

## *PRACTICE DIRECTION 12J – CHILD ARRANGEMENTS & CONTACT ORDER: DOMESTIC VIOLENCE AND HARM*

### **Summary**

This Practice Direction supplements FPR Part 12, and incorporates and supersedes the President's Guidance in Relation to Split Hearings (May 2010) as it applies to proceedings for child arrangements orders.

- 1 This Practice Direction applies to any family proceedings in the Family Court under the relevant parts of the Children Act 1989 or the relevant parts of the Adoption and Children Act 2002 ('the 2002 Act') in which an application is made for a child arrangements order, or in which any question arises about where a child should live, or about contact between a child and a parent or other family member, where the court considers that an order should be made.
- 2 The purpose of this Practice Direction is to set out what the Family Court should do in any case in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic violence or abuse perpetrated by another party or that there is a risk of such violence or abuse.
- 3 For the purpose of this Practice Direction–

'Domestic violence' 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.

'Controlling behaviour' means 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.

‘Coercive behaviour’ means 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.

### **General principles**

- 4 The Family Court presumes that the involvement of a parent in a child’s life will further the child’s welfare, so long as the parent can be involved in a way that does not put the child or other parent at risk of suffering harm.
- 5 Domestic violence and abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to violence or abuse, or witness one of their parents being violent or abusive to the other parent, or live in a home in which violence or abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with violence or abuse, and may also suffer harm indirectly where the violence or abuse impairs the parenting capacity of either or both of their parents.
- 6 The court must, at all stages of the proceedings, and specifically at the First Hearing Dispute Resolution Appointment (‘FHDRA’), consider whether domestic violence is raised as an issue, either by the parties or by Cafcass or CAFCASS Cymru or otherwise, and if so must—
  - identify at the earliest opportunity (usually at the FHDRA) the factual and welfare issues involved;
  - consider the nature of any allegation, admission or evidence of domestic violence or abuse, and the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order and, if so, in what terms;
  - give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly;
  - ensure that where violence or abuse is admitted or proven, that any child arrangements order in place protects the safety and wellbeing of the child and the parent with whom the child is living, and does not expose them to the risk of further harm. In particular, the court must be satisfied that any contact ordered with a parent who has

perpetrated violence or abuse is safe and in the best interests of the child; and

- ensure that any interim child arrangements order (i.e. considered by the court before determination of the facts, and in the absence of admission) is only made having followed the guidance in paragraphs 25-27 below.

7 In all cases it is for the court to decide whether a child arrangements order accords with Section 1(1) of the Children Act 1989; any proposed child arrangements order, whether to be made by agreement between the parties or otherwise must be scrutinised by the court accordingly. The court shall not make a child arrangements order by consent or give permission for an application for a child arrangements order to be withdrawn, unless the parties are present in court, all initial safeguarding checks have been obtained by the court, and an officer of Cafcass or CAFCASS Cymru has spoken to the parties separately, except where it is satisfied that there is no risk of harm to the child in so doing.

8 In considering, on an application for a child arrangements order by consent, whether there is any risk of harm to the child, the court shall consider all the evidence and information available. The court may direct a report under Section 7 of the Children Act 1989, to be provided either orally or in writing, before it makes its decision; in such a case, the court may ask for information about any advice given by the officer preparing the report to the parties and whether they, or the child, have been referred to any other agency, including local authority children's services. If the report is not in writing, the court shall make a note of its substance on the court file.

### **Before the FHDRA**

9 Where any information provided to the court before the FHDRA or other first hearing (whether as a result of initial safeguarding enquiries by Cafcass or CAFCASS Cymru or on form C1A or otherwise) indicates that there are issues of domestic violence or abuse which may be relevant to the court's determination, the court must ensure that the issues are addressed at the hearing, and that the parties are not expected to engage in conciliation or other forms of dispute resolution which are not suitable.

- 10 If at any stage the court is advised by the applicant, by Cafcass or CAFCASS Cymru or otherwise that there is a need for special arrangements to secure the safety of any party or child attending any hearing, the court shall ensure that appropriate arrangements are made for the hearing and for all subsequent hearings in the case, unless it considers that these are no longer necessary.

