Bloomsbury Family Law Conference

Children Law:

Domestic Abuse in the Family Courts 20 years after Re L

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Barbara Mills QC
Charles Hale QC
Jo Delahunty QC
Teertha Gupta QC

Bloomsbury Professional Family Law

4pb Four Paper Buildings

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1. Introduction

1. ***Re L, V, M, H (Contact: Domestic Violence)*** **[2000] EWCA Civ 194**[1] was a landmark case where the Court of Appeal first laid down the guidelines for courts and professionals in contact cases where allegations of domestic violence are made (these were later known as the 'Re L guidelines'). In the judgment, Butler-Sloss P drew on a report by expert psychologists Dr Sturge and Dr Glaser (2000)[2] as well as a report by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law (CASC) (2000)[3]. As a result, the Court endorsed a two-stage process when dealing with such cases[4]:

> *1. A fact-finding hearing is held to determine the truth of the allegations; and*
>
> *2. The court then makes a welfare-based decision about child arrangements incorporating and weighing up*
>
> *(a) the proven facts concerning domestic abuse;*
>
> *(b) the expert evidence concerning the effects of domestic abuse on children; and*
> *(c) the other factors in the welfare checklist.*

2. Today, domestic abuse remains a significant issue for the Family Court. In the year 2019/2020 the Family Court received 55,253 'private law' applications by parents for orders seeking to resolve a dispute with the other parent relating to the future care arrangements for their child. At least 40% of private law children cases now involve allegations of domestic abuse, meaning that the Family Court is required to engage with the question of domestic abuse in around 22,000 cases each year.[5]

3. This note will explore the development of the Family Court's approach to domestic abuse from the decision of ***Re L*** to the present. In doing so, it will consider a number of decisions, including the Court of Appeal's recent decision in ***Re H-N*** **[2021] EWCA Civ 448**; charter developments in the way the Family Court deals with allegations of coercive and/or controlling behaviour, and rape/ sexual abuse; and consider what problems remain unaddressed in managing these difficult cases.

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[1] https://www.bailii.org/ew/cases/EWCA/Civ/2000/194.html
[2] Sturge and Glaser 'Contact and Domestic Violence - The Experts' Court Report' Fam Law, 30, September 2000, pp.615-629.
[3] Advisory Board on Family Law: Children Act Sub-Committee A Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence (The Stationery Office, 2000)
[4] Summary from Ministry of Justice, "*Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report"* ("The Harm Report") June 2020, p.190
[5] *Re H-N* [2021] EWCA Civ 448, para. 3

2. Practice Direction 12J (PD12J)

Introduction

Genesis

4. **PD12J** stems from the Re L guidelines, as subsequent research found they were ignored and/or inconsistently applied because courts and professionals continued to prioritise contact over children's and resident parents' safety.

5. Following the publication of a Women's Aid report about children killed during contact arrangements, the Family Justice Council (FJC) recommended a Practice Direction embodying the Re L and CASC guidelines. This was issued by the President of the Family Division in May 2008 and subsequently incorporated into the Family Procedure Rules 2010 as PD12J.

Applicability

6. PD12J stipulates obligatory requirements for the Family Court and High Court following allegations of domestic abuse, whether admitted or not. It also applies where there is other reason to believe that the child or a party has experienced domestic abuse perpetrated by another party, or that there is a risk of such abuse[6].

7. With regards to case type, PD12J applies at all stages of child arrangement cases[7]. Hence it is not applicable across the full spectrum of family law – for example, public law cases, matrimonial finance and child abduction.

8. PD12J has be subject to two major revisions since its implementation. In 2014, changes included widening the definitional scope of 'domestic violence', greater clarity regarding fact-finding hearings and stricter rules regarding interim contact orders. In 2017, changes included replacing the terminology of domestic 'violence' with 'abuse' as well as further widening the definitional scope (as included below), emphasising its mandatory nature and requiring the court to consider whether the presumption of parental involvement applies in every case.

[6] PD12J, para 2
[7] PD12J, para 1

Definition of domestic abuse

9. PD 12J, para. 3 includes the following working definitions of domestic abuse and coercive and controlling behaviour used in the Family Courts:

> a. Domestic abuse: "includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment"
>
> b. Coercive behaviour: "an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim"
>
> c. Controlling behaviour: "an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour"

10. Two key features of these definitions are that:

    a. Domestic abuse comes in many forms and is not synonymous with an act of physical violence. Indeed, it may never involve a physical injury;
    b. The abuse may not be attributable to (a) discrete incident(s), but may instead be part of a wider pattern of controlling and coercive behaviour. This emphasis on patterns is fundamental to the modern definition of domestic abuse and was helpfully analysed by Hayden J in ***F v M*** **[2021] 4 EWFC**[8] (at para. 4):

[8] https://www.bailii.org/ew/cases/EWFC/HCJ/2021/4.html

*"8. The term is **unambiguous and needs no embellishment**. Understanding the scope and ambit of the behaviour however, requires a recognition that 'coercion' will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. 'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. **Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation**. There has been very little reported case law in the Family Court considering coercive and controlling behaviour. I have taken the opportunity below, to highlight the insidious reach of this facet of domestic abuse."*

11. Although the definition used in the **Domestic Abuse Act 2021** (or Bill as it then was) differs slightly, the Court of Appeal has noted that *"[t]he content is substantially the same. Thus, whilst PD12J will undoubtedly fall for review to ensure that it complies with the DAB once the Bill becomes and Act, it is unlikely that the substance of the core definitions will substantially change."*[9]

12. The Domestic Abuse Act has created, for the first time, a cross-government statutory definition of domestic abuse:

*1. Definition of "**domestic abuse**"*

(1)This section defines "domestic abuse" for the purposes of this Act

(2) Behaviour of a person ("A") towards another person ("B") is "domestic abuse" if—

(a)A and B are each aged 16 or over and are personally connected to each other, and

(b) the behaviour is abusive.

(3)Behaviour is "abusive" if it consists of any of the following—

(a)physical or sexual abuse;

(b) violent or threatening behaviour;

(c) controlling or coercive behaviour;

(d)economic abuse (see subsection (4));

[9] *Re HN and others (Children)(Domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448 at (para. 27)

(e) psychological, emotional or other abuse; and it does not matter whether the behaviour consists of a single incident or a course of conduct.

(4) "Economic abuse" means any behaviour that has a substantial adverse effect on B's ability to—

(a) acquire, use or maintain money or other property, or

(b) obtain goods or services.

(5)For the purposes of this Act A's behaviour may be behaviour "towards" B despite the fact that it consists of conduct directed at another person (for example, B's child).

(6)References in this Act to being abusive towards another person are to be read in accordance with this section.

(7)For the meaning of "personally connected", see section 2.

2. Definition of "**personally connected**"

(1)For the purposes of this Act, two people are "personally connected" to each other if any of the following applies—

(a) they are, or have been, married to each other;

(b) they are, or have been, civil partners of each other;

(c) they have agreed to marry one another (whether or not the agreement has been terminated);

(d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);

(e) they are, or have been, in an intimate personal relationship with each other;

(f)they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));

(g) they are relatives.

(2) For the purposes of subsection (1)(f) a person has a parental relationship in relation to a child if—

(a) the person is a parent of the child, or

(b) the person has parental responsibility for the child.

[…]

13. The main differences between the definitions in the Domestic Abuse Act and PD12J are as follows:
    a. The Domestic Abuse Act uses:
        i. The term "personally connected" instead of "intimate partners or family members";
        ii. A more specific definition of "economic abuse" as opposed to "financial abuse";
    b. The definition in the Domestic Abuse Act as a whole is narrower in scope, listing specific acts or behaviours as opposed to using the PD12J phrasing of "this can encompass, but is not limited to…";
    c. The definition in the Domestic Abuse Act does not include explicit reference to culturally specific forms of abuse.

14. Whether these amount to differences in practice is perhaps unlikely and will be clarified by awaited government guidance as to the interpretation of the Domestic Abuse Act.

Cross-examination

15. The significant reduction of legal aid provision for private family law cases as a result of the **Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)** in April 2013 has resulted in an increased number of litigants-in-person (LiPs) in the family courts. Though domestic abuse victims are technically eligible for legal aid, the Domestic Violence Legal Aid Gateway has strict evidential criteria to qualify for assistance that many survivors of domestic abuse are unable to meet. Rights of Women, Women's Aid and Welsh Women's Aid research highlighted that 40% of survivors of domestic violence still do not have the required forms of evidence to make an application for legal aid to begin with[10]. Moreover, perpetrators do not have access to this Gateway, therefore increasing the likelihood they will not be represented.

16. Until the recent passage of the Domestic Abuse Act 2021 (dealt with further *below*), LiPs who were alleged perpetrators of domestic abuse were able to cross-examine their alleged victims directly.

17. This raises several potential issues, such as:

[10] Rights of Women, Women's Aid and Welsh Women's Aid (2016) Evidencing Domestic Violence: nearly three years on

a. Studies revealing alleged victims of abuse found the experience traumatising, degrading and ultimately, a continuation of abuse[11];
b. Potentially diminishing the quality of evidence, and as such, have a knock-on effect as to the outcome of the respective hearing, and potentially case as a whole.

18. In his 2016 review of PD12J, Mr Justice Cobb proposed a number revisions, all of which were adopted, save for a ban on the direct cross examination of an alleged victim by an alleged perpetrator[12]. Munby P (as he then was) suggested such a change could only be instigated via Parliament[13].

19. The final revision of PD12J gives the judge a discretionary power to conduct the questioning "the judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties"[14]. This is to be read in conjunction with:

a. Section 31(G) Matrimonial and Family Proceedings Act 1984, which allows a judge to question on behalf of a LiP in family court proceedings. This however relies on the judge's willingness to do so.

b. Practice Direction 3AA, Family Procedure Rules 2010, which came into effect in November 2017 and requires courts to consider making directions about the way a vulnerable witness may be cross-examined.

20. Parliament has indeed now gone further than PD12J and made provisions to automatically prohibit cross examination of alleged victims by alleged perpetrators, by virtue of the recent Domestic Abuse Act 2021.

21. The Domestic Abuse Act 2021 also gives provision for the court to appoint legal representatives for the purposes of cross-examination as opposed to judges asking questions on victims' behalf. Though this new system is not without its flaws, requiring judges to undertake this role created significant problems:

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[11] Coy et al.,2012, 2015; Trinder et al., 2014; Women's Aid, 2016 as reported in Barnett, A *"Domestic abuse and private law children cases: a literature review"* (Ministry of Justice Analytical Series, 2020) pp.43-44
[12] https://www.judiciary.uk/wp-content/uploads/2017/01/PD12J-child-arrangement-domestic-violence-and-harm-report-and-revision.pdf
[13] https://www.judiciary.uk/announcements/president-of-the-family-division-sir-james-munby-cross-examination-of-vulnerable-witnesses-in-the-family-court/
[14] PD12J, para 28

a. Research by Corbett and Summerfield (2017) suggests some judges are reluctant to do this, due to the importance of maintaining neutrality[15].

b. This can result in judges simply relaying questions from the LiP, sometimes in their exact terms, and therefore not significantly reducing the harmful effects of direct cross-examination.

c. These difficulties were highlighted in ***PS v BP*** **[2018] EWHC 1987 (Fam)** where a father's appeal was upheld because the judge's questioning was considered overly-protective of the mother, not allowing for her allegations to be sufficiently tested[16].

Special measures

22. The court has the power to make special provisions to support vulnerable persons during family proceedings. Such provisions may typically include, screens, separate entrances/exits for parties and permission for video-link attendance. Though this power is found in **Part 3A FPR** and **PD3AA**, not PD12J it will be considered here for its relevance.

23. Accordingly, the court must consider whether a party's participation in proceedings and/or the quality of evidence given is likely to be diminished due to their vulnerability, and if so, where it is necessary to make any participation directions[17]. The court must also identify any vulnerabilities at the earliest possible stage.

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[15] Barnett, A *"Domestic abuse and private law children cases: a literature review"* p.82

[16] At [34] Hayden J gives observations (which he is careful not to label 'guidance') on this issue:

"(viii) If the court has decided that cross-examination will not be permitted by the accused and there is no other available advocate to undertake it, it should require questions to be reduced to writing. It will assist the process, in most cases, if 'Grounds of Cross-Examination' are identified under specific headings;

(ix) A Judge should never feel constrained to put every question the lay party seeks to ask. In this exercise the Judge will simply have to evaluate relevance and proportionality;

(x) Cross-examination is inherently dynamic. For it to have forensic rigour the Judge will inevitably have to craft and hone questions that respond to the answers given. The process can never become formulaic;

(xi) It must always be borne in mind that in the overarching framework of Children Act proceedings, the central philosophy is investigative. Even though fact finding hearings, of the nature contemplated here, have a highly adversarial complexion to them the same principle applies. Thus, it may be perfectly possible, without compromising fairness to either side, for the Judge to conduct the questioning in an open and less adversarial style than that deployed in a conventional cross-examination undertaken by a party's advocate."

[17] FPR 3A.5 and 3A.5

24. In considering whether a person is deemed to be vulnerable, Rule 3A.3 sets out that the court must have regard in particular to a list of matters, including consideration of the impact of any 'actual or perceived intimidation' and any concerns relating to abuse.

25. Though adequate provision for such measures therefore exists in principle, the problem lies in its lack of effective implementation. For example, Women's Aid reported to the Joint Committee on the Domestic Abuse Bill (2019) that 61% of survivors of domestic abuse had no access to any special measures in the family courts and only 7% had staggered entrance and exit times from perpetrators[18].

26. Vulnerable litigants, particularly when acting in person, may not be aware the provision for such protective measures exists. Equally, they may not be aware of, or want to act on, their own vulnerabilities. As such, it is often down to Cafcass to identify any vulnerabilities and suggest such measures to the court. However, as Cafcass made clear in its submissions to the Court in ***Re H-N* [2021]**, its delayed involvement in the Court process, makes it very difficult to implement special measures in a timely fashion.

27. The importance of Part 3A of the FPR was highlighted in In the matter of ***H v F* [2020] EWHC 86 (Fam)[19]**:

> The appellant mother pursued her appeal on the basis of all the reasons outlined above, in addition suggesting that there had been a number of procedural irregularities and failings in the manner in which HHJ Tolson QC had conducted the hearing. Russell J found that there had been serious procedural irregularities at the hearing:
>
> a. The appellant was ordered to give her evidence from counsel's row, albeit from behind a screen, rather than behind a witness box with screen/s in place. This was not requested by trial counsel or any other parties. In doing this the judge had decided not to follow Part 3A of the FPR 2010, and also failed to give any adequate reasons for doing so as required by r. 3A.9 of the FPR 2010. This was a serious procedural irregularity, and made it difficult for the judge to hear the evidence.

[18] Barnett, A *"Domestic abuse and private law children cases: a literature review"* p.78
[19] https://www.bailii.org/ew/cases/EWHC/Fam/2020/86.html

b. The judge ordered the respondent's evidence should be heard from counsel's row, making reference to the *"feng-shui"* of the court room, and the screens, and saying that it was fair and *"created some kind of balance"* without any application having been made by the respondent that he needed to give evidence in the same manner as the appellant. The preoccupation with the orientation of the courtroom meant the father was unnecessarily cross-examined from behind a screen.

c. The respondent gave evidence sitting next to his McKenzie friend who was able to assist him in the answers he gave when cross-examined, giving the respondent an advantage over the appellant.

Abusive applications

28. As suggested by the London Victim's Commissioner during the Report Stage of the Domestic Abuse Act, repeated applications made by alleged perpetrators against alleged victims can be seen as giving the former a continued platform of abuse against the latter[20].

29. In an attempt to manage this, PD12J states that the court should consider whether the parent making the application is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent[21].

30. Moreover, the Domestic Abuse Act 2021's amendment to the implementation of 'barring orders' in cases of domestic abuse may further help to alleviate this (see below).

Interim orders

31. Where disputed allegations of domestic abuse are undetermined, PD12J prescribes the following in relation to interim child arrangements (paras. 25-27):

25. Where the court gives directions for a fact-finding hearing, or where disputed allegations of domestic abuse are otherwise undetermined, the court should not make an interim child arrangements order unless it is satisfied that it is in the interests of the child

[20] https://www.london.gov.uk/sites/default/files/lords_training_amendment_briefing.pdf
[21] PD12J para 37(c)

to do so and that the order would not expose the child or the other parent to an unmanageable risk of harm (bearing in mind the impact which domestic abuse against a parent can have on the emotional well-being of the child, the safety of the other parent and the need to protect against domestic abuse including controlling or coercive behaviour).

26. In deciding any interim child arrangements question the court should–

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

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

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

32. Some respondents, typically fathers, suggest that nullifying or restricting contact during proceedings can severely diminish the parent-child relationship. Resultantly, this can allow a status quo to develop, particularly given proceedings usually take a significant period of time, which may affect final arrangements even in cases where no findings of domestic abuse are in fact made. These concerns were indeed put before the Court of Appeal in ***Re H-N*** **[2021]** by Families Need Fathers.

33. What is not clear is how this squares with the pro-contact culture described below. Additionally, the strength of this submission is not necessarily borne out by the evidence. The have been reports suggesting the varying implementation of this provision. For example, participants in the English practitioner roundtable described many judges making interim contact orders in apparent disregard of PD12J, and in some cases making contact or even shared care orders before safeguarding checks had been completed, again contrary to PD12J[22].

34. Moreover, Hunter and Barnett (2013) found that the most commonly reported interim orders pending a fact-finding hearing were orders for supervised contact (64% quite or very often), indirect contact (58% quite or very often) or supported contact (47% quite or very often). Less than a quarter of respondents said that orders for no contact were made 'quite often' or 'very often'[23].

