

Contact At All Costs? Domestic Violence and Children's Welfare

Dr Adrienne Barnett*

Accepted for publication in *Child and Family Law Quarterly*
[2014] Volume 26 Issue 4

INTRODUCTION (A)

It is 25 years since the inception of *Child and Family Law Quarterly* and the Children Act 1989, with its guiding precept that 'the welfare of the child' shall be the court's paramount consideration. During those 25 years, despite an increasing awareness by courts and professionals of the effects of domestic violence on children, and initiatives aimed at protecting the safety and welfare of children and resident parents from the risks posed by perpetrators of domestic violence, the numbers of contact applications refused by courts have steadily decreased to the point where they are negligible.¹ We have also seen varying attempts to circumscribe the 'welfare principle' – by feminist campaigners and academics seeking a presumption against contact in circumstances of domestic violence, and by fathers' groups pressing for a presumption of equal shared care.

25 years later legislation is to enshrine for the first time the requirement that '[a] court...is...to presume, unless the contrary is shown, that involvement of [a] parent in the life of the child concerned will further the child's welfare.'² This article considers why, despite the prevalence of domestic violence in private law proceedings, refusals of applications for contact are so rare, and what the implications are of the presumption of parental involvement for child arrangements proceedings where allegations of domestic violence are made.³ It focuses in particular on judicial and

* Lecturer in Law, Brunel University

I am extremely grateful to Felicity Kaganas for her advice and comments which helped to focus this article. I am also very grateful to the external referees for their helpful and insightful comments and suggestions.

¹ Ministry of Justice, *Judicial and Court Statistics 2011* (Ministry of Justice, 2012) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf (last accessed 2 November 2013) – less than 0.3 percent of applications for contact were refused in 2011.

² Children Act 1989, s 1(2A), implemented by Children and Families Act 2014, s 1, in force 22 April 2014

³ The term 'child arrangements order' replaced 'residence' and 'contact' orders from 22 April 2014 – Children and Families Act 2014, s 12

professional perceptions of domestic violence and of children's welfare on parental separation, and how these perceptions inform judicial decision-making and professional practices in private law Children Act proceedings. In doing so, this article draws on the author's small-scale qualitative study of the perceptions and practices of courts and professionals in contact proceedings where domestic violence is an issue, with particular reference to Practice Direction 12J ('the Practice Direction'), which stipulates best practice in cases concerning residence and contact orders where allegations of domestic violence are made.⁴

BACKGROUND TO THE PRACTICE DIRECTION (A)

While domestic violence is prevalent in the general population, it is even higher in families with children.⁵ It is recognised that domestic violence is not perpetrated exclusively by male partners. However, research and statistics attest to the gendered prevalence, frequency and severity of domestic violence.⁶ It is also clear that the vast majority of applications for contact are made by fathers.⁷ 'This reflects that women are significantly more likely to be resident parents and that victim-survivors of domestic violence are disproportionately likely to be women and perpetrators men.'⁸

These data strongly suggest that a large proportion of child contact arrangements take place within a context of domestic violence. A parliamentary inquiry into domestic violence reported that: 'Up to 50% to 60% of Cafcass's caseload is domestic violence,

⁴ A Practice Direction is a supplemental protocol to rules of procedure. They are issued by the President of the Family Division when applicable to family law cases.

⁵ S Walby and J Allen, *Domestic violence, sexual assault and stalking: Findings from the British Crime Survey* (Home Office Research Unit Study 276, 2004); Home Office, *British Crime Survey* (Home Office, 2010); A Mullender, *Tackling Domestic Violence: providing support for children who have witnessed domestic violence* (Home Office, 2004); J Bossy and S Coleman, *A Research and Literature Review: Protection and Accountability* (HMCPSI, 2004)

⁶ S Walby and J Allen, *Domestic violence, sexual assault and stalking: Findings from the British Crime Survey* (Home Office Research Unit Study 276, 2004); C Smart, V May, A Wade and C Furniss, *Residence and Contact Disputes in Court Volume 2* (DCA Research Series 4/05, 2005); M Hester, *Who does what to whom? Gender and domestic violence perpetrators* (University of Bristol, 2009); 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)

⁷ C Humphreys and C Harrison, 'Squaring the Circle – Contact and Domestic Violence' (2003) 33 Fam Law 419-423; R Aris and C Harrison, *Domestic violence and the supplemental information form* (Ministry of Justice, 2007); D Cassidy and S Davey, *Family Justice Children's Proceedings – Review of Public and Private law Case Files in England & Wales* (Ministry of Justice, 2011)

⁸ M Coy, K Perks, E Scott and R Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012) at p 33. Respondents to the author's study spoke almost exclusively in terms of fathers as perpetrators and mothers as victims of domestic violence, although questions were framed gender-neutrally.

and those figures increase every year as domestic violence is better identified.⁹ Her Majesty's Inspectorate of Court Administration ('HMICA') estimated the proportion of Cafcass's cases in which domestic violence is an issue to be up to 70 per cent or more and observed that, anecdotally, 'CAFCASS practitioners place the incidence of domestic violence in the region of 90% or more of cases they deal with'.¹⁰

Despite the prevalence of domestic violence and its well-documented effects on victims and children, legal and professional discourses virtually ignored the issue of domestic violence in the arena of child contact and residence until relatively recently. The connection between the welfare of children on parental separation, and the perpetration of domestic violence by fathers was almost totally absent. Underlying this ideological divide was the perceived importance for children of maintaining contact with non-resident parents, which led to an increasing scrutiny of mothers involved in private law Children Act proceedings and a decreasing focus on the father's conduct and parenting practices.¹¹ This gave rise to dominant feminine and masculine subjectivities of 'implacably hostile mothers' and 'safe family men' which have had a powerful effect on legal decision-making and professional practice in the area of child contact. Mothers' fears and concerns may be reconstructed as obduracy and irrational or pathological self-interest because the dominant construction of children's interests aligns them so closely with father-involvement.¹²

It is not surprising, therefore, that courts and professionals often minimised domestic violence and efforts were focused on persuading mothers to cooperate, rather than on the father's behaviour or on women's and children's safety. Most professionals did not consider domestic violence relevant to current contact, and were unwilling to support the

⁹ Newsline Extra, 'Domestic Violence Commons Inquiry' 38 (2008) Fam Law 269-271 at p 270

¹⁰ HMICA, *Domestic Violence, Safety and Family Proceedings* (HMICA, 2005) at p 17.

¹¹ See F Kaganas and S Day Sclater, 'Contact Disputes: Narrative Constructions of "Good" Parents' (2004) 12 *Feminist Legal Studies* 1-27; V Elizabeth, N Gavey and J 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

¹² H 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; S 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; V Elizabeth, N Gavey and J 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

mother in stopping contact.¹³ These practices persisted even after the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law ('the CASC')¹⁴ and the Court of Appeal in *Re L, V, M, H (Contact: Domestic Violence)*¹⁵ ('*Re L*') laid down 'good practice' guidelines for the approach to be taken when domestic violence is put forward as a reason for denying or limiting parental contact.

