

‘Greater than the mere sum of its parts’: coercive control and the question of proof

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Key words

Coercive control; child arrangements/contact; evidence; fact-finding; risk assessment

Abstract

This article considers how domestic abuse is understood by policy-makers, legal and child welfare professionals and judges in England and Wales, and what the implications of these understandings are for proving domestic abuse and assessing risk in private law Children Act proceedings. It focuses, in particular, on how the dominant incident-based perception of domestic abuse fails to capture the gendered nature and the ongoing, cumulative process and effects of coercive control. It explores how the incident-based approach, epitomised by fact-finding hearings, together with the burden of proof and dominant images of ‘safe family men’ and ‘lying manipulative mothers’, compound the difficulties women experience in proving allegations of abuse. In so doing, it analyses the eight recently reported cases on child arrangements and contact in which allegations of domestic violence were made to determine whether any change can be discerned in how domestic abuse is understood. It concludes that, while some trial judges have a broader awareness of coercive control, the fact-finding process, with its focus on proving ‘the truth’ of individual allegations of violence, and the continuing drive by the appellate courts to promote contact ‘at all costs’, obscure the ‘bigger picture’, with serious consequences for the assessment of risk.

Introduction (A)

Since December 2015, there have been three developments in England and Wales which have important implications for private law Children Act cases where allegations of domestic violence are made. Coercive control - the most prevalent, devastating and brutal form of abuse by which men entrap women in personal life – is central to these developments.¹ A new offence of coercive or controlling behaviour against an intimate partner or family member was introduced in December 2015.² Women’s Aid launched the successful Child

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¹ See E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007). The title to this article pays tribute to this important work

² Serious Crime Act 2015, s 76

First Campaign in January 2016 with the publication of their ten-year review of child homicide cases.³ Finally, there was the successful appeal by Rights of Women in *R (on the Application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* (the Rights of Women case), in which the Court of Appeal held that certain aspects of the regulations made under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which stipulate the forms of evidence of domestic violence required to access legal aid in private family law cases (the ‘gateway’ evidence), were invalid.⁴

This article considers how the ‘incident narrative’ that dominates legal and political discourses on domestic violence fails to capture and obscures the gendered relations of power, practices and effects of coercive control, and how this narrative is reinforced by the perceived need for evidence and proof of domestic abuse. In so doing, it undertakes a systematic encounter between Evan Stark’s pioneering account of coercive control, and the perceptions of and responses to domestic violence by politicians, policy-makers, legal and child welfare professionals and the judiciary in England and Wales.⁵ By examining the debates around LASPO and analysing all child arrangement/contact cases involving allegations of domestic violence which were reported after December 2013 (n = 8), this article considers whether courts have acquired a deeper understanding of domestic abuse, including coercive control, than was demonstrated in the past. It goes on to explore how the incident narrative underpinning the LASPO ‘gateway’ regulations and private law Children act proceedings, epitomised by the ‘fact-finding hearing’, compounds the difficulties victims of domestic abuse may experience in accessing legal and in proving in court proceedings the abuse they have sustained. Finally, it discusses whether the substantive and procedural obstacles to proving domestic abuse and impelling courts to prioritise safety over the promotion of contact may be overcome by eliminating the adversarial fact-finding exercise altogether in order to focus attention on risk rather than ‘the truth’ of allegations.

Dominant narratives of domestic violence (A)

³ Women’s Aid, *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts* (Women’s Aid, 2016). See also Women’s Aid, *Child First: A Call to Action One Year On* (Women’s Aid, 2017).

⁴ *R (on the Application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91.

⁵ *Ibid*

‘A lot of men might not be beating up women, but they’re very controlling. Courts don’t understand emotional abuse... Unless you’re walking in with a black eye, trying to explain to the judge doesn’t work. They’re only concerned with physical violence – “has he hit her, no, then you need to promote contact”. (Kathy)’⁶

The way in which domestic violence is understood in political, legal and popular discourses equates abuse with physically violent incidents. This approach assumes that abuse consists of ‘discrete acts that can be sharply delineated and so managed within a tight temporal frame, like stranger assaults’.⁷ As discussed below, the ‘incident narrative’ has dominated the perceptions and practices of many judges, family lawyers and child welfare professionals in private law Children Act proceedings, as well as some of the provisions of Practice Direction 12J (PD12J) (which stipulates best practice for courts in responding to domestic violence in child arrangements proceedings), ‘with the coercive and controlling dimensions rarely recognised’.⁸ Hunter and Barnett found a marked difference between ‘legalistic’ understandings of domestic abuse, focused on incidents of physical violence (largely held by family lawyers and the judiciary), and social science understandings, which recognise its power and control dynamics (more often held by Cafcass officers).⁹

The incident narrative also underpins the recent reforms to legal aid effected by LASPO. In taking private law cases involving children and financial matters out of scope of legal aid, the government stated that the exception to this should be ‘where there is an ongoing risk of physical harm from domestic violence’.¹⁰ This approach received much criticism on the basis that it excluded other forms of abuse and was narrower than the (then) cross-government definition of domestic violence that was included in PD12J and was used by many other government agencies, which defined ‘domestic violence’ as ‘[a]ny incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional)

⁶ M Coy, K Perks, E Scott and R Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012) at p 51

⁷ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 92.

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 51

⁹ 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)

¹⁰ *Proposals for the Reform of Legal Aid in England and Wales*, Cm 7967 (2010) p 42

between adults who are or have been intimate partners or family members'.¹¹ By 2014, however, both LASPO and PD12J included the new cross-government definition of domestic violence, namely: 'Any incident, or pattern of incidents, of controlling, coercive or threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.'¹²

Two aspects of this evolution of the definition of domestic violence merit consideration. Firstly, it demonstrates how the physical incident model, depicted by the terms, 'incident or pattern of incidents', or 'acts', which fail to capture the ongoing, cumulative process of coercive control, has been increasingly 'stretched' to incorporate what is usually described as psychological or emotional abuse.¹³ The binary juxtaposition of physical and psychological/emotional abuse fails to capture the embodied physicality and brutality of coercive control, although it may well result in psychological and emotional harm and have that intent. Evan Stark explains that, by describing non-physical forms of oppression as psychological abuse, it is 'as if their primary dynamic involved mental processes rather than concrete deprivations and structural restraints'.¹⁴ Secondly, the term, 'incident', neutralises and obscures the gendered agency of the perpetrator of the abuse. As discussed below, by focusing on its patterns, techniques and tactics, coercive control can be seen as the performance of a patriarchal form of dominant masculinity, an 'oppressive strategy of choice' that enacts male power over women in personal life as a way of installing and preserving women's dependence on male partners.¹⁵

With these thoughts in mind, coercive control may best be seen as a strategy of techniques designed to achieve submission, constituted by modern disciplinary forms of power that 'operate principally through the human body'.¹⁶ These perceptions are obscured by the

¹¹ See, eg, The Women's Institute, *Legal Aid is a Lifeline: Women Speak Out on the Legal Aid Reforms* (NFWI, 2011); Rights of Women, *Violence Against Women in the UK: Briefing for the House of Lords, Committee Stage* (Rights of Women, 2012); *Hansard, Lords Debates*, vol 734, cols 590-599 (18 January 2012).

¹² LASPO, s 12(9) and Sch 1, part 1. See also PD12J, para 3, which also describes 'coercive' and 'controlling' behaviour.

¹³ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 86

¹⁴ *Ibid* at p 11.

¹⁵ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 193

¹⁶ L McNay, *Foucault and Feminism: Power, Gender and the Self* (Polity Press, 1992) at p 46

incident narrative, the ideological effect of which is that ‘questions of power and material interest continue to be systematically marginalised and depoliticised’.¹⁷

Understanding coercive control (A)

A number of studies in the USA and UK have revealed the widespread prevalence of coercive control which ‘provide compelling evidence that a majority of abusive relationships for which women seek help are characterized by the range of nonviolent harms identified with coercive control’.¹⁸

What is coercive control? (B)

Stark describes coercive control as a regime of domination arising out of a combination of strategies entailing ‘a malevolent course of conduct that subordinates women to an alien will’ that lead to the entrapment of individual women.¹⁹ Numerous research studies reveal that the techniques and tactics used by abusers to exercise coercive control are striking in their similarity.²⁰ Many of these tactics are the same as those used to extract information or compliance from hostages or prisoners-of-war, such as isolation, deprivation of money, food or medication, preventing communication and escape, and enforcing rules of conduct.²¹ However, it is the particularity of coercive control, the way in which its exercise is insidiously calibrated to the specificity of the particular woman herself, that women find most devastating, and which distinguishes coercive control from the more depersonalised forms of entrapment experienced by hostages and prisoners of war.²² In this respect, men’s privileged access to women is critical to coercive control, as it enables them to gather unique knowledge about her movements and vulnerabilities.²³

¹⁷ R 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 A Diduck and K O’Donovan (eds), *Feminist Perspectives on Family Law*, (Routledge Cavendish, 1st edn, 2006) at p 251

¹⁸ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 275

¹⁹ Ibid at p 15. See also Home Office, *Strengthening the Law on Domestic Abuse Impact Assessment (IA)* (Home Office, 2014) at para 20

²⁰ See, eg, E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007); FI Matheson, N Daoud, S Hamilton-Wright et al, ‘Where did she go? The transformation of self-esteem, self-identity, and mental well-being among women who have experienced intimate partner violence’ (2015) 25(5) *Women’s Health Issues Online Early View* 561-569; CK Sanders, ‘Economic Abuse in the lives of women abused by an intimate partner: a qualitative study’ (2015) 21 *Violence Against Women* 3-29

²¹ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 205

²² Ibid at p 287

²³ Ibid at p 376

Coercive control has been categorised by professionals working with abused women into four broad strategies – physical violence, intimidation, isolation and control – that in combination form ‘a sustained pattern of behaviours’.²⁴ Physical violence may be, but is not always, used by perpetrators of coercive control as part of the abuser’s repertoire of tactics, reinforcing other techniques of domination.²⁵ Although some abusers may inflict severe violence, others employ frequent, low-level violence which becomes a routine part of everyday life, the cumulative effects of which are particularly devastating for victims.²⁶ As discussed below, the dismissal of such violence as unimportant by courts and professionals means that patterns of coercive control may be missed and risk minimised.