35. A recent decision on the application of PD12J para. 25-27 is summarised below.

M v F [2020]

36. The matter of ***M v F* [2020] EWHC 576 (Fam)**[24] concerned an appeal before Mrs Justice Judd DBE in respect of a child arrangements order that had been made and approved by HHJ Tolson QC at a FHDRA:

- The case is illustrative of the immense strains on the court system; it was suggested that the mistakes by HHJ Tolson QC in approving the draft child arrangements order in this case were partially due to the extremely high workload, having taken this case over a lunch hour and with approximately 8 such hearings in his list that day.
- The decision concerned a mother's appeal from an order made at a FHDRA in respect of interim contact. The mother had issued her C100 application, a dispute having arisen between the parties in respect of weekend contact with the parties daughter (10 years). However, soon after, a telephone call between father and daughter took place in which it was alleged he had screamed at her for a prolonged period, causing the child to shake and cry uncontrollably, and sleep in her mother's bedroom. The mother had stated that the daughter no longer wished to have unsupervised contact with him. The father did not accept he screamed at the child, but acknowledged he raised the

[22] Ministry of Justice, "*Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report"* ("The Harm Report") June 2020, p.135
[23] Barnett, A *"Domestic abuse and private law children cases: a literature review"*p.98
[24] https://www.bailii.org/ew/cases/EWHC/Fam/2020/576.html

dispute of weekend nights with the child, causing her to become uncomfortable. The parties agreed pending FHDRA contact would be supervised by an ISW.

- The mother thereafter made a number of allegations, stating she had been subjected to a decade of aggression, verbal abuse, criticism, gaslighting and then an episode of physical abuse in May 2019. She argued that it was in the context of this pattern of behaviour that the father's episode of anger over the telephone was so serious, and it had caused the daughter significant distress. At the FHDRA, she argued that in accordance with PD 12J, the matter should be set down for fact finding hearing and in the meantime contact should continue to be supervised.

- At the FHDRA, HHJ Tolson QC considered that the mother's case would have to be investigated and that there should be a fact finding hearing. He directed himself to PD 12J. He said had said: "***In my judgment, it should never be that simply making an allegation of domestic abuse produces automatically a cautious approach to child arrangements. There are grave dangers in that, because the imposition of restricted arrangements upon a child can itself be damaging to the child's welfare and can make a difficult situation even more complicated and harder to resolve in future".*** He could not conclude that there was any danger in the daughter spending generous amounts of time with her father based on supervised contact having been tried and the positive reports from the ISW. A draft order was approved which the judge did not alter, and that included arrangements for the long term, including the Christmas, Easter, summer holidays, and beyond…

- The mother sought a stay to prevent unsupervised contact taking place (which was granted), and appealed. The mother asserted a final order had been made at FHDRA without evidence. No submissions had even been made on holidays, birthdays etc. Further, the mother asserted the order was not in the child's best interests, and the effect upon the mother herself had not been taken into account. The contact that had been ordered included three night weekends, mid-week contact and half-term contact, which was not a 'return' to anything she and her father were having before.

- It was held upon appeal that the child arrangements order as drafted, amended and approved by the judge was not consistent with the judgment or other parts of the order. The judgment makes clear the judge intended to make an interim order pending a return to court in April with the benefit of a Cafcass report to consider the way forwards, however the order appears to settle arrangements for contact until December 2020 and beyond, allowing for Christmas and Easter to be alternated

annually and for birthdays and other festivals. The appeal court suspected it was due to the enormous work pressures that the order was drafted in this way and approved by the judge, concluding: *"Whether this was in error or not, it was too soon for such a comprehensive order to be made."* [§33] The provisions relating to child arrangements after the next hearing were set aside.

- It was however ambiguous what the judge meant to happen in the interim; there were references to a return to getting normality in the judgment, but it was ambiguous what this meant. Whilst the judge did refer to PD 12J before he ordered unsupervised contact, including overnight contact, and was entitled to take into account the ISW's reports on the good quality of contact, and the unsupervised holiday contact before the October incident. However, the judge was wrong in being exercised by the fact that the mother had originally been willing to agree unsupervised contact and then subsequently took a restricted stance after the telephone call and then at the FHDRA:

  *"38. **In his reasons, the judge stated that there was no evidence to support the 'very different basis upon which counsel put the case' at the FHDRA, as compared to the way it was put in the C100 application. The focus on this, I believe, led him to give insufficient weight to the allegations that the mother had made in the C1A, and developed at the hearing. It was right that at the point she filed it that she was proposing that A had staying contact with her father at weekends and for half of all the holidays. That might be because the allegations she was making were exaggerated or even untrue, but equally it might be because at that stage she had not appreciated the risk of this behaviour to A as well as herself and only did so later. There are situations where a parent who is or has been abused does not believe that the abuse would be turned upon the child but then realises that it might, when, for example, there is an episode such as is described here, where the father is alleged to have shouted at his daughter over the phone for a prolonged period. It might also take time for a parent to appreciate the emotional consequences for the child of witnessing one parent abusing another.***

  39. Taking into account the fact that the judge was not fully appraised of the quantity of contact that A had been having with her father before the incident in October, that the amount of contact that was ordered was substantial given what had taken place beforehand, and the lack of weight he gave to the potential significance of the mother's earlier allegations, I have come to the conclusion that

his decision as to what contact should take place between the FHDRA and the next hearing must also be set aside. Even if the judge was not wrong to have ordered some unsupervised contact (as subsequent events show), given the background and the child's expressed wishes and feelings, it would have been better to consider a more gradual introduction to test it out, to see how A felt about it."

- In the interim, unsupervised contact would take place every other weekend, with the agreement of the parties. This agreement was considered to be in accordance with PD 12J. The father would be taking part in family therapy too, and the Cafcass officer preparing a report.

Presumption of contact? – final orders

37. **Section 1 (2A) of the Children Act 1989** arguably creates a statutory presumption of parental involvement (this was a matter of considerable debate in the Court of Appeal recently…)

38. PD12J stipulates at para. 7:

"7*…the involvement of a parent in a child's life will further the child's welfare, unless there is evidence to the contrary."*

(However, it continues) *"…the court must in every case consider carefully whether the statutory presumption applies, having particular regard to any allegation or admission of harm by domestic abuse to the child or parent or any evidence indicating such harm or risk of harm."*

Accordingly, it expressly recognises that an order for 'contact' will not be appropriate in every case.

39. Despite this, research elucidated by The Harm Report states:

"…a number of professionals reported that the presumption would be applied unless there was an injunction in place, there were serious safeguarding concerns or there was a definitive finding of domestic abuse. Surviving Economic Abuse maintained that victim-survivors needed legal advice and representation in order to rebut the presumption

*effectively…**Overall, the evidence received by the panel suggests that the presumption is implemented inconsistently and is rarely disapplied. To the extent that the courts' pro-contact culture operates as a barrier to addressing domestic abuse, it serves to reinforce that culture.**"*

40. There is a concern therefore that this provision has been interpreted so as to create a 'pro contact' culture, which results in domestic abuse allegations being minimised or even excluded altogether in an effort to ensure contact is resumed as quickly as possible.

4. The Court of Appeal decision in Re H-N [2021]

41. The appeal in ***Re H-N*** **[2021] EWCA Civ 448**[25] has proved important for 6 different reasons:

    (1) **It provides commentary on the effectiveness of PD12J, and guidance on its implementation.**

    (2) **It provides guidance on approaching fact-finding hearings.**

    (3) **It has will be an important judgment for managing cases involving allegations of coercive and/or controlling behaviour.**

    (4) **It has provided commentary on the appropriateness of Scott Schedules and paved the way for a change in approach to dealing with allegations of coercive and/or controlling behaviour.**

    (5) **It has provided some important dicta in respect of dealing with cases involving allegations of rape and sexual assault.**

    (6) **However in doing so, it has arguably obscured the family court's approach to criminal law concepts.**

42. The case concerned 4 joined appeals. *What was each of the appeals about and what was the result?*

(1) **Re B-B**: An appeal against the making of a consent order granting a father contact with his child was allowed. The judge made a number of wholly inappropriate comments to the mother at a hearing which was adjourned, the trial being unable to proceed as listed. The issue before the court was whether, notwithstanding the fact that the consent order was made a number of months later at a further hearing, the impact of those comments was such that the court could not be satisfied that the mother's consent to the order had been 'genuinely and freely' given. The court held that, notwithstanding the pressure the judge was under and the failure of the parties to comply with the court's case management orders for the preparation of the case, the impact of the judge's comments upon a young mother must not be under estimated.

[25] https://www.bailii.org/ew/cases/EWCA/Civ/2021/448.html

(2) **Re H**: An appeal against an order made in September 2019 was dismissed. The judge found an allegation of rape to be 'not proven' and declined to determine allegations of financial and emotional abuse. The judge made an order for contact. Extensive unsupervised contact has continued until the present and has recently been confirmed following a second fact-finding hearing, before a different judge, when further allegations against the father were held to be unfounded. The Local Authority wrote to the Court of Appeal to stress the importance to the child of continuing contact. The mother does not wish contact to stop and was unable to tell the court what, in those circumstances, the purpose would be in remitting the case for a retrial. The appeal was dismissed as being academic. The court emphasised that had there been a purpose to hearing the appeal, it would not have hesitated to do so.

(3) **Re T**: An appeal against the making of an order for contact was allowed. At trial, the judge did not find allegations of anal rape to have been proved and held that a number of incidents of violence on the part of the father against the mother had been minor. The issue was whether the judge should: (i) have made the finding sought of anal rape; and (ii) whether she had failed properly to recognise the significance of admitted incidents of violence as evidence of a pattern of controlling and coercive behaviour. The court held that the judge had been entitled to conclude that the allegation of anal rape had not been made out, for the reasons she gave. However, having determined that the allegations of anal rape were not made out, the judge did not then step back and appreciate the significance of the matters which she did find to have been proved. As a consequence, the judge failed to appreciate the true significance and seriousness of the father's behaviour or to consider whether the findings established a pattern of coercive and/or controlling behaviour.

(4) **Re H-N**: An appeal was allowed against case management orders made consequent upon the judge having declined to make a finding of rape and having indicated that certain admitted incidents of abuse against the mother should not be taken into account. The issue was whether the judge had failed to look at the pattern of control and the abuse which were demonstrated even on the basis of the father's admissions alone. It was held that the judge had discounted the father's admissions of domestic abuse perpetrated over a significant period of time and had underestimated the significance, both for the mother and for H-N, of the fact that the father had wrongfully retained H-N abroad for a period of 8 months.

5. PD12J – Effectiveness and Implementation

41. None of the submissions before the Court of Appeal suggested that the definition of 'domestic abuse' in PD12 required substantial amendment (para. 27).

42. PD12J remains fit for purpose; the challenge relates to the proper implementation of PD12J:

> "*We are therefore of the view that PD12J is and remains,* ***fit for the purpose for which it was designed*** *namely to provide the courts with a structure enabling the court first to recognise all forms of domestic abuse and thereafter on how to approach such allegations when made in private law proceedings. As was also recognised by The Harm Panel, we are satisfied that the structure properly reflects modern concepts and understanding of domestic abuse.* ***The challenge relates to the proper implementation of PD12J****."* (para. 28)

43. In particular, the challenge is the proper implementation of PD12J in cases involving allegations of controlling and/ or coercive behaviour.

6. Fact-Finding Hearings

44. There has been no complete review of court files to determine how often fact-finding hearings have been held since PD12J was implemented. There was a consensus that pre-PD12J fact-finding hearings did not happen frequently enough in domestic abuse cases, submissions before the Court of Appeal in ***Re H-N*** **[2021]** disagreed as to whether they have since increased. Some available statistics are summarised below[26]:

Table 9.1 The prevalence of fact-finding hearings in samples of cases where domestic abuse is alleged[18]

Source	Prevalence
Perry and Rainey (2007)	'tiny minority'
Hunt and Macleod (2008)	8% of 154 cases involving allegations of DA
Hunter and Barnett (2013)	0–25% of cases involving DA allegations; largest group (42%) said less than 10%
Trinder *et al.* (2013)	3 held at enforcement stage and 3 at index stage of a total of 215 cases
Barnett (2015)	Reported to be 'a rarity'
Harding and Newnham (2015)	8 out of 86 cases involving DA allegations
Cafcass and Women's Aid (2017)	5 out of 62 cases involving DA allegations
Harwood (2019)	Reported to be 'rare'

45. According to the above, it seems that, despite the provisions of PD12J, fact-findings are held in the minority of domestic abuse cases. Reasons given for the absence of fact-finding hearings include[27]:

    a. The violence was not deemed relevant to the contact decision;

    b. The violence was not considered serious enough;

    c. The violence was considered 'historic' or not recent enough;

    d. A fact-finding hearing would not affect the outcome of the case, since contact;

    e. Would (and for some respondents should) be ordered in any event;

[26] Barnett, A *"Domestic abuse and private law children cases: a literature review"* p.92
[27] *Ibid.*

f. Fact-finding hearings cause unnecessary delay and are costly for the parties without;

g. Legal aid;

h. Fact-finding hearings promote acrimony between the parties and damage their ongoing relationship.

46. The balance is difficult to consider: holding a fact-finding unnecessarily is not only a waste of resources, but is likely to cause significant distress to the alleged victims in rehashing painful details of abuse. Equally, if the allegations are relevant to the child(ren) being considered, the lack of a fact-finding hearing could result in a child being placed at risk which could have been avoided.

47. PD12J contains detailed guidance on determining whether or not it is necessary to conduct a fact-finding hearing with respect to allegations of domestic abuse. A guide for the proper approach to fact-finding hearings was usefully summarised by the Court of Appeal in ***Re H-N*** **[2021]** at (para. 37) with respect to PD12J paras 5,16 and 17:

> *"i) The first stage is to consider* ***the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order*** *and if so in what terms (PD12J.5).*
>
> *ii) In deciding whether to have a finding of fact hearing the court should have in mind its* ***purpose*** *(PD12J.16) which is, in broad terms,* ***to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children****.*
>
> *iii) Careful consideration must be given to PD12J.17 as to whether it is* ***'necessary'*** *to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.*
>
> *iv) Under PD12J.17 (h) the court has to* ***consider whether a separate fact-finding hearing is 'necessary and proportionate'****. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in 'The Road Ahead'."* (para. 37)

48. The Court of Appeal also made a number of other points clear:

a. The fact-finding process will always produce a binary approach. The Court of Appeal made clear that whether an allegation is proved or not proved is determined under ordinary civil law.

> "6. ***In the light of the binary nature of the burden and standard of proof, the responsibility placed upon each one of those magistrates and judges in each one of those cases is a weighty one. Given the nature of such allegations, the evidence may turn on the word of one parent against that of the other. The evidence may not be crystal clear, yet the stakes may be high. If the court decides that an abusive allegation has not been sufficiently proved, the court must assess future risk on the basis that the event 'did not take place.' If, in reality, the abuse did occur but there is a lack of evidence to prove it, the court's subsequent orders may risk exposing the child and parent to further abuse. Conversely, if the alleged abuse did not in fact occur, but the court finds the allegation proved, orders significantly limiting the 'perpetrating' parent's future relationship with the child may be imposed."***

b. Not every case involving allegations of domestic abuse requires a fact-finding hearing (para. 8).

c. The necessity of a fact-finding hearing needs to be determined at an early stage and in particular with regards to the welfare of the child before it is determined if it is necessary or not, and what form it should take (para. 8).

49. It should be noted that before the Court of Appeal in ***Re H-N* [2021]**, Cafcass made a number of submissions in respect of fact-finding hearings:

a. Cafcass submitted that the court and parties would benefit for there to be Cafcass involvement prior to determination of whether or not a fact-finding hearing is necessary (i.e. involvement greater than the 'safeguarding' letter that is currently produced before FHDRA). Cafcass contended that the present system was 'sub-optimal' and that, rather than a gatekeeping judge simply allocating a case for fact-finding hearing without any social work input other than the 'safeguarding' letter, the judge should direct Cafcass to undertake an enhanced form of safeguarding assessment (including where appropriate meeting the child) prior to the case being listed for a second gatekeeping appointment, with any resulting listing decision being made on a more informed and child-centred basis (paras. 38-39).

b. This was expressly supported by one of the interveners – the Association of Lawyers for Children. The Court of Appeal did not deal with this suggestion and simply suggested that this should be one of the areas that justifies close consideration by those charged with reviewing PD12J … (para. 40).

F v G [2020]

50. ***F v G* [2020] EWHC 2396 (Fam)**[28] was a recent decision which highlights the importance of active case management, considering the necessity of a fact-finding hearing at the earliest opportunity and considering PD12J paras 16 & 17 at all procedural junctures:

- Decision involved an appeal by a father in relation to orders made in private law children proceedings which restricted his contact with his two children (aged 8 and 7) to indirect contact, and directed that he be excluded from decision making in respect of the children's education and health.
- These proceedings took place in the context of extensive custody proceedings in the US in relation to the mother's proposed relocation to the UK. No findings of domestic abuse were made in the US proceedings, despite allegations having been made, and a shared custody arrangement was in place after the father indicated to the US court his intention to move to the UK.
- The mother's application in the UK followed mere weeks from the date of the US court's final judgment in the wake of an alleged incident at a hospital pre-admission appointment. The mother alleged the father had behaved in an overbearing and abusive manner, and that he had slammed a door into her when he was carrying the youngest child in his arms.
- **The mother had applied for there to be a fact-finding hearing, however withdrew her application at the FHDRA after the judge questioned its necessity in the face of the mother saying she was content for the children to go on holiday with the father, and have contact with him.**
- The Cafcass officer spoke to the children; the older child said he wanted to see his dad more, however the younger child showed more resistance and stated his father shouted at him, and he did not feel safe at his dad's house. The Cafcass officer stated he found the mother's account of physical and emotional abuse, and intimidation/threats plausible, and that the descriptions of the father's presentation

[28] https://www.familylawweek.co.uk/site.aspx?i=ed213076

were similar to the domineering and overbearing presentation he had experienced. The Cafcass officer stated that domestic abuse was likely to have occurred since the end of the relationship, and that the mother was currently experiencing coercive and controlling behaviours. A psychiatric report was recommended. He concluded the children and their mother needed a break from direct arrangements, and that the father took responsibility for his behaviour. He considered reduced direct contact but took the view the father's response to that would intensify difficulties for the children.