The post-*Re L* case law and research revealed that the application of the guidelines was inconsistent and 'patchy' and that they were frequently ignored.¹⁶ Courts continued to minimise and 'neutralise' domestic violence, even in cases of extremely severe physical violence, and to focus instead on promoting contact.¹⁷ Fact-finding hearings were rarely held, and the promotion of post-separation contact continued to lead to women being pressurised into agreeing to unsafe contact arrangements and courts being reluctant to restrict contact. Research initiated by the Family Justice Council ('FJC') in 2006 found that, in general, the *Re L* guidelines were more honoured in the breach than the observance and that in applications for consent orders the *Re L* guidelines were virtually ignored.¹⁸ As a consequence, the numbers of contact applications refused by courts prior to the Practice Direction being issued steadily decreased,¹⁹ and direct contact was the expected outcome in the vast majority of cases.²⁰

¹³ M Hester and R Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (The Policy Press, 1996); M Hester, C Pearson and L Radford, *Domestic Violence: A National Survey of Child Welfare and Voluntary Sector Mediation Practice* (The Policy Press, 1997); C Humphreys, 'Judicial alienation syndrome – failures to respond to post-separation violence' (1999) 29 Fam Law 313-316. See, eg, *Re H (A Minor) (Contact)* [1994] 2 FLR 776; *Re M (A Minor) (Contact: Conditions)* [1994] 1 FLR 272; *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124; *Re P (Contact: Supervision)* [1996] 2 FLR 314; *D v N (Contact Order: Conditions)* [1997] 2 FLR 797

¹⁴ CASC, *Guidelines for Good Practice on Parental Contact in cases where there is Domestic Violence* (TSO, 2001)

¹⁵ *Re L, V, M, H (Contact: Domestic Violence)* [2000] 4 All ER 609, [2000] 2 FLR 334

¹⁶ DCA and DfES, *The Government's Response to the Children Act Sub-Committee (CASC) Report: Making Contact Work* (DCA, DfES, 2004)

¹⁷ HMICA, *Domestic Violence, Safety and Family Proceedings* (HMICA, 2005); A Perry and B Rainey, 'Supervised, Supported and Indirect Contact Orders: Research Findings' (2007) 21 *International Journal of Law, Policy and the Family* 21-47; J Hunt and A Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (Ministry of Justice, 2008)

¹⁸ J Craig, 'Everybody's Business: Applications for Contact Orders by Consent' (2007) 37 Fam Law 26-30.

¹⁹ In 2005, 1.15% of contact applications were refused – see DCA, 'Judicial Statistics 2005 (Revised)' (TSO 2006, Cm 6903); in 2006, 0.95% of contact applications were refused – see Secretary of State for Justice and Lord Chancellor, 'Judicial and Court Statistics 2006' (TSO 2007, Cm 7273);

²⁰ C Smart and V May, 'Residence and Contact Disputes in Court' (2004) 34 Fam Law 36; J Hunt and A Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (Ministry of Justice, 2008); V Peacey and J Hunt, *Problematic contact after separation and divorce? A national survey of parents* (One Parent Families/Gingerbread, 2008)

The FJC called for a ‘cultural change...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”.’²¹ In order to promote this ‘cultural change’, Practice Direction 12J was issued by the President of the Family Division in May 2008.

This account of the background to the Practice Direction demonstrates how the practices and perceptions of courts and professionals have been both shaped by, and have reinforced, the ideological separation of contact and domestic violence, driven by the pervasive assumption that post-separation contact invariably benefits children. The focus of this study, was whether the Practice Direction has led to any shift in professional and judicial perceptions and practices in private law Children Act proceedings where domestic violence is an issue.

THE METHODOLOGY (A)

In-depth semi-structured interviews were conducted with a total of 29 barristers, solicitors and Family Court Advisers employed by Cafcass (‘FCAs’) from five HMCTS regions,²² covering a diverse geographical and demographic area.²³ Additionally, all reported cases relevant to the operation of the Practice Direction from May 2008 to September 2013 were reviewed. The data from the interviews and case review were analysed thematically utilising discourse analytic and qualitative approaches.²⁴

The research findings relevant to the subject of this article will now be discussed. Reference will also be made to contemporaneous research by Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale (‘Coy et al’)²⁵ and Rosemary Hunter and Adrienne Barnett (‘Hunter and Barnett’).²⁶

²¹ J Craig, ‘Everybody’s Business: Applications for Contact Orders by Consent’ (2007) 37 Fam Law 26-30 at p 27

²² The interview sample comprised 8 barristers, 10 solicitors and 11 FCAs.

²³ Most interviews were conducted in 2011; five were undertaken in 2010.

²⁴ Pseudonyms were used to preserve the anonymity of interview participants.

²⁵ M Coy, K Perks, E Scott and R Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012)

http://www.rightsofwomen.org.uk/pdfs/Policy/Picking_Up_the_Pieces_Report_final.pdf (last accessed 10 June 2014)

²⁶ R Hunter and A 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) <http://kar.kent.ac.uk/35678/1/FFH%20report%20January%202013.pdf> (last accessed 15 June 2014)

THE FINDINGS (A)

The ‘presumption of contact’ (B)

The interviews and analysis of case law reveal that most professionals and judicial officers have continued to endorse the de facto ‘presumption of contact’ since the Practice Direction was issued. All but one interview participant considered that contact between children and non-resident parents is ‘very important’ or ‘extremely important’. There were no overt differences in views between family lawyers and FCAs in this respect. ‘On a scale of 1 to 10, I would say 10. With 10 being the exceptionally important, yes.’ [Ms H, FCA, SE] Nine respondents (most of whom were solicitors) indicated that post-separation contact is important, but only if it is safe, including emotionally safe. Only two participants (both FCAs) were of the view that contact is beneficial as long as it is of good quality.

Professional and judicial assumptions about the benefits of contact between children and non-resident fathers have had a powerful effect on the way in which domestic violence is perceived and is seen as ‘relevant’ to contact.