Abusers intimidate women by threats, surveillance, and degradation.²⁷ Intimidation by surveillance is intended to impress on victims that ‘the perpetrator is omnipotent and omnipresent’, and includes stalking, listening in on phone calls, reading the victim’s mail or text messages, monitoring social media platforms, and interrogating friends.²⁸ Abusers may degrade, humiliate and shame women to establish their moral superiority, by, for example, swearing at them, ordering them around, putting them down, enforcing rules and activities which humiliate or dehumanise the victim, or through visible marking.²⁹ Coercively controlling men can also make women ‘question their own reality’ by thinking they are ‘going mad’, using tactics such as turning the gas on and off and hiding household items.³⁰

Isolation is used ‘to prevent disclosure, instil dependence, express exclusive possession, monopolize their skills and resources, and keep them from getting help or support’, by

²⁴ Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012) at p 22. See also E Pence and M Paymar, *Education Groups for Men Who Batter: The Duluth Model* (Springer, 1993); P Lehmann, C Simmons & VK Pillai, ‘The validation of the checklist of controlling behaviours (CCB): assessing coercive control in abusive relationships’ (2012) 18 *Violence Against Women* 913-933

²⁵ R Hunter, ‘Narratives of Domestic Violence’ (2006) 28 *Sydney Law Review* 734-776.

²⁶ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007)

²⁷ *Ibid*; Women’s Aid, *Nineteen Child Homicides What must change so children are put first in child contact arrangements and the family courts* (Women’s Aid, 2016) at p 26; Home Office, *Controlling or Coercive Behaviour in an Intimate or Family Relationship. Statutory Guidance Framework* (Home Office, 2015) at p 4

²⁸ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 255. See also Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012)

²⁹ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at pp 258-260; Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012)

³⁰ Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012) at p 22. See also L Harne, *Violent Fathering and the Risks to Children: The Need for Change* (Bristol: The Policy Press 2011)

preventing women from working, denying them access to transport and/or means of communication, forbidding calls or visits to family and friends, and preventing them from calling the police or accessing medical or other support.³¹

At the centre of the abuser's strategy is control, 'an array of tactics that directly install women's subordination to an abusive partner', by micromanaging their life and preventing resistance or escape.³² Control involves regulating the 'minute facets of everyday life' including how women dress and do housework and what they watch on TV, and depriving them of, or limiting their access to money and other resources.³³

The combination of these strategies, which are a feature of nearly all of the reported cases discussed below, are experienced by women as entrapment, and to understand this we need to replace the prevailing incident narrative of domestic violence with a pattern of techniques giving rise to an 'abusive gendered household regime', whereby abuse is embedded in the fabric of women's everyday lives and parenting practices.³⁴

The gendered nature of coercive control (B)

'Domestic 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 perpetrators are men.'³⁵

The substantial statistical evidence referred to by Lord Justice Wall attests to the higher prevalence, persistence and severity of violence inflicted by men against female partners than

³¹ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 262. See also Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012); Women's Aid, *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts* (Women's Aid, 2016)

³² E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 271

³³ Ibid at p 274. See also Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012); Home Office, *Controlling or Coercive Behaviour in an Intimate or Family Relationship. Statutory Guidance Framework* (Home Office, 2015)

³⁴ Morris A, 'Gendered dynamics of abuse and violence in families: considering the abusive household gendered regime' (2009) 18(6) *Child Abuse Review* 414-487 at p 414.

³⁵ Wall LJ, 'Enforcement of Contact Orders' [2005] 35 *Family Law* 26-32 at p 30.

vice versa.³⁶ However, understanding the role of gender in domestic abuse is not simply a numbers game. Coercive control is, above all, a gendered strategy of domination of women by men, ‘designed to deny women a personal life’.³⁷ The way in which coercive control targets stereotypical female roles may be overlooked because, despite women’s increasing formal liberation, its tactics are embedded in still taken-for-granted feminised norms of what it means to be a ‘good’ partner, wife or mother, ‘or target devalued activities to which women are already consigned, like cooking, cleaning, and child care’.³⁸ This can give rise to ‘enormous ambiguity’ about where ‘normal’ family life ends and subjugation begins.³⁹

Of course, women may assault men and other women, and use violence to coercively control them. However, ‘[n]othing men experience in the normal course of their everyday lives resembles this conspicuous form of subjugation’.⁴⁰ This is not because men have a greater inherent capacity than women for violence but because the abuser’s model of masculinity reflects, is shaped and reinforced by, and enacts ideological and discursive conceptions of male dominance arising out of persisting structural and material gender inequality in wider society.⁴¹ With women’s increasing formal liberation in the public sphere, men who practice coercive control are ‘doing’ or ‘performing’ a model of masculinity designed to solidify ‘women’s generic obedience to male authority’ by forcibly imposing stereotypes of femininity on female partners in the only arena they can still do so in modern society – personal life.⁴² Although most men concede their privileges or at least accept that they should be compromised, many men *do* enforce the material, tangible and symbolic advantages they gain from dominating, exploiting and entrapping female partners. Discourses of gender equality and neutrality that have increasingly dominated political, legal and economic discourses in many Western democracies since the 1970s have enabled many women to benefit from increasing economic independence and civic rights. However, those same discourses and ideologies can work to mask the gendered strategies of coercive control and its structural and material foundations, which conceal it from official gaze while allowing it to flourish in the privacy of personal life.

³⁶ 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 2013/2014* (ONS Bulletin, 2015)

³⁷ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 387

³⁸ *Ibid* at pp 210-211

³⁹ *Ibid* at p 211

⁴⁰ *Ibid* at p 15

⁴¹ *Ibid*

⁴² *Ibid* at p 213

Coercive control v dominant narratives of domestic violence (B)

The degendered, incident-based approach to domestic violence means that the seriousness of the abuse is defined almost solely by individual acts of physical violence which frequently give rise to the entirely unrealistic assumption that between incidents of physical violence, ‘normal’ family life carries on and victims have decisional autonomy. These beliefs ‘are demonstrably false in the millions of cases where abuse is unrelenting, volitional space closed, or decisional autonomy is significantly compromised’.⁴³

Additionally, disaggregating individual incidents of violence gives rise to the assumption that the abuse has ended if the ‘only’ allegations of abuse are ‘old’ or ‘historic’. This fails to reflect the ongoing, cumulative nature of coercive control and its effects, where there is no clear beginning or end to the abuse, the lasting impact of which is frequently far from historic. It also means that the many other techniques and tactics that constitute patterns of ongoing controlling, intimidating and isolating behaviour may be downgraded or rendered invisible, and that the continuing ‘terrorizing effect’ of such ‘historic’ abuse may be missed.⁴⁴

A further assumption embedded in the dominant incident narrative is that, once partners have separated, the abuse ends. This fundamentally misunderstands how coercive control can persist and even escalate after victim and perpetrator have separated, because a primary aim of coercively controlling men is to keep the relationship going at all costs.⁴⁵ This explains why a history of coercive and controlling behaviour has been found to be a key predictor of post-separation abuse, and the risk of severe or fatal injury increases on separation, as the abuser tries to regain his power and control over the woman.⁴⁶

⁴³ Ibid at p 115

⁴⁴ 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) at p 17

⁴⁵ Ibid at p 57. Similar findings were made by C Godsey and R Ribonson, ‘Post-Separation Abuse Featured in the New Duluth Power and Control Wheel’ (2013) *Family & Intimate Partner Violence Quarterly* 101-105; R Thiara, C Harrison and University of Warwick, *Safe not sorry: Supporting the campaign for safer child contact* (Women’s Aid, 2016)

⁴⁶ B Featherstone & S Peckover, ‘Letting them get away with it: Fathers, domestic violence and child welfare’ (2007) 27(2) *Critical Social Policy* 181-202; P Ornstein & J Rickne, ‘When does intimate partner violence continue after separation?’ (2013) 19(3) *Violence Against Women* 617-633