- The Cafcass officer produced an addendum report which acknowledged that there were disputed domestic abuse allegations, and suggested if clarity was provided by admissions or a fact finding hearing, the father's risk to the children would be reduced by his attendance at a Domestic Abuse Perpetrator's programme. **A fact finding hearing was not however further considered at DRA. This was crucial to the development of the case. Upon considering PD 12J paras. 16 and 17 in hindsight, it is clear this was a mistake.**
- The psychiatric report concluded he did not suffer from any mental illness or personality disorder, but did not go further save to say issues about the father's behaviour should be determined by the court.
- At final hearing, the mother adopted the Cafcass officer's recommendations for indirect contact. She submitted that there should be significant limitations on the father's PR in that she alone should be responsible for decisions in respect of the children's health and education. The trial judge made findings of fact against the father regarding domestic abuse, the hospital incident, the fact he had sought to influence what the children said to the Cafcass officer, and his refusal to co-operate with educational and medical issues. The judge accepted the Cafcass officer's recommendations, ordering indirect contact only and a restriction on the father's PR.
- The father appealed. Mrs Justice Judd DBE allowed the appeal on the following basis, and remitted the matter for a fresh FHDRA:

    a. The Cafcass officer's opinion that the father had engaged in coercively controlling and abusive behaviour, that the oldest child was doing his father's bidding when he said he was happy to go to his father's, and that the children were at risk of harm, was accepted by the Recorder. The father was therefore disadvantaged by a CAFCASS recommendation made on the basis of findings not formally sought. Mrs Justice Judd DBE noted:

"27. Hindsight is a wonderful thing, and it is easy to see that at the DRA the focus of both parties and the court was on the proposal that the father should have a psychiatric assessment rather than upon defining the issues that required to be decided at the final hearing. The case was now being put on a very difference basis to the situation at the FHDRA."

b. Further, the Recorder relied upon what the GP had recorded in two brief letters to make a finding the father had been physically violent to the mother. Whilst the father was able to challenge the mother, CAFCASS officer, and social worker from the hospital, the GP was not called to give evidence and no explanatory questions were asked.

c. The finding by the Recorder that the children were suffering harm, as advised by the Cafcass officer, was very much dependent on findings regarding the father's behaviour. All evidence pointed the other way.

d. The CAFCASS officer had not observed the children with the father, despite making such a significant recommendation. The more detailed assessment of father's relationship with the children was contained in the psychological report from the American proceedings – although of course the court was not bound by this, the magnitude of the decision to end all direct contact and the very different conclusion reached meant that the evidence underpinning it have should been given more weight.

e. The Recorder had not weighed in the balance the harm that could be caused to the children by the immediate loss of their relationship with their father, which had to be set against the risk of father's behaviour to the mother continuing. No consideration was given to some other arrangement for direct contact, rather than it ceasing altogether.

AB v CD [2022]

51. ***AB v CD*** **[2021] EWHC 819[29],** handed down on the same day as **Re H-N**, provides further guidance as to the approach to be taken by the court in making findings of fact.

52. The judge had made findings against F of rape and threats to remove the child to Pakistan. The judge had also decided not to consider allegations of physical abuse made

[29] https://www.familylawweek.co.uk/site.aspx?i=ed220345

by M. Her approved order contained a recital noting the "*strength and power"* of these allegations.

53. Mrs Justice Roberts allowed F's appeal. She noted that the judge had been entitled to exclude certain allegations from consideration in the exercise of her case management powers. In respect of these allegations, "*the position as a matter of law was that they were never proved and both parties were entitled to proceed on the basis that they played no part in her analysis or deliberations"* (para. 39). Consequently:

> *"*52. […] *I regard it as a mistake to have included within her approved order the recital about the "strength and power" of the allegations which she claims to have ignored in her survey of the evidence. The inevitable inference to be drawn from that recital is that, despite having elected to make no findings in relation to them, she nevertheless brought them into account to one degree or another and further that she had carried out an evaluation of evidence which she claimed she had ignored in reaching her conclusions. In the absence of any clear analysis in relation to the means by which she had approached the assessment of credibility, the presence of this recital in her order signals a clear impression that matters which she claims to have left out of account have, on the contrary, informed her conclusions."*

54. Allegations which a judge has declined to consider should not play a part in the judge's evaluation of the evidence.

7. Allegations of Coercive and/or Controlling Behaviour

55. The parties and interveners referred the court to the decision of Mr Justice Hayden in ***F v M* [2021] EWFC 4**[30]. The CoA supported this endorsement and suggested that the judgment is valuable and essential reading for the Family judiciary due to:

    a. the illustration that its facts provide of what is meant by coercive and controlling behaviour;

    b. Hayden J has undertaken the valuable exercise of highlighting at para. 60 the statutory guidance published by the Home Office pursuant Section 77(1) of the Serious Crime Act 2015 identifying paradigm behaviours of controlling and coercive behaviour which will be relevant to the evaluation of evidence in the Family Court. (para. 30)

56. To 'rewind' however, there are a couple of useful decisions dealing with allegations of coercive and controlling behaviour that are useful to consider before we look at the decision of ***F v M* [2021]** and ***Re H-N* [2021]**…

SD v AFH (Appeal: Coercive and Controlling Behaviour: Inference or Speculation) [2019]

57. In ***SD v AFH (Appeal: Coercive and Controlling Behaviour: Inference or Speculation)* [2019] EWHC 1513 (Fam)**[31], a father sought permission to appeal against a decision with findings of fact that he had demonstrated controlling and coercive behaviour, undermining and assaulting the mother.

- The father appealed on a number of grounds (para. 31):

  i. Failure to discharge the burden and/ or standard of proof on the evidence.
  ii. That the court had made a finding based on suspicion or doubt.
  iii. That the findings made were contrary to the literal definition of coercive and controlling behaviour.
  iv. Inadequate allocation of time and procedural defects.
  v. New and compelling evidence.
  vi. That the judge erred in fact in his analysis pertinent to the relevant issues.

[30] https://www.bailii.org/ew/cases/EWFC/HCJ/2021/4.html
[31] https://www.bailii.org/ew/cases/EWHC/Fam/2019/1513.html

vii. That the judge demonstrated subconscious bias in his analysis.

viii. Procedural defectiveness of the non-molestation order.

- Williams J was satisfied that HHJ Plunkett was justified in reaching the conclusions that he did. The father's acquittal for assault in the Crown Court was not inconsistent with the finding on the balance of probabilities that he had pushed the mother to the ground. The father was not focusing on his son's best interests.

- One of the father's central submissions was in respect of text exchanges between the parties and that there was no evidence of coercion within the texts that were before the court at all. Williams J concluded as follows:

  "39. *One of the father's central submissions was that the text exchanges between the parties leading up to the agreement as to child arrangements demonstrated quite plainly that the mother had entered into the agreement of her own free will and that there was no evidence of coercion. To the contrary, the father submitted that there were examples within the text messages of the mother making alternative proposals which were more generous to the father than he had proposed. The father submitted that had HHJ Plunkett taken this into account, he could not have reached the conclusion that there was control and coercion prior to the child arrangements agreement being reached. In evaluating the circumstances in which that agreement was reached, the judge clearly drew upon the evidence as to subsequent events in order to illuminate the likely dynamic that underpinned those exchanges. He was also aware that there was a huge amount of digital material which had not been put before him which might have illustrated the dynamic interplay between the father and the mother. The father submits that using the subsequent evidence to illuminate the issue of pre-July coercion is illegitimate as it fails to take account of the context in which the later behaviour took place. Whilst I can accept that there might be some merit in that in respect of behaviour long after the event or low-level behaviour, I do not accept that premise in respect of recent behaviour or behaviour which is unarguably controlling or coercive. The judge had a recording of the hand-over on 1 July 2018 when the father having got the child into his car and being on the point of driving off told the mother she wouldn't get him back without a court order; the context being that the father was plainly demonstrating possessive or jealous behaviour about his belief that the mother was in another relationship. There was thus a very close temporal nexus between an unchallengeable example of controlling or coercive behaviour on 1 July and the reaching of the agreement in late June. There was thus no step change in the*

behaviour or inflexion point which would render the use of evidence of events post July in support of the pre-agreement conditions inappropriate. There was clearly a continuum which made it entirely appropriate to draw inferences as HHJ Plunkett did.

40. *However, the texts which were put in evidence by the father himself on their face do not support the father's contention that this was an agreement reached of the mother's own free will and without any coercion by him. Some, individually read, show evidence of the father being over-bearing, confidently mis-stating the law (to his own advantage), implicitly threatening court if the mother did not accept his agreement, being insistent. The mother's responses refer to his behaving in a 'vile' way over her accidentally opening his post, objecting to his abusive texts and verbal outbursts when they meet. They are of course contemporaneous and produced by the father. Thus, far from demonstrating the father's case, they were consistent with the mother's case that she had felt overwhelmed and dominated by the father at the time. HHJ Plunkett did not in fact rely on them in this way - although he might have – but they simply show the father's inability to see things in any way other than his own. Far from supporting his case that the judge failed to give them due weight in the scales which weighed against coercion they support the judge's conclusions. It seems fairly obvious that the judge did not feel the need to rely on them because the other evidence so clearly showed the controlling and coercive nature of the father's behaviour*."

- In respect to whether findings were made contrary to the literal 'definition' of "coercive and/or controlling behaviour" from PD12J, Williams J made the following comments:

"45. *The judge found that the coercive and controlling behaviour at the time of the agreement was at a lower level than that which emerged later. That finding is consistent with the picture which emerges from the text exchanges and from the evidence of each of the parties and from the obvious escalation which emerges from the audio and visual recordings.*

46. ***The dividing line between behaviour which can properly be characterised as coercive or controlling and within PD12J and behaviour which does not cross that threshold is not a bright line. The PD12J definition by its own terms makes clear that to amount to coercive or controlling behaviour the behaviour will be well outside that which is acceptable within a relationship. The evidence in this case plainly demonstrated that the father's behaviour was outside those fairly broad parameters of acceptable relationship based behaviour. In respect of the behaviour surrounding the reaching of the agreement in June it may have been***

towards the lower end of the spectrum of behaviour within PD12J but within it, it plainly was. By September it had progressed along the spectrum. There is no merit in the father's contention that his behaviour could not properly be characterised as controlling or coercive behaviour within the statutory definition."

- There was no merit in any of the grounds of appeal and permission to appeal was refused.

R v P (Children: Similar Fact Evidence) [2020]

58. The decision in ***R v P (Children: Similar Fact Evidence)*** **[2020] EWCA Civ 1088**[32] is a vital Court of Appeal decision, and one that should be kept in mind when clients bring evidence forwards and seek to adduce it to show a propensity to coercive and controlling behaviour. This decision is the precursor to ***F v M*** **[2021]**.

- The decision came in the context of a father's application for contact with his children (ages 5 and 2 years). The mother objected on the basis that the father had subjected her to very serious coercive and controlling behaviour. This included an allegation of rape. She alleged that he had: insisted on her abandoning her university course; misrepresented his name, occupation and financial position to her parents; isolated her from her close friends and family; required her to move house constantly to avoid them being found by family and public health bodies; made baseless allegations to the authorities against her family; and shouted at their eldest child. The mother obtained a non-molestation order against the father, with a fact-finding hearing pending.
- At the end of the parties' relationship the father started a relationship with another woman, Mrs D. A Welsh local authority contacted the London local authority to alert it to the fact there were ongoing proceedings in respect of Mrs D's children, and that concerns had been raised about the father's behaviour towards Mrs D and her children. A s. 37 report a court in Wales had been ordered which raised serious concerns, and revealed information about the influence exerted by the father over Mrs D. The children had been removed from the care of Mrs D and the father, and placed with Mr D.

[32] https://www.bailii.org/ew/cases/EWCA/Civ/2020/1088.html

- The mother argued the Welsh reports, and other evidence including letters provided by Mr D and Mrs D's parents, showed the father had subjected her to the same kind of coercive control he had directed against her. The judge at first instance however took the case management decision to exclude the Welsh reports and the letters, and criticised the mother's solicitors for including it in the court bundle. The judge also refused to admit a report from the London local authority that had been directed by the court, which took into account the Welsh evidence. The reports were said to contain hearsay and the trial judge said that the father could not have a fair hearing if the reports were admitted on the assumption they were true.

- The mother appealed, arguing the reports and letters were highly relevant both to the fact-finding hearing and any welfare decision. **It was logically probative as showing a propensity for the father to act in a coercive and controlling manner**. **She argued that it is often difficult for a party to prove the other party's behaviour had been coercive and controlling because behaviour of that sort is a pattern.** The second section 7 report of the London local authority was prepared by direction of the court to take into account the Welsh reports. These reports could not be ignored. The relevance was not considered at all, nor was any necessary analytical exercise in relation to admission or exclusion, in accordance with legal principles carried out. She argued the judge was wrong to have regard only to the fairness to the father when the exclusion of such significant evidence would be unfair to her.

- The Court of Appeal considered the relevant procedural rules, practice directions and case law [see §19 onwards]. The court summarised some of the main principles from the case law, and considered the analysis which applies in civil cases also applies to family proceedings:

  > *"24.* […] ***There are two questions that the judge must address in a case where there is a dispute about the admission of evidence of this kind. Firstly, is the evidence relevant, as potentially making the matter requiring proof more or less probable? If so, it will be admissible. Secondly, is it in the interests of justice for the evidence to be admitted?*** *This calls for a balancing of factors of the kind that Lord Bingham identifies at paragraphs 5 and 6 of* O'Brien [v Chief Constable of South Wales Police [2005] UKHL 26]."

- The Court of Appeal went on to consider the fact that in this case the similar fact evidence involved '**propensity**', and the extent to which facts relating to the other occasions have to be proved for propensity to be established. It considered the

Supreme Court criminal decision of *R v Mitchell* [2016] UKSC 55, and summarised it as follows:

> *"25. Where the similar fact evidence comprises an alleged pattern of behaviour, the assertion is that the core allegation is more likely to be true because of the character of the person accused, as shown by conduct on other occasions. To what extent do the facts relating to the other occasions have to be proved for propensity to be established?*
>
> *26.* […] ***In summary, the court must be satisfied on the basis of proven facts that propensity has been proven, in each case to the civil standard. The proven facts must form a sufficient basis to sustain a finding of propensity but each individual item of evidence does not have to be proved****."*

- The appeal was allowed to set aside the judge's order; a necessary analysis concerning whether the disputed evidence should be admitted had not been carried out by the trial judge. It was noted by the Court of Appeal that it had no doubt the evidence from the Welsh reports, the evidence from Mr D and Mrs D's parents, and the second London local authority report were relevant, and therefore admissible, and that it should be admitted in the interests of justice. Whether propensity is established, and whether it is of probative value was however a matter for the trial judge (see ***F v M* [2020]** below).

F v M [2021]

59. Following ***R v P (Children: Similar Fact Evidence)* [2020]**, the Court of Appeal transferred the matter back to the High Court where it came before Hayden J for a 10-day fact-finding hearing. The court reiterated what was required in understanding and identifying coercive and controlling behaviour, and recognising in particular its insidious scope and manner. Although often difficult for professionals to identify, there would often be clues, hints, indicators and triggers as to what people reported which should stimulate forensic curiosity as opposed to superficial investigation.

60. The judgment provides important guidance in respect of (a) key guidance for identifying coercive and controlling behaviour; (b) approaching cases involving similar fact evidence, and the significance and importance of such evidence in cases of coercive and controlling behaviour (following on from the ***R v P (Children: Similar Fact Evidence)* [2020]** decision):

- The father and mother met at university in late 2013 when 19 and 18 respectively. The father was Muslim and in the UK on a student visa; the mother British and from a Hindu family. According to the mother, within a couple of weeks of entering into a relationship, the father began discussing marriage and isolating her from friends and family. She became pregnant in February 2014. The mother said that she was subject to coercive and controlling behaviour, including rape, throughout their relationship. The mother got in touch with her parents in September 2017 and left the father.

<u>Coercive and controlling behaviour</u>

- Hayden J found that the mother's evidence established a compelling and authentic paradigm of abuse by the father through coercive and controlling behaviour. Her evidence was supported and strengthened by the wider evidence of her parents, friends and various others (university acquaintances, tutors and the university chaplain). The court made findings that:

  - The father raped the mother, probably on more than one occasion.
  - He alienated the mother from her friends and family. Further, he was determined to erode her morale and self-esteem and ensure that she quit her university course.
  - He took away all of the mother's means of communication.
  - He controlled the mother's food.
  - He restricted the mother's physical movement.
  - He exploited the mother financially by taking her savings and by using her name to run up debts.
  - He forced her into a second pregnancy.
  - He indulged in gratuitous emotional torture of the mother's parents. He used the mother to threaten, intimidate and frighten them.
  - He made entirely groundless accusations that the mother's parents were prejudiced and hostile to him as a Muslim, that they had tried to force the mother to terminate her first pregnancy, and that the mother was at risk of honour-based violence. He cast

himself as a victim, and it was concerning that that had been tacitly accepted by the police and others without a more sceptical assessment of his credibility.

The court was satisfied that between December 2013 and September 2017, the father subjected the mother to a brutalising, dehumanising regime, which subjugated her and was profoundly corrosive of her autonomy.

