involvement would put the child or

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<sup>24</sup> John Patterson and Gunther Teubner, ‘Changing Maps: Empirical Legal Autopoiesis’ in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005) 222

<sup>25</sup> See Michael King, ‘What’s the Use of Luhmann’s Theory?’ in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics* (Hart 2006) 41

<sup>26</sup> Munro (n 2) 70

<sup>27</sup> *ibid* 84

<sup>28</sup> Hunter and Barnett (n 5) 73

the other parent at risk of suffering harm.<sup>29</sup> This provision was included against the recommendations of the Family Justice Review and in the face of strong opposition from lawyers, academics and the judiciary.<sup>30</sup> While, ideally, there should be no presumption of involvement, it is accepted that this provision will inevitably be implemented. In order to ensure that it does not have the effect of further marginalising domestic violence, a presumption against contact where domestic violence is admitted or proved should be included in the Children Act 1989.

## 9.2 Revision of the Practice Direction

- The description of ‘domestic violence’ in the Practice Direction should be replaced with the current cross-government definition. This would assist in highlighting the coercively controlling nature of domestic violence and in broadening perceptions of its ‘relevance’ to contact.
- It should be made clear that domestic violence is always relevant to contact, regardless of its age or perceived severity
- The term ‘fact-finding hearing’ should be replaced with ‘domestic violence hearing’.
- Domestic violence hearings should assume an inquisitorial, rather than adversarial form, so that the complainant is not disadvantaged by the burden of proof.
- Domestic violence hearings should always be held where alleged perpetrators dispute allegations, unless the court is satisfied that the factors set out in Paragraphs 26 and 27 can be fully assessed without one. Cafcass should always be consulted about the need to hold a domestic violence hearing.

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<sup>29</sup> Department for Education, Ministry of Justice & Department for Business, Innovation and Skills, <http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0131/2013131.pdf> last accessed 15.01.14; Department for Education, *Children and Families Bill 2013: Contextual Information and Responses to Pre-legislative Scrutiny* (Cm 8540, 2012)

<sup>30</sup> Family Justice Review Panel, *Family Justice Review Final Report* (Ministry of Justice, Department for Education, Welsh Government 2011) [109]. See also Julie Exton, ‘ADJ news: Shared Parenting’ (2012) 42 *Family Law* 1403-1404 articulating the views of the Association of District Judges; Liz Trinder, ‘Shared residence: A Review of Recent Research Evidence’ (2010) 40 *Family Law* 1192-1197



- If the court considers that a preliminary domestic violence hearing is not required, disputed allegations should be determined at the ‘welfare’ hearing unless the court is satisfied that the factors set out in Paragraphs 26 and 27 can be fully assessed without those allegations being determined.
- Consent orders should not be approved by the court unless the parties are present in court and all safeguarding enquiries have been undertaken by Cafcass and provided to the court.
- Interim contact pending domestic violence hearings should not be ordered against the wishes of the resident parent unless all safeguarding enquiries have been obtained by the court and Cafcass has been consulted.
- Paragraph 25 of the Practice Direction should be amended to provide that, where domestic violence is admitted or proved, the court should consider whether the perpetrator should attend a DVPP (rather than ‘seek advice or treatment’).

### **9.3 Training**

- There should be uniformity in the domestic violence training that judicial officers undertake, which should be regularly updated.
- Family lawyers should be required to undergo compulsory domestic violence training by accredited providers, which should be attended in person (and not undertaken online).<sup>31</sup>
- Domestic violence training should cover the gendered nature of domestic violence, its power and control dynamics, the effects of domestic violence on women and children, the strategies employed by abusers including the pursuit of contact and residence proceedings, and the broader consequences of contact between children and abusive fathers.

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<sup>31</sup> Solicitors and barristers are not required to undertake domestic violence training, and research by Hunter and Barnett (n 5) suggests that most family lawyers have had no training.

#### **9.4 Risk and 'welfare' assessment**

- Since Part 25 of the Family Proceedings Rules 2010 was implemented with the aim of curtailing the use of expert reports in family law proceedings, and the recent funding restrictions on the use of experts including DVPPs, it is anticipated that the role of Cafcass in assessing risk will markedly increase. It is suggested that the Domestic Violence Toolkit should be reinstated, and that Cafcass officers be properly trained to use the toolkit and the CAADA DASH risk identification checklist.
- Safeguarding enquiries should be extended to include Family Law Act and Protection from Harassment Act injunctions. While all Cafcass officers interviewed thought this would be extremely helpful, many queried how this could be achieved, and there are a number of logistical and resource issues. This is clearly an area that will require some consideration and, inevitably, resources, including the possibility of a national register of injunctions.
- All respondents considered that it would be extremely beneficial for courts and Cafcass officers to be required to consider the factors set out in Paragraph 27 by way of a 'checklist' in all cases where domestic violence has been admitted or proved; they should also form part of the questions to experts.

#### **9.5 Final orders – ensuring safety**

- If the court decides, after applying the factors in Paragraphs 26 and 27, that contact should be professionally supervised, it should not order such contact unless it can be satisfied at the time of making the order that, after a finite period, professional supervision will no longer be necessary.
- If the parties agree and/or the court decides that contact should be fully supervised at a contact centre, this requirement should not be downgraded to a supported contact centre, contact supervised by family members or friends, or any other mechanism because facilities for professionally supervised contact are not available.

## **9.6 Consent orders**

- With the recent restrictions on legal aid for the vast majority of parents involved in private law Children Act proceedings, it is even more important that courts take the initiative to scrutinise proposed consent orders, and ensure that a Cafcass officer is always present at court and has spoken to both parties separately before such orders are approved.
- A Cafcass officer should always ensure that any litigant in person who is or may be a victim of domestic violence has voluntarily agreed to a proposed consent order before the court is asked to approve it.
- Judicial officers should have a ‘checklist’ of factors to consider when asked to approve consent orders, the first item on which should be domestic violence.<sup>32</sup> Judicial officers should also ensure that any litigant in person has voluntarily agreed to a proposed consent order.
- Consent orders submitted during the course of or after ‘without notice’ applications, or in the context of injunction proceedings, should be subjected to particular scrutiny and should not be approved until all safeguarding enquiries have been obtained.

## **9.7 Litigants in person and fact-finding hearings**

- Fact-finding hearings are likely to be the aspect of private law Children Act proceedings that litigants in person find most difficult to manage. Inevitably, the role of judicial officers will increase in significance as they may well need to take on a more interventionist approach to assist the parties. It is recommended that empirical research is undertaken to determine how disputed allegations of domestic violence are being resolved where one or both parents are acting in person, what difficulties are being encountered by courts and parties to proceedings, and how determining allegations of domestic violence can best be managed in these circumstances.

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<sup>32</sup> Ms A [Solicitor, London] is to be credited with this helpful suggestion

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# APPENDIX A

## **Practice Direction: Residence & Contact Orders: Domestic Violence & Harm**

**Revised Practice Direction superseding guidance first issued  
on 14 May 2008**

**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 checklist"), 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***

# **APPENDIX B**

## **COURTS SELECTED FOR RECORDS REVIEW**

### **1. Inner city court in London**

The Principal Registry of the Family Division ('the PRFD'): This is the busiest court in London and indeed nationally. In the year April 2006 to March 2007 it received 3,925 private law Children Act applications. This figure is over three times the number filed at the County Court which had the second highest number of applications for the same period. Applications are received at the PRFD from all areas of London. London also has the highest number of solicitors available to undertake private law Children Act cases. London was selected for the large inner city area as the PRFD, being the largest family court nationwide, is based there, and for reasons of convenience, as the researcher is based in London.

### **2. Provincial town in the North East**

The county court in the town selected received 481 private law applications during the period April 2006 to March 2007; the attached chart at Appendix A demonstrates that this number is typical of courts receiving a medium number of applications per year. There are 30 Resolution members based in Doncaster. The attached graph at Appendix B demonstrates that this is slightly higher than the median number for courts with medium numbers of private law Children Act applications (n = 25).

### **3. Rural town in the South West**

The county court in the small town selected received 183 private law Children Act applications during the period April 2006 to March 2007, a number typical of courts receiving relatively low numbers of applications per year. There are 5 Resolution members practising in this town, again a number that is representative of courts with low numbers of private law applications.

## APPENDIX C

### TIMELINE FOR OBTAINING ACCESS TO COURT RECORDS

Date	
00.03.08	Researcher wrote to chair of Children in Families Committee of the FJC to enquire whether the FJC would have an interest in the research findings. At this stage, subject of research was extent to which the courts and professionals followed the <i>Re L</i> guidelines.
00.04.08	Researcher informed that FJC would be interested in seeing the completed research and advised to contact President of the Family Division for approval for access to court records.
15.04.08	Researcher was sent relevant application form [DAP-PA (ADR)] and was advised to return it completed to a contact person allocated at HMCS.
30.06.08	Researcher wrote to Ministry of Justice representative to inform her of the change in the research topic since the Practice Direction was issued and to request the name of the appropriate person to contact in the President's office.
08.08.08	Researcher wrote to the President's private secretary, as advised, requesting that the President consider the research proposal.
03.09.08	Researcher was informed that, subject to methodology, the President had no objection in principle to the proposed research, and that in order to obtain his permission for access to court files, she would have to gain approval for the project from HMCS.
20.01.09	Application form completed by researcher. Clarification sought on submitting an application to interview members of the judiciary.
21.01.09	MoJ representative advised who the researcher's contact at the DAP was and suggested that the researcher send her the proposal with detailed information about the proposed judicial interviews; she would then find an in-house researcher to assess the project
23.01.09	Researcher corresponded with DAP contact re calculating the impact assessment; also confirmed that permission is required from the Judicial Office for Senior Judicial Approval to interview members of the judiciary once the DAP application is approved.
17.03.09	Researcher sent the completed form to the DAP contact.
30.03.09	Final application form and supporting documents sent to DAP contact.
02.06.09	Email received from researcher's allocated sponsor from Family Law and Justice Division of the MoJ, advising that the application had been rejected, and that the President considered that the research be deferred until proposed revisions to the Practice Direction took place and could be tested.
23.06.09	Researcher was informed that the Practice Direction had been redrafted in January 2009 (relating to judicial continuity) but no further revisions were

	planned; however, the Private law Programme was to be revised
16.07.09	In light of this information, researcher asked original DAP contact if the request for access to court records could be reconsidered.
18.07.09	DAP representative informed researcher that he had put in a request for a business sponsor for the researcher from the Civil and Family Unit
22.07.09	Email received from representative of the Civil and Family Unit advising the researcher that the proposal had been rejected on the basis that it was of limited use due to further changes being considered in the area of private law, which could alter the process further; additionally there were concerns about access to court material because of increased emphasis on security and pressure on court staff resources.