Perceptions of domestic violence (B)

Most of the professionals interviewed recognised that domestic violence is not limited to incidents of physical violence [n = 21]. Many respondents described it as encompassing emotional abuse, and a few considered that financial control and denigration of the mother are forms of domestic violence. ‘You know, it isn’t always physical, it’s the emotional abuse and the erosion of self-esteem.’ [Ms G, Barrister, SE] Half of all respondents (but only two barristers) articulated a theoretical understanding of the power and control dynamics that characterise domestic violence, although more FCAs than family lawyers understood these dynamics. ‘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]

Many participants thought that their local judges have a good understanding of what constitutes domestic violence and ‘take it seriously’, and a few respondents observed that judges’ awareness of domestic violence has improved over the past few years. The more recent reported cases also 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.²⁷

However, these perceptions do not necessarily translate into practice, since half of all interview participants still considered anything ‘less than physical’ not to be serious, important or ‘real’ violence. These professionals tended to minimise behaviours that did not constitute incidents of severe physical violence. 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]

Eight respondents expressed concern that courts, too, tend to focus on incidents of physical violence and are not alive to, or take seriously, other forms of domestic abuse. ‘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] Similar findings were made by Coy et al.²⁸ These perceptions are supported by the case law which also reflects a narrow construction of the importance and relevance of domestic violence.²⁹

When is domestic violence relevant to contact? (B)

The reported cases and the interview responses strongly indicate that most courts and family lawyers perceive domestic violence to affect case outcomes and therefore to be relevant to contact when it involves recent incidents of very severe physical violence.³⁰ Domestic violence that is considered to be ‘minor’ or ‘petty’ and/or is designated as ‘old’ or ‘historical’ is not thought to be relevant to contact because courts and professionals fail to contextualise it within the gendered power and control

²⁷ See *Re W (Children: Domestic Violence)* [2012] EWCA Civ 528, [2014] 1 FLR 260; *Re W (Children)* [2012] EWCA Civ 1788; *Re S (A Child)* [2012] EWCA Civ 1031

²⁸ See in particular at p 60.

²⁹ See, eg, *Re P (Children)* [2008] EWCA Civ 1431; *A v A (Appeal: Fact-finding)* [2010] EWHC 1282 (Fam); *Re H (Contact Order)* [2010] EWCA Civ 448, [2010] 2 FLR 866; *Re R (Family Proceedings)* [2009] EWCA Civ 1619, [2009] 2 FLR 82; *Re J (A Child)* [2012] EWCA Civ 720

³⁰ See, eg, *Re E (Contact)* [2009] EWCA Civ 1238, [2010] 1 FLR 1738; *Re C (Domestic Violence: Fact-Finding Hearing)* [2009] EWCA Civ 994, [2010] 1 FLR 1827. Similar findings were made by Coy et al and Hunter and Barnett.

dynamics of domestic 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]

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 L gave an example of a case 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...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, as was the only violence he considered to be ‘real’ violence because it was, historical.

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. This bifurcated approach permeates every aspect of contact proceedings, including the practices of professionals in negotiating agreements for contact and of judicial officers in approving them. It therefore goes a long way towards explaining why refusals of contact orders, already rare, have decreased to miniscule levels since the Practice Direction was implemented.

Seeking agreement – advice or coercion? (B)

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 that not only do children ‘need’ to maintain a relationship with non-resident parents, but also that ‘conflict’ and litigation are harmful so it is better for children for their parents to cooperate and agree that contact should happen rather than ‘battle it out’ in court proceedings.

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 [n = 12], and that the courts expect such agreements to involve some form of contact. It was not, therefore, surprising to find that most family lawyers advised their clients that contact is ‘the norm’ and that the courts generally expect children to have contact with non-resident parents, unless there are ‘exceptional’, ‘compelling’ or ‘good’ reasons against it [n = 13].

‘I think that our local courts are very much of the view that contact should take place if at all possible...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]³¹

Some lawyers went further and were more openly coercive, using various strategies to push mothers into agreeing to contact. ‘I usually 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 15 minutes. That they will lose, on the facts.’ [Ms F, Barrister, SE]

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, and six lawyers indicated that they would advise clients on the courts’ preference for contact ‘as long as it is safe’.

A minority of family lawyers [n = 4] and FCAs [n = 3] articulated an awareness of, and concern about the pressure that can be put on resident mothers to compromise,

³¹ The advice given to mothers by Ms G is typical of that expressed by most family lawyers.

often at the cost of their own and the children's safety. '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 concern about the court's role in driving agreements for contact:

'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 judge that if there is a sniff of an agreement between parents that they will want to go for that.' [Ms Y, FCA, London]

Two barristers and an FCA expressed particular concern at the pressures that can be put on mothers who may be victims of domestic abuse and subject to coercive control. Ms P [Barrister, SW] and Ms C [Solicitor, SE] 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 Ms P 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.' [Ms P, Barrister, SW]

Ms P felt, 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.'

While three Cafcass officers thought that family lawyers representing victims/mothers *do* attempt to protect their clients' interests and focus on their safety, two others felt that family lawyers do not do so, and can push her, or allow her to enter into, unsafe

agreements for contact. Ms Y gave an example of a case where she considered that the mother's representatives were behaving like the mother in failing to stand up to the father. '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.' [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.'

The way in which family lawyers may steer mothers towards agreements for contact is illustrated by the advice they give about interim contact pending fact-finding hearings. Most participants indicated that whether courts order interim direct contact depends on the particular judge and/or the circumstances of the case, and primarily whether or not contact is taking place at the time of the proceedings. At least eight participants indicated, however, that the mother will have to be particularly adamant and steadfast in her opposition to contact to persuade courts not to order direct contact. Only three solicitors and one barrister out of 18 family lawyers were clear that they would *not* try to persuade mothers who allege violence to agree to interim direct contact if they opposed it. Of the remaining 14 lawyers, six would advise their client to agree to contact (including those family lawyers who had been adamant that they would never persuade a victim of domestic violence to agree to contact), and eight indicated that their advice would depend on the circumstances. Family lawyers 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'.

'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]

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, 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]

Judicial scrutiny of consent orders (B)

If it is the case that resident mothers, including those who have sustained domestic violence, may experience varying degrees of compulsion to agree to contact, it is all the more important that judges properly scrutinise proposed consent orders, as required by the Practice Direction.

According to just over half of the respondents, the extent to which judicial officers 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. A sizeable minority of respondents across the professional groups considered that a great deal of 'rubber-stamping' of consent orders still happens [n = 8].

'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]³²

³² Similar findings were made by Hunter and Barnett.

Five Cafcass officers expressed concern that courts may approve consent orders where they had already raised concerns about domestic violence, which may occur when the FCA is not present in court, or is involved in other cases. Mr J reported that in one of the courts in which he practises, the judges either fail to seek his views on consent orders 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]

On the other hand, two FCAs provided examples of cases where they had voiced strong concerns about agreements for contact being made, which *did* have an effect on the outcomes. Ms Y [FCA, London] gave an example of an extremely worrying case where the mother, who spoke no English and was clearly very distressed, had two male lawyers with her, one of whom was interpreting. Ms Y was concerned that the lawyer was not giving a true account of what the mother was saying and it was only when she got one of the Cafcass staff to interpret that ‘the full story’ of a ‘really scary’ father emerged and Ms Y was able to ‘unpick’ the consent order.

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 this 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 FCAs, 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.

Fact-finding hearings (B)

If the mother has managed to resist advice, encouragement or pressure to reach agreement and the father disputes allegations of domestic violence, the court will need to consider whether to hold a fact-finding hearing. This decision has important implications for whether or not domestic violence is taken into account when recommendations and decisions are made about contact.