- Hayden H found F to be "*a profoundly dangerous young man, dangerous to women he perceives to be vulnerable and dangerous to children.*" (para. 101)

- The court gave the following guidance in respect of identifying coercive and controlling behaviour:

(1) In the Family Court "*coercive and controlling behaviour is given no legal definition*":

*"*4. ***In my judgement, it requires none. The term is unambiguous and needs no embellishment****. Understanding the scope and ambit of the behaviour however, requires a recognition that 'coercion' will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. 'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation. There has been very little reported case law in the Family Court considering coercive and controlling behaviour. I have taken the opportunity below, to highlight the insidious reach of this facet of domestic abuse. My strong impression, having heard the disturbing evidence in this case, is that it requires greater awareness and, I strongly suspect, more focused training for the relevant professionals."*

(2) Understanding and identifying coercive and controlling behaviour required *"**an evaluation of a pattern of behaviour in which the significance of isolated incidents could only be understood in the context of a much wider picture**."* (para. 60)

(3) The statutory guidance published pursuant to the Serious Crime Act 2015, Pt 5 s 77(1) identified **paradigm behaviours**: it was necessary to be vigilant to those. The behaviours identified by Hayden J in *A County Council v LW & Anor* [2020]

EWCOP 50 as apposite in the context of vulnerable adults are "*strikingly relevant here"* too:

- Isolating a person from their friends and family
- Depriving them of their basic needs
- Monitoring their time
- Monitoring a person via online communication tools or using spyware
- Taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep
- Depriving them access to support services, such as specialist support or medical services
- Repeatedly putting them down such as telling them they are worthless
- Enforcing rules and activity which humiliate, degrade or dehumanise the victim
- Forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities
- Financial abuse including control of finances, such as only allowing a person a punitive allowance
- Controlling ability to go to school or place of study
- Taking wages, benefits or allowances
- Threats to hurt or kill
- Threats to harm a child
- Threats to reveal or publish private information (e.g. threatening to 'out' someone)
- Threats to hurt or physically harm a family pet
- Assault
- Criminal damage (such as destruction of household goods)
- Preventing a person from having access to transport or from working
- Preventing a person from being able to attend school, college or University
- Family 'dishonour'
- Reputational damage
- Disclosure of sexual orientation
- Disclosure of HIV status or other medical condition without consent
- Limiting access to family, friends and finances.

(4) However, However, as per Hayden J's judgment in *A County Council v LW & Anor* [2020] EWCOP 50:

"22. *It is important to emphasise that this list is* ***not exhaustive****. It does not, for example, include controlling intake of food and nutrition, which was such a striking facet of the evidence here.* ***Abusive behaviour of this kind will often be tailored to the individual circumstances of those involved.*** *The above is no more than a check list which should prompt questioning and enquiry, the responses to which should be* ***carefully recorded so that the wider picture emerges****. That which might, in isolation, appear innocuous or insignificant may in the context of a wider evidential picture be more accurately understood*."

(5) Hayden J said it was also helpful to consider the guidance and assistance in FPR PD12J, and the offence of controlling and coercive behaviour in an intimate or family relationship as defined in **s.76 of the Serious Crime Act 2015**.

> *"(1) A person (A) commits an offence if—*
>
> *(a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,*
>
> *(b) at the time of the behaviour, A and B are personally connected,*
>
> *(c) the behaviour has a serious effect on B, and*
>
> *(d) A knows or ought to know that the behaviour will have a serious effect on B.*
>
> *(2) A and B are "personally connected" if—*
>
> *(a) A is in an intimate personal relationship with B, or (b)A and B live together and—*
>
> *(i) they are members of the same family, or*
>
> *(ii) they have previously been in an intimate personal relationship with each other*. […]"

(6) Hayden J emphasised however that "***a tight, overly formulaic analysis may ultimately obfuscate rather than illuminate the behaviour… When Judges are called upon to resolve issues of fact, we do so by evaluating separate strands of evidence and then considering them in the context of the whole. Some features of the evidence will weigh more heavily than others and evidence which may not be significant, in isolation, may gain greater***

relevance when placed in the context of the wider evidential canvas." (para. 108).

(7) The definition in PD12J provides useful guidance when broken down (para. 108):

"*Coercive Behaviour:*

i. *a pattern of acts;*
ii. *such acts will be characterised by assault, threats, humiliation and intimidation but are not confined to this and may appear in other guises;*
iii. *the objective of these acts is to harm, punish or frighten the victim.*

Controlling Behaviour:

i. *a pattern of acts;*
ii. *designed to make a person* ***subordinate*** *and/ or* ***dependent****;*
iii. *achieved by isolating them from support, exploiting their resources and capacities for personal gain, depriving them of their means of independence, resistance and escape and regulating their everyday activities."*

(8) In assessing evidence of coercive and controlling behaviour, it was necessary to factor in a recognition of the behaviour's "***insidious scope and manner***" (para. 109). Hayden J emphasised:

"109. *The emphasis in Section 76 of the Serious Crime Act 2015 , is on "repetition" and "continuous engagement" in patterns of behaviour which are controlling and coercive. Behaviour, it seems to me, requires, logically and by definition, more than a single act.* ***The wording of FPD 2010 12J is therefore potentially misleading in so far as it appears to contemplate establishing behaviour by reference to "an act or a pattern of acts". Key to assessing abuse in the context of coercive control is recognising that the significance of individual acts may only be understood properly within the context of wider behaviour. I emphasise it is the behaviour and not simply the repetition of individual acts which reveals the real objectives of the perpetrator and thus the true nature of the abuse***."

(9) It was often difficult for professionals to identify the behaviour, but there would frequently be clues, hints, indicators and triggers in which people reported that that might stimulate wider forensic curiosity and investigations of greater subtlety and nuance. Much of the evidence in this case for example showed how families, friends, work colleagues and neighbours knew what was happening to both the mother and the father's previous partner from an early stage. (para. 112)

(10) Broader professional education on the scope and ambit of coercive and controlling behaviours was likely to generate greater alertness to abuse of that type which **all too frequently lies buried or only superficially investigated.** Communication and sharing of information between police forces is imperative. (para. 112)

Similar fact evidence (paras. 72-81)

- Soon after the mother left in September 2017, the father commenced a relationship with a woman in her 40s (J, or Mrs D as referred to in the above case), and moved in with her and her two young sons. Within a few weeks she had resigned from her teaching career and sold her car. She moved with the father and her sons to Wales without telling anyone. Her children's new school contacted their father (T, or Mr D), and the boys were eventually transferred into his care in December 2018. It was T's evidence that the boys had been physically neglected and emotionally traumatised by the father.

- The court found that the similar fact evidence concerning F's relationship with his previous partner was relevant and admissible due to the **striking parallels** with both the father's relationship with the mother and J. When compared, the force of F's abuse came into greater focus, and **the comparison served to better illustrate the corrosive and debilitating impact of that abuse**. E.g.

(1) Both the mother and J were alienated from family and friends;

(2) The father was directly involved in engineering J's job resignation, as he had been in the mother quitting university, and in both cases there was real professional concern that each woman had made the decision reluctantly and under duress;

(3) It was found that J had acted out of character by uprooting her children, disappearing to Wales and losing sight of her children's welfare interests. When J's father had attempted to see her, F manipulated events to portray him as an aggressor and

persuaded J to take out a non-molestation order against him. This had similar tones to his demonisation of the mother's parents.

Re H-N [2021]

61. In respect of ***F v M* [2021]** the Court of Appeal notes *that "all parties commended it to the court for its **comprehensive and lucid analysis**, and for the plea contained within it urging greater prominence to be given to coercive and controlling behaviour in Family Court proceedings."* (para. 29). The Court of Appeal calls *it "**essential reading for the Family judiciary**"* (para. 30).

62. As well as endorsing Hayden J's approach in ***F v M* [2021]**, the Court of Appeal in ***Re H-N* [2021]** made explicitly clear that coercive control is relevant to past and future harm to the child:

"31…***harm to a child in an abusive household is not limited to actual violence to the child or to the parent. A pattern of abusive behaviour is as relevant to the child as to the adult victim**. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:*

i) Is directed against, or witnessed by, the child;

ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;

iii) Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;

iv) Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men."

63. The Court of Appeal endorsed submissions made by the second interveners (Women's Aid, Rights for Women, Rape Crisis England & Wales, and Welsh Women's Aid) that coercive control is the overarching issue that ought to be tried first by the court:

"51. *Ms Mills QC on behalf of the second interveners, ('Women's Aid', 'Rights for Women', 'Rape Crisis England and Wales' and 'Welsh Women's Aid'), submitted that **'the***

overwhelming majority of domestic abuse (particularly abuse perpetrated by men against women) is underpinned by coercive control and it is the overarching issue that ought to be tried first by the court.' We agree and it follows that consideration of whether the evidence establishes an abusive pattern of coercive and/or controlling behaviour is likely to be the primary question in many cases where there is an allegation of domestic abuse, irrespective of whether there are other more specific factual allegations to be determined. *The principal relevance of conducting a fact-finding hearing and in establishing whether there is, or has been, such a pattern of behaviour, is because of the impact that such a finding may have on the assessment of any risk involved in continuing contact."*

64. It was clear that establishing whether a pattern of coercive and/or controlling behaviour was present in a relationship may add to an already lengthy forensic evaluative process (para. 54), in particular in circumstances in which the FJS is currently overborne with work (para. 55). The Court of Appeal also made clear that delay is inimical to the welfare of the child, and needed to be borne in mind when determining the necessity of a fact-finding hearing (para. 55).

65. The court did not wish to further burden the already over-burdened FJS with guidance that resulted in additional fact-finding hearings, or extend the length of fact-finding trials causing further delay that would be contrary to the very rights of children and parents.

"55. *Any requirements imposed through guidance from this court resulting in additional fact-finding hearings or extending the length of fact-finding trials could only increase the volume of work in the system, extend yet further the current potential for delay and thereby be entirely contrary to the very rights and needs of the children and parents that the jurisdiction exists to meet; it is also likely to be experienced as a substantial additional burden by the hard-pressed Family judiciary and the specialist solicitors and Family Bar upon whom the courts are heavily reliant."*

"…How to meet the need to evaluate the existence, or otherwise, of a pattern of coercive and/or controlling behaviour without significantly increasing the scale and length of private law proceedings is therefore a most important, and not altogether straight- forward, question. It is a matter that will require consideration by others involved in working through the implications of the MOJ Harm Panel report, in implementing the Domestic Abuse Act and in any subsequent revision of revising PD12J as part of those two processes. The President will refer the anonymised skeleton arguments in these appeals to Mrs Justice

Knowles (the lead judge on issues of domestic abuse) and to Mr Justice Cobb (the lead judge on private law matters) for consideration as part of that review."

66. The court did however offer a number of '<u>pointers</u>':

"57. […]

a) PD12J (as its title demonstrates) is focussed upon 'domestic violence and harm' in the context of 'child arrangements and contact orders'; it does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court;

b) PD12J, paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is 'necessary' in order to:

i) Provide a factual basis for any welfare report or other assessment;

ii) Provide a basis for an accurate assessment of risk;

iii) Consider any final welfare-based order(s) in relation to child arrangements; or

iv) Consider the need for a domestic abuse-related activity.

c) Where a fact-finding hearing is 'necessary', only those allegations which are 'necessary' to support the above processes should be listed for determination;

d) In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other. […]

58. ***Where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary in the context of PD12J, paragraph 16, that assertion should be the primary issue for determination at the fact- finding hearing. Any other, more specific, factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise, unless any particular factual allegation is***

so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape)*."*

67. In respect of the appeal in ***Re T*** (one of the matters under appeal in ***Re H-N*** **[2021]**), the Court of Appeal concluded that the trial judge had fallen into error by not standing back and considering the significance of findings, and whether the evidence established a pattern of coercive and/or controlling behaviour. This impacted upon the conclusions in respect of the risk the father posed to the child, and the issue of contact:

- The trial judge (HHJ Evans-Gordon) made 3 findings of physical violence against the father. The Court of Appeal concluded however the judge **failed to acknowledge in particular the seriousness of the two incidents where the father made reference to dying or to killing.** Whilst the trial judge concluded the father did not intend either to 'strangle' or to 'suffocate' the mother, this does not prevent the mother from having been the victim to 2 extremely frightening episodes. The trial judge had **failed to recognise the impact upon the mother and child.** (para. 174)

- The Court of Appeal did not accept that words which can be interpreted as threat to kill are words 'commonly used in anger which do not import any genuine threat to life.' The impact on the mother was abundantly clear given the judge accepted her evidence that when she was on the floor with the plastic bag over her head she was 'feeling as though she wanted to die.' The judge **failed to stand back and consider the impact of her findings which prevented the judge from asking the primary question: whether the evidence established a pattern of coercive and/or controlling behaviour.** (para. 174)

- The Court of Appeal concluded:

  "178. *In our judgment, the judge* ***fell into error in that she omitted to look at the findings she had made as a whole.*** *We fear that having determined that the allegations of anal rape were not made out,* ***she did not then step back and appreciate the significance of the matters which she did find to have been proved. As a consequence, the judge failed to appreciate the true significance and seriousness of the father's behaviour or to consider whether these findings established a pattern of coercive and/or controlling behaviour.***

179. *We have difficulty, for example, with the judge's observation in relation to the November 2017 'strangling' incident. The judge found that the father had said something to the effect that he would kill the mother, but she held that these words are commonly used in anger which do not import any genuine threat to life'. We are not convinced that that is the case, but in any event those words need to be considered in context, namely that the judge had found that the father had 'probably held the mother in the vicinity of her neck' at the time he spoke those words. There does not need to have been a 'genuine threat to life' for this to be regarded as a signal piece of highly intimidating behaviour on the father's part.*

180. *We are particularly troubled by the 'plastic bag' incident. Looking at the background history and the state of the parties' relationship by December 2017, with the 'strangling' incident having taken place only the month before, we cannot see on what basis the judge could conclude that coming up behind the mother (who was on the floor holding their baby), and putting a plastic bag over her head before saying that 'this was the way she would die' could be regarded as a 'prank'. This was, in our judgment, the second of two intimidating and highly abusive incidents of a similar type carried out within a few weeks of each other. We say that conscious of the findings the judge made about the mother's own aggressive behaviour towards the father on occasion.*

181. *During the course of the hearing of these appeals we have sought to emphasise that the child's welfare remains at the heart of these cases and that neither the parties, nor the courts, should lose sight of the importance of considering* ***what the impact any findings of domestic abuse have on the welfare of the child and, therefore, the issue of contact.***

182. *In our judgment,* ***these findings are highly relevant to any risk assessment****. We repeat that the judge took care to say that her analysis of the situation should not be taken 'as an excuse' nor should she be taken as endorsing any abusive behaviour by either of the parties.* ***The two findings which we have highlighted however sit uneasily with the judge's assessment that: (i) this relationship was characterised by 'mutual verbal and minor physical abuse attributable to relationship conflict'; or (ii) that there was no risk, the parties having separated, in circumstances where (on the judge's own finding) there had been no 'trigger' for the plastic bag incident; and (iii) that the father had only been: 'driven to anger and loss of control in conflicts with the mother in situations where she***

was verbally and, occasionally, physically abusing him'. In our judgment had the judge regarded the November and December incidents with the significance they deserve it is unlikely that she would have drawn such conclusions."

8. Scott Schedules

68. The Court of Appeal in ***Re H-N*** **[2021]** goes on to make some important comments in respect of the appropriateness of Scott Schedules in cases involving allegations of domestic abuse and coercive and/or controlling behaviour.

69. In doing so, the judgment echoes some of the concerns in The Harm Report (Chapter 5.4 and 7.5.1).

Re LG (Re-opening of Fact-finding) [2017]

70. The need for the court to recognise patterns of behaviour in such cases was discussed by Mr Justice Baker in ***Re LG (Re-opening of Fact-finding)*** **[2017] EWHC 2626 (Fam)**. In particular, Baker J refers to the draw-backs in the court restricting allegations in Scott Schedules for fact-finding hearings to a few "specimen" allegations, noting that the parties and the court must be careful to ensure that significant issues are not overlooked. Sometimes a pattern of harassment and other forms of domestic abuse are only discernible by conducting a broader examination of the allegations and comprehensive analysis.

- The case concerned proceedings in which a father was seeking contact with his 7-year-old daughter. Baker J found a judge had been wrong to refuse to re-open a fact-finding hearing at which the mother's allegations of domestic violence against the father had not been accepted. The father had subsequently been convicted for causing criminal damage to the mother's car, and a restraining order imposed upon him. This cast serious doubt upon the conclusion reached at the previous fact-finding hearing before the magistrates…

- Baker J noted:

  "27. ***The original fact-finding hearing before the justices was confined to the five allegations set out in the schedule prepared in accordance with the case management directions.*** *As set out above, the overriding objective in FPR rule 1.1 requires the court to deal with a case in ways that are proportionate to the nature, importance and complexity of the issues. It is therefore entirely appropriate for a court in the exercise of its case management powers to confine a fact-finding hearing to the issues that it considers necessary and relevant.* ***Not infrequently, a party alleging domestic violence is directed to identify and rely on a few allegations as***

"specimen" allegations on which to seek findings. In taking this course, however, parties and the court must be careful to ensure that significant issues are not overlooked. Sometimes a pattern of harassment and other forms of domestic abuse is only discernible by conducting a broader examination of the allegations.

28. I*n this instance, one court conducted a partial examination of some of the allegations made by the mother and found that she was not a credible witness and refused, on a balance of probabilities, to make the findings she sought. Another court, applying the higher criminal standard of proof, accepted the evidence of the mother, rejected the evidence given by the father, and convicted him of criminal damage, and then imposed a restraining order from which it can plainly be inferred that the court concluded that his conduct amounted to harassment or had caused fear of violence.* ***No court has carried out a comprehensive investigation of all the allegations, including those considered separately by two courts and additional allegations made by the mother about the father's behaviour****, some dating from before the consent order of 3 February 2016, others said to have taken place more recently and including allegations that the father has broken the terms of the restraining order.* […]

30. *It follows in my view that no court has yet carried out a* ***competitive analysis*** *of the allegations of domestic abuse in this case. These allegations are of great importance, for the reasons identified in Practice Direction 12J.* ***A comprehensive analysis of the allegations may demonstrate that the mother has fabricated or grossly exaggerated her case. Alternatively, it may demonstrate that some or all of the allegations are true and that the pattern of incidents alleged by the mother demonstrates abusive behaviour on the part of the father. The conclusion reached by the court on this issue will have a fundamental impact on the future child arrangements for L, not only on the question of contact but also, possibly, where and with whom she lives****.* […]

32. *I have carefully considered the rationale for the decision reached by this very experienced judge in her clear and careful judgment, but ultimately reached the conclusion that she was wrong to refuse to reopen the fact-finding hearing in this case. The subsequent conviction of the father for an offence of criminal damage to a car at a time when the mother and L were present in the vehicle, and the subsequent imposition of a restraining order to protect the mother and her older child from further conduct amounting to harassment or causing fear of violence, give rise to "solid*

ground" for challenging the findings made by the justices in August 2015. In my view, there must now be a fact-finding hearing at which the court considers all relevant allegations to establish whether domestic abuse has occurred. It is only after this has occurred that the court will be in a position to determine what arrangements should be made for L and ensure that, if violence or abuse is admitted or proven, a child arrangements order can be put in place that protects the safety and well-being of the child and the other parent."