## **APPENDIX D**

# **Request to Her Majesty's Courts Service (HMCS) Data Access Panel and Performance Committee**

**Covering new / revised data collections  
and research to be undertaken  
in the Crown, county and magistrates' courts  
in England and Wales**

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## Part A – Request to HMCS Data Access Panel

### 1. Title of data collection / research request

Contact only when it is Safe

### 2. Date of request

16<sup>th</sup> March 2009

### 3. Type of Request. Is this:-

- a) a new data collection
- b) a change to a current data collection
- c) a research request from within HMCS or the Ministry of Justice
- d) an external research request

X

Please provide details:

This is a request from a PhD student at Brunel University

### 4. Applicant details

Principal contact's name	Adrienne Barnett
Post	PhD Researcher
Location	Brunel University
Telephone	02078427070
E mail	ab@1pumpcourt.co.uk

### 5. HMCS Business Area Sponsor's details (if different to above)

Name	
Post	
Location	
Telephone	
E mail	

### 6. HMCS Business Area's principal contact (to be supplied by the Business Area sponsor)

Name	
Post	
Location	
Telephone	
E mail	

### 7. Timing



What is the latest date for approval by the HMCS Performance Committee (and if relevant, to issue a Privileged Access Agreement (PAA)).

**Note:** Remember to take into account an estimate of the time needed to implement the proposal. If this is less than eight weeks from receipt of full details by the HMCS-DAP secretariat, please state why

14<sup>th</sup> May 2009

**8. Key details of your proposed changes**

Please give the key details of your changes to data collection / the aims and objectives of your research. Attach any supporting documentation / methodology. It is important that there is a clear business process devised in order for there to be clarity about the impact on HMCS staff. Therefore a full methodology at this stage is highly desirable and any lack of clarity may well delay/stall the Application. If your research does include interviews or focus groups with court staff or judiciary, you must supply an outline of the areas under discussion or, where possible, the questions in advance. If you are seeking questionnaire responses then you should supply a copy questionnaire with this completed application form.

Please see attached Background Statement and Methodology

**9. Link to Government Objectives**

What Public Service Agreements (PSAs) or other key 'targets' does the proposal support?

**Note:** State explicitly which are directly involved. If 'none', give reasons why the proposal should be recommended / approved

PSA 13

**10. Who supports this proposal?**

**Note:** State which Ministers and/or senior staff are aware of the proposal and which support it

The office of the President of the Family Division and the Family Justice Council are aware of the proposal and have expressed interest in it.

**11. Who or what will the information be collected from?**

**Note:** State which business area; whether direct from the courts or electronically by use of a computer system; whether the data are already available in the database

The information will be collected directly from the following courts:

The Principal Registry of the Family Division; Wimbledon Family Proceedings Court; Doncaster County Court; Doncaster Family Proceedings Court; XXX County Court; XXX Family Proceedings Court.

**12. How will the information be stored?**

The information will be stored electronically in the Applicant's computer. Any paper copies of the information will be stored by the Applicant in a locked filing cabinet.

**13. Do you intend to share this information (between researchers / HMCS / business are / government agencies / others?)**

If yes, please provide clear detail and explain what data protection controls you will employ and therefore how you will **GUARANTEE** the security of the data?

Information obtained directly from court records will be available only to the Applicant and her supervisor, Ms. Felicity Kaganas, Department of Law, Brunel University. The security of such data will be guaranteed by keeping all paper copies of data in the Applicant's locked filing cabinet, and electronic information in the Applicant's computer, to which no other persons have access.

The Applicant's PhD thesis, which will contain the results of the study, will be available to academic staff and researchers. The Applicant hopes to publish the results of her study in professional and academic publications, and to make such findings available to other interested organisations such as HM Courts Service, the Family Justice Council, the Family Law Bar Association and the President's office. Additionally, the findings will be made available to the Applicant's Business Sponsor and to the Ministry of Justice Records Management Service prior to publication. The identities of all parties to the legal proceedings studied and of participants in the study will be anonymised by assigning a letter code or pseudonym to all such persons.

**14. What other agencies have been considered to provide this information?**

What information is to be obtained from them?

**Note:** If 'none', explain why the data can only be obtained from the courts

No other agencies are able to provide this information, because no other agencies will maintain information required for the Applicant's study. This is primarily because the type of data sought will only be available from case files maintained by individual courts – see attached Data Collection Themes.

**15. Timing**

What is the anticipated start date for this data collection / timetable for this research?

**Note:** If your research includes court visits, please attach details including duration of visit, local facilities required and, if available, proposed dates (please also note **Question 17** below)

June 2009: feasibility stage of the research, which will involve half a day at each court. The local facilities required will be desk space to review court files.

August 2009: main stage of the research. The amount of time required at each court will depend on whether the Applicant will be permitted to take photocopies of court records. If such photocopying is permitted, it is anticipated that the Applicant will require 1 full day in each county court and half a day in each Family Proceedings Court. If photocopying is not permitted, it is anticipated that the Applicant will require 3 days in each county court and 1 day in each Family Proceedings Court. The local facilities required will be: desk space to review court files and use of a photocopier (if permitted). I have estimated the amount of time involved in reviewing case files from my own knowledge of the size of private law Children Act cases, based on my professional experience over 20 years as a barrister practising in family law.

**16. What collection method do you propose to use?**

- On line (web based collection)
- E Mail
- Extract from existing systems
- Other electronic (e.g. spreadsheet or disk)
- Telephone
- Paper
- Interview

X
X
X
X
X

If interview, please specify:

- Court admin staff
- Court legal staff
- Court staff AND judiciary
- Judiciary only

NB: If your request is to interview 'judiciary only' please contact the MoJ Research Unit for details of the separate arrangements for this process

- Other (please give details)

**17. IMPACT ASSESSMENT**

Give an estimate of the burden for each HMCS Business Area affected, indicating in person days how long it will take each business area to complete the exercise and remember to include all levels of staff – e.g. if data are to be gathered by Areas or Regions. A 'person day' is equal to 7.2 hours

If your request includes looking at un anonymised data held within court files, you must remember to take into account the time it will take for court staff to retrieve and replace files, from various (including off-site) storage arrangements (Note: need for a Privileged Access Agreement - see **Part B**)

HMCS Business Area	Estimated <i>Person days</i> for each business to provide the information	State number of locations to be visited / affected. If 'All' see Question 19 below)

	(State per year / per request)	
Crown Court		
County Courts	1 person day – feasibility stage 1 person day – main stage	3
Magistrates' Courts	1 person day – feasibility stage 1 person day – main stage	3
RCJ		
Regional and Area offices		
HQ (specify area)		
Other (give details		

- 18. Please give the net effect of the impact assessment, clearly stating any off-setting factors (e.g. reduced data collection / removal of processes)**

Feasibility stage: 6 person days  
Main stage: 6 person days

- 19. If 'All' or a majority of locations, is stated above in Qu.17, for any business type, please give explicit reasons why a sample is not appropriate**  
**Note:** if detailed low-level analyses are not required, sample surveys should be the default option

- 20. Are the estimates above and the collection's design supported by any consultation exercises, pilots or other tests of the proposal? If so, please give details below.**  
**Note:** State who was involved; or, if yet to take place, is there sufficient detail set out in the answer to Questions 3 & 8 and in any attached methodology

The estimates of person days set out above have been made with advice from HMCS Resources Directorate

- 21. Does the collection include information of ethnic category?**  
If yes, please confirm that the standard 16+1 categorisation is being used

No

- 22. Analysis of Data?**
- Who will be responsible for analysing the data?
  - Is there a clear analysis methodology? please specify

The Applicant will be responsible for analysing the data. Please see the attached Methodology with respect to the method of analysis

**23. Is the information intended for publication or other release?**

- If “no”, please give reasons why not (*Note: Open Government guidelines and the Freedom of Information Act assume most data can be released unless there are specific confidentiality issues*)
- If “yes”, please give details of the publication or release strategy

**NB: If your request includes looking at unanonymised data held within court files, it will be a requirement of the Privileged Access Agreement (PAA) that you MUST submit a copy of your publication to your Business Sponsor, and to the Ministry of Justice Records Management Services (MoJ RMS) (details in Part D) for approval PRIOR to publication**

Yes. See response to question 13

## **Part B – Further details to support a Privileged Access Agreement (PAA)**

This section **must** be completed if you need access to court data - such as files, documents or other records held at court which are not available to the public.