Most respondents, including all ten FCAs interviewed, and eight solicitors, but only two barristers, considered that fact-finding hearings were generally ‘helpful’ or ‘useful’, to ‘narrow the issues’ or ‘resolve’ matters. Six family lawyers held mixed views on fact-finding hearings, and only two barristers and a solicitor held entirely negative views of them. The main negative aspects of fact-finding hearings were reported to be that they 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 contact is likely to be ordered in any event.³³

‘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]

For family lawyers who hold these views, fact-finding hearings are an unnecessary and harmful impediment to the ultimate goal of achieving contact and the harmonious post-separation family. This reinforces the perception that domestic violence is an unimportant obstacle to the really important business of promoting contact.

The majority of family lawyers indicated that they would request a fact-finding hearing on behalf of the alleged victim (including some of those who held negative

³³ For similar findings see Hunter and Barnett

views) [n = 12], and just over half of all respondents indicated that judicial officers are usually willing to hold fact-finding hearings if asked to do so [n = 15].³⁴ However, the apparent willingness to request and hold fact-finding hearings masks the narrow circumstances in which they are likely to be requested and held. Most participants confirmed that fact-finding hearings are usually restricted to allegations considered ‘relevant’ to contact, namely, those involving ‘incidents’ of recent, severe physical violence.³⁵ The majority of family lawyers approved of this approach and some (those with predominantly negative views) thought they should be restricted even further.

If preliminary fact-finding hearings are not held, the interviews and case law indicate that ‘composite’ hearings are rare, and that the approach of the lower courts in many cases is to ‘weed out’ and 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 in the drive to encourage ‘contact at all costs’.

Assessing risk and welfare – ‘safe family men’ and ‘hostile mothers’ (B)

If the case does proceed to the stage where domestic violence is proved or admitted, the Practice Direction requires courts to assess and contextualise the risks involved of contact between children and perpetrators of domestic violence in order to determine not only whether contact can be ‘made safe’ but also whether it can be beneficial.³⁶ Most participants thought that courts do require the ‘risk’ of future contact to be assessed. However, responses were mixed on whether courts consider the broader factors set out in Paragraph 27 of the Practice Direction, with more family lawyers than FCAs reporting that courts *do* consider the Paragraph 27 factors ‘in some shape or form’ [Mr R, Solicitor, NE].

The factor that respondents most frequently mentioned courts taking into account, which was also the key indicator of ‘risk’ for most participants, was whether the father accepted the findings made against him [n = 17]. Fathers who remain in denial after findings are made are generally seen by courts and professionals as ‘high risk’.

³⁴ 11 respondents indicated that there are wide differences amongst judges in this respect.

³⁵ Similar findings were made by Coy et al and Hunter and Barnett

³⁶ Paragraphs 26 and 27. These provisions, with slight amendments, are now contained in Paragraphs 36 and 37 of the revised Practice Direction but the previous paragraph numbers are used in this article.

However, seven respondents indicated that acceptance of findings is rare and it would also seem that perpetrators tend to deny allegations in the first place, which suggests that most perpetrators of domestic violence are ‘high risk’;³⁷ however, as discussed below, most ‘high risk’ perpetrators invariably end up with some form of direct contact.

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 is 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 he has ‘improper’ motives. Two family lawyers observed that it is very difficult to persuade courts that the father is ‘motivated by anything other than a desire to see the children’. [Ms T, Barrister, NW]

‘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.’ [Ms B, Solicitor, London]

Judicial attitudes towards fathers could also be discerned from participants’ reports of judges readily accepting expressions of contrition at face value, expressing sympathy for violent fathers, and being reluctant to accept that fathers could be abusive towards children.

‘And equally if they are admitting it then, you know, even if it’s just on the morning of the fact-finding hearing then sometimes judges will be much more

³⁷ This was confirmed by Hunter and Barnett’s research and there is some support for this in the case law - see *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 S (A Child)* [2012] EWCA Civ 617; *Re W (Children)* [2012] EWCA Civ 1788; *Re S (A Child)* [2012] EWCA Civ 1031; *AB v BR and Children (Through their Children’s Guardian)* [2013] EWHC 227 (Fam), [2014] 1 FLR 178; *ML v KW and Another (Contact: Finding of Fact Hearing)* [2013] EWHC 341 (Fam), [2014] 1 FLR 224

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]

The case law demonstrates an inconsistent application of Paragraph 27 by the lower courts and by Cafcass officers. In some cases the Paragraph 27 factors appear to have been ignored because of the perceived importance of contact and the downgrading of domestic violence, to the displeasure, on occasions, of the appellate courts.³⁸ On the other hand, the 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 or its impact on the mother and children.³⁹

Some professionals, too, expressed views generally more sympathetic to fathers than to mothers, particularly barristers, and demonstrated a reluctance to see fathers in a negative light. Most participants considered that fathers pursuing contact as a means of controlling or harassing the mother is more complex and less prevalent than mothers unjustifiably denying contact.

Attitudes towards fathers contrasted with those demonstrated by professionals and judicial officers towards mothers. Although most participants did not see mothers as deliberately malicious and hostile to contact, images of 'implacably hostile mothers' continue to exert a powerful influence. All respondents viewed mothers as capable of obstructing contact for the 'wrong' reasons, and many demonstrated a wary attitude towards mothers, although fewer FCAs than family lawyers expressed overtly hostile attitudes towards mothers. A substantial minority of professionals (predominantly family lawyers) viewed allegations of domestic violence with suspicion or disbelief,⁴⁰ and some felt that mothers fabricate allegations for ulterior motives, most frequently as a delaying tactic and/or to disrupt the father's relationship with the child.⁴¹ The case law demonstrates that judges, too, may view women's complaints about domestic violence with suspicion, and that their concerns for their own safety, well-

³⁸ See, eg, *Re W (Children)* [2012] EWCA Civ 528, *Re W (Children: Domestic Violence)* [2014] 1 FLR 260; *Re W (Children)* [2012] EWCA Civ 528 [15] Black LJ; *Re S (A Child)* [2012] EWCA Civ 617

³⁹ See *Re E (Contact)* [2009] EWCA Civ 1238, [2010] 1 FLR 1738; *AB v BR and Children (Through their Children's Guardian)* [2013] EWHC 227 (Fam), [2014] 1 FLR 178.

⁴⁰ N = 11, comprising 8 family lawyers and 3 FCAs.

⁴¹ Similar findings were made by Coy et al and Hunter and Barnett.

being and autonomy may be seen as expressions of self-interest.⁴² This is exacerbated by the way in which domestic violence disappears during the course of proceedings, so that the ‘problem’ of contact is laid at the door of the mother.