F v M [2021]

71. In ***F v M*** **[2021]**, while Hayden J declined to give prescriptive guidance on the use of Scott Schedules in family cases generally, he noted that such an insidious type of abuse may not be captured by this formulaic approach to marshalling the evidence and honing allegations. It was noted in a detailed post-script that by intensely focusing on particular and unspecified incident, it may prove counterproductive and risk obscuring the serious nature of harm perpetrated by a *pattern of behaviour.*

72. Hayden J goes on to suggest Scott Schedules may have severe limitations as to render them ineffective and unsuitable. The door was left open for the Court of Appeal to signal a change in approach …

"Post Script

Ms Jones has invited me to make comment on the use of Scott Schedules (i.e. a table identifying the allegations and the evidence relied on in support) in cases involving this category of domestic abuse. Having given the matter considerable thought I have come to the clear conclusion that it would not be appropriate to give prescriptive guidance. ***Whilst I entirely see the advantage of carefully marshalling the evidence and honing down the allegations, I can also see that what I have referred to as a particularly insidious type of abuse, may not easily be captured by the more formulaic discipline of a Scott Schedule. As I have commented above, what is really being examined in domestic abuse of this kind is a pattern of behaviour, possibly over many years, in which particular incidents may carry significance which may sometimes be obvious to an observer but to which the victim has become inured.*** *It seems to me that what is important is that the type of abuse being alleged is made clear to the individual who is said to be the perpetrator.*

An intense focus on particular and specified incidents may be a counterproductive exercise. It carries the risk of obscuring the serious nature of harm perpetrated in a pattern of behaviour. *This was the issue highlighted in the final report of the expert panel to the Ministry of Justice: 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases' (June 2020).* ***It is, I hope, clear from my analysis of the evidence in this case, that I consider Scott Schedules to have such severe limitations in this particular sphere as to render them both ineffective and frequently unsuitable. I would go further, and question whether they are a useful tool more generally in factual disputes in Family Law cases. The subtleties of human behaviour are not easily receptive to the confinement and constraint of a Schedule.*** *I draw back from going further because Scott Schedules are commonly utilised and have been given much judicial endorsement. I do not discount the possibility that there will be cases when they have real forensic utility.* ***Whether a Scott Schedule is appropriate will be a matter for the judge and the advocates in each case unless, of course, the Court of Appeal signals a change of approach****."*

Re H-N [2021]

73. The Court of Appeal in ***Re H-N*** did not go as far as hoped by many of the parties and interveners. It concluded that:

    i. The value of Scott Schedules in domestic abuse cases had declined. Sometimes they were a potential barrier to fairness and good practice, rather than an aid.

    ii. There are a number of principled and pragmatic concerns in relation to Scott Schedules.

    iii. The courts needed to focus on the wider context of whether there had been a pattern of coercive and controlling behaviour rather than on a list of specific factual incident.

    iv. Serious thought was needed to develop a different way of summarising and organising the matters to be tried at a fact finding hearing without limiting the number of allegations or minimising the abuse. Suggestions included a 'threshold' type document as in public law proceedings, formal pleadings of particulars of claim as seen in civil proceedings and a narrative statement in a prescribed form.

    v. However, such work was not for the court.

The value of Scott Schedules

- The Court of Appeal struck with the unanimity in the oral submissions heard that the value of Scott Schedules in domestic abuse cases had declined to the extent that in some cases "***they were now a potential barrier to fairness and good process, rather than an aid.***" (para. 43):

  (1) **Principled concerns**: the asserted need for the court to focus on the wider context of whether there has been a pattern of coercive and controlling behaviour, as opposed to a list of specific factual incidents tied to a particular date and time. Abusive, coercive and controlling behaviour is likely to have a cumulative impact upon victims that would not be identified simply by separate and isolated consideration of individual incidents (para. 44);

  (2) **Pragmatic concerns**: In one of the four appals, parties were required to 'limit' the allegations to be tried to 10, and the judge reduced it further to 3. The very process of directed selection, produces a false portrayal of the couple's relationship. If an applicant succeeds in proving the 3 allegations, there is a risk the court will move forward on the basis that those three episodes are the only matters 'proved' and therefore the only facts upon which any adverse assessment of the perpetrator's future risk falls to be made: "***By reducing and then further reducing its field of focus, the court is said to have robbed itself of a vantage point from which to view the quality of the alleged perpetrator's behaviour as a whole and, importantly, removed consideration of whether there was a pattern of coercive and controlling behaviour from its assessment***." (para. 45)

- The Court of Appeal noted the force of these criticisms and said "***serious thought is needed to develop a different way of summarising and organising matters to be tried at fact-finding hearing*** *so that the case that a respondent has to meet is clearly spelled out, but the process of organisation and summary does not so distort the focus of the court proceedings that the question of whether there has been a pattern of behaviour or a course of abusive conduct is not before the court when it should be.*" (para. 46)

However, none of the various suggestions to replace Scott Schedules as advanced by the parties were expressly endorsed

- The Court of Appeal did not deal with the matter of how the move away from Scott Schedules is to be best achieved.

  "48. Quite how a move away from the use of Scott Schedules is to be achieved, and what form any replacement 'pleading' might take, does, however, raise difficult questions and was the subject of submissions to this court. ***A number of suggestions were made by the parties in submissions including; a 'threshold' type document, similar to that used in public law proceedings, formal pleadings by way of particulars of claim as seen in civil proceedings and a narrative statement in prescribed form. The particular advantage of a narrative statement was, it was submitted, that it would allow there to be a focus on the overall nature of the relationship and expressly whether a party says that she had been harmed as a result of the behaviour and, if so, in what manner. Such an approach would allow the court to identify at an early stage whether an allegation of controlling and coercive behaviour is in issue. Identifying the form of harm (which may be psychological) and only then looking back at the more granular detail, would, it was submitted, allow the court to determine what specific facts need to be determined at a fact-finding hearing.***

  49. *The process before this court has* ***undoubtedly confirmed the need to move away from using Scott Schedules****. This court is plainly* ***not an appropriate vehicle to do more than describe the options suggested by the parties in their submissions during the course of the hearing****. It will be for others, outside the crucible of an individual case or appeal, to develop these suggestions into new guidance or rule changes. In practice that work is likely, in the first instance, to be done through the Private Law Working Group together with The Harm Panel's implementation group whose final recommendations may in turn lead to changes to the FPR or in the issuing of fresh guidance through the medium of a Practice Direction."*

9. Allegations of Rape & Sexual Assault

74. One of the criticisms in respect of ***Re H-N*** **[2021]** is the extent to which the Court of Appeal adequately deals with how the Family Court should manage allegations of rape and serious sexual assault, and the intersection between criminal and family law concepts:

    a. This section will begin by considering some of the recent case law involving allegations of rape and sexual assault, both when judges have got it right and when they have not.

    b. It will consider the interface between criminal and family law concepts, and in particular the guidance given in the decision in ***Re H-N*** **[2021]** to this issue.

JH v MF [2020]

75. Perhaps one of the most revealing judgments from the past few years was the decision of Russell J in ***JH v MF*** **[2020] EWHC 86 (Fam)**[33]. The judgment is important reading for any family law practitioner, in particular those dealing with private children law cases involving allegations of domestic abuse and serious sexual assault. It is an example of one of the most serious cases of both procedural mismanagement, and a fundamentally flawed approach to the fact-finding exercise by HHJ Tolson QC, in particular in respect to the issue of 'consent.'

- The case concerned an appeal following a fact-finding hearing in private Children Act proceedings, involving allegations of domestic abuse including of the most serious sexual assault. As well as a number of serious procedural irregularities in particular in respect of special measures (outlined *above*), Russell J also found that the judge's approach to fact-finding was so flawed as to lead to the conclusion that it was unsafe and wrong:

    (1) **The judge had erred in his task in balancing the evidence by placing insufficient, or perhaps any, weight on corroborative evidence or material before the court, and placing undue weight on irrelevant matters**. He had failed to take into account relevant material as to the parties' relationship, including reports of aggressive, criminal and violent behaviour on the

[33] https://www.familylawweek.co.uk/site.aspx?i=ed208693

respondent's part. This included the witness statement of a neighbour along with other police records which offered support to the mother's allegations, including that the respondent had a propensity towards violent and abusive behaviour. The judge had found there was no independent evidence, but failed to set out why he chose to disregard it or set out (if he had regard to it) why it was not independent or in any sense corroborative, other than to dismiss both a friend and neighbour's evidence because they were the appellant's "friends." (para. 23).

(2) **The judge failed properly and correctly to balance the evidence before the court and gave insufficient reasons for not making findings.** This included the judge's conclusions with regard to controlling and coercive behaviour, predicated on the assumption contrary to PD 12J that language cannot form a significant part of the basis of a controlling relationship, and dismissing violent behaviour (throwing objects) as part of a controlling or coercive relationship without explanation. The appeal court found if taken together these behaviours could indeed be found to be part of a pattern of controlling, abusive and coercive behaviour (para. 24).

(3) **The judge placed undue weight on the demeanour of the parties when assessing the evidence.** He failed to give reasons for preferring one party's evidence over another. In concluding *"she gives a description of a woman who is of a highly anxious, it might be said, neurotic disposition,"* made a finding about the appellant's state of mind without forensic expert evidence. The judge failed to consider that the respondent's anxious presentation might be the result of previous abuse by the respondent, and was unsurprising given the failure to apply Part 3A (paras. 25-26).

(4) **The judge failed to take into consideration that the respondent had previously, and repeatedly, been involved with the police in respect of incidents of domestic violence and harassment, and failed to properly assess the police reports and intervention not just with this appellant but other previous partners and female relatives.** A finding that the respondent had pinned the appellant against a wall was made, however this was in the context of a contemporaneous police report of a more extensive assault and no further finding was made. The conclusion that the appellant's description "*goes no further, really, in my view, on analysis, than saying that the relationship had*

its difficulties …" was reached in the absence of a thorough analysis of domestic abuse in this case. Also the judge's comments that the cessation of complaints by the appellant were reassuring or supportive of a decision that there was minimal domestic abuse are "*wholly misconstrued as the most obvious reason there were no further incidents or complaints was that the appellant had fled the family home with C and their location was not known to the Respondent who had remained on conditional police bail himself for another year."* (para. 28) Further the finding the child was not harmed by the respondent, given the judge's approach to the case as a whole, is not safe (para. 29).

(5) **The judge had been wrong to make findings on matters not put to the appellant.** The finding that the appellant had been *"guilty of aggressive behaviour herself, on occasions"* was unsafe given this had not been put to the appellant during the trial, and did not form any part of the respondent's case (para. 30). In addition, after failing to deal with text messages sent by the respondent during the hearing and being addressed in respect of this failure on application for permission to appeal, the judge concluded graphic, sexually explicit and threatening messages such as *"If you don't shut up I will stick my cock up your ass"* were consistent with "*sexting*" and not "*helpful"* despite it not being part of the respondent's case that the texts were "*sexting*," nor it having been put to the appellant during her evidence. The judge had failed to consider the connection of the texts to controlling or coercive behaviour, and the potential relevance in connection with the complaints of sexual assault (para. 31).

(6) **The judge was wrong to allow outdated views on sexual assault and likely victim responses to influence his findings and conclusions, in particular with respect of findings that the appellant had not been raped by the respondent.** This was particularly in regard to the trial judge's astoundingly flawed treatment of **consent**. Russell J considers the judgment and goes on to outline the flawed nature of the judge's approach. In particular, in relying on his view that the appellant had not physically fought off or resisted the respondent, Russell J held that the judge had been "***manifestly at odds with current jurisprudence, concomitant sexual behaviour, and what is***

currently acceptable socio-sexual conduct". (para. 33) Russell J went on to state:

*"37. **This judgment is flawed. This is a senior judge, a Designated Family Judge, a leadership judge in the Family Court, expressing a view that, in his judgment, it is not only permissible but also acceptable for penetration to continue after the complainant has said no (by asking the perpetrator to stop) but also that a complainant must and should physically resist penetration, in order to establish a lack of consent. This would place the responsibility for establishing consent or lack thereof firmly and solely with the complainant or potential victim. Whilst the burden of proving her case was with the Appellant in any counter allegation the burden lay with the Respondent. Indeed it was the Respondent who had brought the case as the applicant in the Family Court, thus the burden of proof did not lie solely with the Appellant. Moreover the judge should have been fully aware that the issue of consent is one which has developed jurisprudentially, particularly within the criminal jurisdiction, over the past 15 years (of which more below)."***

Further, the judge's comment in relation to the appellant not taking immediate action in respect of the first incident to call the police or anyone else (such as seeking medical advice) was wrong:

"38. […] In keeping with his approach thus far the judge had apparently concluded that it is necessary for victims of sexual assault to report the assault or make a contemporaneous report. Yet it is now explicitly accepted that many victims will not do so, out of fear or embarrassment which are based on their cultural, social or religious background and the concomitant pressures, mores or beliefs."

Then in relation to the second incident where the appellant did go to the police to make a complaint the judge criticised impliedly, and to some extent explicitly, the appellant because she had accompanied a friend to the police station to complain about the respondent's aggressive behaviour to that friend, and it was the friend who then raised the incident of sexual assault to the police:

"42. The friend told the Police, as the judge quoted in his judgment (above), "'I asked her what had happened and she said that she had let the [Respondent]

have sex with her as it was easier than saying no.'" This, the judge found, could hardly be said to support a coherent account of rape. This conclusion is obtuse, any decision of consent must include a coherent account (to borrow the judge's own phrase) and consideration of the extent to which the complainant or victim was free to choose and to consent, or to paraphrase the relevant criminal statute (s74 Sexual Offences Act (SOA) 2003), that person has had the freedom and capacity to make that choice. It is arguable, at the very least, that the evidence before the judge was that the Appellant's freedom and capacity to choose had been extinguished or at least gravely compromised."

Russell J went on to quote the trial judge's conclusions and state why they were so flawed:

43. At paragraph 28 of his judgment, which reads "My findings on this occasion, as to both these occasions, is that the sex between the parties carried the consent of both. This was not rape. It may have been that at a point during both occasions of intercourse the mother became both upset and averse to the idea of the intercourse continuing. But if she did so, I emphasise this was something which was usual for her, the product of events in her past and her psychological state in not being able to take physical pleasure from sex. It was not a consequence of any action on the part of the father. Moreover, at no point during these occasions do I find that the mother withdrew consent or conveyed to the father any discomfiture that she was feeling about the intercourse continuing. I cannot even, on this evidence, find that the father was somehow insensitive to the mother's position. I can accept that he would have asked for sex perhaps on a number of occasions before sex commenced, but that is as far as it goes. Given the nature of these allegations I have felt it necessary to set out these detailed findings in respect of it."

44. Thus, the judge had accepted that "at a point during both occasions of intercourse the [Appellant] became both upset and averse to the idea of intercourse continuing. [My emphasis]" *but he continued to reach the conclusion that had the Appellant done so it was not as a consequence of any action on the part of the Respondent because it was* "something that was usual for her, the product of her past and her psychological state in not being able to take physical pleasure from sex." *The judge went to say that* "at no point do I

find that the [Appellant] withdrew consent or conveyed to the [Respondent] any discomfiture that she was felling about intercourse continuing." ***The judge failed to explain the reasons for his findings; as to why, if it was evident to the judge that the Appellant had become averse to sexual intercourse continuing it was not evident to the Respondent; and, secondly, why it was acceptable for the Respondent to insist on sexual intercourse knowing that it was distressing and unwelcome to the Appellant.*** *The evidence that the judge had rehearsed thus far did would not support such a finding nor did he give any or adequate reasons for preferring the evidence of the Respondent, other than the bald comment in paragraph 13 that he had found him to be* "the more convincing witness, giving his evidence in a straight-forward, forthright manner…"*The fact is that this judge had largely relied on his view that the Appellant had not vigorously physically fought off the Respondent.*

45. ***Moreover, the judge did not consider or explain in his judgment why, as it was an accepted fact that the Appellant was unable to take physical pleasure from sex, there was no onus on the Respondent to establish that the Appellant was able to and was freely exercising her right to choose whether or not to participate in sexual intercourse. The logical conclusion of this judge's approach is that it is both lawful and acceptable for a man to have sex with his partner regardless of their enjoyment or willingness to participate."***

- Russell J concluded it could not be lawful or jurisprudentially apposite for the Family Court to take an approach in respect of consent and the need to demonstrate physical resistance that is so much at odds from that which applies in the criminal jurisdiction (see below at paragraph 78 onwards for more on this). The case was remitted for retrial. Importantly, a formal request would be made for those judges who might hear cases involving allegations of serious sexual assault in family proceedings to be given training based on that provided to criminal judges.

76. A vast amount can be learned from this judgment going forwards. The importance of a judge reaching their decision having considered all of the available evidence is clear. The judge's flawed approach to the allegations of serious sexual assault and use of obsolete concepts concerning the issue of consent was extremely worrying and must not

be repeated in the Family Court again. The case generated significant media interest in this regard.