You do not need to complete this section where your data collection is only for information available to the public or of a purely statistical nature (i.e. does not involve direct case/court user identification) - but even when not mandatory, *additional information may facilitate the Data Access Panel application process.*

**It is not possible for researchers to have blanket access to court filing stores or data systems.** Before a PAA can be issued you will need to specify which court files you wish to inspect and which data you hope to extract from them. If your study is a broad based one and you are sure that all or most files contain the information you seek, then you should consider specifying a sample of cases - for example, all cases at a particular court between March and June of a certain year or every third case between certain dates. This will enable court staff to more easily identify the files involved. You should also appreciate that court files may well be stored away from the courthouse, depending upon how old they are. Retrieval of such files may well involve a specific cost.

### Additional Information:

It is possible to approach court staff for general enquiries without a PAA but only with the sponsorship of the appropriate HMCS Business Area and an approved DAP application.

Although a PAA may not be necessary for research that relies solely on an interview or questionnaire approach, researchers may find that court staff are more willing to become involved if the interview/questionnaire element is included within a PAA.

However, research which includes interviews with members of the judiciary does require **Senior Judicial agreement** and a PAA will not be drafted until this has been secured. This will be sought by the appropriate HMCS Business Team and inevitably does increase the length of the application process, and applicants should take this into account.

If your research does include interviews or focus groups with court staff or judiciary, you must supply an outline of the areas under discussion or, where possible, the questions in advance.

If you are seeking questionnaire responses then you should supply a copy questionnaire with this completed application form.

24.

Please attach the following documents:

- a) A full methodology, detailing the elements relating to court access. *Including: which courts; sample size; type of court record involved – e.g. files/computer systems; method of identification; interviews/questionnaires/focus groups*
- b) The names of all the people involved in your study who could have access to **un anonymised** court data, with CVs for each   
(tick box if attached)
- c) Where formal senior judicial approval is required, relevant documents confirming approval and any supporting documentation.   
(tick box if attached)

## **Part C - Clarifying your methodology**

**Part B** provides information on the circumstances when a PAA is required, e.g., when you need access to court files. To obtain a PAA, you must be able to identify the exact case files you require, because you cannot have general access to case files. Court staff must receive a list of specific cases in order to be able to retrieve the files for a researcher, or appropriate parameters from which to select files (e.g. all trials on a particular day).

### **A researcher cannot have general access to case files.**

You may, however, be uncertain about whether court files contain the information you need, or how to identify a sample of case files for your study. In these circumstances, we suggest that you complete all parts of this Application as fully as possible and request a **two-stage approach**. A **feasibility stage** to test the availability of data and, if this is successful, a **main stage** of data collection. The Ministry of Justice's Records Management Services will assess whether a separate PAA should be issued for the feasibility stage and the Business Sponsor will assess what support and guidance court staff might be able to provide to help identify suitable cases.

Some cases can be identified through central electronic databases held by HMCS (for the Crown Court and county court family cases) and currently by the Office for Criminal Justice Reform (for magistrates' court cases). The HMCS Resources Directorate should be contacted on the data available from these sources (contact details in **Part D**).

The **feasibility stage** would involve your request to conduct a limited study in order to ascertain whether the information is held in the court files and how you will select files for your study. You should clearly set out in your Application details of the information you want to find. The likely points to be clarified include:

- a list of specific types of case kept;
- how are the cases logged;
- how are the files stored;
- can the specific cases be identified;
- what data are contained on the 'file';
- How can a list of cases be created in order that it can be used to attach to the PAA, or if the aim is to be completely random, how best that can be achieved.

It must be stressed that agreement to the feasibility stage does not necessarily imply agreement to the main study. Each application will be assessed on the comprehensiveness of the information supplied and, crucially, the impact of the research on the operation of the courts. Courts are subject to time and case volume pressures and staff may not be able to accommodate additional demands.

#### **REMINDER:**

Court staff will always have to obtain case files for external researchers. The case files will need to be obtained from various (sometimes off-site) storage arrangements. The pre-identification of cases is therefore essential if your project is to be viable. You should consider whether the identification of cases or even the collection of the data you seek may be better done through some other source (see Question 14).

## **GUIDANCE NOTES**

### **1. HMCS Data Access Panel (HMCS DAP) and HMCS Annual Data Requirements (HMCS ADR)**

Her Majesty's Courts Service (HMCS) is a separate Executive Agency within the Ministry of Justice. It is imperative that data collections or research investigations within HMCS courts or other offices should not impede the operation of that court / office. Accordingly all requests for changes to established data collections, new data collections and research using court records or involving interviews with court staff, must be:

- considered by the HMCS Data Access Panel (DAP), and following their recommendation
- approved by the HMCS Performance Committee

**Court files are closed to the public until they are a minimum of thirty years old.** This was set out in the Public Records Acts 1958 and 1967 (PRAs) and has not been altered by the Freedom of Information Act 2000 (Fol). It is worth noting that granting any requests made under the Fol would make the information released to one requestor available to the wider public.

However, the Ministry of Justice (MoJ) can grant special authority, subject to various conditions, to inspect otherwise exempt court files in England and Wales. This may be possible through the granting of a Privileged Access Agreement (PAA) by the Departmental Records Officer who has authority delegated from the Lord Chancellor. The requestor must demonstrate that it would be appropriate or desirable for access to be allowed to files for a specified reason which will be judged on the merits of the application but would need to be substantive and sufficient to outweigh the exemption. This requirement applies equally to other Government Departments as well as individuals and external organisations. No reference is made in the PRAs or the Fol to Government Departments having automatic rights of access to each other's records.

HMCS produces an Annual Data Requirements (ADR), which identifies the data collected centrally by HMCS, via various sources and where it is used whether it be for management information, planning, briefings, publications or sharing with external agencies.

A further role of the HMCS Data Access Panel is to provide governance over HMCS' ADR, and act as the ADR's 'gatekeeper' by ensuring that:

- All requests for new regular data collections which receive approval, are added to the ADR (it will be the successful applicant's responsibility to provide a completed template for inclusion)
- All requests for one-off data collections or research requests which receive approval are included in an annex to the ADR
- All refused requests for data collection will be included in an annex to the ADR

### **2. Exceptions**

- a) There are separate arrangements for research with only involves members of the judiciary; and



- b) These instructions do not currently apply to changes in data collection or research requests outside of HMCS, e.g. other MoJ agencies such as the Tribunals.

### **3. Data Collection – amendments to Annual Data Requirements**

An Annual Data Requirement (ADR), which outlines the data provided by the Crown, County and Magistrates' Courts in England and Wales, was formally implemented in HMCS from April 2008. Any requests for changes to the ADR must be made through the HMCS Data Access Panel and the Performance Committee.

The principle method to have approval granted for a change to the ADR is as follows:

- a) completion of the DAP application form by the applicant / Business Area requesting the change
- b) Application form and supporting documents are submitted to the HMCS Data Access Panel secretariat
- c) consideration by the HMCS Data Access Panel (HMCS–DAP)
- d) recommendation by HMCS–DAP to the HMCS Performance Committee

### **4. Research Requests**

Research requests will often involve access to court files. Inevitably, data held in court files and other court records (including electronic systems) can be of a sensitive and personal nature, and access to it is subject to legal restrictions – most notably the Public Records Acts 1958 & 1967, and the Data Protection Act 1998. If the request is made by an external researcher (i.e., not employed by HMCS or the Ministry of Justice) and includes a request for access to unanonymised data held within court files, a Privileged Access Agreement is required, under the provisions of the Public Records Act 1958. Please see **Part B – Further details to support a Privileged Access Agreement (PAA)** and **Part C – Clarifying your methodology** for more information specifically for external researchers.

The process to be followed in order to have a successful research request approved is:

- a) Completion of the application form by the researcher
- b) Application form is submitted to the HMCS Data Access Panel Secretariat, who will approach an HMCS Business Area to act as sponsor (unless one has already been identified). **Sponsorship is essential for the application to proceed**
- c) Only once sponsorship is given, will the application be considered by the HMCS-DAP
- d) Recommendation by HMCS-DAP to the HMCS Performance Committee

### **5. Timetable**

These processes take time, depending upon the complexity of your request. Once the completed application has been received, it takes, on average, three weeks for the HMCS-DAP stage. The recommendations are then passed to the HMCS Performance Committee **where approval will usually be sought at the monthly Committee meetings**. Only once approval has been given will the drafting of the PAA (if required) commence.

You should therefore build this into your timetable and make sure that you start the process in good time for the beginning of your proposed data collection / research. It is also important that the information you provide is part of the final plan for the project, since any substantive changes may mean restarting the process from scratch.

In general, you should submit the application once you have secured funding (at least in principle), and when your proposals are clear.

## **6. HMCS Business Area Sponsors**

The HMCS Data Access Panel will usually only consider applications that have a Business Area sponsor. For data collections and internal research, this will initially be the business area that makes the request. External researchers should send their completed application to the HMCS Data Access Panel secretariat, which will approach the appropriate business area to request their sponsorship, if that approach/contact has not already been made and been successful.

If supported, the Business Area will appoint a named contact, who will usually have responsibility for making arrangements for you to contact / visit courts. If your request includes interviews with the judiciary, senior Judicial Agreement is required and this will be sought by the Business Area sponsor (see **Part B**).

Business Sponsors should note that they are responsible for ensuring that the proposed data collection / research request is legally defensible. If there is any doubt, either about the planned sampling method or the research topic, the business sponsor **MUST** seek an independent legal view and provide this to the HMCS Data Access Panel before applications can be progressed.