By disaggregating physical violence into discrete incidents, the cumulative impact of the myriad of other tactics, which may include frequent, ‘minor’ physical violence, is ignored.⁴⁷ This means that children’s and women’s experiences of coercive control are obscured and discounted, and a core tactic of coercive control – the denial of a voice to the women who are subjected to it – is reinforced.⁴⁸

The effects of coercive control on women and children (B)

‘[T]he single most important characteristic of woman battering is that the weight of multiple harms is borne by the same person, giving abuse a cumulative effect that is far greater than the mere sum of its parts.’⁴⁹

It is important to understand that the entrapment and fear generated by coercive control are the cumulative effects of an ongoing course of malevolent conduct, experienced as chronic rather than episodic. Women may suffer a range of physical and psychological health problems, symptoms and disorders such as depression, chronic pain, sleep and appetite disorders, anxiety disorders, substance use and suicidal behaviour.⁵⁰ They may also experience ‘profound disempowerment’ and a loss of self and confidence because of the constraints on their agency and ability to make their own choices and decisions.⁵¹ The deployment and effects of coercive control on migrant and refugee women can be particularly severe, as lack of support and information and language barriers ‘give their abusive husbands total power to define their world’.⁵²

Living with domestic abuse can also be extremely harmful to children. The devastating physical, psychological, emotional and developmental harm that children exposed to domestic violence can suffer is now well known by legal and child welfare professionals,

⁴⁷ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 95

⁴⁸ *Ibid* at pp 110-111

⁴⁹ *Ibid* at p 94

⁵⁰ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007); G Dillon, R Hussain, D Loxton & S Rahman, ‘Mental and physical health and intimate partner violence against women: a review of the literature’ (2013) *International Journal of Family Medicine* 1–15.

⁵¹ Katz E, ‘Beyond the Physical Incident Model: How Children Living with Domestic Violence are Harmed By and Resist Regimes of Coercive Control’ (2015) *Child Abuse Review* (Wiley Online Library). See also FI Matheson, N Daoud, S Hamilton-Wright et al, ‘Where did she go? The transformation of self-esteem, self-identity, and mental well-being among women who have experienced intimate partner violence’ (2015) 25(5) *Women’s Health Issues Online Early View* 561-56

⁵² R Hunter, ‘Narratives of Domestic Violence’ (2006) 28 *Sydney Law Review* 734-776 at p 745. See also S Anitha, ‘No recourse, no support: State policy and practice towards South Asian women facing domestic violence in England’ (2010) 40(2) *British Journal of Social Work* 462-479

judges and policy makers, and is reflected in the definition of harm in the Children Act 1989,⁵³ and in Paragraph 5 of PD12J, which states that:

‘Domestic violence and abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to violence or abuse, or witness one of their parents being violent or abusive to the other parent, or live in a home in which violence or abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with violence or abuse, and may also suffer harm indirectly where the violence or abuse impairs the parenting capacity of either or both of their parents.’

However, an increasing body of research reveals that the most devastating harms to children may arise out of living in coercively controlling household regimes. Children whose fathers coercively control their mothers may be exposed to the constant abuse of their mothers and suffer from economic and physical deprivation and social isolation, thereby experiencing entrapment themselves, which can contribute to a range of emotional and behavioural problems.⁵⁴ Coercive control may also have a serious impact on children’s relationships with their mothers, as a common tactic of coercive controllers is to manipulate, undermine and distort the mother/child relationship by, for example, demeaning and belittling women in front of children, encouraging children to participate in the abuse, preventing mother and child spending time together, and involving them in secrecy about the abuse.⁵⁵

Post-separation child arrangements and contact, and protracted proceedings, can be a route to continue abuse of the mother by using and manipulating children to control mothers, undermining the mother’s parenting abilities, interrogating children about their mothers’

⁵³ Children Act 1989, s 31(9)

⁵⁴ S Holt, H Buckley & S Whelan, ‘The impact of exposure to domestic violence on children and young people: a literature review’ (2008) 32 *Child Abuse & Neglect* 797-810; L Dunstan, J Bellamy & S Evans, *Links between coercive controlling violence, parenting problems and children’s behaviours* (Parramatta Family Relationship Centre, Australia, 2012); E Katz, ‘Beyond the Physical Incident Model: How Children Living with Domestic Violence are Harmed By and Resist Regimes of Coercive Control’ (2015) *Child Abuse Review* (Wiley Online Library)

⁵⁵ F Buchanan, ‘Addressing the Impact of Domestic Violence on Mothers’ Relationships With Their Infants’ (2014) 6(3) *Family and Intimate Partner Violence Quarterly* 41-46; C Sturge and D Glaser, ‘Contact and Domestic Violence: The Experts’ Court Report (2000) 30 *Family Law* 615-629; L Bancroft, JG Silverman & D Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2nd edn, London: Sage, 2012); R K Thiara & C Humphreys, ‘Absent presence: the ongoing impact of men’s violence on the mother-child relationship’ (2015) *Child and Family Social Work* (published online)

lives, making negative comments about their mothers, asking them to relay abusive or subtly threatening messages, and tracking women down by initiating proceedings.⁵⁶ At the most serious level, coercive control has been highlighted as a particular risk factor in child homicides that have occurred during post-separation contact.⁵⁷

A full understanding of coercive control and its effects on women and children is, therefore, essential to the proper assessment of risk in private law Children Act proceedings.

Judicial and professional understanding of coercive control (A)

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’.⁵⁸ 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 masculinity’, reinforced by the strong presumption of the benefits of contact between children and non-resident fathers.⁵⁹ Marianne Hester observes the ‘differences in culture, practice and discourse’ between professionals and practitioners working in criminal justice, child protection and private family law proceedings as so striking that they could be said to occupy three different ‘planets’.⁶⁰ Judicial and professional understandings of domestic abuse go a long way to explain and reinforce this ideological divide.

Judicial and professional perceptions of domestic abuse before 2014 (B)

⁵⁶ L Harne, *Violent Fathering and the Risks to Children: The Need for Change* (Bristol: The Policy Press 2011); C Godsey and R Robinson, ‘Post-Separation Abuse Featured in the New Duluth Power and Control Wheel’ (2013) *Family and Intimate Partner Violence Quarterly* 101-105; RK Thiara & C Humphreys, ‘Absent presence: the ongoing impact of men’s violence on the mother-child relationship’ (2015) *Child and Family Social Work* (published online)

⁵⁷ M Brandon, P Belderson, C Warren et al, *Analysing child deaths and serious injury through abuse and neglect: what can we learn? Research Report RR023* (DCSF, 2008); S Vincent, *Child death and serious case review processes in the UK Research Brief No. 5* (University of Edinburgh 2009); Women’s Aid, *Nineteen Child Homicides. What must change so children are put first in child contact arrangements and the family courts* (Women’s Aid, 2016)

⁵⁸ B Featherstone and S Peckover, ‘Letting them get away with it: Fathers, domestic violence and child welfare’ (2007) 27(2) *Critical Social Policy* 181-202 at p 182

⁵⁹ A Barnett, *Contact at all costs? Domestic violence, child contact and the practices of the family courts and professionals* (Brunel University, 2014) at p 114. See also M Eriksson and M Hester, ‘Violent Men as Good-enough Fathers?: A Look at England and Sweden’ (2001) 7(7) *Violence Against Women* 779-798.

⁶⁰ M Hester, ‘The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children’s Safety in Contexts of Domestic Violence’ (2011) 41(5) *British Journal of Social Work* 837-853

Research and case law prior to the implementation of PD12J in 2008 revealed that courts minimised, equalised and neutralised domestic violence, even in cases of very severe physical violence, which meant that it was often disregarded and considered irrelevant to contact.⁶¹ Coercive control, at that time, did not even feature in legal discourse. However, research undertaken since PD12J was implemented, but prior to 2014, indicates that some judges and professionals working in the family justice system have acquired a greater awareness that domestic violence is not limited to incidents of physical violence and can include emotional abuse, financial control and denigration of the mother.⁶² Cases reported after PD12J was implemented also indicate that a few judges were starting to recognise the coercively controlling nature of domestic violence, as well as the many ways in which that control can be exercised. For instance in *Re S (A Child)*, the trial judge opened up to scrutiny the father's conduct towards the mother, which included following the mother in his car, sending her numerous bullying and derogatory text messages, insisting that the child be enrolled at a nursery of his choice, and restricting the mother from living and working where she chose.⁶³ Although the mother had been physically violent to the father, the judge concluded that *he* was the abusive parent, recognising that his conduct formed a pattern of domineering and controlling behaviour, which was an inseparable aspect of his own parenting of the child.