Judicial and professional perceptions of the benefits of contact and the relevance of domestic violence to contact, together with attitudes towards parents involved in contact proceedings, have a powerful influence on the way in which family lawyers advise parents when domestic violence has occurred, and on the orders made by courts.

Final orders (B)

Many interview respondents indicated that, even where domestic violence is proved, this ‘hardly ever’ or ‘very rarely’ results in no direct contact. ‘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 not encountered a case recently where the court ordered indirect contact only after a fact-finding hearing.⁴³ These observations are supported by the reported cases, which demonstrate that despite findings of domestic violence being 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.⁴⁴ 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.⁴⁵ The cases also reveal the unrelenting messages from the appellate courts about the importance of persevering with contact, even in cases of proven domestic violence, and the ‘draconian’ nature of decisions to refuse direct contact.⁴⁶ A similar reluctance to ‘give

⁴² See, eg, *Re W (Children: Domestic Violence)* [2012] EWCA Civ 528; [2014] 1 FLR 260. Similar findings were made by Coy et al and Hunter and Barnett.

⁴³ Orders for contact were made in 81 percent of the cases of the women interviewed by Coy et al; there were no instances of ‘no contact’ orders. Similar findings were made by Hunter and Barnett.

⁴⁴ See, eg, *Re A (Residence Order)* [2009] EWCA Civ 1141, [2010] 1 FLR 1084; *Re W (Children)* [2012] EWCA Civ 528, [2014] 1 FLR 260

⁴⁵ 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

⁴⁶ See *Re M (Children)* [2009] EWCA Civ 1216, [2010] 1 FLR 1089; *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)* [2012] EWCA Civ 999, [2013] 1 FLR 494; *Re M (Children)* [2013]

up on' contact was also demonstrated by some of the participants in this study. 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 time and resources because the de facto presumption of contact has constituted them as 'necessary'.

The factors most commonly cited by the majority of family lawyers that would militate against the court ordering direct contact were 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 [n = 13]. Additionally, the perpetrator's failure to admit the violence or accept the findings 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 suggest how extreme the circumstances have to be before courts will refuse direct contact.

'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...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]

The very low refusal rate of applications for contact may also be a consequence of the prevalence of agreements for contact, which may be attributable in part to the advice given to mothers. Most family lawyers indicated that even if domestic violence is proved they would advise the mother to agree to 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

EWCA Civ 1147; *Re M (Parental Responsibility Order)* [2013] EWCA Civ 969, [2014] 1 FLR 339 per Ryder LJ at para 11

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]

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] More commonly, family lawyers use various strategies to persuade resident parents to agree to contact where domestic violence is proved or admitted, such as advising on the 'presumption of contact', emphasising the advantages to the client of maintaining some control over the outcome since the court will inevitably order contact and reassuring the mother that contact could be managed safely for her and the child. 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.

Family lawyers' reports of the advice they would give to mothers if domestic violence is proved were confirmed by their responses to a case scenario ('the final case scenario') in which the mother's 'serious', but 'historic' allegations against the father were not found proved, the mother opposed all contact on the basis that she was frightened of the father and believed that he would never change, and the father did not accept the findings of domestic abuse made against him. The majority of respondents considered that the court in this case scenario would order some direct contact, if not immediately, but at some stage thereafter. It was not surprising, therefore, that most family lawyers 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 [n = 13]. '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]

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.

The two family lawyers who had made it very clear, when speaking in general terms, that they would never advise or coerce a client to agree to contact where there is a history of domestic violence, both indicated that they would advise the mother in the final case scenario 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. These findings suggest that even ‘justified’ opposition to contact may be fruitless because of perceptions by family lawyers that any opposition is futile.

Most FCAs expressed concern about courts ordering direct contact when domestic violence has occurred, yet the majority [n = 9] reported that courts *do* generally follow their recommendations in these circumstances. Since orders for no direct contact are so rare, these views suggest that it must be unusual for an FCA to recommend no direct contact, and that they, too, are reserving such recommendations for the most ‘serious’ cases. 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.

So it seems that the circumstances in which lawyers would support mothers in opposing contact, in which Cafcass officers would not recommend direct contact, and in which courts would not order it seem to be getting more limited and extreme, and the courts continue to be extremely reluctant to ‘give up on’ contact. This means that the obligation of the ‘good mother’ can include putting up with very abusive behaviour and the possibility of no contact taking place has almost passed into the realms of the unimaginable.

THE STATUTORY PRESUMPTION OF PARENTAL INVOLVEMENT’ (A)

As we have seen, the ‘benefits’ of contact have come to be treated as indisputable and unchallengeable ‘truth’, and ‘in the hands of the courts, this “truth” has become embedded in the law’.⁴⁷ It is this ‘truth’ that underlies the statutory presumption of parental involvement being enshrined in the Children Act 1989. It is based on the 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.

In reality, however, behind the hegemonic status of this assumption 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.⁴⁸ A large number of studies have found that the quality of contact is more important for children’s wellbeing than frequency.⁴⁹ 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, and that the quality and stability of a child’s care and relationship with the primary carer are factors of major influence.⁵⁰ What is also absent from legal/political constructions of children’s welfare are the negative aspects of contact, despite the existence of substantial literature on this issue.⁵¹

⁴⁷ Felicity Kaganas and Shelley Day Sclater, ‘Contact Disputes: Narrative Constructions of “Good” Parents’ (2004) 12 *Feminist Legal Studies* 1-27, at pp 4-5

⁴⁸ See, eg, J Elliott, G Ochiltree, M Sinclair and F Tasker, ‘Divorce and Children: A British Challenge to the Wallerstein View’ (1990) 20 *Fam Law* 309-310; PR Amato and B Keith, ‘Parental Divorce and the Well-being of Children: A Meta-analysis’ (1991) *Psychological Bulletin* 26-46; J Pryor and B Rogers, *Children in Changing Families: Life after Parental Separation* (Blackwell, 2001); L Trinder, J Connolly, J Kellett, C Notley and L Swift, *Making Contact Happen or Making Contact Work? The process and outcome of in-court conciliation* (DCA Research Series 3/06, 2006)

⁴⁹ K Hewitt, ‘Divorce and Parental Disagreement’ (1996) 26 *Fam Law* 368-371; J Pryor and F Seymour, ‘Making decisions about children after parental separation’ (1996) 8(3) *CFLQ* 229-242; B Rogers and J Pryor, *Divorce and Separation: The Outcomes for Children* (Joseph Rowntree Foundation, 1998); J Lewis, ‘Fathering Practices in Twenty-Six Intact Families and the Implications for Child Contact’ (2005) 1 *International Journal of Law in Context* 81-99

⁵⁰ TL Thiriout and ET Buckner, ‘Multiple Predictors of Satisfactory Post-Divorce Adjustment of Single Custodial Parents’ (1991) 17 *Journal of Divorce and Remarriage* 27-48; F Furstenberg and A Cherlin, *Divided Families: What happens to children when parents part* (Harvard University Press, 1991); L Burghes, *Lone Parenthood and Family Disruption: the Outcomes for Children* (Family Policy Studies Centre, 1994)