## **7. Further Information**

- Answers to **Part A** should be as full as possible; incomplete forms or inadequate answers may result in not obtaining HMCS Business Sponsorship, or at least a delay in the HMCS Data Access Panel's consideration of the Application
- Alternative sources of the data must be considered fully before the courts are considered (see **Part A Question 14** below)
- Where detailed research tender / proposal documents are available, these should be attached to the Application and answers to appropriate questions should refer to these documents
- If there are uncertainties about the way you will conduct your research / what data is available, further guidance is supplied in **Part C**
- If you need advice on setting up and analysing this research / data collection, please contact the Ministry of Justice's Economics and Statistics Division (see **Part D** for details) who will be pleased to help
- All new MoJ research projects that have not yet received ministerial approval must enter the new research quality assurance (RQA) process at the link below.  
<http://libra-infonet.lcd.gsi.gov.uk/justice/business/tools/research/rqa.htm>

## ANNEX: QUESTION 8 : AIMS AND OBJECTIVES

### Introduction

This PhD study will examine the extent to which the courts and professionals working in the family justice system follow the *Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* [2008] 2 FLR 103. This Practice Direction raises questions about identifying and proving domestic violence as well as the management of risk. This study will focus, in particular, on those issues that have been highlighted in previous research<sup>1</sup>, in policy reviews<sup>2</sup>, by the Court of Appeal in the leading case of *Re L*<sup>3</sup> and subsequent cases, and by the Family Justice Council<sup>4</sup> as causing particular problems for children and parents in contact and residence cases where domestic violence is an issue. These are the identification of domestic violence in residence and contact cases, the extent to which the courts and professionals are willing to enable fact-finding hearings to take place, the practice of the courts where consent orders are invited in such cases, and the steps taken to ensure the safety of the child and the parties.

### Background context of the study

Until relatively recently, the connection between the welfare of children on parental separation, and the perpetration of abuse on primary carers by non-resident parents was almost totally absent in family law. Courts and professionals working within the family justice system tended to treat cases involving contact and residence separately from issues involving domestic violence.

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<sup>1</sup> See, eg, Hester, M. and Radford, L. (1996) *Domestic Violence and Child Contact Arrangements in England and Denmark*, Bristol: The Polity Press; Hester, M., Pearson, C. and Radford, L. (1997) *Domestic Violence: A National Survey of Child Welfare and Voluntary Sector Mediation Practice*, Bristol: The Polity Press; Anderson, L. (1997) *Contact between Children and Violent Fathers*, London: Rights of Women

<sup>2</sup> For example, The Advisory Board on Family Law: Children Act Sub-Committee (2000) *A Report to the Lord Chancellor's Department on the Question of Contact in Cases where there is Domestic Violence*, London: The Stationery Office

<sup>3</sup> *Re L (Contact: Domestic Violence)*, *Re V (Contact: Domestic Violence)*, *Re M (Contact: Domestic Violence)*, *Re H (Contact: Domestic Violence)* [2002] 2 FLR 334, CA

<sup>4</sup> See Craig, J. (2007) 'Everybody's Business: Applications for Contact Orders by Consent', *Fam Law* 26

Approximately 17 years ago research was initiated which inquired into the implications for women and children of continued contact with violent fathers<sup>5</sup>. It was found that the practices and perceptions of professionals working in family proceedings were both influenced by, and also reinforced, the ideological separation of contact and domestic violence, with serious consequences for children and resident parents<sup>6</sup>. This research led to a number of important legal and policy developments, which resulted in ‘good practice’ guidelines issued by the Children Act Sub-Committee of the Advisory Board on Family Law (CASC)<sup>7</sup>, which were shortly afterwards followed by the landmark combined appeals of *Re L*<sup>8</sup> in which the Court of Appeal decided, inter alia, that courts should consider the nature and effect of the alleged violence at the earliest opportunity and investigate allegations of violence so that findings of fact can be made.

Since the CASC Report and the decision in *Re L*, the Court of Appeal has expressed concern at the failure of the lower courts to follow the CASC and *Re L* guidelines<sup>9</sup>. This concern was reinforced by recent research initiated by the Family Justice Council which found, inter alia, that in general, the guidelines in *Re L* are more honoured in the breach than the observance and that pressure can be put on victims of domestic violence to agree to contact orders; in the case of consent orders, the *Re L* guidelines were virtually ignored<sup>10</sup>. One of the principal recommendations of the Family Justice Council was that a Practice Direction should be issued setting out the practice to be followed in all such cases. The resulting President’s Practice Direction forms the subject of this study.

### **Aims and Objectives**

The aim of the study is to identify whether the courts and professionals have changed their practices in private law Children Act proceedings in such a way as to comply with the Practice Direction; if this is not the case, to ascertain why its provisions are

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<sup>5</sup> Hester, M. and Radford, L. (1992), ‘Domestic Violence and Access Arrangements for Children in Denmark and Britain’, *Journal of Social Welfare and Family Law* 57

<sup>6</sup> See Fn 1 above

<sup>7</sup> See Fn 2 above

<sup>8</sup> See Fn 3 above

<sup>9</sup> See, eg, *Re K and S (Children)* [2006] FCR 316, CA; *Re H (A Child) (Contact: Domestic Violence)* [2006] 1 FCR 102, CA

<sup>10</sup> See Fn 4 above

not being adhered to; to determine what can be done to improve practice in this area to ensure that the safety and well-being of children and parents in residence and contact cases is not jeopardised.

Adrienne Barnett  
Brunel University  
10<sup>th</sup> March 2009

## QUESTION 8: METHODOLOGY : REVIEW OF COURT RECORDS

### Introduction

I propose to adopt a primarily qualitative approach to the research, while using principally qualitative and some quantitative methods.

### Choice of Methods

The following methods have been identified as most appropriate to the subject and theoretical perspective of this study:

- i. Review of Court Records
- ii. Interviews with solicitors, barristers, CAFCASS officers and members of the judiciary

### Review of Court Records

This will be the principal source of both quantitative and qualitative data for this project. My study population of courts is defined as: all county courts and family proceedings courts ('FPCs') in England and Wales that hear private law Children Act cases involving residence and contact disputes.

#### 1. Selection of court sample

I have obtained a complete up-to-date list of all such courts from the HMCS website. Given sufficient time and resources, I would conduct a power analysis to ensure that my sample is representative of the parent population<sup>11</sup>. Since my sample size would have to be severely limited by restraints of time and resources in any event,<sup>12</sup> I decided that this was not feasible or necessary. In order to ensure that I cover as representative as possible a selection of courts by ensuring a geographical and demographic spread, I would ideally have wished to select one county court and one FPC within each of the HMCS regions in England and Wales, namely: London, Midlands, North East, North West, South East, South West, Wales. However, this would result in having to review

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<sup>11</sup> See Babbie, E. (1995) *The Practice of Social Research*, London: Wadsworth

<sup>12</sup> There are 75 county courts and over 300 FPCs in the parent population

the records of at least 14 courts, which would not be possible for reasons of time and resources.

On the basis that the maximum number of courts whose records would be feasible to review is six, I have decided to select courts in a large inner city area (in London), a smaller rural area (in the South West) and a provincial town (in the North East), thus covering a diverse geographical and demographic area<sup>13</sup>.

I obtained the information upon which the selection of the specific courts was based from a review of all the latest HMCS Annual Family Court Reports, which are available for all county courts in England and Wales<sup>14</sup>. The latest reports cover the period from April 2006 to March 2007<sup>15</sup>. The reports provide the figures for the total numbers of private law Children Act applications per court per year. These figures were categorised into courts with relatively low numbers of such applications per year (1 – 299), medium numbers of applications per year (300 – 699) and high numbers of applications per year (700 and above).

In order to ensure that the courts reviewed also cover a broad range in terms of the numbers of solicitors available to represent parties in private law Children Act disputes, I reviewed the list of Resolution members based in each county court city and town<sup>16</sup>. This enabled me to ascertain the number of solicitors most commonly available to undertake family law work for each geographical sub-category of court<sup>17</sup>.

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<sup>13</sup> Similar studies that have involved a review of court records have selected 3 courts covering diverse catchment areas – see Smart, C. and May, V. (2004), ‘Why Can’t They Agree? The Underlying Complexity of Contact and Residence Disputes’, *Journal of Social Welfare and Family Law*, 26(4): 347

<sup>14</sup> Such reports are not available for the FPCs.

<sup>15</sup> Only the 2005 – 2006 reports were available for a small number of courts. The 2006-2007 reports were published by HMCS in September 2008; it is therefore assumed that the 2007-2008 reports will not be available until approximately September 2009.

<sup>16</sup> Resolution’s website lists all its members per town throughout England and Wales

<sup>17</sup> These figures will not be 100 per cent accurate, because I recognise that there may be solicitors based in towns surrounding those in which each county court is based who act in such cases, but for reasons of time and resources, it was not possible to review Resolution’s membership list for every town and village throughout England and Wales. It is also recognised that some solicitors who are not members of Resolution may undertake private law Children Act work.

Utilising the information from the HMCS Family Court Reports and Resolution's list of members, the following courts have been selected for the case review:

Inner city court in London: The Principal Registry of the Family Division ('the PRFD'). This is the busiest court in London and indeed nationally. In the year April 2006 to March 2007 it received 3,925 such applications (over three times the number filed at Liverpool County Court, which has the second highest number of applications). Applications are received at the PRFD from all areas of London.

Rural town court in the South West: XX County Court. This court received 183 private law applications during the period April 2006 to March 2007, a number typical for courts receiving relatively low number of applications per year. There are 5 Resolution members practising in XX, again a number that is representative for courts with low numbers of private law applications.

Provincial town court in the North East: Doncaster County Court. This court received 481 private law applications during the period April 2006 to March 2007; the attached chart demonstrates that this number is typical for courts receiving a medium number of applications per year. There are 30 Resolution members based in Doncaster. This is slightly higher than the median number for courts with medium numbers of private law applications (25). However, a high proportion of Resolution members in Doncaster undertake publicly funded work, and there are a high number of public law applications received by that court; therefore it is hypothesised that many of those solicitors may undertake predominantly public law work.