Despite this increased awareness, a number of post-2008 studies highlighted the way in which many family judges and professionals lacked insight into the gendered and pervasive nature of coercive control and its effects on women and children.⁶⁴ Family lawyers tended to perceive domestic violence in narrower terms than did Cafcass officers, who had a better understanding of the nature and seriousness of patterns of coercive control.⁶⁵ For most judges and legal professionals, any form of abuse other than physical assault was not 'real' violence,

⁶¹ 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; C Harrison, 'Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic Violence' (2008) 14(4) *Violence Against Women* 381-405

⁶² A Barnett, 'Contact at all costs? Domestic violence and children's welfare' (2014) *Child and Family Law Quarterly* 439-462; 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)

⁶³ *Re S (A Child)* [2012] EWCA Civ 1031; see also *Re W (Children)* [2012] EWCA Civ 528

⁶⁴ Maddy Coy, Katherine Perks, Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012); Thiara R and Gill A, *Domestic Violence, Child Contact, Post-Separation Violence: Experiences of South Asian and African-Caribbean Women and Children* (London: NSPCC 2012)

⁶⁵ 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)

as they failed to identify ‘seemingly minor incidents as part of ongoing patterns of significant and highly dangerous controlling behaviour’.⁶⁶

The recent criminalisation of coercive control is indicative of the increased awareness, in the political arena, of the harm posed by coercive and controlling behaviour. The discussion that follows questions whether family judges and professionals ‘have made the same progress in recognising and responding to domestic abuse that the criminal courts have’.⁶⁷

Coercive control: current judicial and professional perceptions and practice (B)

Determining current judicial and professional perceptions of and responses to domestic abuse in child arrangements and contact cases is no easy task as there is no research or monitoring data available on such proceedings for the past three years. It is to the reported cases, therefore, that we must look to gain some insight into current judicial and professional perceptions and practices. However, these cannot provide a representative sample of all such cases since they only reflect the very small number of cases that go to appeal. Additionally, since LASPO was implemented, the numbers of cases that have been appealed and therefore reported have reduced substantially. The reported cases may also be atypical of judicial practice generally since they largely involve refusals by trial judges to order direct contact between fathers and children, which is extremely rare.⁶⁸ Nevertheless, they provide us with some insight into the way in which a small minority of trial judges are responding to coercive control, and into the attitudes and messages emanating from the higher courts, which are ‘a powerful interpretive lens in shaping how family law professionals respond to mothers and fathers involved in custody disputes’.⁶⁹

All child arrangements/contact cases reported from the end of 2013 until October 2016 were reviewed. Eight cases were identified where domestic violence was an issue, all perpetrated by fathers of the subject children.⁷⁰ Five of these cases involved appeals by fathers against

⁶⁶ Women’s Aid, *Nineteen Child Homicides. What must change so children are put first in child contact arrangements and the family courts* (Women’s Aid, 2016) at p 27; see also *ibid*

⁶⁷ Women’s Resource Centre, *Women’s Equality in the UK – A health check* (Women’s Resource Centre, 2013)

⁶⁸ See, eg, Ministry of Justice, *Judicial and Court Statistics 2011* (Ministry of Justice, 2012); M Harding and A Newnham, *How do County Courts Share the Care of children Between Parents? Full Report* (University of Warwick, University of Reading, 2015)

⁶⁹ V Elizabeth, E Gavey & 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 at p 255

⁷⁰ This period was selected because Barnett had already reviewed cases reported up to September 2013 – see A Barnett, *Contact at all costs? Domestic violence, child contact and the practices of the family courts and*

orders refusing direct contact, one involved an appeal by a father against an order for professionally supervised contact, and one was an appeal by a non-resident mother against the refusal to make a contact order in her favour. Five of the seven appeals were allowed by the Court of Appeal. The eighth case was a first-instance decision by a High Court judge refusing direct contact between the father and children. In all these cases, a fact-finding exercise had been undertaken at which the fathers denied or minimised the allegations.

The judgments in all eight cases reveal coercive and controlling behaviours by the fathers, although the trial and appellate judges do not always identify these as such. In all but one of the eight cases, trial judges made findings on the coercively controlling aspects of perpetrators' behaviours, and their orders largely reflected how seriously they took these findings, although in some cases, physical violence was the determining factor. In *Re M (Children)* the trial judge held that the father had ‘“failed to persuade me that he was not going to destabilise the family by continuing his violent, threatening, minimising behaviours, upsetting the children and harming them emotionally”’.⁷¹ In *Re T (A Child: Suspension of Contact: Section 91(14) CA 1989)* various judges at first instance had found the father to be unreasonable, argumentative, bullying and aggressive, ‘leaving the mother ostensibly vulnerable and undermined’.⁷² The trial judge considered the father’s overall conduct and its effect on the mother and child as so abusive that ‘the mother should not be subjected to his behaviour through the courts or otherwise for the foreseeable future’ and accordingly, refused to order direct contact and made an order under Section 91(14) of the Children Act 1989 prohibiting the father from making further applications for two years without permission of the court (‘a Section 91(14) order’).⁷³

In *Re K (Children)* both the guardian and the recorder identified a clear pattern of coercive and controlling behaviour but it was apparent that they did not consider this to be as serious

professionals (Brunel University, 2014). The sample cases were identified by reviewing the Bailii database, which is the most comprehensive and up-to-date source of reported cases - see <http://www.bailii.org/>. Additionally, all cases reported in Family Law Reports from the end of 2013 to date were reviewed.

⁷¹ *Re M (Children)* [2013] EWCA Civ 1147 per Macur LJ at [7], quoting the trial judge.

⁷² *Re T (A Child: Suspension of Contact: Section 91(14) CA 1989)* [2015] EWCA Civ 719 per Tomlinson LJ at [13]

⁷³ *Ibid* per Tomlinson LJ at [30]. See also *Re J-M (A Child)* [2014] EWCA Civ 434, *Re J-M (Contact Proceedings: Balance of Harm)* [2015] 1 FLR 838; *Re V (A Child) (Inadequate Reasons for Findings of Fact)* [2015] EWCA Civ 274; [2015] 2 FLR 1472 per McFarlane LJ at [10]

as incidents of physical assault.⁷⁴ The recorder concluded that during the marriage the father had:

‘ “Exhibited some controlling behaviour over mother perhaps consistent with his view of how his wife and the mother of his children should behave in the home extending to what she wore, extending to making her somewhat fearful about her position and requirement to conform. I accept that there was the incident in Holland but that has not been repeated and there is no evidence of recent physical violence between father and mother...There clearly has been aggressive confrontational behaviour by father which has reached a high pitch and which, in my judgment, has probably psychologically browbeaten mother *but no more*”.’⁷⁵

The most astute judicial understanding of coercive control can be found in the judgment of Russell J in *FY v MY & others (Children)*. In an earlier hearing, Russell J had made findings on the father’s ‘abusive behaviour towards ... [the mother], and the children, and concluded that he was controlling, abusive and manipulative’, a conclusion that was supported by subsequent events.⁷⁶ Russell J contextualised the father’s conduct as an integral aspect of his parenting by highlighting that he not only physically and emotionally harmed the two older children, but also used them during contact to continue abusing and controlling the mother by making abusive and threatening phone calls and denigrating the mother to the children, which led her to order no direct contact, limit indirect contact, and make a Section 91(14) order.⁷⁷

The only reported case in which the trial judge’s findings, that included controlling behaviour, were *not* reflected in the order made was *Re F (Children)*.⁷⁸ The father sought a residence order in respect of his 13-year-old daughter who was living with him, with whom the mother sought contact. The father stalked the mother obsessively and alleged that she was having an affair with his 26-year-old son (her stepson), which was found to be untrue. The father had so inculcated the child with these views that she opposed all contact with her mother. The Cafcass officer found the father to be extremely ‘intimidating and aggressive’ and queried whether the child’s experiences of her father amounted to significant harm.⁷⁹

⁷⁴ *Re K (Children)* [2016] EWCA Civ 99

⁷⁵ *Ibid* per King LJ at [13], quoting the recorder’s judgment, emphasis added

⁷⁶ *FY v MY & others (Children)* [2016] EWFC 16 per Russell J at [3]

⁷⁷ *Ibid* at [130]

⁷⁸ *Re F (Children)* [2015] EWCA Civ 1315

⁷⁹ *Ibid* per McFarlane LJ at [10], quoting the Cafcass officer

The trial judge, however, completely ignored his own findings, focused only on the father's application for a residence order (which he granted), and failed to even consider the mother's contact application. The mother's appeal was allowed, and the Court of Appeal castigated the trial judge for ignoring the Cafcass officer's evidence, and failing to follow PD12J or to apply the welfare checklist.⁸⁰

The insights of some of these trial judges, with the notable exceptions of *Re F (children)* and *Re K (Children)*, into the harm that may be posed by coercive and controlling behaviours have not always been shared by the Court of Appeal, which has been at pains to promote contact and in so doing, to downgrade and minimise anything other than severe, recent physical violence. So, for example, in *Re J-M (A Child)*, the Court of Appeal strenuously emphasised that 'contact should be terminated only in exceptional circumstances where there are cogent reasons for doing so, as a last resort, when there is no alternative, and only if contact will be detrimental to the child's welfare'.⁸¹ These judicial pronouncements must be seen in the context of the recent amendment to the Children Act 1989, which provides that a court is 'to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare', although none of the judgments mention this provision and are expressed in far more robust terms.⁸²