⁵¹ See eg, C Sturge and D Glaser, ‘Contact and Domestic Violence – The Experts’ Court Report’ (2000) 30 *Fam Law* 615-629; PR Amato, ‘Children of divorce in the 1990s: An update of the Amato and Keith (1991) meta analysis’ (2001) 15 *Journal of Family Psychology* 355-370; G Harold and M Murch, ‘Inter-parental conflict and children’s adaptation to separation and divorce: theory, research and implications for family law, practice and policy’ (2005) 17(2) *CFLQ* 185-205; J Fortin, J Hunt and L 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)

It should be made clear that it is not being asserted that the research and findings discussed above present a ‘correct’ or ‘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’. It follows, therefore, that there may be numerous constructions, no final arbiter of which is ‘correct’, and many reasons why particular constructions arise and become dominant. However, 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 marginalising and discrediting oppositional meanings about their welfare, and by trivialising and rendering irrational women’s reasons for opposing contact with non-resident fathers.

It may be thought unlikely that the new statutory presumption of parental involvement will have a significant impact on judicial and professional practice in proceedings for child arrangements orders, since the vast majority of courts and professionals already operate with a de facto presumption. However, the symbolic and material impact of the new provision should not be underestimated. Practice Direction 12J was recently revised to bring its provisions and terminology into line with recent amendments to the Children Act 1989 and with Practice Direction 12B - the Child Arrangements Programme (‘CAP’). The Private Law Working Group took the opportunity to replace its description of domestic violence with the current cross-government definition. It also implemented some of the recommendations of Hunter and Barnett’s study in order to improve risk assessment and protection for children and victim parents, and attempted to make the process more ‘user-friendly’ for litigants in person (‘LIPs’). However, we have seen that the strong belief of courts and professionals in the benefits of post-separation contact has already subverted attempts by policy-makers and judicial bodies to improve protection for resident parents and children in private law cases where allegations of domestic violence are made. There is a danger, therefore, that the new presumption will reinforce the existing pro-contact stance of courts and professionals and undercut the aims and operation of the revised Practice Direction. This may be exacerbated by the CAP’s emphasis on agreement-seeking and

diversion from the court process,⁵² and by the increasing number of litigants in person in family proceedings.

Litigants in person (B)

The effect of the presumption of parental involvement and the drive towards agreement may well be compounded by the surge in the numbers of litigants in person since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') was implemented in April 2013. Current statistics indicate that over 50 percent of parties to private law proceedings are LIPs.⁵³ Furthermore, a recent Freedom of Information request by LawyerSupportedMediation.com revealed that the proportion of unrepresented mothers in private law children proceedings has increased by 64 percent, an increase which is almost double the rate of unrepresented fathers.⁵⁴ Many of these mothers are likely to be victims of domestic violence because of the stringent 'gateway' requirements for evidencing domestic violence stipulated by LASPO. Research by Rights of Women and Women's Aid in August 2013 found that in the first three months of the new legal aid rules, '50% of women affected by violence were ineligible for family law legal aid because they did not have the required evidence of domestic violence. Private law practitioners' casework experiences reported to the FJC echo these findings.'⁵⁵

The effect of the large numbers of LIPs on the court process and on judicial and professional practice cannot be overestimated. The numerous written responses to the recent Commons Justice Select Committee's enquiry into the effect of LASPO attest to the problems now encountered by courts. Cases are demanding considerably more time and resources from the courts as there are more contested cases, cases and hearings are taking longer and are less likely to reach agreement and settle, and 'unmeritorious' applications are being made which would have been filtered out by

⁵² There is not the space in this article to do justice to the many innovative provisions of the revised Practice Direction, nor the terms of the CAP, which will be explored elsewhere.

⁵³ This is revealed by Ministry of Justice statistics and the numerous responses to the recent enquiry into the effect of LASPO - <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/laspo/?type=Written> (last accessed 2 June 2014). All responses to the LASPO enquiry may be accessed at this link.

⁵⁴ Family Law Week, 'Unrepresented mothers in private law children proceedings increase by over 60%' (Law Week Limited, June 2014) <http://www.familylawweek.co.uk/site.aspx?i=ed130563> (last accessed 30 June 2014). See also <http://www.familylawweek.co.uk/site.aspx?i=ed131047>

⁵⁵ Written evidence to the LASPO enquiry from the Family Justice Council at p 7

lawyers.⁵⁶ Additionally, without lawyers to prepare documentation and ‘translate’ the problems that parents bring to the courts in ways that ‘make sense’ to law, judges and FCAs are spending a considerable amount of time trying to work out what the ‘real’ issues are. ‘Generally, I encounter difficulties every day in the courts I attend with litigants in person not knowing how to go about things, not being willing to negotiate, not understanding the issues or being able to “narrow them down” and generally demanding their day in court. The Judges are worn to shreds dealing with them, as are we!’⁵⁷

The presumption of parental involvement may constitute a functional and ideological vehicle for courts and professionals to manage the difficulties posed by the large increase in LIPs, which could have a significant effect on the ability of women who have sustained domestic violence to obtain protection and autonomy from violent fathers. It may also reinforce current perceptions of the relevance of domestic violence to parental ‘involvement’.

Perceptions of domestic violence and its relevance to child arrangements (B)

Paragraph 3 of the revised Practice Direction explains that ‘domestic violence’ ‘includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse...[which] can encompass, but is not limited to, psychological, physical, sexual, financial or emotional abuse.’ It is too early to assess whether the revised definition will, on its own, raise judicial and professional understanding of the dynamics of domestic violence. There is a danger, however, that the presumption of parental involvement will reinforce existing perceptions of many courts and professionals that controlling or coercive behaviours are less serious or important than severe physical violence, and restrict even further the circumstances in which abuse is considered ‘relevant’ to child arrangements.

Furthermore, many women, particularly those acting in person, may have great difficulty even articulating and proving such abuse, let alone ‘disproving’ the

⁵⁶ Research by Kim Williams in 2011 also found that family cases involving litigants in person took longer, particularly where both parties were unrepresented – see K Williams, *Research Summary 2/11 Litigants in person: a literature review* (Ministry of Justice, 2011)

⁵⁷ Written evidence of the FLBA, a member’s account, at p 12. See also Ryder LJ in *Re C (Due Process)* [2013] EWCA Civ 1412, [2014] 1 FLR 1239 at para 40

presumption on the basis of it. Research by Rights of Women into the LASPO gateways for legal aid ‘highlighted the very significant challenges women faced in evidencing non-physical forms of violence; forms of violence including coercive control which are now included in the Cross-Government definition of domestic violence. As one respondent said “*I have no evidence, it’s emotional and financial abuse. I can’t see a way to prove this*”.’⁵⁸ Numerous responses to the LASPO enquiry attest to these difficulties.