As far as the FPCs are concerned, it was not possible to determine the numbers of applications per court, because these are not currently published by HMCS. Information from the county courts is available from the computer system, FamilyMan; the FPCs did not have FamilyMan or a similar system in place during 2007 and information for HMCS for 2007 and previous years was



sourced manually<sup>18</sup>. I therefore decided to select FPCs in each of the county court towns selected for review, namely Doncaster FPC and XX FPC, and Wimbledon FPC<sup>19</sup> in London, for reasons of time and resources, and because the county court family court reports indicate that individual cases are on occasions transferred between county courts and the local FPCs.

## **2. Selection of cases for review**

I intend to select 20 cases from each county court and 6 cases from each FPC for review. The reason for the much lower number of cases for review in the FPCs is because those courts receive far fewer private law Children Act applications than the county courts. In the year April 2007 to March 2006 the total number of private law applications made to the county courts was 86,771 and to the FPCs was 19,600<sup>20</sup>.

If access is granted by HMCS for the review of court records, the cases to be reviewed will be selected as follows. The cases selected for review would be those initiated after the Practice Direction has been in effect for at least 3 months, to enable courts and practitioners to become familiar with its operation. Ideally I would like to be able to review cases that start and finish during the review period. Since it is clear from the Family Court Reports that the target for each court is to complete a case within 40 weeks,<sup>21</sup> I decided to review a sample of cases initiated in each subject court from the beginning of September 2008, the majority of which it is anticipated would be completed by the time of my main stage record review in August 2009<sup>22</sup>.

The first stage of the selection process would be a feasibility study to identify the specific cases to be reviewed. I would hope to be able to undertake this stage by June 2009. This would involve a review of the following cases in each court:

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<sup>18</sup> See *Judicial and Court Statistics 2007* (London: TSO) Cm 7467 at Pg. 203

<sup>19</sup> Because no information on the numbers of applications is available for FPCs in London, the selection had to be made on a random basis, and Wimbledon FPC was selected on the basis of convenience.

<sup>20</sup> See Fn 8 at Pg. 91

<sup>21</sup> The degree to which this target is met varies, but is generally well above 70%

<sup>22</sup> It is recognised that some cases commenced in Yeovil County Court and the FPCs in the later months of the selection period may not be completed during the review period, but for reasons of time, the main stage of the case review will have to take place during August 2009

The PRFD: all private law applications issued during the first two weeks of October 2008. This period is based on the average number of applications per fortnight for the period April 2006 to March 2007 being 166. It is considered that a one-week time frame may be too small as it may contain anomalies or atypical cases. From this sample, a random sample of 20 cases will be selected<sup>23</sup>.

Doncaster County Court: all private law applications issued during September and October 2008. This period is based on the average number of applications per month for the period April 2006 to March 2007 being 40. From the sample of 80 cases, a random sample of 20 cases will be selected.

XX County Court: all private law applications issued from the beginning of September to the end of January 2009. This period is based on the average number of applications per month for the period April 2006 to March 2007 being 15.

The four-month period from the beginning of September 2008 until the end of December 2008 will be selected for each FPC, as it is not known what the average number of applications per month for those courts is.

### **3. Review of court records : main stage of the review**

It is intended that the cases selected during the feasibility stage of the study will be reviewed during August 2009. If I am permitted to photocopy case records, the relevant papers from each case will be photocopied at each court. If photocopying is not permitted, I will record the relevant information electronically on my laptop computer; clearly this will necessitate a longer period for this stage of the review.

### **4. Analysis**

Qualitative data obtained from the review of court records will be analysed thematically. Attached herewith at **Appendix D** is a summary of the Data Collection Themes. Statistical analysis will be undertaken of the (lesser amount of) quantitative data collected, such as the proportion of residence and contact cases involving allegations of domestic violence; the numbers of fact-finding hearings held; the stage

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<sup>23</sup> I intend to filter out any cases in which I have been instructed by any of the parties in my professional capacity.

of the proceedings at which fact-finding hearings are held; the proportion of consent orders that can be identified as involving allegations of domestic violence.

Adrienne Barnett  
Brunel University  
10<sup>th</sup> March 2009

## **ANNEX: QUESTION 14 : DATA COLLECTION THEMES**

### **1. Domestic violence as a factor in residence and contact cases**

- what proportion of residence cases involve domestic violence, as far as can be identified
- what proportion of contact cases involve domestic violence, as far as can be identified

### **2. Identifying domestic violence as an issue and making the court aware of it**

- documentary information available to the court on issue of proceedings, eg, C1 and C1A forms
- do courts consider whether domestic violence is an issue whether or not it is raised as an issue by the parties
- initial screening by CAFCASS
- does the designated family judge/justices clerk send issue documents to CAFCASS
- do courts inform the parties of screening reports or other information from CAFCASS at the first hearing
- to what extent do solicitors/barristers find out about domestic from clients and its effect on the child and the parties
- to what extent do solicitors/barristers make the court aware of domestic violence and its effect on the child and the parties

### **3. Deciding on the relevance of domestic violence to the conduct of the proceedings and the orders sought**

- how and when do courts decide 'the factual and welfare issues' involved [PD Para 3]
- how and when do courts decide the extent to which domestic violence would be relevant in deciding orders for contact and residence
- at the first hearing, do courts consider: (a) the likely impact of domestic violence on the conduct and outcome of the proceedings, and (b) whether the nature and effect of domestic violence is likely to affect the court's decision? If so, how do they carry out this consideration?

### **4. Consent Orders**

- what proportion of consent orders in the court records reviewed are identified as involving domestic violence
- what information is available to courts on a consent order [subdivided into: information requested by the court; information provided by representatives]
- how would the court be aware of domestic violence when a consent order is proposed
- to what extent do courts scrutinise proposed consent orders

- to what extent do courts refuse to make a proposed consent order because of issues of domestic violence/ or request further information/ or involve CAFCASS
- are consent orders made where CAFCASS express concerns about domestic violence
- what is the attitude/practice of solicitors and barristers to consent orders sought

**5. The practice of courts in respect of fact-finding hearings**

- number of fact-finding hearings held
- at what stage in the proceedings are fact-finding hearings held
- how do fact-finding hearings get listed, eg, at the request of the parties/courts own motion/request by CAFCASS
- how do courts decide whether to list a fact-finding hearing
- if fact-finding hearings are recommended in a CAFCASS report, to what extent do they take place
- willingness of courts to list fact-finding hearings if requested to do so by either or all of the parties
- do fact-finding hearings take place on the listed date; if not, reasons for this
- do courts ever refuse to hold fact-finding hearings if requested and if so, what factors influence this decision
- do courts make findings about the following:
  - o nature and degree of domestic violence
  - o its effect on the child
  - o its effect on the parents
- do courts make clear in their judgments or reasons how their findings on domestic violence have influenced their decisions in respect of residence and contact and if they make an order, do they explain the reasons why

**6. Interim orders – assessing risk and ensuring safety**

- do courts consider the following factors when deciding whether to make interim residence or contact orders when a fact-finding hearing [or CAFCASS report] has been directed:
  - o the safety of the child and resident parent
  - o the risk of harm to the child
- if the court decides to make an interim contact order, do they consider:
  - o how the risks and safety for the child and resident parent can be secured
  - o how to minimise the risks and secure safety
  - o what arrangements can be made to secure safety, eg, supervised or supported contact
- if the courts decides not to order interim direct contact, do they consider indirect contact and if so, do they consider any risks involved with such contact

**7. Final orders when domestic violence has occurred : factors courts take into account when determining whether to make an order**

To what extent, and how, do courts consider the following factors:

- the harm the child has suffered as a result of the domestic violence
- the harm the child is at risk of suffering if an order for residence or contact is made
- the safety of the child and resident parent
- the conduct of the parents towards each other and the child
- the effect of domestic violence on the child and the resident parent
- the motivation of the parent seeking contact
- the likely behaviour during contact of the parent seeking contact and its effect on the child
- the capacity of the parent seeking residence or contact to appreciate the effect of the violence on the child and the other parent
- the attitude of the parent seeking residence or contact to their past violence and whether they have the capacity to change

**8. Final orders where domestic violence has occurred: where the court decides to make an order for direct contact**

- has the court satisfied itself that the physical and emotional safety of the child and resident parent can be secured before, during and after contact
- does the court consider whether the perpetrator should seek advice or treatment as a pre-condition to an order or to assess risk to the child
- do courts consider whether contact should be supervised

**9. Final orders where domestic violence has occurred: where the court decides not to make any orders for direct contact**

- do courts make orders for indirect contact; if so, what are the safety considerations involved

# APPENDIX E

## INTERVIEW SCHEDULE: JUDGES AND MAGISTRATES

### Identifying domestic violence as an issue

1. When you receive the papers for a first appointment in a contact or residence case, how much information, if any, is usually revealed in the papers filed by the parties at that stage about domestic violence? If the only paperwork filed were the non-resident parent's C100 form, how would you become aware of any allegations of domestic violence?
2. With respect to Paragraph 4.2 of the Revised Private Law Programme, what documents are usually available to you at the FHDRA and are they sufficient to identify whether domestic violence is likely to be an issue? Has there been any improvement in the extent of the information on domestic violence available at first hearings (and in particular at the FHDRA) since the Revised Private Law Programme came into effect on 4<sup>th</sup> October 2010?
3. Are you ever/regularly/frequently provided with an initial screening report by CAFCASS prior to the first appointment? How detailed are such reports, and what sort of information do they contain? Would you usually inform the parties of the contents of any screening reports you have received?
4. In your experience, are Cafcass carrying out the steps to identify safety issues set out in Paragraph 3.9 (a) to (e) of the Revised Private Law Programme? To what extent has this assisted in identifying issues of safety and risk more comprehensively and expeditiously?
5. Do you think that the C1A forms usually contain sufficient details of domestic violence? [This question will be amended to include the C100A forms if they are in use at the time of the interviews.]
6. If you are presented with an initial application for contact and/or residence, and neither party raises allegations of domestic violence and such issues are not raised in Cafcass's screening report, would you ask the parties whether domestic violence is an issue in the case? Do you think that tribunals are more likely to enquire about domestic violence of their own motion since the Practice Direction came into effect?