Re D is the only reported case in which the Court of Appeal refused the father's appeal against an order for professionally supervised contact with his two children and a Section 91(14) order. This may be attributed in no small part to the trial judge, the Guardian and the expert risk assessor illuminating the totality of the father's conduct and its implications for his parenting of the child.⁸³ The trial judge found proved all of the mother's allegations of physical violence perpetrated against her by the father, and found that the father fabricated allegations of historic sexual abuse by the maternal grandfather. However, the full extent of the father's coercively controlling behaviours emerge from the Guardian's reports and the subsequent risk assessment undertaken by a domestic violence expert. The Guardian described the father as 'volatile, unpredictable, aggressive, arrogant, undermining and lacking

⁸⁰ *Re F (Children)* [2015] EWCA Civ 1315

⁸¹ *Re J-M (A Child)* [2014] EWCA Civ 434, *Re J-M (Contact Proceedings: Balance of Harm)* [2015] 1 FLR 838 per Black LJ at [25]. See also *Re M (Parental Responsibility)* [2013] EWCA Civ 969, [2014] 1 FLR 339; *Re R (No Order for Contact Appeal)* [2014] EWCA Civ 1664, [2015] 2 FLR 1331; *Re T (A Child: Suspension of Contact: Section 91(14) CA 1989)* [2015] EWCA Civ 71

⁸² Children Act 1989, s 1(2A), which came into force on 22 October 2014

⁸³ *Re D (Children)* [2016] EWCA Civ 89

in empathy’.⁸⁴ The expert risk assessment concluded that the father minimised the extent and impact of his conduct, displayed extreme hostility towards the mother, and noted that the mother ‘had been repeatedly subjected to emotional and psychological abuse by the father often in front of the children’.⁸⁵ As discussed below, this case highlights the importance of placing the assessment of risk at the heart of child arrangement/contact cases where domestic violence is an issue.

Historic abuse (B)

One of the most concerning consequences of the incident-based approach to domestic violence is the perception that ‘old’ allegations of violence signify that the abuse is ‘in the past’ and therefore irrelevant to current child arrangements and contact. Pre-2014 research revealed that many judges and child welfare and legal professionals disregarded altogether allegations of violence considered too ‘old’ or ‘historic’, as it was seen as irrelevant to current risk.⁸⁶ Indeed, one of the most commonly reported reasons why fact-finding hearings might not be held was because the allegations were perceived as too ‘old’: ‘“Too many very minor and historic allegations are brought up which have no relevance to future arrangements, thus wasting Court time and causing delay in contact between the applicant and the children which is not in their best interests.” (B261, NW)’.⁸⁷ A minority of respondents to Hunter and Barnett’s survey even reported that they would advise a client not to raise the issue of domestic violence at all if the allegations were ‘old’ or ‘historic’.⁸⁸ However, Hunter and Barnett point out that such allegations may not be so readily disregarded if they are understood ‘in the context of a pattern of controlling behaviour, in which such “old” incidents have a continuing terrorizing effect’.⁸⁹

The perception that ‘historic’ abuse is irrelevant to current child arrangements or contact was also evident in the political arena. Regulations made under LASPO restricted legal aid to cases where evidence of domestic violence was not more than 24 months old at the date of

⁸⁴ *Re D (Children)* [2016] EWCA Civ 89 per Baker J at [24]

⁸⁵ *Ibid* per Baker J at [13]

⁸⁶ Women’s Aid, *Nineteen Child Homicides. What must change so children are put first in child contact arrangements and the family courts* (Women’s Aid, 2016) at p 27; see also *ibid*

⁸⁷ 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) at p 27

⁸⁸ *Ibid*, at p 34

⁸⁹ *Ibid*, at p 17

application for legal aid.⁹⁰ The government's stated reason for imposing a time restriction was that it 'is an on-going test of the relevance of the abuse'.⁹¹ This restriction met with huge opposition from stakeholders, politicians, policy-makers, lawyers and the judiciary, many of whom criticised the arbitrary nature of the two-year time limit.⁹² Some critics pointed out that the evidence may become 'out of date' despite the perpetrator remaining high risk, that some women may feel unready to pursue legal proceedings within two years of leaving a violent relationship and others may feel that they would be more at risk if they did so.⁹³

Some legal professionals who responded to the Commons Select Committee inquiry into LASPO in 2014 pointed out that the imposition of any time limit on evidence for legal aid does not reflect the ongoing, cumulative nature of coercive control: '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.'⁹⁴

The two-year time limit on evidence was a key issue in the Rights of Women case. The main issue on which the Court of Appeal focused was whether the two-year time limit on gateway evidence in Regulation 33 frustrated the purpose of LASPO. Allowing the appeal, the Court of Appeal concluded that there is 'no obvious correlation between the passage of such a comparatively short period of time as 24 months and the harm to the victim of domestic violence disappearing or even significantly diminishing. ... [The 24-month time limit] operates in a completely arbitrary manner'.⁹⁵ In response to this decision, the government amended Regulation 33 as an interim measure by substituting a time limit of 60 months for

⁹⁰ The original proposal was for a 12-month limit. See Justice, *Reform of Legal Aid in England and Wales: the Government Response*, Cm 8072 (TSO, 2011) at para 25

⁹¹ *Government Response to Justice Committee's Eighth Report of Session 2014-15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Cm 9096 (Crown, 2015) at p 10

⁹² Written evidence from the FLBA at p 2. See also written evidence from the FJC at p 8.

⁹³ See, eg, The Women's Institute, *Legal Aid is a Lifeline: Women Speak Out on the Legal Aid Reforms* (NFWI, 2011)

⁹⁴ Written evidence from Lucy Reed. See also written evidence from the Family Law Company, Exeter

⁹⁵ *R (on the Application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91 per Longmore LJ at [45]

the 24-month limit.⁹⁶ In February 2017 it was reported that the Ministry of Justice intends to abolish time limits altogether.⁹⁷

The decision of the Court of Appeal in the Rights of Women case was welcomed by a range of legal professional bodies including the Law Society and Resolution.⁹⁸ The question to consider is whether the increased insights into the importance of apparently ‘historic’ allegations of domestic abuse, demonstrated by politicians, policy makers, legal professionals and the judiciary during the LASPO debates, signify a real rather than an apparent shift in the way in which domestic abuse is understood.

The recently reported cases suggest that the appellate judiciary (and in some cases, the trial judges) still perceive ‘historic’ incidents of violence to be irrelevant to child arrangements/contact. In *Re V (A Child) (Inadequate Reasons for Findings of Fact)*, McFarlane LJ emphasised the fact that all but one of the allegations took place prior to the child’s birth or when he was still an infant.⁹⁹ For this reason, he said, ‘most, if not all, of the allegations listed on the schedule were not in fact relevant to whether or not young T in 2012/2013, who had been having contact with his father, including staying contact, at whatever regularity, could carry on having contact to this father in the future’.¹⁰⁰ By disaggregating and minimising the ‘incidents’ of abuse, McFarlane LJ discounted what appears to have been an ongoing pattern of coercive control. In *Re K (Children)* the recorder dismissed as irrelevant an ‘incident’ of physical violence that took place five years earlier on the basis that there was ‘no evidence of recent physical violence between father and mother’, failing to contextualise its relevance within his findings of continuing controlling, aggressive behaviour.¹⁰¹

The way in which judges and professionals understand domestic abuse has important implications for the ability of women to ‘prove’ the abuse they have sustained, as well as for the proper assessment of risk. Although most of the trial judges in the small sample of recently reported cases discussed herein did identify and make findings on fathers’ coercive

⁹⁶ Civil Legal Aid (Procedure) (Amendment) Regulations 2016, reg 2(2), which came into force on 25 April 2016

⁹⁷ Owen Bowcott, ‘Legal aid shakeup hands lifeline to domestic violence victims’ (*The Guardian*, 23 February 2017) <https://www.theguardian.com/law/2017/feb/23/legal-aid-domestic-violence-law-courts>

⁹⁸ G Garton Grimwood, *Legal aid for victims of domestic violence*, House of Commons Library Briefing Paper Number 05839 (House of Commons, 2016)

⁹⁹ *Re V (A Child) (Inadequate Reasons For Findings of Fact)* [2015] EWCA Civ 274; [2015] 2 FLR 1472

¹⁰⁰ *Ibid* per McFarlane LJ at [37]; see also Elias LJ at [49]–[52]. See also *Re K (Children)* [2016] EWCA Civ 99 per King LJ at [11]–[15]

¹⁰¹ *Re K (Children)* [2016] EWCA Civ 99, per King LJ at [13], quoting the recorder’s judgment

and controlling behaviours, and to varying extents took on board their seriousness, current family law and procedure discourages this, by continuing to focus on proving incidents of physical violence rather than patterns of coercive control.