### **First hearing/ FHDRA**

- 11 At the FHDRA, if the parties have not been provided with the safeguarding letter/report by Cafcass/CAFCASS Cymru, the court shall inform the parties of the content of any safeguarding letter or report or other information which has been provided by Cafcass or CAFCASS Cymru, unless it considers that to do so would create a risk of harm to a party or the child.
- 12 Where the results of Cafcass or CAFCASS Cymru safeguarding checks are not available at the FHDRA, and no other reliable safeguarding information is available, the court shall adjourn the FHDRA until the results of safeguarding checks are available. The court shall not generally make an interim child arrangements order, or orders for contact, in the absence of safeguarding information, unless it is to protect the safety of the child.
- 13 There is a continuing duty on the Cafcass Officer/Welsh FPO which requires them to provide a risk assessment for the court under section 16A Children Act 1989 if they are given cause to suspect that the child concerned is at risk of harm. Specific provision about service of a risk assessment under section 16A of the 1989 Act is made by rule 12.34 of the FPR 2010.
- 14 The court must ascertain at the earliest opportunity whether domestic violence or abuse is raised as an issue of risk of harm to the child which is likely to be relevant to any decision of the court relating to the welfare of the child, and specifically on the making of any child arrangements order.

### **Admissions**

- 15 Where at any hearing an admission of domestic violence or abuse toward another person or the child is made by a party, the admission should be recorded in writing and retained on the court file. A copy of any record of admissions must be made available as soon as possible to any Cafcass

officer or officer of CAFCASS Cymru or local authority officer preparing a report under section 7 of the Children Act 1989.

### **Directions for a fact-finding hearing**

- 16 The court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic violence or abuse—
- (a) in order to provide a factual basis for any welfare report or for assessment of the factors set out in paragraphs 36 and 37 (below);
  - (b) in order to provide a basis for an accurate assessment of risk; or
  - (c) before it can consider any final welfare-based order(s) in relation to child arrangements; or
  - (d) before it considers the need for a domestic violence-related Activity (such as a Domestic Violence Perpetrator Programme (DVPP)).
- 17 In determining whether it is necessary to conduct a fact-finding hearing, the court should consider—
- (a) the views of the parties and of Cafcass or CAFCASS Cymru;
  - (b) whether there are admissions by a party which provide a sufficient factual basis on which to proceed;
  - (c) if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;
  - (d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;
  - (e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact-finding hearing;
  - (f) the nature of the evidence required to resolve disputed allegations;
  - (g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and
  - (h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.

- 18 Where the court determines that a finding of fact hearing is not necessary, the order shall record the reasons for that decision.
- 19 Where the court considers that a fact-finding hearing is necessary, it must give directions as to how the proceedings are to be conducted to ensure that the matters in issue are determined as soon as possible, fairly and proportionately, and within the capabilities of the parties. In particular it should consider–
- (a) what are the key facts in dispute;
  - (b) whether it is necessary for the fact-finding to take place at a separate (and earlier) hearing than the welfare hearing;
  - (c) whether the key facts in dispute can be contained in a schedule or a table (known as a Scott Schedule) which sets out what the applicant complains of or alleges, what the respondent says in relation to each individual allegation or complaint; the allegations in the schedule should be focused on the factual issues to be tried; and if so, whether it is practicable for this schedule to be completed at the first hearing, with the assistance of the judge;
  - (d) what evidence is required in order to determine the existence of a pattern of coercive, controlling or threatening behaviour, violence or abuse;
  - (e) directing the parties to file written statements giving details of such behaviour and of any response;
  - (f) whether documents are required from third parties such as the police or health services and giving directions for those documents to be obtained;
  - (g) whether oral evidence may be required from third parties and if so, giving directions for the filing of written statements from such third parties;
  - (h) whether any other evidence is required to enable the court to decide the key issues and giving directions for that evidence to be provided;
  - (i) what evidence the alleged victim of violence is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence;

- (j) what support the alleged perpetrator may need in order to have a reasonable opportunity to challenge the evidence; and
- (k) whether a pre-hearing review would be useful prior to the fact-finding hearing to ensure directions have been complied with and all the required evidence is available.