7. If either or both of the parties are acting in person, does this have any effect on whether domestic violence is likely to be disclosed to the court?

**Deciding on the relevance of domestic violence to the conduct of the proceedings and the orders sought**

8. If domestic violence is raised by either party as an issue in a residence or contact case, how would you decide whether it is relevant to the issues in the case? What factors would you take into account in deciding this question? Are there any circumstances where domestic violence is not likely to be relevant to the issue of residence and contact?
9. In what circumstances, if any, could domestic violence justify a party opposing direct contact?
10. Do you think that there has been any change in the way in which courts consider the relevance of domestic violence to the issues in the case since the President's Guidance in Relation to Split Hearings was issued in May 2010?

**Consent orders**

11. If a tribunal is presented by the parties with a draft consent order for contact, and is aware that one party has made allegations of domestic violence against the other, how is that judge likely to deal with the proposed consent order?
12. Would it necessarily be the case that the tribunal would be aware of allegations of domestic violence if presented with a draft consent order for contact, eg, where no statements have been filed and no screening report is available from Cafcass? Would a tribunal be likely to enquire of the parties whether it is an issue in such circumstances?
13. Have you ever refused to approve a draft consent order (or requested further information or involved Cafcass) because of concerns about domestic violence?
14. If a Cafcass officer had raised concerns about domestic violence and its effect on the child in a Section 7 report, but the parties subsequently presented the court with a draft consent order providing for direct contact, how would the court be likely to proceed?
15. Do you think that it is better for children that their parents agree residence and/or contact arrangements rather than the court deciding?



16. Do you think there has been any change in your practice in respect of consent orders, or that of your fellow judges, since the Practice Direction came into effect? Has your practice changed in this respect since the implementation of the Revised Private Law Programme?

### **Fact-finding hearings**

17. At what stage in residence and contact proceedings would you normally list a fact-finding hearing?

18. In your experience, how are fact-finding hearings usually listed, ie, at the request of the parties; on the court's own motion; at the suggestion of a Cafcass officer?

19. In what circumstances would most courts decide that a fact-finding hearing is not necessary? Has there been any change in such circumstances since the President's Guidance in Relation to Split Hearings was issued in May 2010?

20. Do you think that there has been any change in the extent to which courts decide to list fact-finding hearings since the President's Guidance in Relation to Split Hearings was issued in May 2010?

21. How, if at all, has the Revised Private Law Programme affected your ability to decide whether a fact-finding hearing is necessary?

22. Vignette: the mother alleges that, in the past, the father has been verbally abusive towards her and has hit and punched her when he was drunk. She accepts in principle that the children should have contact with the father but wants it supervised. She alleges no violence since the parties separated, but some verbal abuse and says she is still scared of the father. The father accepts that he has been verbally abusive towards the mother in the past, and admits some pushing and shoving, but says he has stopped drinking and is a changed man. He agrees to some interim supervised contact on a short-term basis, with a view to moving on fairly swiftly to unsupervised. Would a fact-finding hearing in these circumstances be required?

23. Since the Practice Direction came into effect in May 2008, do you think that there has been an increase in the occurrence of fact-finding hearings? Has this been the case in your own court? Conversely, do you think there has been a decrease in the occurrence of fact-finding hearings since the President's Guidance in Relation to Split Hearings was issued in May 2010?

24. Have you tried any cases where a fact-finding hearing was listed, but on the day of trial it did not go ahead? Are you aware of any cases dealt with by your fellow judges where this has happened? Please could you elaborate on the circumstances.
25. Do you find that fact-finding hearings are helpful in determining the best outcome for the child in contested residence and contact cases?
26. How do you think fact-finding hearings could be streamlined and made more effective?

### **Interim orders – assessing risk and ensuring safety**

27. If the resident parent opposes contact on the basis of domestic violence and a fact-finding hearing is listed, how do you determine whether there should be any interim direct contact? In what circumstances do you think it would be appropriate for some direct contact to take place?
28. Has there been any change in the making of interim orders since the implementation of the Revised Private Law Programme and in particular, the use of conciliation and/or mediation at the FHDRA?
29. Do you think that most courts set out in their orders the statement envisaged by Paragraph 6.1(f) of the Revised Private Law Programme?
30. Vignette: the mother alleges that the father was violent towards her when they lived together, and has threatened her since they separated. She opposes all contact between the father and the child, who is aged 7. You list the matter for a fact-finding hearing in 2 months' time. The father seeks interim contact, which is opposed by the mother. How would you deal with this situation? How do you think most judges would deal with this situation?

### **Final orders when domestic violence has occurred: factors court takes into account**

31. When one parent has admitted domestic violence against the other, or findings have been made against them, how would this affect your decision on the issue of contact? What factors would you take into account in these circumstances in determining the issue of contact?

32. Do you think that the practice of the courts has changed since the Practice Direction came into effect, when determining the issues of residence and contact in circumstances where domestic violence has occurred?
33. Do you think that the Guidance on Split Hearings and the Revised Private Law Programme have affected outcomes in contact proceedings where domestic violence is admitted or found?
34. Where domestic violence has occurred, in what circumstances would you envisage ordering contact between the child and non-resident parent?

**Final orders when domestic violence has occurred: where the court decides to make orders for direct contact**

35. If domestic violence has occurred but you decide that there should be some direct contact between the child and the perpetrator, what safeguards would you consider for the child and the resident parent?
36. If domestic violence has occurred, would you consider requiring the perpetrator to attend a domestic violence perpetrator programme? In what circumstances would this be beneficial for the child and the parties? Do you think that there has been any change in the extent to which attendance at such programmes is required since the Practice Direction came into effect?
37. Vignette: the mother alleges that the father has been violent towards her over a period of years, with allegations ranging from verbal abuse and threats through to kicking and punching. The father denies all the allegations. A fact-finding hearing is held and you make some findings against the father, but not to the extent alleged by the mother – that he has been verbally abusive, has pushed and shoved the mother during arguments, and hit her once many years ago, and that all of this happened when he was drunk. The mother opposes all contact on the basis that she is frightened of the father and believes he will never change. The father does not accept your findings against him. How would you proceed?

# APPENDIX F

## INTERVIEW SCHEDULE: SOLICITORS AND BARRISTERS

### A. General questions

1. What advice do you give clients generally about contact and how the courts view it? Would your advice differ depending on whether you represent the resident or non-resident parent?
2. How important do you think it is for non-resident parents to have some contact with the child/children?
3. Have you encountered clients who you believe are unjustifiably denying the other parent contact with the child/children? How have you formed this view?
4. Do you consider that the fear of domestic violence by one parent towards the other would justify them in opposing contact? In what circumstances, if any, could it do so? How would you advise a client if they opposed contact in these circumstances?
5. Do you think that it is better for children that their parents agree contact arrangements rather than the court deciding? How do you think your clients have felt about agreements for contact that have been reached?

### Defining 'Domestic Violence'

6. Paragraph 2 of the Practice Direction provides that '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."

What is your view of this description of 'domestic violence'?

7. How do you think most tribunals understand the term 'domestic violence'?

## **B. Questions relating to the Practice Direction**

### **Identifying domestic violence as an issue and making the court aware of it**

8. Solicitors: when a client first consults you about a residence or contact issue would you usually ask them:
- a. whether any domestic violence has occurred;
  - b. whether the child is aware of the domestic violence;
  - c. about the effect of the domestic violence on themselves and the other party;
  - d. about the effect of the domestic violence on the child?

Barristers: if there were no mention of domestic violence in your papers, would you specifically ask your client about it; whether the child is aware of the domestic violence; about the effect of domestic violence on the child and on themselves and the other party?

9. In your experience, at the first appointment (or at any stage) have you ever been made aware by the court of whether CAFCASS has undertaken initial screening for domestic violence? If so, are you informed about the content of any screening report or other information provided by CAFCASS?
10. With respect to Para 4.2 of the Revised Private Law Programme, what documents are usually available at the FHDRA? Has there been any improvement in the extent of information on domestic violence available at the FHDRA/first hearings since the Revised Private Law Programme came into effect on 4.10.10?
11. Do you think that domestic violence is usually revealed by the C1A forms? Solicitors: what degree of detail do you usually include when drafting C1A forms? Barristers: what degree of detail do you usually find in C1A forms?
12. If at the early stages of proceedings there were no statements filed, and the only paperwork available is the father's C100 form, how would you expect domestic violence to emerge?
13. If your client has told you about domestic violence perpetrated by the other parent, would you routinely make the court aware of this? How would you make the court aware, and what opportunities are there for doing so?
14. In your experience, do courts ever/usually consider whether domestic violence is an issue in the proceedings even if neither of the parties raise it as an issue? Do you think that there has been any change in the courts' practices in this respect since the Practice Direction?