‘Proving’ coercive control: an unfair burden on mothers? (A)

The incident-based approach to domestic violence dominates the issue of ‘proof’ in both private family law proceedings and in the ability of victims to access legal aid for such proceedings. The documentation required from victims of domestic violence in order to access legal aid in private family law cases largely typifies that which would evidence incidents of physical violence, including the granting of protective injunctions, perpetrators’ convictions for violence or abuse towards their families, reports from medical professionals, Domestic Violence Protection Notices and Orders, and letters from refuges.¹⁰²

Numerous stakeholder groups and researchers highlighted the enormous difficulties for women in providing evidence ‘that they simply do not have’ of the abuse they have sustained.¹⁰³ For example, the majority of women who have sustained domestic violence do not report the abuse to the police or seek injunctive relief.¹⁰⁴ However, coercive control can be even harder to detect and consequently to evidence ‘because its means and effects merge with behaviors widely associated with women’s devalued status in personal life’.¹⁰⁵ For these reasons, a common criticism of LASPO was that the gateway criteria failed to reflect women’s experiences of domestic violence.¹⁰⁶ Indeed, the Court of Appeal in the Rights of Women case accepted that victims of financial abuse ‘will not be able to obtain any of the verifications required by regulation 33’, and this was one of the reasons for holding that Regulation 33 of the Community Legal Aid (Procedure) Regulations 2012 (‘Regulation 33’) frustrated the purposes of LASPO.¹⁰⁷

¹⁰² *Proposals for the Reform of Legal Aid in England and Wales*, Cm 7967 (2010)

¹⁰³ Rights of Women, *Women’s Access to Justice: a research report* (ROW, 2011) at p 47.

¹⁰⁴ *Ibid*

¹⁰⁵ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 229. See also The Women’s Institute, *Legal Aid is a Lifeline: Women Speak Out on the Legal Aid Reforms* (NFWI, 2011) at p 23

¹⁰⁶ See written evidence to the Commons Select Committee LASPO inquiry (May, 2014) which can be accessed at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/laspo/?type=Written>

¹⁰⁷ *R (on the Application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91 per Longmore LJ at [43]

As a consequence of the concerted opposition to the evidence criteria, the government progressively widened them.¹⁰⁸ However, the additions to the gateway evidence continued to presuppose that the abuse sustained was discrete incidents of physical violence.

In the court arena, the most significant manifestation of the incident-based approach to domestic violence is the fact-finding hearing which, as the name indicates, is intended to determine specific ‘facts’. This approach is underpinned by their origins in care proceedings in relation to the local authority’s obligation to prove that the ‘threshold criteria’ are met.¹⁰⁹ Bracewell J in *Re S (Care Proceedings: Split Hearing)* explained that cases suitable for such hearings ‘would be likely to be cases in which there is a clear and stark issue, such as sexual abuse or physical abuse’.¹¹⁰ The fact-finding hearing, therefore, is itself a product of the incident-based approach to domestic violence, and places undue weight on finding ‘the truth’ rather than assessing risk.

From the outset of the fact-finding process, the incident narrative can work to erase the abuse women have sustained. Courts have to ‘consider the nature of any allegation, admission or evidence of domestic violence or abuse, and the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order and, if so, in what terms’.¹¹¹ This provision discourages investigating patterns of coercive control because it assumes ‘a linear relationship between particular incidents and specific harms’ and obscures ‘the totality of the perpetrator’s behaviour’.¹¹² With respect to the recently reported cases, this is demonstrated by the approach of the Court of Appeal in *Re V (A Child) (Inadequate Reasons for Findings of Fact)*.¹¹³ The father’s appeal was allowed and the case was remitted for rehearing to a new judge who, McFarlane LJ said, ‘must actively consider whether any, and if so which, of the allegations on the current schedule do in fact need to be relitigated’.¹¹⁴ This approach was expressly based on McFarlane LJ’s interpretation of PD12J. He stated that it was not apparent that the trial judge had ‘engaged in the process that the Practice Direction requires in deciding whether what is on the schedule of allegations is relevant to the issues

¹⁰⁸ Civil Legal Aid (Procedure) (Amendment) Regulations 2014 which came into force on 22nd April 2014

¹⁰⁹ Children Act 1989, s 31

¹¹⁰ *Re S (Care Proceedings: Split Hearing)* [1996] 2 FLR 773 at p 775

¹¹¹ PD12J, para 6

¹¹² 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) at p 17

¹¹³ *Re V (A Child) (Inadequate Reasons For Findings of Fact)* [2015] EWCA Civ 274; [2015] 2 FLR 1472

¹¹⁴ *Ibid* per McFarlane LJ at [39]

which would be current in the subsequent welfare decision for the child'.¹¹⁵ Additionally, Hunter and Barnett found that many legal professionals and judges considered that only 'real' or 'extremely serious' violence would provide grounds for a fact-finding hearing.¹¹⁶

PD12J further provides that if the court decides that a separate fact-finding hearing is necessary, it should consider 'what are the key facts in dispute' and whether these should be itemised in a Scott Schedule completed by both parties (which requires the victim to specify the dates and details of each individual 'incident' of abuse and the alleged perpetrator to respond to each separate allegation).¹¹⁷ The use of Scott Schedules means that women are compelled to articulate the abuse they have sustained within the discursive framework of the incident-based approach to domestic violence, further rendering invisible coercive and controlling behaviours. This erasure is reinforced by courts 'carving up' disputes on the basis of limited admissions, or restricting the fact-finding hearing to a few 'sample' incidents, which means 'that the full extent of the risk posed to the mother and child is minimised or even invisible'.¹¹⁸ Since April 2014 courts also need to consider 'what evidence is required in order to determine the existence of a pattern of coercive, controlling or threatening behaviour, violence or abuse', as an alternative to requiring evidence about 'incidents' of physical violence.¹¹⁹ In the absence of any current empirical data, it is not known whether judges are undertaking this exercise, although there is no indication in the recent case law that the trial judges *did* apply this provision.

If the fact-finding exercise is undertaken, the burden is on the party who asserts that domestic violence occurred to prove 'the truth' of her allegations on the balance of probabilities. If judges cannot decide which parent is telling the truth, they can fall back on the burden of proof and find that the mother has not 'proved her case', as any doubts are resolved in favour of the respondent to the allegations.¹²⁰ Judges have particular difficulty determining 'the truth' where coercive control is in issue as it 'lacks the fungibility of violence' and,

¹¹⁵ Ibid per McFarlane LJ at [37]

¹¹⁶ Ibid, at p 31

¹¹⁷ PD12J, at para 19

¹¹⁸ A Barnett, *Contact at all costs? Domestic violence, child contact and the practices of the family courts and professionals* (Brunel University, 2014) at p 258; see also 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)

¹¹⁹ PD12J at para 19(d)

¹²⁰ See *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35 per Lord Hoffman at [31]

frequently, the only evidence available is the parties' oral testimony.¹²¹ The burden of proof in such cases may assist the court, but severely disadvantage the victim.

The majority of trial judges in the recently reported sample of cases did not overtly rely solely on the burden of proof when making (or not making) findings. An example of where this did occur, however, is *Re V (Inadequate Reasons for Findings of Fact)*, in which the mother alleged that after separation, the father would 'bombard' her 'with threatening text messages, telephone calls and Facebook communications'.¹²² The trial judge found this allegation 'not proved' on the basis 'that the onus of proof was on the mother and she had simply failed to provide any evidence of the relevant text messages or Facebook communications'.¹²³ This reliance on the burden of proof to find against the mother had extremely serious consequences in this case. McFarlane LJ found the judge's conclusion 'important...because it is the one aspect of the schedule of allegations which directly relates to the time when the father was having contact with T'.¹²⁴ This led to the Court of Appeal highlighting the 'historical' nature of the findings that *were* made against the father, which was one of the reasons why his appeal was allowed.

Although it is not possible to discern from the judgments given in the eight reported cases exactly what evidence was adduced on which findings were (or were not) made, it is apparent that in all cases, great reliance was placed on the parties' oral evidence because the trial judge is best placed to 'observe their demeanour and credibility'.¹²⁵ The way in which victims of domestic abuse are perceived by judges and professionals, therefore, has important consequences for their ability to 'prove' the abuse they have sustained.

The 'false allegations' narrative (B)

' "It's like you have to prove yourself not to be a liar before anyone listens to you." ' ¹²⁶

¹²¹ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 372

¹²² *Re V (Inadequate Reasons for Findings of Fact)* [2015] EWCA Civ 274; [2015] 2 FLR 1472 per McFarlane LJ at [25]

¹²³ *Ibid* at [26]

¹²⁴ *Ibid*

¹²⁵ *Re M (Children)* [2013] EWCA Civ 1147 per Macur LJ at [11].

¹²⁶ C Harrison, 'Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic Violence' (2008) 14(4) *Violence Against Women* 381-405 at p 394

Judges' and professionals' perceptions of women involved in private law Children Act proceedings are informed by prevailing legal, political and child welfare discourses that valorise fatherhood and render invisible the father's conduct, giving rise to gendered subjectivities of 'implacably hostile mothers' and 'safe family men'.¹²⁷ So the discursive and ideological context in which coercive control has emerged is already populated by images of hostile, lying mothers and victimized fathers.