F v M (Appeal: Finding of Fact) [2019]

77. Another fact-finding decision in the context of Children Act proceedings involving a finding of rape was Cobb J's judgment: ***F v M (Appeal: Finding of Fact)* [2019] EWHC 3177 (Fam)**[34]. Unlike the case of ***H v F* [2020]**, it was found that the trial judge had not been misguided as to the law on rape.

- In this decision, a father appealed against a determination of fact made at the conclusion of a fact-finding hearing that the subject child's conception had been as a result of rape. The mother claimed that after a short time engaged in the sexual act, she told the father she did not want him to continue and she did not want him to ejaculate inside her. The father denied that she ever asked him to "stop," and said that prior to the initiation of sexual intercourse they had agreed he would not ejaculate inside of her. He maintained he had accidentally done so. The judge found that in failing to stop and withdraw before ejaculation, the father had raped the mother.
- The appeal was dismissed. The judge had heard evidence from both parties, and formed mixed views about the reliability and truthfulness of both parties. However, she had analysed the contextual evidence, including the communications between the parties, and was particularly struck by the consistency of the references by the mother in text messages to the fact she had pleaded with the father to "stop."
- While the judge may have inadvertently given the impression she was relying on the fact the father ejaculated inside the mother's vagina as part of the proof of rape, her conclusion was founded on the fact that part-way through the sexual act, the mother ceased to consent to the act and made it known to the father she wished him to "stop":

  "27. […] ***In this case, the Judge's conclusion that M had been raped did not , however, depend upon a finding that the M had given conditional consent to penetration (i.e. "on the clear understanding that the man will not ejaculate within her vagina" but that F had made up his mind to do so). The Judge's conclusion was founded on the fact that part-way through the sexual act, M ceased to consent to the act ('stop, stop…') and had made this known to F by***

[34] https://www.familylawweek.co.uk/site.aspx?i=ed205552

requesting that he 'stop'. It is therefore not material to her finding of rape that there had been any discussion about ejaculation before the act of sexual intercourse (if there had been), nor that F had in fact ejaculated inside M's vagina. In short, as soon as M had withdrawn her consent to the sexual intercourse during the act, F's continued penetration of her became a serious sexual assault, which in the criminal law would, within the meaning of the Sexual Offences Act 2003, be rape.

- Finally, the court noted that there are a number of reasons why the circumstances of the child's conception might ultimately be relevant to future child arrangements; it would be important for there to be a determination of if the father's conduct was violent or abusive, and in turn, whether the conduct would likely be relevant in deciding whether or not to make a child arrangements order.

  *"*29. […] *Quite irrespective, therefore, of whether F has committed the offence of 'rape' or is otherwise criminally culpable, there is a range of reasons why the circumstances of N's conception may ultimately be* ***relevant to future child arrangements****. Specifically, it was regarded at an earlier case management hearing (and I agree with this direction) that* ***it would be important for there to be a determination of whether F's conduct towards M in the sexual act by which N was conceived was 'violent or abusive', and in turn whether that conduct would be likely to be relevant in deciding whether to make a child arrangements order*** *(see PD12J FPR 2010, para.4, para.5, and see further para.7 [i.e. does the statutory presumption apply having regard to any incident of domestic abuse?]).*"

Criminal law concepts in family law

Re R (Children) (Care Proceedings: Fact-finding Hearing) [2018]

78. In ***Re R (Children) (Care Proceedings: Fact-finding Hearing)*** **[2018] EWCA Civ 198**[35], the Court of Appeal, having considered the degree to which the Family Court should deploy criminal law concepts in its own evaluation of the same or similar behaviour, held, as a matter of principle, that it was fundamentally wrong for the Family

[35] https://www.bailii.org/ew/cases/EWCA/Civ/2018/198.html

Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based on criminal law principles and concepts.

"62. […] ***The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to those applicable to the prosecution by the State of an individual before a criminal court. The latter is concerned with the culpability and, if guilty, punishment for a specific criminal offence, whereas the former involves the determination facts, across a wide canvas, relating to past events in order to evaluate which of a range of options for the future care of a child best meets the requirements of his or her welfare. Similarly, where facts fall to be determined in the course of ordinary civil litigation, the purpose of the exercise, which is to establish liability, operates in a wholly different context to a fact-finding process in family proceedings. Reduced to simple basics, in both criminal and civil proceedings the ultimate outcome of the litigation will be binary, either 'guilty' or 'not guilty', or 'liable' or 'not liable'. In family proceedings, the outcome of a fact-finding hearing will normally be a narrative account of what the court has determined (on the balance of probabilities) has happened in the lives of a number of people and, often, over a significant period of time. The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established.***"

"65. […] *The extracts from the judgments of Butler-Sloss P and Hedley J helpfully, and accurately, point to the* ***crucial differences between the distinct roles and focus of the criminal court, on the one hand, and the Family Court, on the other, albeit that each may be considering the same event or events within their separate proceedings****. Against that background, it must be clear that* ***criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court. Given the wider range of evidence that is admissible in family proceedings and, importantly, the lower standard of proof, it is at best meaningless for the Family Court to make a finding of 'murder' or 'manslaughter' or 'unlawful killing'. How is such a finding to be understood, both by the professionals and the individual family members in the case itself, and by those outside who may be told of it, for example***

the Police? The potential for such a finding to be misunderstood and to cause profound upset and harm is, to me, all too clear.

66. *Looked at from another angle, if the Family Court were required to deploy the criminal law directly into its analysis of the evidence at a fact-finding hearing such as this,* ***the potential for the process to become unnecessarily bogged down in legal technicality is also plain to see****. In the present case, the judge's detailed self-direction on the law of self-defence, and the resulting appeal asserting that it was misapplied, together with Miss Venters' late but sound observations about the statutory defence of 'loss of self-control', are but two examples of the manner in which* ***proceedings could easily become over-complicated and side-tracked from the central task of simply deciding what has happened and what is the best future course for a child****. It is also likely that the judges chosen to sit on such cases in the Family Court would inevitably need to be competent to sit in the criminal jurisdiction.*

67. *There is no need to labour this point further. For the reasons that I have shortly rehearsed, as a matter of principle,* ***it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts****. As my Lord, Hickinbottom LJ, observed during submissions, 'what matters in a fact-finding hearing are the findings of fact'. Whilst it may not infrequently be the case that the Family Court may be called upon to re-hear evidence that has already been considered in the different context of a criminal prosecution, that evidence comes to the court simply as evidence and it falls to be evaluated, in accordance with the civil standard of proof, and set against whatever other evidence there may be (whether heard by the criminal court or not) for the sole purpose of determining the relevant facts."*

F v M (Appeal: Finding of Fact) [2019] EWHC 3177

79. In this matter (also dealt with *above*), Cobb J relied upon the Court of Appeal in ***Re R (Children) (Care Proceedings: Fact-finding Hearing)*** **[2018]** and said as follows:

"29.*There is a* ***risk in a case such as this****, where the alleged conduct at the heart of the fact-finding enquiry is, or could be, of a criminal nature,* ***for the family court to become too distracted by criminal law concepts****.* ***Although the family court may be tempted to consider the ingredients of an offence, and any defence available, when***

considering conduct which may also represent an offence, it is not of course directly concerned with the prosecution of crime.*"*

JH v MF [2020] EWHC 86

80. As referred to *above*, in the authority of ***JH v MF*** **[2020]** Russell J made the following comments however which may be read as being *contrary* to the decision of the Court of Appeal in ***Re R (Children) (Care Proceedings: Fact-finding Hearing)*** **[2018]**:

"47. ***While a trial in the Family Court cannot, and must not, set out to replicate a trial or to apply, or seek to apply, Criminal Law or statute it cannot be lawful or jurisprudentially apposite for the Family Court to apply wholly different concepts or to take an approach wholly at odds from that which applies in the criminal jurisdiction when it comes to deciding whether incidents involving sexual intercourse, whether vaginally penetrative or not, and other sexual acts including oral penetration, penetration by an object or in other form were non-consensual. Non-consensual sexual intercourse was considered lawful within a marriage until as late as 1992 (Cf. R [1992] 1 AC 599) it has not been lawful in any other sphere for generations. There is no principle that lack of consent must be demonstrated by physical resistance, this approach is wrong, family judges should not approach the issue of consent in respect of serious sexual assault in a manner so wholly at odds with that taken in the criminal jurisdiction (specifically the changes in place since SOA 2003 and subsequent amendments). Serious sexual assault, including penetrative assault, should be minimised as an example of coercive and controlling behaviour (itself a criminal offence) although such behaviour may form part of the subordination of a potential victim's will (see the guidance set out at paragraphs 19 and 20 above).***

48. *To consider the relevant approach to be taken reference should be made to the statutory provisions in respect of consent; s 74 of the Sexual Offences Act (SOA) 2003 provides that "'Consent' (for the purposes of this Part – my parenthesis) a person consents if he agrees by choice, and has the freedom and capacity to make that choice." There are circumstances in criminal law where there can be evidential or conclusive presumptions that the complainant did not consent set out in ss75 & 76 which, respectively, concern the use or threat of violence by the perpetrator and the use of deception; neither of which preclude reliance on s74 (Cf. Blackstone's B3.46 2020 ed.)*

49. *To quote from Blackstone's Criminal Practice [2020 at B3.28] where the absence of consent is considered it is said "the definition in s74 with its emphasis on free agreement, is designed to focus upon the complainant's autonomy. It highlights the fact that a complainant who simply freezes with no protest or resistance may nevertheless not be consenting. Violence or the threat of violence is not a necessary ingredient. To have the freedom to make a choice a person must be free from physical pressure, but it remains a matter of fact for a jury as to what degree of coercion has to be exercised upon a person's mind before he or she is not agreeing by choice with the freedom to make that choice. Context is all-important."* ***There can be no reason why this approach should not be followed in the Family Court, whilst applying a different standard of proof. The deleterious and long-term effects on children of living within a home domestic abuse and violence, including serious sexual assault, has been accepted for some years, as is the effects on children's welfare, and their ability to form safe and healthy relationships as adults, if their parents or carers are themselves subjected to assault and harm****."*

Re H-N [2021]

81. So where are we left post ***Re H-N*** **[2021]**?

a. The Court of Appeal concluded that there was a clear distinction between judges needing to have a sound understanding of the impact of abuse and being drawn into an analysis of factual evidence based on criminal law principles (para. 65).

b. The Court of Appeal concluded that the Family Courts should avoid analysing evidence of behaviour by the direct application of the criminal law. What mattered was determining how the parties had behaved to each other and their children, not whether that behaviour came within the definition of a criminal act (para. 65).

c. The law as stated by McFarlane and Hickingbottom LJJ in ***Re R (Children) (Care Proceedings: Fact-finding Hearing)*** **[2018]** was an authoritative statement of the law, and insofar as the judgment in ***JH v MF*** **[2020]** differs the Court of Appeal's finding in ***Re R*** is binding and must prevail over the High Court (paras 65-66).

d. Judges would make findings on the balance of probabilities and would not decide whether a criminal offence had been proved to a criminal standard (para. 73).

e. Terminology used should not give an impression that the abusive parent had been convicted of a criminal offence (para. 73).

82. Following on from Russell J's comments in ***JH v MF*** **[2020]**, the Court of Appeal referred to the progress has been made by the Judicial College in devising a free standing sexual assault awareness training programme for judges:

> "67. *Following the judgment of Russell J and at the request of the President, the Judicial College devised a free standing sexual assault awareness training programme for Family judges. The programme draws heavily on the successful 'serious sexual assault' programme for criminal judges. Since July 2020, it has been a mandatory requirement for all judges who hear any category of Family cases to undertake this programme. The programme, which is under constant review, includes elements in respect of psychological reactions to sexual assault and trauma, and has the benefit of contributions having been made by a number of victims of sexual assault discussing the impact that an attack has had upon them. In addition to the more general training in relation to domestic abuse which is already in place for Magistrates, bespoke training suitable for the work they undertake in respect of sexual assault and trauma is in the process of being developed.*
>
> 68. *This bespoke Family training feeds in turn into, and is further developed within, the extensive training programmes that are run in relation to domestic abuse by the Judicial College for the fee paid and salaried judges. These courses have been in place for some years and play a key role in both induction courses for newly appointed Family judges and continuation courses run for Family judges who are already in post."*

83. The court noted that the Family Court should be concerned with how the parties behaved and what they did with respect to each other, rather than whether such behaviour fits into the definition of a serious crime under criminal law. Nonetheless, that is not to say Family Courts and parties who appear in them should shy away from using words in the manner generally used in ordinary speech (e.g. 'rape' for non-consensual penetrative sex) as this would produce a wholly artificial approach…

"71. Hickinbottom LJ observed during the hearing in Re R, 'what matters in a fact-finding hearing are the findings of fact' [paragraph 67]. The Family court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not, come within the strict definition of 'rape', 'murder', 'manslaughter' or other serious crimes. Behaviour which falls short of establishing 'rape', for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to 'not guilty' in the family context. For example in the context of the Family Court considering whether there has been a pattern of abusive behaviour, the border line as between 'consent' and 'submission' may be less significant than it would be in the criminal trial of an allegation of rape or sexual assault.

72. ***That is not to say that the Family courts and the parties who appear in them should shy away from using the word 'rape' in the manner that it is used generally in ordinary speech to describe penetrative sex without consent. Judges are not required to avoid using the word 'rape' in their judgments as a general label for non-consensual penetrative sexual assault; to do otherwise would produce a wholly artificial approach. The point made in Re R and now in this judgment is different; it is that Family courts should avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or not proved****. A further example can be drawn where the domestic abuse involves violence. The Family Court may well make a finding as to what injury was caused, but need not spend time analysing whether in a criminal case the charge would allege actual bodily harm or grievous bodily harm."*

10. Proposals for Change

84. The Court of Appeal in ***Re H-N*** expressed there were **limits on the scope of the general guidance it could give**: "*We must make clear at the outset that there is a limit to the extent to which we can give general guidance. In part, this is because there are various initiatives already in train, to which we refer in paragraphs (19-20) below. But it is also because there is plainly and properly a limit to what a constitution of the Court of Appeal, determining four individual appeals, can, and as a matter of law should, say about issues which do not strictly arise in any of those appeals*." (para. 2)

85. The Court of Appeal emphasised at present the MoJ is moving to implement '**The Harm Panel Report**'; the **Domestic Abuse Bill** is before Parliament; and those within the judiciary, Cafcass and the legal and social work profession have contributed to the President of the Family Division's '**Private Law Working Group**' ('PLWG'). (para. 19)

86. In respect of The Harm Panel Report in particular, the Court of Appeal noted the MoJ has started work on how the proposed new 'investigative and problem solving' approach to the Family Court can be effected and, as part of its recommendations, pilots of **Integrated Domestic Abuse Courts (IDAC)** are being designed. (para. 20)

87. As a result the CoA said:

> "21. … ***It would be impossible and inappropriate for us, as judges in the Court of Appeal, following a short hearing of four appeals, to lay down comprehensive guidance in this judgment aimed at resolving (or even identifying) the many difficulties that are said to exist and which are the very subject of these other more extensive endeavours***…
>
> ***…*** 22***. Our focus must therefore necessarily be limited to offering guidance on those matters which are most directly relevant to the court process***."

88. This section will consider work of **The Private Law Working Group**, **The Harm Panel Report** and **Domestic Abuse Act** in turn.

The Private Law Working Group[36]

89. The Private Law Working Group (convened by Mr Justice Cobb at the invitation of Sir Andrew McFarlane) published its second report on 12 March 2020. The final report was said to await the publication of the MoJ Harm Report.

90. The report emphasised the need for "fundamental, long term and sustained change" (p.4) in the way private law cases are resolved.

91. The report made a number of observations and recommendations: those most relevant to the issue of domestic abuse are as follows:

Interim Contact

92. It is important that courts shouldn't "*rush to judgment"* on re-establishing contact before assessing why it is not happening; the resident parent and/or the child may have entirely appropriate reasons for stopping contact.

93. Consultees had suggested that services to support contact in private law cases should mirror those in public law, for example the provision of contact centres (at an affordable cost). However, there is no clear source of funding for such a provision.

94. Delay has a significant impact on parents and children. Courts should ensure that urgent cases are processed in a timely way. The reality is however that applications exceed the current capacity of the court and Cafcass.

95. PLWG considered whether excessive delay was caused by the practice of routinely ordering s7 reports at the end of fact-finding hearings. Subject to the view of the Harm Report, it may be possible for a note of findings to be sent to Cafcass, to respond within 21 days with a 'pathway' for the future; the case would be listed for a hearing 28 days following the fact finding.

Tracking of cases

96. The PLWG first report had recommended triaging of cases onto tracks depending on complexity; procedure would vary as to the track, aiming to provide a proportionate approach to resolving cases. On reflection, the PLWG were concerned that too few cases would fall into the lowest track for it to be worthwhile. They have not drawn up a

[36] Private Law Working Group, "Private Law: Family Disputes", Second Report to the President of the Family Division, https://www.judiciary.uk/wp-content/uploads/2020/04/PRIVATE-LAW-WORKING-GROUP-REPORT-1.pdf

definitive list of factors which determine which cases would go onto which tracks. Nevertheless, depending on the Harm Panel report, some form of 'tracking' should be piloted.

Support services

97. PLWG expressed concern that nothing in the Domestic Abuse Bill acknowledged the need for children affected by domestic abuse to have specialist support.

98. Separating families should be provided with additional support services. Consultees provided widely diverging responses on who should provide these services. Further discussion is needed: a priority is to develop some properly costed models and make a bid for funding.

99. There should be greater use of the court's power to make a direction in a final order that a parent should attend a SPIP, as an Activity Condition under CA 1989 s11C.

Children and vulnerable witnesses

100. The proposals of the 2015 Working Group on Vulnerable Witnesses and Children should be implemented in full: implementation has been slow to happen.

101. A fresh approach is needed to the evidence of children, including capturing their wishes and feelings.

102. A 'child impact statement' could be trialled, intended to assist parents to see from the child's perspective what impact the proceedings have had on them.