### **Deciding on the relevance of domestic violence to the conduct of the proceedings and the orders sought**

15. If domestic violence is raised as an issue in a case (either by the court or the parties) do courts consider the extent to which it is likely to be relevant in deciding contact applications [Prompt: eg, in terms of its nature, extent, and effect on the parties and on the child?] Are there any differences in this respect between the county courts and the FPCs? Are there any circumstances, in your view, where domestic violence is not likely to be relevant to the issue of contact?
16. Do you have experience of any cases where domestic violence was raised as an issue by a party but the court considered at an early stage that it was not likely to affect the outcome? If so, how did the court reach this conclusion?
17. Do you think that there has been any change in the way in which courts consider the relevance of domestic violence to the issues in the case since the President's Guidance in Relation to Split Hearings was issued in May 2010?

### **Consent orders**

18. How would the court become aware of domestic violence in cases where the parties present it with a consent order?
19. Where parties are agreed on contact, how much information would you provide to the court? Would you make the court aware of any domestic violence if the papers filed did not disclose this? Do you think there has been any change in your practice in this respect since the Practice Direction?
20. To what extent do courts scrutinise proposed consent orders? Do they ask for information about domestic violence? Do you think there has been any change in this respect since May 2008? Are there any differences between the county courts and FPCs?
21. In your experience, do courts ever refuse to make consent orders because of concerns about domestic violence, or request further information or involve CAF/CASS for this reason? Has there been any change in this respect since the Practice Direction?

22. Have you ever represented clients where contact has been agreed despite concerns raised by a CAFCASS officer because of domestic violence?

### **Fact-finding hearings**

23. How do fact-finding hearings usually get listed, ie, by request of a party/parties or on the court's own motion?

24. If you or the other party requests the court to list a fact-finding hearing, are they usually willing to do so? Has there been any change since the Practice Direction? Have you acted in any cases where you or your opponent have requested a fact finding hearing but the court has refused? What about if a fact-finding hearing is recommended in a Cafcass report?

25. Since the Practice Direction came into effect in May 2008, have you noticed any increase in the listing of fact-finding hearings?

26. Do you think that there has been any change in the extent to which courts decide to list fact-finding hearings since the President's Guidance in Relation to Split Hearings was issued in May 2010?

27. At what stage in the proceedings do courts usually decide whether to list a fact-finding hearing?

28. Have you acted in any cases where a fact-finding hearing has been listed, but on the day of trial the hearing does not take place, or is cut short? [Prompt: please elaborate on the circumstances] In your experience, does this happen rarely/ regularly/frequently?

29. If your client opposes contact on the basis of domestic violence and the other party disputes this, would you request a fact-finding hearing? Conversely, if you represent the non-resident parent who disputes allegations of domestic violence made by the resident parent, would you request a fact-finding hearing? In either case, in what circumstances would you not do so?

30. Are fact-finding hearings held in all appropriate cases?

31. What is your view of fact-finding hearings? [Prompt: eg, do you consider them useful; a waste of time?]

32. The Practice Direction provides that courts should make findings about:

- the nature and degree of domestic violence
- its effect on the child
- its effect on the parents

In your experience, do courts do so?

### **Interim orders – assessing risk and ensuring safety**

33. In your experience, if the resident parent opposes contact on the basis of domestic violence and a fact-finding hearing is listed, do courts order interim direct contact? In what circumstances do courts tend to do so? Has there been any change in this respect since the Practice Direction? What kind of interim orders do courts usually make pending a fact-finding hearing?
34. In an interim situation, if you are acting for the resident parent and she/he was concerned about their safety, how would you advise them and what representations would you make to the court?
35. Do you think that courts focus enough on minimising the risks and securing the safety of the child when ordering interim contact? What about the safety of the resident parent? Do you think there has been any change in the court's focus on risk and safety since the Practice Direction came into effect?
36. Has there been any change in the making of interim orders since the implementation of the Revised Private Law Programme and in particular, the use of conciliation and/or mediation at the FHDRA?
37. Vignette: you are representing the mother, who alleges that the father was violent towards her when they lived together, and has threatened her since they separated. She opposes all contact between the father and the child, who is aged 7. A fact-finding hearing has been listed, to take place in 2 months' time. The father seeks interim contact. How would you advise the mother? What is the court likely to do if the mother opposes all interim direct contact in these circumstances?

### **Final orders when domestic violence has occurred: factors court takes into account**

38. If the court makes findings of domestic violence against the non-resident parent in a disputed contact case (or where domestic violence is admitted), how does this usually affect their decision on the issue of contact? What is the most likely outcome?



39. Do you think that, since the Practice Direction came into effect in May 2008, there has been any change in the way the courts determine contact when domestic violence is proved or admitted?
40. Do you think that the Guidance on Split Hearings has affected outcomes in contact proceedings where domestic violence is found or admitted?
41. The Practice Direction provides that where domestic violence has occurred, the court should consider, inter alia:
- the effect of the domestic violence on the child and the resident parent
  - the motivation of the parent seeking residence or contact
  - the likely behaviour of the parent seeking contact during contact and its effect on the child
  - the capacity of the parent seeking residence or contact to appreciate the effect of past violence and the potential for future violence
  - the attitude of the parent seeking residence or contact to their past violent conduct and whether they have the capacity to change.
- In your experience, do courts usually do so?  
Where would the courts get the information from to consider these factors (eg, evidence, findings, Cafcass, experts)  
Has there been any change in this respect since the Practice Direction?  
Has there been any change in how Cafcass consider these issues since the practice direction?  
*[A written copy of this list of factors will be provided to interviewees]*
42. Where domestic violence has occurred, what do you think could make contact safe for the child and resident parent?

**Final orders when domestic violence has occurred: where the court decides to make orders for direct contact**

43. If domestic violence has occurred but the court decides to order direct contact, what, if any, safeguards is the court likely to direct?
44. To what extent are the courts likely to require the perpetrator to attend a domestic violence perpetrator programme? Do you think that there has been any change in the extent to which attendance at such programmes is required since the Practice Direction came into effect?
45. Vignette: the mother alleges that the father has been violent towards her over a period of years, with allegations ranging from verbal abuse and threats through to kicking and punching. A fact-finding hearing is held and the judge makes some findings against the father but not to the extent alleged by the

mother – that he has been verbally abusive, has pushed and shoved the mother during arguments, and hit her once many years ago, and that all of this usually happened when he was drunk. The mother opposes all contact on the basis that she is frightened of the father and believes that he will never change. The father does not accept the court's findings against him.

How would you advise the mother?

How would you advise the father?

What is the court likely to order/direct in these circumstances?

# APPENDIX G

## INTERVIEW SCHEDULE: CAFCASS OFFICERS

### A. General Questions

1. How important do you think it is for non-resident parents to have some contact with the child/children?
2. Have you reported on cases where the resident parent has unjustifiably denied contact with the child/children? How have you formed this view? Is this a common or rare occurrence?
3. Would the fear of domestic violence by one parent towards the other justify them in opposing contact? In what circumstances, if any, could it do so?
4. Have you reported on cases where the non-resident parent has pursued contact proceedings as a means of continuing control over, or harassment of, the resident parent? Is this a common or rare occurrence?

### B. Understanding Domestic Violence

5. Paragraph 2 of the Practice Direction provides that ‘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.” What is your view of this description of ‘domestic violence?’ Do you think that this description is materially the same as, or differs from, Cafcass’s definition, as set out in Paragraph 1.2 of the Domestic Violence Toolkit? [copy to be provided to respondents] If you consider that the descriptions differ materially, how does this impact on your practice?
6. How do you think most tribunals (judges, district judges and magistrates) understand the term ‘domestic violence’?

## **C. Questions relating to the Practice Direction**

### **Identifying domestic violence as an issue**

7. In all private law cases in which you have involved, has initial screening been undertaken by Cafcass prior to the first hearing?
8. Does the initial screening usually reveal whether any Family Law Act injunctions have been applied for or made with respect to the parties to the Children Act proceedings?
9. In your experience, are the checks required by Cafcass Safeguarding Framework (Paragraph 4.3.4) always undertaken in each case? [List provided below] Are these checks sufficient to reveal whether domestic violence is an issue?
10. Do you think that enough information is available to Cafcass from the documents provided by the courts for the initial screening, to enable Cafcass to identify whether, and to what extent, domestic violence may be an issue? If the only documentation filed at that stage was the non-resident parent's C100 form, how would Cafcass know whether domestic violence was likely to be an issue?
11. Is enough information about domestic violence revealed by the C1A forms [C100A if available at time of interview]?
12. In your experience, are the results of initial screening always reported to the court prior to the first hearing?
13. Do you consider that telephone interviews with parties, as part of initial screening, are sufficient to enable Cafcass to identify whether, and to what extent, domestic violence may be an issue?
14. Where initial screening indicates a concern about domestic violence (but not such as to require immediate referral to social services), in your experience does Cafcass advise the court of the need to implement a more detailed risk assessment before decisions relating to the child can be made? [re Para 4.3.15 of the Safeguarding Framework]?

15. If you are involved in a first hearing (as conciliator, Family Court Advisor or otherwise), do the parties' representatives usually inform you and the court about the occurrence of domestic violence?
16. In cases where domestic violence has not been revealed by the initial screening: if you attend a first hearing (as conciliator, Family Court Advisor or otherwise), do courts usually/ever enquire whether domestic violence is an issue even if neither of the parties have raised it? Do you think that there has been any change in this respect since the Practice Direction came into effect?
17. What impact has Paragraph 3.9 of the Revised Private Law Programme had on the identification of risk?

**Deciding on the relevance of domestic violence to the conduct of the proceedings and the orders sought**

18. If domestic violence is raised as an issue in a case, do courts consider the extent to which it is likely to be relevant in deciding contact applications. In what circumstances, if any, would domestic violence not be relevant to the issue of contact?
19. Do you have experience of any cases where domestic violence was raised as an issue (either by initial screening or by a party) but the court considered at an early stage that it was not likely to affect the outcome of the application? If so, how did the court reach this conclusion? Do you think the court was correct in reaching this conclusion?
20. Do you think that there has been any change in the way in which courts consider the relevance of domestic violence to the issues in the case since the President's Guidance in Relation to Split Hearings was issued in May 2010?