This was starkly evident in the debates around LASPO where concerns were expressed by government that mothers may make false allegations of domestic violence for the purposes of obtaining legal aid. Indeed, the 'false allegation' narrative is explicitly the *reason for* the introduction of the strict gateway evidence. According to government: 'We note concerns raised in consultation responses about the risk of creating an incentive for false allegations of domestic violence. That is why clear, objective evidence is needed.'¹²⁸ The same argument was pursued by the government in the Rights of Women case: '“The evidence list has been drafted taking account of the need for objective evidence of the need to target legal aid to genuine cases without providing an incentive for unfounded allegations of domestic violence.”'¹²⁹

The requirement for 'objective evidence', therefore, 'risks the perverse outcome of perpetuating the culture of disbelief about violence against women', an outcome that may be compounded for women who do not conform to victim stereotypes.¹³⁰ As Lord Macdonald observed: '[the Bill] appears to step backwards in expecting victims of domestic violence to conform to a stereotype of conduct, so that they will not be believed, their gateway will be shut and they will not get legal aid.'¹³¹ However, the 'real issue', as Baroness Scotland

¹²⁷ A Barnett, *Contact at all costs? Domestic violence, child contact and the practices of the family courts and professionals* (Brunel University, 2014)

¹²⁸ *Reform of Legal Aid in England and Wales: the Government Response*, Cm 8072 (2011) at pp 92-93 para 23. See also *Proposals for the Reform of Legal Aid in England and Wales*, Cm 7967 (2012) at para 4.68 p 42; *Hansard, Lords Debates*, vol 734, col 601 (18 January 2012) per Lord McNally; *Government Response to Justice Committee's Eighth Report of Session 2014-15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Cm 9096 (2015) at p 10

¹²⁹ *R (on the application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2015] EWHC 35 (Admin) per Longmore J at [53], quoting Joe Parsons, Ministry of Justice spokesperson.

¹³⁰ *Rights of Women, Women's Access to Justice: a research report* (Rights of Women, 2011) at p 16

¹³¹ *Hansard, Lords Debates*, vol 734, col 589 (18 January 2012)

commented, is ‘how we persuade and enable those who are in need of the succour that can be provided to come forward, not how we stop them making false allegations’.¹³²

The focus on isolated incidents of physical violence and the inability of many courts and professionals to understand coercive control, reinforced by discourses of irrational, lying, manipulative mothers, can lead to the mother’s uncorroborated oral testimony being viewed with suspicion and discounted as not being ‘real’ evidence.¹³³ This may be compounded by stereotypic images of ‘typical’ victims and victim behaviour. A barrister interviewed by Barnett in 2011 gave an example of a case where the judge found that the mother had been fabricating the allegations because she was ‘“a solicitor and very well dressed and came across very well”’. [Ms A3, Barrister, London]’¹³⁴

There is also a perception that mothers who are ‘credible’ in their testimony should be able to provide a coherent narrative. A barrister interviewed by Barnett in 2011 observed: ‘“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]’¹³⁵ In *Re V (Children) (Inadequate Reasons for Findings of Fact)* McFarlane LJ unpicked the trial judge’s findings against the mother by comparing what the mother had said in her Scott Schedule against her oral evidence and that of her witnesses and in so doing, found inconsistencies and contradictions.¹³⁶ The assumption that domestic violence emerges and is accounted for in a rational, chronological and coherent way demonstrates a failure to understand the effects of abuse on women, whose coping strategies can include ‘dissociating themselves from the violence, “forgetting” about abuse, retaining vague and sketchy memories of violent incidents, [and] minimising the seriousness of the violence’.¹³⁷

Where judges have a greater understanding of coercive control and its interconnection with parenting, they appear to have more insight into the parties’ credibility. In *FY v MY & others (Children)* Russell J found that the father’s oral and written evidence reflected his self-

¹³² Ibid at col 593

¹³³ A Barnett, *Contact at all costs? Domestic violence, child contact and the practices of the family courts and professionals* (Brunel University, 2014) at p 324

¹³⁴ Ibid at p 244

¹³⁵ A Barnett, *Contact at all costs? Domestic violence, child contact and the practices of the family courts and professionals* (Brunel University, 2014) at p 244.

¹³⁶ *Re V (Inadequate Reasons for Findings of Fact)* [2015] EWCA Civ 274; [2015] 2 FLR 1472. For a similar exercise, see the judgment of Mostyn J in *A v A (Appeal: Fact-finding)* [2010] EWHC 1282 (Fam)

¹³⁷ R Hunter, ‘Narratives of Domestic Violence’ (2006) 28 *Sydney Law Review* 734-776 at p 742

absorption and inability to understand his children's emotional needs.¹³⁸ Her assessment of the mother as 'very child-centred' and 'committed to maintaining a relationship between F and the children' was supported by the expert's and the guardian's impressions of her and was 'apparent in how she gave her evidence to me and the thoughtful way in which she answered the questions put to her'.¹³⁹

It is clear that separate fact-finding hearings fail to capture or reflect women's and children's experiences of domestic abuse. In order to respond appropriately and protectively to those experiences, we need to place them at the forefront and heart of the proceedings by focusing on the totality of the risk, rather than isolating individual acts of physical violence and ignoring the context of coercive control. Accordingly, it is suggested that domestic abuse would more productively be dealt with in 'composite' hearings to gain a full appreciation of children's and parents' experiences rather than in discrete fact-finding hearings. Abandoning separate fact-finding hearings would mean that decisions could be made holistically and coercive control recognised as an indivisible aspect of the child's and victim's lives and, in many cases, as defining their lives. This could be encouraged by holding fully inquisitorial, rather than adversarial, hearings, a procedure that is already encouraged by Paragraph 28 of PD12J. The mother, then, would no longer have to bear the burden of proving specific 'incidents', and perpetrators would no longer be able to rely simply on denials. This would also encourage a better understanding of denial as a hallmark of the abuse itself, and the perceived 'need' for evidence as stemming from those denials.

Assessing risk (A)

One of the reasons for the introduction of PD12J was to encourage better assessment of risk and welfare. PD12J requires the court to make an order for contact only 'if it can be satisfied that the physical and emotional safety of the child and the parent with whom the child is living, as far as possible, can be secured before during and after contact, and that the parent with whom the child is living will not be subjected to further controlling or coercive behaviour by the other parent'.¹⁴⁰ Paragraph 37 of PD12J requires the court to consider the effect of the abuse on the child, the motivation of the perpetrator in seeking contact, the likely behaviour of the perpetrator during contact, and the capacity of the parents to appreciate the

¹³⁸ *FY v MY & others (Children)* [2016] EWFC 16 per Russell J at [148]

¹³⁹ *Ibid* per Russell J at [152]. See also *Re D (Children)* [2016] EWCA Civ 89

¹⁴⁰ PD12J, para 36

effects of the abuse on the child. These provisions implement the recommendations of the expert report to the court in *Re L, V, M, H (Contact: Domestic Violence)*,¹⁴¹ which urged courts to focus on the full risk to the child posed by the perpetrator.¹⁴² However, these provisions can only operate effectively if coercive control is fully understood, and if the ambit of the court's inquiry is not restricted by the incident-based fact-finding process. If courts downplay or disregard apparently 'minor incidents' of violence and other intimidating, isolating and controlling behaviours and focus only on proven incidents of recent physical violence, they may miss the full extent of the 'larger regime of dominance'.¹⁴³

Evidence from research undertaken prior to 2013 strongly suggests that risk was not always adequately assessed because the nature of the abuse was misunderstood.¹⁴⁴ Additionally, risk can be under-estimated or discounted because many judges and professionals fail to understand the way in which coercively controlling men may portray themselves as charming, reasonable and benign, so that they may 'be convinced by men's presentation as Dr Jekyll and miss the Mr Hyde of behind closed doors'.¹⁴⁵ As a consequence, judges were reluctant to accept that an abusive father could be motivated by anything other than a desire to see the child.¹⁴⁶ Additionally, as a consequence of the 'paradox' that plays out in family proceedings whereby 'a parent can be seen as a violent perpetrator of domestic abuse and a good enough father' the parenting capacity of perpetrators may be over-estimated, not be sufficiently assessed, or considered at all.¹⁴⁷ On the other hand, it was found that those judges and professionals who understood coercive control, its effects on women and children, and the strategies of perpetrators were more likely to require and undertake the broader assessment required by Paragraph 37.¹⁴⁸

¹⁴¹ *Re L, V, M, H (Contact: Domestic Violence)* [2000] 2 FLR 334

¹⁴² Claire Sturge and Danya Glaser, 'Contact and domestic violence – the experts' court report' (2000) 30 *Family Law* 615-629

¹⁴³ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 106

¹⁴⁴ E Trinder, J Hunt, A Macleod, J Pearce & H Woodward, *Enforcing contact orders: problem-solving or punishment?* (University of Exeter and Nuffield Foundation, 2013) at p 61.