Police disclosure

103. There is a "*pressing need for a uniform, clear code for the provision of police documents in private law proceedings".* Significant delay can be caused by the non-provision of police disclosure.

104. Many litigants are in person and unable to afford costly fees: there should be a way of providing police disclosure without cost to the litigant.

105. The President of the Family Division should take up the invitation of the NSPCC to conduct a review of the existing police disclosure protocol.

The Harm Report[37]

106. This report, commissioned by the MoJ, was published in June 2020. Its focus was the family court's handling of domestic abuse in private law children proceedings. There was a public consultation which yielded over 1,200 responses. A literature review was also conducted and has been published separately.

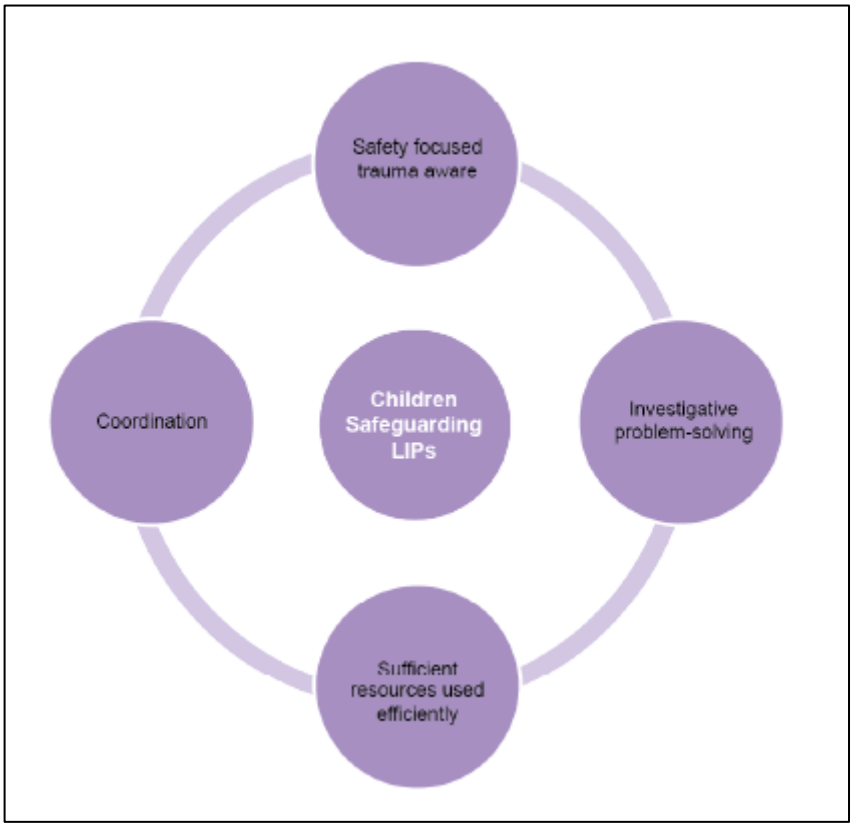
107. The panel identified 4 themes in the evidence reviewed:

a. **Resource constraints** – resources were inadequate to keep up with increasing demand in private law children proceedings, and more parties are coming to court unrepresented
b. **Pro-contact culture** - respondents felt that courts placed undue priority on ensuring contact with the non-resident parent, which resulted in systemic minimisation of allegations of domestic abuse
c. **Working in silos** - submissions highlighted differences in approaches and culture between criminal justice, child protection (public law) and private law children proceedings, and lack of communication and coordination between family courts and other courts and agencies working with families, which led to contradictory decisions and confusion
d. **An adversarial system** - with parents placed in opposition on what is often not a level playing field in cases involving domestic abuse, child sexual abuse and self-representation, with little or no involvement of the child

[37] Ministry of Justice, "Assessing risk of harm to children and parents in private law children cases", https://www.gov.uk/government/consultations/assessing-risk-of-harm-to-children-and-parents-in-private-law-children-cases

108. The panel endorsed these concerns [171], holding that these are "*four overarching barriers to the family court's ability to respond consistently and effectively to domestic abuse and other serious offences".* Their specific recommendations are aimed at addressing these broader issues.

109. Principles of the system: should be designed with the needs of litigants in person, and domestic abuse and other safeguarding concerns, as central considerations; such procedures would then also be capable of dealing with the most straightforward cases. (This is a difference from the PLWG approach of different procedural 'tracks' for cases of differing complexity/levels of risk to children).



110. A Statement of Practice should be devised, and promoted by the President of the Family Division. This should include:

a. Allegations of domestic abuse should be dealt with respectfully and explored fully;
b. Court process and facilities should provide safety and security for all;
c. Delay should be minimised but safety is the priority;

d. Courts and professionals will be alert to those seeking to use court processes in an abusive and controlling way;
e. Child's wishes will be heard;
f. If findings of domestic abuse are not made, any underlying reasons for the allegations being made will be sensitively addressed;
g. The ongoing safety of CAOs will be kept under review; if children feel unsafe on court-ordered contact then this will be assessed in a child-focused way.

111. It may be that "*some existing binding or persuasive authorities... may need to be revisited"*.

112. The presumption of parental involvement should be urgently reviewed. The Panel felt that it "*reinforces the pro-contact culture and detracts from the court's focus on the child's individual welfare and safety"*. The Panel was not persuaded by any specific proposals for amendment, which should be explored further in a review.

113. A reformed Child Arrangements Programme should be piloted and delivered. It should aim to be non-adversarial, problem-solving and with judicial continuity as a key feature. This should co-ordinate with the Government's manifesto commitment to pilot integrated domestic abuse courts, and with the work of the PWLG. The programme should be comprised of three stages:

1. An initial 'investigation and information exchange phase' – to include information-gathering from professionals already working with the family. Parents would be provided with information, including about domestic abuse. Parents and children should be consulted.
2. An 'adjudication phase' – judge led. Fact finding would take place during this stage.
3. A 'follow up phase' – proactive follow up, three to six months after orders are made.

114. The voice of the child should be heard more fully: the Vulnerable Witnesses and Children Working Group 2015 recommendations should be implemented in full, and different options for hearing from children, and giving them advocacy and support, should be piloted within the reformed Child Arrangements Programme.

115. Safety and security at court: the Domestic Abuse Bill should include additional provisions for special measures in family courts for (alleged) victims of domestic abuse, modelled on those in the criminal jurisdiction; direct cross-examination by alleged perpetrators should be prohibited; a framework of key entitlements for adults and children involved in family proceedings should be published, again modelled on the Code of Practice in the criminal jurisdiction (for example, alleged victims should be offered familiarisation visits); where there are allegations of domestic abuse, special measures should be the norm; PD3AA should be applied proactively, in a trauma-aware way; consideration should be given for the alleged perpetrator to give their evidence remotely; as a matter of course, IDVAs and mental health support workers should be allowed to accompany the party they are supporting into court; an model should be developed and its cost assessed for supporting both alleged victims and alleged perpetrators in the family court; section 91(14) should be amended to remove the exceptionality requirement, making it easier for the family court to prevent abusive applications.

Getting to court	• Victims informed about special measures and encouraged to use them • Offered pre-adjudication familiarisation visits • Access to pre-adjudication counselling and support
Court building	• Separate entrances and safe waiting areas • Court staff well trained and effective arrangements in place to ensure they are aware of the needs of parties • Robust response to breaches of safety and security
In the courtroom	• Move to a more investigative, problem-solving approach • Proactive and trauma-aware identification of vulnerability • Special measures such as screens and video link readily available • Effective limitations on abusive cross examination • Understanding of effects of trauma on how victims present and give evidence • Support workers permitted in courtroom • Inequality of arms addressed
Repeat applications	• Judicial continuity, consistent approach • Proactive identification of abuse via court proceedings • More effective use of section 91(14) orders to prevent further abuse

116. Communication and co-ordination: mechanisms should be put in place at a national and local level to ensure better communication between the family courts and criminal courts, police, MARACs and other perpetrator management panels, statutory child protection services; specialist domestic abuse agencies; and non-statutory family support and therapeutic services. Urgent consideration should be given to how police

disclosure may be funded where parties are not legally aided and cannot afford to fund it themselves (a recommendation in common with the PLWG).

117. Additional investment recommended for:

a. The court, including judicial resources, and administrative support;
    i. There should be less delay
b. Cafcass;
    i. Guardians should be appointed in more cases
c. The court estate
    i. Including improved facilities for special measures e.g. separate waiting rooms
d. Legal aid;
    i. This should be made available to alleged perpetrators as well as alleged victims in the interests of the child
    ii. Evidential requirements for alleged victims of abuse should be reviewed to ensure barriers are not in place
    iii. Parties should not be faced with administrative barriers to accessing legal aid
e. Funding for specialist assessments;
f. Domestic Abuse Perpetrator Programmes;
g. Supervised contact centres;
h. Educational and therapeutic provision relating to domestic abuse for parents;
i. Specialised support for adults and children.

118. Domestic Abuse Perpetrator Programmes should be reviewed to ensure they are effective and consistent with the overall principles recommended by the Panel; they should be more widely available; parents should be able to self-refer; outcomes from this review should form the basis of a new commissioning specification.

119. Training of all participants in the family justice system, to include a "*cultural change programme"* to embed reform. This training should include topics such as the impact of domestic abuse on children, early child development, child sexual abuse and prevalence rates, trauma and its effect, and what constitutes behaviour change in perpetrators of domestic abuse.

120. Social Worker Accreditation due to significant weaknesses identified in social workers' knowledge and skills.

121. Monitoring and oversight: a national monitoring team should be established within the office of the Domestic Abuse Commissioner; it should report regularly on the family court's performance in protecting children and victims from domestic abuse; family courts should be included in reviews following the death or serious harm of a child, or a domestic homicide.

122. Further research commissioned by the Ministry of Justice into the operation of the current Child Arrangements Programme, PD12J, and s91(14); pilots of the revised Child Arrangements Programme should be robustly evaluated; the ongoing Child Safeguarding Practice Review should undertake a review of domestic abuse cases in private law proceedings, to include a 'baseline' in the next 12 months and a 'review' 2-3 years in the future.

The Domestic Abuse Bill 2021

123. The Domestic Abuse Bill became law on 29 April 2021, and is therefore now the Domestic Abuse Act ('the Act').

124. Its implementation is yet to be confirmed, but it is currently predicted to come into force during 2021/2022.

Prohibition on direct cross-examination

When will cross-examination be prohibited?

125. Section 65 of the Act amends the Matrimonial and Family Proceedings Act 1984 ('MFPA 1984'), adding sections 31Q onwards in relation to cross examination.

126. These new sections automatically prohibit cross-examination where:

a. A party has been convicted of, given a caution for, or charged with a 'specified offence'; or
b. An on-notice protective injunction is in force between the parties; or
c. Where 'specified evidence' is adduced that a party has carried out domestic abuse.

127. 'Specified offences' and 'specified evidence' will be defined in upcoming regulations. Based on previous drafts before Parliament, the former will likely include violent

offences, sexual offences, offences of domestic abuse / coercive control and possibly harassment and / or breaches of DAPOs.

128. It is notable that direct cross examination of an alleged victim by an alleged perpetrator of a sexual offence is prohibited in the criminal courts. Instead, an advocate is provided to undertake the cross examination[38]. Given domestic abuse cases in the family courts often involve allegations of sexual nature, it will be interesting to see whether the Domestic Abuse Act follows the approach of the criminal courts in this respect.

129. As well as the automatic prohibitions listed above, there is a provision which gives the court discretionary power to prohibit a party from cross-examining even if none of the above applies. This might be particularly relevant in cases of domestic abuse which do not meet the mandatory threshold listed above, and/or where a party/witness is vulnerable for some other reason. This discretionary power apply where:

a. the quality of evidence given by the witness is likely to be diminished if the cross-examination is conducted by the party in person, and it would be likely to be improved if the prohibition was imposed; or
b. the cross-examination by one party in person would be likely to cause significant distress to the witness or another party and that distress is likely to be more significant than if the cross examination were conducted some other way.

130. This discretionary power can either be initiated by the judge or requested by the parties.

131. In determining their decision, the judge must consider:

a. the views of the witness / proposed questioning party;
b. the nature of the questions likely to be asked, having regard to the issues in the case;
c. any behaviour findings in these or other proceedings against either the witness or proposed questioning party;
d. any behaviour by the party at any stage of the case, both generally and in relation to the witness / party; and
e. any relationship (of whatever nature) between the witness and the party.

[38] S.34 Youth Justice and Criminal Evidence Act 1999

132. **The Domestic Abuse Act therefore has not directly addressed any limitation to cross examination on sexual history in domestic abuse cases.** Though this is something which the court can limit and/or prevent by virtue of the discretionary power above, this does not go as far as the statutory restrictions imposed in the criminal courts[39].

If cross-examination is prohibited, what are the alternatives?

133. The court must first consider whether there are satisfactory alternative means for the witness to be cross-examined or of obtaining evidence that the witness might have given under cross-examination in the proceedings.

134. If there are not satisfactory alternative means, the court must invite the prohibited party to arrange, by a specified date, for a qualified legal representative to act for them for the purpose of cross-examining the witness.

135. If no representative has been appointed by the party by the specified date, the court itself must consider whether to appoint a qualified legal representative to represent the interests of the party. Once again, if the representative is appointed, their remit is limited to cross-examining only.

136. Whilst these alternatives avoid the problems outlined above with regards to judges undertaking questions, they do raise issues of their own[40]:

a. Whether it is practicable for a representative to participate solely for the purposes of cross-examination. This is likely to make it much more difficult for representatives to take instructions, understand and put their client's case.
b. It does nothing to lessen the client's vulnerability at other points of the hearing, which may also be significantly distressing. This may however be alleviated by special measures, depending on their efficacy.

Special Measures

137. Section 64 of the Act creates a presumption where a party or witness is or is at risk of being a victim of domestic abuse from a member of their family or a witness or party in

[39] S.41 Youth Justice and Criminal Evidence Act 1999
[40] http://www.transparencyproject.org.uk/domestic-abuse-act-2021-what-does-it-mean-for-family-courts-and-the-people-using-them/?fbclid=IwAR0rcNRMjwva-1ytqt7iCwfLCKdPiaDwRpDzi4GCPIBVcE98OlOpa7R7Xms

the proceedings, that the quality of their evidence and / or their participation as a party is likely to be diminished by reason of vulnerability.

138. As explained above, PD3AA does already caters for this, however the key difference is that a presumption now applies – parties will no longer have to justify their eligibility.

Barring Orders

139. Section 91(14) of the Children Act 1989 allows the court to prevent a parent making further applications without first obtaining permission from the court to do so. Given these 'barring orders' are such an intrusion into the right of party to bring proceedings, they are used as a last resort[41]. This is typically where the respective parent has made repeated, vexatious or unmeritorious applications.

140. The Act will amend this to allow the court to make a barring order where it is satisfied that the making of an application would put the child or another 'relevant individual' at risk of harm. Though this was technically permitted under existing law, the now explicit provision is likely to encourage parties to make such applications.

Domestic Abuse Protection Orders ('DAPO')

141. These are a similar to two existing orders - the Domestic Violence Protection Orders ('DVPO') and the Non-Molestation Order ('NMO').

DAPO vs. DVPO

142. Like the DVPO, DAPOs allow the police and magistrates' courts to put protective measures in place in the immediate aftermath of a domestic violence incident to protect the victim even if there is insufficient evidence to charge the perpetrator.

143. There are, however, some key differences which should make DAPOs a more protective tool that DVPOs:

a. A DVPO can last a maximum of 28 days, whereas a DAPO can last indefinitely;
b. The DAPO scheme can also be used in Family Courts, either when initiated by the victim or the Judge.

[41] See *Re P* [2000] Fam 15 for further guidance as to the making of barring orders.

c. A suspected breach of a notice or order is arrestable (an officer needs reasonable ground to believe there has been a breach and does not need a warrant);
d. A breach of a DAPO is a criminal offence, punishable by a maximum sentence of 5 years in prison.

DAPO vs. NMO

144. The conditions for a DAPO are similar to that of a NMO. A DAPO can be made where a court finds, on the balance of probabilities, there has been:
    a. 'Abusive behaviour'; and
    b. The parties are 'personally connected'; and
    c. 'It is necessary and proportionate to protect the victim from domestic abuse, or the risk of domestic abuse'

145. Whereas the powers of NMOs are solely prohibitive in nature, DAPOs can also impose mandatory requirements. That is, they can order a person to actively do something (for example, wear a tag), rather than just telling them not to do something (for example, not use or threaten violence).

Where does that leave DVPOs and NMOs?

146. The Act will repeal the former DVPO scheme, but it is not clear whether it will also repeal the parts of the Family Law Act 1996 which deal with NMOs. This is strange as DAPOs seem to effectively do everything an NMO can do, and more.

147. The Transparency Project highlights a confusing passage of the Government's DAPO factsheet[42], which states that NMOs will: "remain in place so that they can continue to be used in cases which are not domestic abuse-related, such as cases of stalking or harassment where the perpetrator is not a current or former intimate partner or a family member."

148. This is confusing because:
    a. NMOs are only available in cases of 'associated persons', which in practice is broadly the same as current or former intimate partners or a family members.
    b. Stalking and/or harassment can be related to, or part of, domestic abuse.

[42] https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-protection-notices-orders-factsheet

149. Statutory guidance is due, which is meant to clarify how DAPOs will fit into the existing legal framework, and therefore will hopefully elucidate these points.

11. Widening the Lens

Domestic Abuse and the Hague Convention

150. As mentioned above, PD12J applies only to cases concerning child arrangements, yet allegations of domestic abuse span the broad spectrum of cases before the family courts. An example of such cases not captured by PD12J are those concerning child abduction governed by The 1980 Hague Convention ('the 1980 Convention').

151. The 1980 Convention was designed to protect children from the harmful effects of wrongful removal or retention and establish procedures to ensure the prompt return of abducted children to the State of their habitual residence, as well as to secure protection for rights of access.