20 Where the court fixes a fact-finding hearing, it must at the same time fix a Dispute Resolution Appointment to follow. Subject to the exception in paragraph 31 below, the hearings should be arranged in such a way that they are conducted by the same judge or, wherever possible, by the same panel of lay justices; where it is not possible to assemble the same panel of justices, the resumed hearing should be listed before at least the same chairperson of the lay justices. Judicial continuity is important.

### **Reports under Section 7**

21 In any case where a risk of harm to a child resulting from domestic violence or abuse is raised as an issue, the court should consider directing that a report on the question of contact, or any other matters relating to the welfare of the child, be prepared under section 7 of the Children Act 1989 by an Officer of Cafcass or a Welsh family proceedings officer (or local authority officer if appropriate), unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests.

22 If the court directs that there shall be a fact-finding hearing on the issue of domestic violence or abuse, the court will not usually request a section 7 report until after that hearing. In that event, the court should direct that any judgment is provided to Cafcass/CAFCASS Cymru; if there is no transcribed judgment, an agreed list of findings should be provided.

23 Any request for a section 7 report should set out clearly the matters the court considers need to be addressed.

### **Representation of the child**

24 Subject to the seriousness of the allegations made and the difficulty of the case, the court shall consider whether it is appropriate for the child who is the subject of the application to be made a party to the proceedings and be separately represented. If the court considers that the child should be so

represented, it shall review the allocation decision so that it is satisfied that the case proceeds before the correct level of judge in the Family Court.

### **Interim orders before determination of relevant facts**

- 25 Where the court gives directions for a fact-finding hearing, the court should consider whether an interim child arrangements order is in the interests of the child; and in particular whether the safety of the child and (bearing in mind the impact which domestic violence against a parent can have on the emotional well-being of the child) the parent who has made the allegation and is at any time caring for the child can be secured before, during and after any contact.
- 26 In deciding any interim child arrangements question pending a full hearing 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 violence, 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.

## **The fact-finding hearing**

28 While ensuring that the allegations are properly put and responded to, the fact-finding hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved. At the fact-finding hearing–

- Each party can be asked to identify what questions they wish to ask of the other party, and to set out or confirm in sworn evidence their version of the disputed key facts.
- The judge or lay justices should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focusing on the key issues in the case.

Victims of violence are likely to find direct cross-examination by their alleged abuser frightening and intimidating, and thus it may be particularly appropriate for the judge or lay justices to conduct the questioning on behalf of the other party in these circumstances, in order to ensure both parties are able to give their best evidence.

29 The court should, wherever practicable, make findings of fact as to the nature and degree of any domestic violence or abuse which is established and its effect on the child, the child's parents and any other relevant person. The court shall record its findings in writing, and shall serve a copy on the parties. A copy of any record of findings of fact or of admissions must be sent to any officer preparing a report under Section 7 of the 1989 Act.

30 At the conclusion of any fact-finding hearing, the court shall consider, notwithstanding any earlier direction for a section 7 report, whether it is in the best interests of the child for the court to give further directions about the preparation or scope of any report under section 7; where necessary, it may adjourn the proceedings for a brief period to enable the officer to make representations about the preparation or scope of any further enquiries. The court should also consider whether it would be assisted by any social work, psychiatric, psychological or other assessment of any party or the child (such as an expert risk assessment), and if so (subject to any necessary consent) make directions for such assessment to be undertaken and for the filing of any consequent report. Any section 7 or other report should address the factors set out in paragraphs 36 and 37, unless the court directs otherwise.

- 31 Where the court has made findings of fact on disputed allegations, any subsequent hearing in the proceedings should be conducted by the same judge or by at least the same chairperson of the justices. Exceptions may be made only where observing this requirement would result in delay to the planned timetable and the judge or chairperson is satisfied, for reasons recorded in writing, that the detriment to the welfare of the child would outweigh the detriment to the fair trial of the proceedings.