These problems have important implications for the willingness of courts to hold fact-finding hearings. Although courts have to consider what evidence is required in order to determine the existence of a pattern of coercive, controlling or threatening behaviour, violence or abuse,⁵⁹ it is clear that professionals and LIPs are finding this a difficult and challenging task. The temptation to avoid getting to grips with this issue by ruling that such behaviour would not, in any event, overcome the presumption of parental involvement, may be overwhelming.

A further problem is that courts may not become aware in the first place that domestic violence is an issue in a case. The recognised difficulties for victims in disclosing domestic violence are likely to be compounded where the mother is acting in person, so the court may not even be provided with the information to assess whether domestic violence, as now defined, is a feature of the case.⁶⁰ If courts and professionals are unaware of the existence or extent of domestic violence, no ‘good enough’ reasons may therefore be discerned to displace the presumption of parental involvement. Those victims of domestic violence who have difficulty articulating the abuse they have sustained may be at greater risk of being constructed as ‘hostile’ and therefore deserving of a prescriptive application of the presumption.

Pressure to agree to ‘parental involvement’

The pressure on victims of domestic violence by courts and professionals to agree to contact may be compounded where the victim is acting in person. Many of the responses to the LASPO enquiry expressed grave concern that, following the reduced

⁵⁸ Written Evidence from Rights of Women at para 11, emphasis in original

⁵⁹ Practice Direction 12J, para 18

⁶⁰ See *Re C (Due Process)* [2013] EWCA Civ 1412, [2014] 1 FLR 1239

availability of legal aid, there are fewer lawyers to advise ‘clients to be reasonable and to consider the effect of their behaviour on children...’.⁶¹ Those clients who need persuading to be ‘reasonable’ may include mothers who have sustained domestic violence that professionals do not consider to be ‘relevant’ to child arrangements. On this basis, it may be thought that fewer self-represented victims of domestic violence may find themselves steered into agreements.

However, this is not necessarily the case. Coy et al pointed out that where women are not represented, ‘[p]ressure to reach speedy resolution may mean that women accede to arrangements which are not necessarily in their own or their children’s best interests.’⁶² The current difficulties for the courts in managing the increase in LIPs may result in greater pressure on both litigants in person and those who are represented to reach agreement or attend mediation as the only way in which courts are able to cope with the large numbers of LIPs. Without lawyers to rely on, judges may increasingly find themselves, willingly or not, drawn into that process, and there are indications that, even before the presumption of parental involvement, judges have been undertaking this task, with worrying consequences for victims and children.

‘Some of my clients have had to attend injunction hearings alone due to LAA losing/not processing their applications or asking ridiculous questions. At hearings, Judges have gone ahead despite knowing problems with legal aid. In one of my cases, my client was pushed into agreeing contact and a contact order was made. If I had been there, this would not have happened as in the circumstances the order was completely inappropriate.’⁶³

Furthermore, there may well be increased pressure on mothers who are LIPs by representatives of fathers seeking child arrangements orders and by unrepresented fathers themselves. A number of responses to the LASPO enquiry pointed out that unrepresented victim/mothers may be intimidated, bullied and pressurised by fathers and/or their representatives. ‘Ex partner wanted more contact and applied for a

⁶¹ Written Evidence from the Legal Aid Practitioners Group. See also Written Evidence from Resolution at para 14.

⁶² Coy et al at p 40. See also Hunter and Barnett at p 61.

⁶³ Written Evidence from the Legal Aid Practitioners Group, case study provided by practitioner. See also Written Evidence from All Wales Family Panel chairmen’s Forum and from the Family Justice Council at p 5.

contact order. The caller has to attend a second hearing. At the first hearing he was aggressive and she is afraid to go to the second hearing. He is a barrister representing himself. The caller is finding it difficult to understand court processes.’⁶⁴

There is also the problem of McKenzie Friends who have their own ‘agendas’, as was pointed out by some responses to the LASPO enquiry. ‘We as a practice have had many encounters as [sic] McKenzie Friends with their own agenda, many of who [sic] have encouraged appalling behaviour and bullying of our clients.’⁶⁵ The presumption of parental involvement may even be specifically employed as part of a wider strategy. McKenzie Friends listed by Families Need Fathers (‘FNF’), for example, subscribe to the FNF charter which stipulates, inter alia, that ‘[t]here should be a presumption of shared residence and this should be the starting point when parents separate’.⁶⁶

Whether it is used by courts, professionals, LIPs or McKenzie Friends, the new presumption may prove to be a powerful tool to compel mothers, represented and unrepresented, to agree to ‘parental involvement’. This was explicitly articulated by Baroness Butler-Sloss in an interview with FNF:

‘The judges and magistrates will be given a greater degree of influence, because they will read out that this clause is actually intended to benefit the child from the involvement of both parents...So I think it gives a big tool to mediators, a tool to the welfare officer, if the child gets to a welfare officer, a tool to the judge and the magistrates, to beat the head of the custodial parent and say you can’t just take the child yourself. So the first important message for parents is...they can be knocked into shape, into accepting that both of them must play a part in the life of the child in the future. But the second important message is, that if for some reason one of the parents really shouldn’t see too much of the child, for whatever reason that may be, that also comes out of this Clause.’⁶⁷

⁶⁴ Written Evidence from Gingerbread at p 2. See also Written Evidence from the Magistrates Association and from Knowsley Domestic Violence Support Services.

⁶⁵ Written Evidence from Ben Hoare Bell LLP. See also Written Evidence from the Judicial Executive Board.

⁶⁶ <http://www.fnf.org.uk/law-and-information/mckenzie-friends-listings>

⁶⁷ Families Need Fathers, ‘McKenzie Briefing 2014 No 1’ (Families Need Fathers, 2014) <http://www.fnf.org.uk/research-and-publications/children-and-families-act-briefing> (last accessed 15 June 2014)

Mothers who are perceived as implacably hostile or who do not conform to victim stereotypes may be particularly susceptible to this coercive approach. So the presumption of parental involvement may work to constrain ‘obstructive’ mothers in a circular process – by reinforcing the perception that seeking to restrict parental involvement is unacceptable, and by justifying more forceful pressure on such ‘difficult’ mothers.

Diversion from the court process (B)

Not only may victims of domestic violence be pressured into agreeing to child arrangements orders; they may also be diverted right out of the court process altogether. Even before the recent legal aid changes, Coy et al found that: ‘A significant proportion of solicitors and barristers...reported that parties were required to attend mediation despite domestic violence having been raised as an issue.’⁶⁸ This is likely to increase under the CAP, which obliges courts to consider, at every stage of the proceedings, whether non-court dispute resolution is appropriate.⁶⁹ The presumption of parental involvement may have an important role to play in encouraging such ‘diversion’ and in enabling mediators to achieve agreements. Although many responses to the LASPO enquiry indicate that mediation and Mediation Information and Assessment Meeting (‘MIAM’) uptake has decreased since LASPO, it may well increase when the compulsory MIAM provisions are fully effective. This is extremely worrying, since current research suggests that screening for domestic violence by mediators during MIAMs may be inadequate and ineffective.⁷⁰ Increasing numbers of mothers who have sustained domestic violence may therefore find themselves mediating in the shadow of the presumption of parental involvement.