152. Under the 1980 Convention, if an application is brought within 12 months of the removal and the removal is demonstrated as wrongful, the court must order a return unless one of the statutory defences can be made out.

153. One of these defences, article 13(b) is known as the "grave risk exception". This provides:

> *"[1] Notwithstanding the provisions of the preceding Article [12], the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –*
>
> *[…]*
>
> *b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."*

154. This defence has been used increasingly in recent years, prompting the Hague Conference of Private International Law (HCCH), to develop a guide to good practice on its interpretation[43].

155. This "grave risk" can include claims of domestic abuse, either directed at the child, or at the respondent with a corollary impact on the child. In order for the defence to be

[43] https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf

borne out it is imperative that the child is the focus of the defence in the sense that the harms, if demonstrated, must be shown to impact the child.

156. The demonstration of this to the court can be particularly challenging given the summary nature of Hague proceedings placing limitations on the amount and availability of evidence before the court. This particularly applies to oral evidence. Indeed, in ***Re E (Children) (Abduction: Custody Appeal)*** **[2011] UKSC 27** at [32] the Supreme Court stated "it will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination"[44].

157. Instead, the Supreme Court at (para. 36) in ***Re E*** **[2011]** *r*ecommended the following approach to the Article 13(b) defence where disputed allegations are made:

> *"There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues."*

158. In practice, this means fact-findings in cases involving the 1980 Convention are few and far between, even in cases of alleged domestic abuse.

159. Fact-findings may be conducted where allegations are made which are capable of establishing a grave risk, and the purported protective measures offered are insufficient to ameliorate that risk. One example is ***DT v LBT (Abduction: Domestic Abuse)*** **[2010] EWHC 3177 (Fam)** where Mr Justice Peter Jackson described at [15] the approach taken to the hearing as having been required "*to establish the necessary factual conclusions on the issues raised by the mother*", in circumstances where there were

[44] https://www.bailii.org/uk/cases/UKSC/2011/27.html

"*fundamental discrepancies in the parties' accounts, and in particularly the disputed allegations of serious domestic violence"*.

160. This, in addition to the absence of the applicability PD12J, demonstrates how differently cases involving alleged domestic abuse can be treated in the family courts.

Domestic Abuse and Public Law

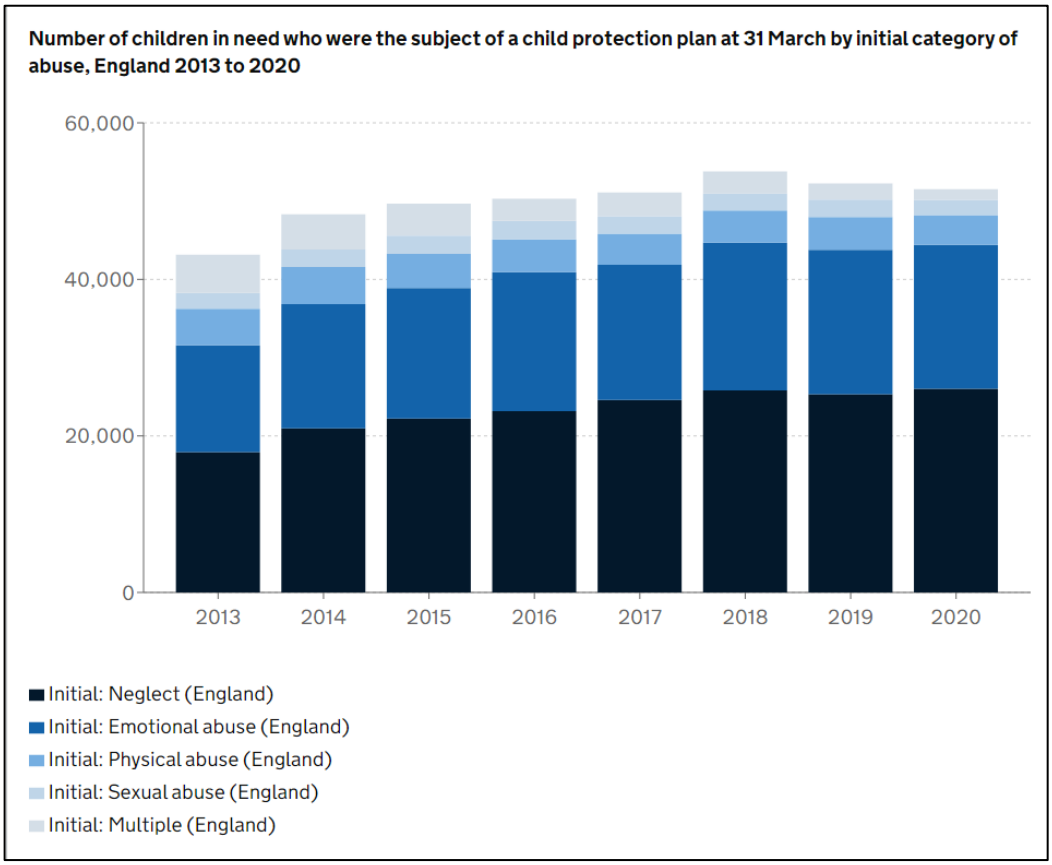
161. S120 of the **Adoption and Children Act 2002** (implemented 31 Jan 2005) brought about a change to the statutory definition of harm in S31(9) **Children Act 1989** to include "*impairment suffered from seeing of hearing the ill-treatment of another"*. Public law threshold can be established directly by means of the child's exposure to domestic abuse.

162. Domestic abuse has become an increasingly common reason for statutory child protection agencies to be involved with families.

163. Significantly more children are being given Child Protection Plans under the category of 'Emotional Abuse', which is the category commonly used when domestic abuse is the main concern. 'Emotional Abuse' registrations increased proportionally more than any other category between 2013 and 2020:[45] there was a 74% rise. ('Neglect' rose 69%; 'Physical Abuse' fell 18%; 'Sexual Abuse' fell 3%.)

164. The London Child Protection Procedures Threshold document indicates that children whose carer "is a victim of domestic abuse which has taken place on a number of occasions" may be 'children in acute need' requiring Tier 4 statutory child protective services. 'Domestic violence' is the most common risk/need factor identified in child assessments.[46]

[45] https://explore-education-statistics.service.gov.uk/find-statistics/characteristics-of-children-in-need/2020#dataBlock-7ce027d2-7cbb-46da-8c60-08d884b70554-tables
[46] https://explore-education-statistics.service.gov.uk/find-statistics/characteristics-of-children-in-need/2020#dataBlock-7ce027d2-7cbb-46da-8c60-08d884b70554-tables



165. A significant proportion of parents who contact Family Rights Group for advice give domestic abuse is a reason that Children's Services are involved: 24% of all callers and 68% of mothers[47].

166. The latest three-year analysis of Serious Case Reviews into children who die or are seriously harmed following experiences of abuse or neglect found that "the most prominent" of all the many risk factors identified is "the ongoing risk posed by situations of domestic abuse". The authors comment that "living with domestic abuse is always harmful to children, and it is rightly seen as a form of child maltreatment in its own right" (p.77).[48]

'Significant harm' or just 'harm'?

167. ***Re MA (Children)*** **[2009] EWCA Civ 853** emphasises the need for courts to need to consider carefully the level of harm experienced by children living in a household where there is abuse of others. Ward LJ noted that this case was "*the first time this Court has*

[47] https://www.wrc.org.uk/blog/domestic-abuse-draft-principles-family-rights-group

[48] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869586/TRIENNIAL_SCR_REPORT_2014_to_2017.pdf

had to consider when the dividing line between harm and significant harm is established" (para. 48).

168. The care proceedings involved 4 children: three biological children of the parents (M, S and H) and another child who had lived with the parents for several months (A). The parents had come to the UK from Pakistan; their asylum claim had been rejected. The judge made a number of findings about the parents' treatment of A: they screamed at her, they threatened to set a dog on her, the father beat her on a number of occasions for not eating her food properly, they failed to give her any parental love and affection despite being in loco parentis [21]. The judge also made a number of findings of physical ill-treatment of M, then aged 2, including that the mother had kicked her on the leg, the father had hit her to the right side of the face.

169. The judge had found that S had been exposed to the ill-treatment and neglect suffered by A, but that this did not amount to harm, much less significant harm; the physical ill-treatment of M was harm, but not significant harm.

170. The Guardian appealed, supported by the Local Authority. A majority of the Court of Appeal (Wilson LJ dissenting) dismissed the Guardian's appeal.

171. In relation to the relevance of the treatment of A: A had been removed from the home before protective measures were taken in respect of the other children. It had been open to the judge not to conclude that the other children would be treated in such a way in the future as likely to cause significant harm; there was "*good evidence"* before him that "*the parents' biological children are treated differently"* (para. 43).

172. Article 8 informs its meaning "*and serves to emphasise that there must be a "relevant and sufficient" reason for crossing the threshold"* (para. 54).

> *"*54. *Given the underlying philosophy of the Act, the harm must, in my judgment, be significant enough to justify the intervention of the State and disturb the autonomy of the parents to bring up their children by themselves in the way they choose. It must be significant enough to enable the court to make a care order or a supervision order if the welfare of the child demands it."*

173. Whether physical ill-treatment constitutes significant harm depends on the context: "*Slaps and even kicks vary enormously in their seriousness. A kick sounds particularly unpleasant, yet many a parent may have nudged their child's nappied bottom with their foot in gentle play, without committing an assault. Many a parent will have slapped their child on the hand to make the point that running out into a busy road is a dangerous thing to do. What M alleged, therefore, was not necessarily indicative of abuse. It will all depend on the circumstances*" (para. 39).

174. Ward LJ endorsed the observations of Munby J in ***Re K: Local Authority v N and others*** **[2007] 1 FLR 399** that:

> *"The task of the court considering threshold for the purposes of s 31 of the 1989 Act may be to evaluate parental performance by reference to the objective standard of the hypothetical 'reasonable' parent, but this does not mean that the court can simply ignore the underlying cultural, social or religious realities. On the contrary, the court must always be sensitive to the cultural, social and religious circumstances of the particular child and family. And the court should, I think, be slow to find that parents only recently or comparatively recently arrived from a foreign country – particularly a country where standards and expectations may be more or less different, sometimes very different indeed, from those with which are familiar – have fallen short of an acceptable standard of parenting if in truth they have done nothing wrong by the standards of their own community."*

175. Ward LJ also endorsed the comments of Hedley LJ in **Re L (Care: Threshold Criteria) [2007] 1 FLR 2050**, with one exception: that he was wrong to suggest that the threshold of significant harm may be comparatively low (para. 51).

> *"[50] What about the court's approach, in the light of all that, to the issue of significant harm? In order to understand this concept and the range of harm that it's intended to encompass, it is right to begin with issues of policy. Basically it is the tradition of the UK, recognised in law, that children are best brought up within natural families. Lord Templeman, in Re KD (A Minor: Ward) (Termination of Access) [1988] 1 AC 806, [1988] 2 FLR 139, at 812 and 141 respectively, said this:*

'The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature.'

There are those who may regard that last sentence as controversial but undoubtedly it represents the present state of the law in determining the starting point. It follows inexorably from that, that society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.

[51] That is not, however, to say that the state has no role, as the 1989 Act fully demonstrates. Nevertheless, the 1989 Act, wide ranging though the court's and social services' powers may be, is to be operated in the context of the policy I have sought to describe. Its essence, in Part III of the 1989 Act, is the concept of working in partnership with families who have children in need. Only exceptionally should the state intervene with compulsive powers and then only when a court is satisfied that the significant harm criteria in s 31(2) is made out. Such an approach is clearly consistent with Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Article 8(1) declares a right of privacy of family life but it is not an unqualified right. Article 8(2) specifies circumstances in which the state may lawfully infringe that right. In my judgment, Art 8(2) and s 31(2) contemplate the exceptional rather than the commonplace. It would be unwise to a degree to attempt an all embracing definition of significant harm. One never ceases to be surprised at the extent of complication and difficulty that human beings manage to introduce into family life. Significant harm is fact specific and must retain the breadth of meaning that human fallibility may require of it. Moreover, the court recognises, as Lord Nicholls of Birkenhead pointed out in Re H and others that the threshold may be comparatively low. However, it is clear that it must be something unusual; at least something more than the commonplace human failure or inadequacy."

Level of analysis

176. The courts should analyse any alleged link between domestic violence and harm to a particular child.

177. Munby P, in ***Re A* [2015] EWFC 11, [2016] 1 FLR 1** endorsed the comments of HHJ in ***North East Lincolnshire Council v G & L* [2014] EWFC B192**, emphasising the need to jump too quickly between the presence of domestic violence and harm to a child.

> *"I deplore any form of domestic violence and I deplore parents who care for children when they are significantly under the influence of drink. But so far as Mr and Mrs C are concerned there is no evidence that I am aware of that any domestic violence between them or any drinking has had an adverse effect on any children who were in their care at the time when it took place. The reality is that in this country there must be tens of thousands of children who are cared for in homes where there is a degree of domestic violence (now very widely defined) and where parents on occasion drink more than they should, I am not condoning that for a moment, but the courts are not in the business of social engineering. The courts are not in the business of providing children with perfect homes. If we took into care and placed for adoption every child whose parents had had a domestic spat and every child whose parents on occasion had drunk too much then the care system would be overwhelmed and there would not be enough adoptive parents. So we have to have a degree of realism about prospective carers who come before the courts."*

Homicide

178. Mrs Justice Hogg, in ***Re A and B (one parent killed by the other)* [2011] 1 FLR 782, [2010] EWHC 3824 (Fam)**, formulated guidance as to the approach to be taken by Local Authorities and courts in the very difficult cases where one parent kills the other. 13 principles should be followed (summarised as follows):

> i. In all such cases, threshold will be met.
>
> ii. The LA should give immediate consideration to issuing proceedings and appoint an allocated social worker for the children;

iii. The LA is likely to need to exercise PR and should not leave the extended family to attempt to resolve matters through private law proceedings;

iv. If proceedings are commences, a Children's Guardian should be appointed immediately;

v. The case should be transferred to the High Court, which will scrutinise plans for interim placement and contact; drift must be avoided;

vi. Concurrent criminal proceedings must be case managed carefully and may include joint case management hearings;

vii. Professionals should seek specialist guidance and advice from a child psychiatrist or psychologist;

viii. The children are likely to require therapeutic help, which should be carefully managed if they are likely to be a witness in the criminal proceedings;

ix. The children's school should be involved and updated;

x. The family home may be a crime scene; the LA should liaise with the police to recover familiar toys and clothes; carers should be given immediate financial and practical support;

xi. Expert advice should be sought by LAs in planning contact; any disagreements should be resolved by the court; consideration should be given to family group conferencing;

xii. There is no presumption that the family of the perpetrator should be discounted as carers; expert psychological/psychiatric assessment of proposed adult carers should be considered;

xiii. Professionals involved in assessment should receive a copy of the judgment to enable them to reflect on their work.

12. Where does this leave us now?

Resource constraints

179. The resource constraints in the family justice system are well known.

180. Both the Private Law Working Group report and the Harm Report recognise the severe funding constraints, yet both recommend numerous projects to trial and review: is this feasible?

181. The issues have been heightened by the impact of the pandemic. Initially the Covid crisis led to a marked fall in private law applications being issued: compared to the previous year there were 45% fewer applications in March 2020 (3,373 vs 6,137) and 29% fewer in April (2,556 vs 3,607). This impact was short-lived: by June 2020, more applications were issued than in June 2019 (3,768 vs 3,617). Overall, 2020 saw a very similar number of applications issued as in 2019 (45,696 vs 45,389).

182. Covid has placed additional pressures on a family justice system that was already under-resourced. Will these reviews and pilot projects happen?

Example: Cafcass

183. On 12 May 2021, Cafcass announced a significant change in their approach to recommendations of Domestic Abuse Perpetrator Programmes (DAPPs) in private family proceedings.[49]

184. Cafcass note that the availability of DAPPs has been significantly affected due to the pandemic restrictions on in-person activities; Cafcass do not consider there is yet sufficient evidence to support a remote model and have not endorsed any remote DAPPs. Consequently, a significant backlog has built up of approximately 700 cases.

185. With immediate effect:

a. Cases where there is an existing order for a DAPP will be reviewed; Cafcass will request permission to file a further report, either recommending that the case remain

[49] https://www.cafcass.gov.uk/2021/05/12/current-provision-of-domestic-abuse-perpetrator-programmes/

on the waiting list, or for the order for a DAPP to be discharged and an 'alternative plan' be put in place, which may involve a final order for no contact;

b. Where there is no existing order for a DAPP, Cafcass may:

i. Recommend an interim or final order involving some level of contact. If Cafcass previously would have recommended a DAPP, any such contact must be "*very carefully risk assessed"*, in line with a new practice tool assessing the level of motivation and victim empathy;

ii. Recommend a family be placed on a DAPP waiting list, bearing in mind the delay this will inevitably involve; this will only be done in circumstances where it is truly necessary and is strongly discouraged in the guidance;

iii. Recommend a final order for no contact.

186. The guidance is clear that resource constraints (i.e. the non-availability of a DAPP programme) may be the determining factor in a Cafcass recommendation for no contact:

"The reality is, depending on the risks present, that there will be some cases where it becomes impossible to progress safe and beneficial 'spending time' arrangements in the absence of a DAPP. In these circumstances we need to be explicit about why we are recommending no 'spending time' arrangements – in terms that can be understood by the child (either now or if they access their files in future) taking into account their views and wishes."

187. The guidance notes that "*the affected parents are likely to be distressed and concerned by this recommendation*": perhaps an under-statement of the impact on parents faced with a recommendation for a final order for no contact.

188. It remains to be seen how this guidance will be applied in practice and for how long it will be in force. However, it has the potential to make it more difficult for parents who have been found to have perpetrated abuse to rebuild their relationships with their children in a safe way.

189. One of the Harm Panel's recommendations was that access to DAPPs be widened: we are moving in the opposite direction.