¹⁴⁵ M Coy, K Perks, E Scott and R Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women, 2012) at p 58

¹⁴⁶ A Barnett, *Contact at all costs? Domestic violence, child contact and the practices of the family courts and professionals* (Brunel University, 2014) at p 285.

¹⁴⁷ Women's Aid, *Nineteen Child Homicides. What must change so children are put first in child contact arrangements and the family courts* (Women's Aid, 2016) at p 11

¹⁴⁸ A Barnett, *Contact at all costs? Domestic violence, child contact and the practices of the family courts and professionals* (Brunel University, 2014)

An analysis of the sample of recently reported cases suggests that the appellate courts focus almost solely on the risk of physical violence (in some cases only to the child) by continuing to disaggregate individual incidents of violence from patterns of coercive control. For example, in *Re M (Children)* the Court of Appeal allowed the father's appeal because the trial judge failed 'to adequately address why the children's safety and the management of the mother's anxieties cannot be achieved under any circumstances of supervision'.¹⁴⁹ Additionally, images of 'safe family men' may undermine efforts by trial judges to hold fathers to account. In *Re K (Children)*, the Court of Appeal castigated the guardian and the trial judge for requiring the father to apologise to the children and to the mother for his behaviour and demonstrate that he had changed, instead of commending them for what appears to have been a proper application of Paragraph 37 of PD12J.¹⁵⁰ On the other hand, in *Re D (Children)* the Court of Appeal wholeheartedly approved the making of an order for professionally supervised contact and a Section 91(14) order, because they had the benefit of the keen insights of the trial judge, the guardian and the expert risk assessor into the father's coercively controlling behaviour and its implications for the child's and the mother's safety and emotional welfare, and its effect on the mother-child relationship.¹⁵¹

The holding of fully inquisitorial hearings, led by expert risk assessment rather than preceded by adversarial fact-finding hearings that 'decontextualise incidents of violence from the fabric of the relationship' would enable courts 'to gain a full understanding of the risks to children and to the other party of the perpetrator's behaviour' and discourage the dismissal of 'historic' abuse.¹⁵² This approach should also enhance the ability of Cafcass officers to apply the Domestic Abuse Practice Pathway, which provides practitioners with 'a structured, focused and stepped framework for assessing risk in cases where domestic abuse is a feature', including coercive or controlling behaviours.¹⁵³

Conclusion (A)

Prior to the LASPO debates, research suggests that some judges and professionals working in the family justice system were beginning to acquire an awareness of domestic violence as

¹⁴⁹ *Re M (Children)* [2013] EWCA Civ 1147 per Macur LJ at [19]

¹⁵⁰ *Re K (Children)* [2016] EWCA Civ 99

¹⁵¹ *Re D (Children)* [2016] EWCA Civ 89

¹⁵² 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) at p 47

¹⁵³ Cafcass, *Practice Pathway: A structured approach to risk assessment in Domestic Abuse* (Cafcass, 2016)

encompassing wider behaviours than solely physical violence. The withdrawal of legal aid under LASPO and the groundswell of sympathy and support it generated for victims of domestic violence revealed an even greater awareness of the many forms domestic abuse may take and of the relevance of ‘historic’ abuse to child arrangements and contact. However, there is a difference between awareness and full understanding, and whether this marks a sea change in judicial and professional understandings of coercive control and its effects on victims and children is questionable. It is not known whether the ability to identify patterns of coercive control and understand their significance for contact demonstrated by some trial judges in the recent case law extends to the majority of the judiciary in the lower courts. However, it is suggested that, if this was the case, there would have been far more appeals against orders refusing contact between children and abusive fathers, because of the striking success rate of those appeals that have been made.

Continuous and compulsory training on domestic abuse for the judiciary and legal professionals, delivered by specialist domestic violence services, should go some way to enabling judges and professionals to understand, identify and respond appropriately to coercive control.¹⁵⁴ However, this alone may not be sufficient to achieve a genuine transformation in the way in which courts and professionals respond to domestic abuse in child arrangement/contact cases, because of two primary and interrelated aspects of the process which continue to challenge and subvert a complete cultural shift. Firstly, the drive to promote contact ‘at all costs’ contributes to the perception that anything other than recent incidents of severe physical violence are irrelevant or unimportant. This, in turn, inhibits a real understanding of the nature and risks of parenting by abusive men.¹⁵⁵ What we now know about the strategies, techniques and tactics employed by coercively controlling men and the devastating effects of these on mothers and children, should lead us to question the benefits for children of parenting by fathers who use coercion and control to dominate and subjugate mothers. However, recent case law suggests that even when the Court of Appeal acknowledges the abuse perpetrated by the father, contact is still strenuously promoted. Anecdotal evidence suggests that the ‘contact at all costs’ approach has been strengthened by the presumption of parental involvement enshrined in Section 1(2A) of the Children Act 1989

¹⁵⁴ 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); Women’s Aid, *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts* (Women’s Aid, 2016); Women’s Aid, *Child First: a call to action one year on* (Women’s Aid, 2017)

¹⁵⁵ See Women’s Aid, *Child First: a call to action one year on* (Women’s Aid, 2017)

and in Paragraph 4 of PD12J. Although no research is available on the operation of this provision, Women's Aid report that since its implementation, 'there are growing concerns amongst some practitioners and academics that the courts are prioritising contact with an abusive parent over the safety of the child and non-abusive parent'.¹⁵⁶ In his recent review of PD12J, Mr Justice Cobb recommended that Paragraph 4 of PD12J should be amended to provide that: 'Where the involvement of a parent in a child's life would put the child or other parent at risk of suffering harm arising from domestic violence or abuse, the presumption in section 1(2A) of the Children Act 1989 shall not apply.'¹⁵⁷ While it is hoped that, if implemented, this change will encourage both the lower and higher courts to place safety, rather than the promotion of contact, at the heart of child arrangement proceedings, there is a danger that its proper application may be undermined by a continued focus on incidents of recent, physical violence rather than on patterns of coercive and controlling behaviour.

Secondly, the requirement for 'objective' evidence to access legal aid, and the nature and process of the fact-finding exercise, reinforce the incident narrative of domestic violence. This compounds the difficulties women may have in proving the full extent of the abuse they have sustained. We have seen how the parties' oral testimony may be filtered through dominant subjectivities of 'safe family men' and 'lying, manipulative mothers' and stereotypes of 'real' victims and perpetrators. These difficulties are exacerbated by the complainant having to bear the burden of proof, resulting in an unfair burden on mothers to prove domestic abuse. This strongly suggests that domestic abuse would more productively be dealt with in 'composite' hearings rather than discrete fact-finding hearings, which would not only bring the full extent of the abuse into plain sight, but also enable courts and professionals to understand domestic abuse as an indivisible aspect of parenting and family life. It is also hoped that this will no longer mean that fathers who have had findings of abuse made against them after contesting allegations will be 'rewarded' with unsupervised or even staying contact.¹⁵⁸ A more holistic approach should produce better risk assessments, which would focus not only on 'predicting the likelihood of discrete incidents of physical violence or abuse' but on the totality of the perpetrator's behaviours, including whether the mother

¹⁵⁶ Women's Aid, *Nineteen Child Homicides. What must change so children are put first in child contact arrangements and the family courts* (Women's Aid, 2016) at p 13.

¹⁵⁷ The Hon. Mr Justice Cobb, 'Review of Practice Direction 12J FPR 2010 Child Arrangement and Contact Orders: Domestic Violence and Harm' (Cobb, 2017) p 12

¹⁵⁸ E Trinder, J Hunt, A Macleod et al, *Enforcing contact orders: problem-solving or punishment?* (University of Exeter and Nuffield Foundation, 2013); Harding M and Newnham A, *How do County Courts Share the Care of children Between Parents? Full Report* (University of Warwick, University of Reading, 2015)

will be subjected to further coercion and/or control.¹⁵⁹ A further step in the right direction would be substituting the ‘incident’ terminology in PD12J with a description of coercive control that focuses on the perpetrator’s agency and on patterns of abuse, rather than ‘stretching’ the incident terminology to include other tactics of coercion and control.

While these suggestions may not, in themselves, transform the gendered structural inequalities underpinning coercive control, they may contribute towards a shift in the discursive and ideological hierarchies informing current family law which deny mothers the autonomy and freedom from entrapment after parental separation that is unquestioningly afforded to fathers. To achieve this, we need to ‘transcend those binaries which are seen to have constrained understandings of social practice within liberal legal thought’ by subverting the misleading dichotomy between physical and psychological/emotional abuse.¹⁶⁰ This should lead to a greater appreciation of the embodied brutality of entrapment by coercive control. Without such an understanding, courts may continue ‘depicting the bars without grasping that they are part of a cage’.¹⁶¹

¹⁵⁹ C Newman, *Expert Domestic Violence Risk Assessments in the Family Courts* (Respect, 2010) at p 1

¹⁶⁰ R 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 at p 536

¹⁶¹ E Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press, 2007) at p 366