Interim and final orders (B)

⁶⁸ Coy et al at p 35

⁶⁹ Practice Direction 12B, para 6

⁷⁰ See P Morris, ‘Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting’ (2013) 35(4) JSWFL 445-457 at p 453. See also Judiciary of England and Wales, ‘The Judicial Working Group on Litigants in Person: Report’ (Judiciary of England and Wales, 2013) at p 16 <http://www.judiciary.gov.uk/publications/judicial-working-group-lip-report/> (last accessed 5 July 2014)

With respect to interim child arrangements orders, the revised Practice Direction requires courts to consider, in addition to the risk of harm to the child and caring parent, whether contact will be beneficial for the child.⁷¹ If domestic violence is found to have occurred, it reiterates some of the provisions of its predecessor, including that the court should only make a child arrangements order if it is satisfied that the physical and emotional safety of the child and resident parent can be secured.⁷² Additionally, the court needs to be satisfied that the resident parent will not be subjected to further controlling or coercive behaviour by the other parent.⁷³ The court also has to consider the broader factors set out in Paragraph 37 (formerly Paragraph 27) of the Practice Direction.

However, the presumption of parental involvement puts the onus squarely on the caring parent to establish that parental involvement will *not* further the child's welfare. Resident parents who have sustained domestic violence may therefore have to prove that both interim and final orders will be neither safe nor beneficial for the child and that they will be subjected to further controlling or coercive behaviour by the abuser. Within the discursive context of current family law, this may be an almost impossible burden to fulfil, particularly for mothers without legal representation.

Room for optimism? (B)

It is hoped that this account of the possible effect of the presumption of parental involvement is unduly pessimistic, and there are, of course, many other complex factors at play in the transformed world of family law. We have seen that where judges and professionals *do* understand the dynamics of domestic abuse and recognise the conjoined and contextual nature of domestic violence and parenting, they are able to see beyond images of 'safe family men', and the perceived importance of contact is less likely to take priority over the effects of the father's conduct on the mother and child. The vastly reduced availability of legal aid in private law proceedings and the difficulties for victims of domestic violence in accessing it appear to have raised professional and judicial awareness of the dynamics of domestic violence and its consequences for victims and children. The large numbers of organisations and

⁷¹ Practice Direction 12J at para 27

⁷² *Ibid* at para 36

⁷³ *Ibid*

professionals who responded to the LASPO enquiry with concerns about the ‘two-year’ restriction for gateway evidence of domestic violence suggests an increased awareness by professionals and judicial officers of the relevance of ‘historic’ abuse. ‘For victims of anything bar the most trivial abuse two years is not a long time, and they may have been the subject of ongoing controlling or coercive behaviour through contact arrangements in the meantime.’⁷⁴

Additionally, the increase in litigants in person may open up the space for an expanded role by Cafcass officers, many of whom, as we have seen, appear to have keener insights into the behaviours of perpetrators and more reservations than courts and family lawyers about the drive towards ‘parental involvement’. They will, however, need to be very firm and forthright to overcome the drive towards agreement and ‘diversion’.

CONCLUSIONS (A)

‘Many relationships have domestic violence in them but only a fraction of contact cases fail...When we 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]

Underlying the rarity of refusals of applications for contact is the welfare of the child, a ‘civilising’ device⁷⁵ 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. 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. These relations of power give rise to a discursive and ideological terrain that downplays, trivialises and erases women’s concerns about continued contact with violent fathers and have a

⁷⁴ Written evidence from Lucy Reed, barrister. Numerous similar comments were made in the written evidence given by other organisations and professionals.

⁷⁵ See R Van Krieken, ‘The “Best Interests of the Child” and Parental Separation: on the “Civilising of Parents”’ (2005) 68(1) *Modern Law Review* 25-48

powerful normative influence on professional and judicial perceptions and practices. The symbolic and functional power of the presumption of parental involvement may reduce even further the ability of victim/mothers to offer any opposition to father-involvement in child arrangements proceedings by reinforcing ‘the deviant nature of failing to abide by [the norm] of the separated but continuing family’.⁷⁶

The very narrow circumstances in which domestic violence is seen as relevant to contact and the strong pro-contact stance of the vast majority of courts and professionals ‘suggests that the father’s role continues to be viewed as inalienable, even when there is known previous or continuing violence.’⁷⁷ We have seen that the parameters of what constitutes the ‘safe family man’ are expanding to include increasingly abusive, ‘dangerous’ fathers, a process that may be exacerbated by the presumption of parental involvement. This means that mothers may experience greater difficulty resisting the impetus towards agreement, and those who are unrepresented may be increasingly compelled to negotiate with their abuser.

The valorisation of fatherhood in political, popular and legal discourses, reinforced by the perceived benefits of contact, means 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’.⁷⁸ These discourses have so resonated with professionals that they rarely question or even consider the quality of parenting by fathers 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. 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’.⁷⁹ This means that even fathers with proven

⁷⁶ F Kaganas, ‘A presumption that “involvement” of both parents is best: deciphering law’s messages’ (2013) 24(3) CFLQ 270-293 at p 271

⁷⁷ Christine Harrison, ‘Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic Violence’ (2008) 14 *Violence Against Women* 381-405 at p 382.

⁷⁸ Coy et al at p 11

⁷⁹ Calvin Bell, ‘Domestic Violence and Contact: 10 Reasons Why’ [2008] 38 *Fam Law* 1139-1143 at p 140

histories of violence are seen as important for their children's welfare, an importance that is now almost cast in stone by the presumption of parental involvement.

We need to acknowledge that constructing non-resident fathers as 'safe family men' may contribute towards sustaining the image of law's 'ideal' post-separation family but will not make perpetrators of domestic violence 'safe', which may be an unattainable goal. If we are to achieve the 'cultural shift' called for by the Family Justice Council, we need to acknowledge properly that 'the family' is not always a safe haven but a place where abuse can occur. In order to do so, we need to recognise that domestic violence is morally reprehensible and a 'significant failure in parenting',⁸⁰ and that women's desires for safety, wellbeing and autonomy are morally legitimate. Until we are able to do so, many children may be put at risk by a prescriptive application of the presumption of parental involvement, courts will continue to clash with 'implacably hostile mothers', and contact between children and violent fathers will continue to be seen as positively desirable.

⁸⁰ C Sturge and D Glaser, 'Contact and Domestic Violence – The Experts' Court Report' [2000] 30 Fam Law 615-629