**Consent Orders**

21. To what extent do courts scrutinise proposed consent orders? Are you aware of whether they ask for information about domestic violence? Do you think that there has been any change in this respect since the Practice Direction came into effect?
22. In your experience, do courts ever refuse to make consent orders because of concerns about domestic violence, or request further information or involve

Cafcass for this reason? Has there been any change in this respect since the Practice Direction came into effect?

23. Do you have experience of any cases where agreement for contact has been reached by the adult parties despite concerns raised by you because of domestic violence? If so, how do courts usually deal with this situation, and what, if anything, are you able to do about it?
24. Do you think there has been any change in the way courts approach consent orders since the implementation of the Revised Private Law Programme in October 2010?

### **Fact-finding hearings**

25. If it is apparent at the first hearing that domestic violence is an issue in a case, do courts usually list a fact-finding hearing?
26. If you or another Cafcass officer recommends that a fact-finding hearing should be listed, do courts usually ensure that it takes place? Do you have experience of any cases in which a fact-finding hearing did not take place but you considered that it should have done?
27. Have you noticed any increase in the listing of fact-finding hearings since the Practice Direction came into effect? Has there been any change in this respect since the President's Guidance in Relation to Split Hearings was issued in May 2010?
28. Have you encountered any cases where a fact-finding hearing has been listed, but on the day of trial the hearing does not take place, or is cut short? In your experience, does this happen rarely/regularly/frequently? Have you noticed any change in this respect since the President's Guidance in Relation to Split Hearings was issued in May 2010?
29. Do you think that fact-finding hearings are helpful in determining the best outcomes for children in contested contact cases where domestic violence is an issue?
30. The Practice Direction provides that courts should make findings about:
  - the nature and degree of domestic violence
  - its effect on the child
  - its effect on the parents.

In your experience, do courts do so? Is there any difference in this respect between the different tiers of courts? (judges, district judges and magistrates).

### **Interim orders – assessing risk and ensuring safety**

31. If a fact-finding hearing has been listed, in your experience in what circumstances, if any, would courts order interim direct contact? Do you consider that the court's decisions are usually appropriate?
32. Do you think that courts focus enough on minimising the risks and securing the safety of the child when ordering interim contact? What about the safety of the resident parent? Do you think there has been any change in the court's focus on risk and safety since the Practice Direction came into effect?
33. Do you think that the representatives of the resident parent focus sufficiently on safeguarding the child and their client? Have you noticed any change in their practice in this respect since the Practice Direction came into effect?
34. Has there been any change in the making of interim orders since the implementation of the Revised Private Law Programme in October 2010?

### **Final orders when domestic violence has occurred: factors courts take into account**

35. If the court makes findings of domestic violence against the non-resident parent in a disputed contact case (or where domestic violence is admitted), what are you likely to recommend to the court with respect to contact? Do you think that your practice, and that of other Cafcass reporters has changed in this respect since the Practice Direction came into effect?
36. Where domestic violence has occurred, in what circumstances, if any, would you be likely to recommend some direct contact between the child and the perpetrator?
37. Do courts usually follow your recommendations, particularly if you recommend that there should be no direct contact?
38. Do you think that, since the Practice Direction came into effect, there has been any change in the way the courts determine contact when findings/admissions of domestic violence have been made?

39. The Practice Direction provides that where domestic violence has occurred, the court should consider, inter alia:
- the effect of the domestic violence on the child and the resident parent
  - the motivation of the parent seeking contact
  - the likely behaviour of the parent seeking contact during contact and its effect on the child
  - the capacity of the parent seeking contact to appreciate the effect of past violence and the potential for future violence
  - the attitude of the parent seeking contact to their past violent conduct and whether they have the capacity to change.

In your experience, do courts usually do so? Do you think that all/most Cafcass officers address these factors in their reports?

*[A written copy of this list of factors will be provided to interviewees]*

**Final orders when domestic violence has occurred: where the court decides to make orders for direct contact**

40. Where domestic violence has occurred but you recommend that there should be some direct contact, what safeguards, if any, would you be likely to suggest? What is the court likely to order?
41. In what circumstances would you recommend that the non-resident parent attends a perpetrator programme? Do courts usually follow your recommendation? Do you think that there has been any change in the extent to which attendance at such programmes is required since the Practice Direction came into effect?

**Vignette**

42. The mother alleges that the father has been violent towards her over a period of years, with allegations ranging from verbal abuse and threats through to kicking and punching. A fact-finding hearing is held and the judge makes some findings against the father but not to the extent alleged by the mother – that he has been verbally abusive, has pushed and shoved the mother during arguments, and hit her once many years ago, and that all of this usually happened when he was drunk. The mother opposes all contact on the basis that she is frightened of the father and believes that he will never change. The father does not accept the court’s findings against him.

What would you recommend in this situation?

What is the court likely to order/direct in these circumstances?



# APPENDIX H

## INITIAL DATA COLLECTION THEMES

### **1. The meaning of ‘domestic violence’**

- What do courts and professionals understand by ‘domestic violence’

### **2. The ‘presumption of contact’**

- How important do courts and professionals consider contact between children and non-resident parents to be
- How do courts and professionals view parents involved in contact proceedings

### **3. Identifying domestic violence as an issue and making the court aware of it**

- What documentary information is available to the court and to Cafcass when proceedings are issued
- Are the documentation and procedures currently available sufficient to enable full disclosure of domestic violence
- do courts consider whether domestic violence is an issue whether or not it is raised as an issue by the parties
- are courts routinely provided with initial screening by CAF/CASS and do they make parties aware of it
- to what extent do solicitors/barristers enquire from their clients information about domestic violence and its effect on the child and the parties
- to what extent do solicitors/barristers make the court aware of domestic violence and its effect on the child and the parties

### **4. Deciding on the relevance of domestic violence to the conduct of the proceedings and the orders sought**

- how and when do courts decide the extent to which domestic violence would be relevant in deciding orders for contact and residence
- at the first hearing, do courts consider: (a) the likely impact of domestic violence on the conduct and outcome of the proceedings, and (b) whether the nature and effect of domestic violence is likely to affect the court’s decision? If so, how do they carry out this consideration?

## **5. Consent Orders**

- what information is available to courts when a consent order is proposed, including information about domestic violence
- how would the court become aware of domestic violence when a consent order is proposed
- to what extent do courts scrutinise proposed consent orders
- to what extent do courts refuse to make a proposed consent order because of issues of domestic violence/ or request further information/ or involve CAFCASS
- how are consent orders dealt with where CAFCASS express concerns about domestic violence
- what is the attitude/practice of solicitors and barristers in relation to consent orders sought and how do they advise their clients

## **6. The practice of courts in respect of fact-finding hearings**

- at what stage in the proceedings are fact-finding hearings held
- how do fact-finding hearings get listed, eg, at the request of the parties/courts own motion/request by CAFCASS
- how do courts decide whether to list a fact-finding hearing
- if fact-finding hearings are recommended in a CAFCASS report, to what extent do they take place
- are courts willing to list fact-finding hearings if requested to do so by either/both of the parties
- once listed, do fact-finding hearings actually take place; if not, what are the reasons for this
- has the Practice Direction and the President's Guidance in Relation to Split Hearings impacted on the volume of fact-finding hearings
- how can practice with respect to fact-finding hearings be improved to make the process more streamlined and effective
- what are the perceptions of participants of the utility of fact-finding hearings in determining best outcomes for children
- do courts make findings about the following:
  - o nature and degree of domestic violence
  - o its effect on the child
  - o its effect on the parents

## **7. Interim orders – assessing risk and ensuring safety**

- to what extent do courts makes interim orders for direct contact pending a fact-finding hearing [or CAFCASS report] and in what circumstances would they do so

- do courts consider the safety of the child and resident parent and the risks to the child when deciding whether to make interim contact orders when a fact-finding hearing [or CAFCASS report] has been directed
- if the court decides to make an interim contact order, how do they minimise the risk of harm to the child and ensure the safety of the child and the resident parent
- if the court decides not to order interim direct contact, do they consider indirect contact and if so, do they consider any risks involved with such contact
- how do solicitors and barristers advise parties in respect of interim orders

### **8. Final orders when domestic violence has occurred : factors courts take into account when determining whether to make an order**

- Do courts' findings of domestic violence affect their decisions in respect of contact and residence
- has there been any change in the way in which courts determine contact and residence when domestic violence is found to have occurred, since the Practice Direction came into effect
- how do professionals advise their clients when findings of domestic violence have been made
- to what extent do courts follow recommendations by Cafcass when determining final orders for contact
- to what extent, and how, do courts consider the factors set out in Paragraph 27 of the Practice Direction, including:
  - the safety of the child and resident parent
  - the conduct of the parents towards each other and the child
  - the effect of domestic violence on the child and the resident parent
  - the motivation of the parent seeking contact
  - the likely behaviour during contact of the parent seeking contact and its effect on the child
  - the capacity of the parent seeking residence or contact to appreciate the effect of the violence on the child and the other parent and the attitude of the parent seeking residence or contact to their past violence and whether they have the capacity to change

### **9. Final orders where domestic violence has occurred: where the court decides to make an order for direct contact**

- what safeguards, if any, is the court likely to order
- does the court consider whether the perpetrator should seek advice or treatment as a pre-condition to an order or to assess risk to the child, including attendance at perpetrator programmes

- do courts consider whether contact should be supervised

**10. Final orders where domestic violence has occurred: where the court decides not to make any orders for direct contact**

- do courts make orders for indirect contact; if so, what are the safety considerations involved