**In all cases where domestic violence or abuse has occurred**

- 32 The court should take steps to obtain (or direct the parties or an Officer of Cafcass or a Welsh family proceedings officer to obtain) information about the facilities available locally to assist any party or the child in cases where domestic violence or abuse has occurred.
- 33 Following any determination of the nature and extent of domestic violence or abuse, whether or not following a fact-finding hearing, the court should consider whether any party should seek advice, treatment or other intervention as a precondition to any child arrangements order being made or as a means of assisting the court in ascertaining the likely risk of harm to the child and to the parent with whom the child is living from that person, and may (with the consent of that party) give directions for such attendance and the filing of any consequent report.
- 34 Further or as an alternative to the advice, treatment or other intervention referred to in paragraph 33 above, the court may make an Activity Direction under section 11A and 11B Children Act 1989. Any intervention directed pursuant to this provision should be one commissioned and approved by Cafcass. It is acknowledged that acceptance on a DVPP is subject to a suitability assessment by the service provider, and that completion of a DVPP will take time in order to achieve the aim of risk-reduction for the long-term benefit of the child and the parent with whom the child is living.

**Factors to be taken into account when determining whether to make child arrangements orders in all cases where domestic violence or abuse has occurred**

- 35 When deciding the issue of child arrangements the court should ensure that any order for contact will be safe and in the best interests of the child.
- 36 In the light of any findings of fact the court should apply the individual matters in the welfare checklist with reference to those findings; in particular, where relevant findings of domestic violence or abuse have been made, the court should in every case consider any harm which the child and the parent with whom the child is living has suffered as a consequence of that violence or abuse, and any harm which the child and the parent with whom the child is living, is at risk of suffering if a child arrangements order is made. The court should only make an order for contact if it can be satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before during and after contact, and that the parent with whom the child is living will not be subjected to further controlling or coercive behaviour by the other parent.
- 37 In every case where a finding of domestic violence or abuse is made, the court should consider the conduct of both parents towards each other and towards the child; in particular, the court should consider–
- (a) the effect of the domestic violence or abuse on the child and on the arrangements for where the child is living;
  - (b) the effect of the domestic violence or abuse on the child and its effect on the child's relationship with the parents;
  - (c) whether the applicant parent is motivated by a desire to promote the best interests of the child or is using the process to continue a process of violence, abuse, intimidation or harassment or controlling or coercive behaviour against the other parent;
  - (d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and
  - (e) the capacity of the parents to appreciate the effect of past violence or abuse and the potential for future violence or abuse.

#### **Directions as to how contact is to proceed**

- 38 Where the court has made findings of domestic violence or abuse but, having applied the welfare checklist, nonetheless considers that direct contact is safe and beneficial for the child, the court should consider what, if any, directions

or conditions are required to enable the order to be carried into effect and in particular should consider—

- (a) whether or not contact should be supervised, and if so, where and by whom;
- (b) whether to impose any conditions to be complied with by the party in whose favour the order for contact has been made and if so, the nature of those conditions, for example by way of seeking intervention (subject to any necessary consent);
- (c) whether such contact should be for a specified period or should contain provisions which are to have effect for a specified period; and
- (d) whether it will be necessary, in the child's best interests, to review the operation of the order; if so the court should set a date for the review consistent with the timetable for the child, and shall give directions to ensure that at the review the court has full information about the operation of the order.

39 Where the court does not consider direct contact to be appropriate, it shall consider whether it is safe and beneficial for the child to make an order for indirect contact.

#### **The reasons of the court**

40 In its judgment or reasons the court should always make clear how its findings on the issue of domestic violence or abuse have influenced its decision on the issue of arrangements for the child. In particular, where the court has found domestic violence or abuse proved but nonetheless makes an order which results in the child having future contact with the perpetrator of domestic violence or abuse, the court should always explain, whether by way of reference to the welfare check-list the factors in paragraphs 36 and 37 or otherwise, why it takes the view that the order which it has made is safe and beneficial for the child.

This Practice Direction is issued by the President of the Family Division, as the nominee of the Lord Chief Justice, with the agreement of the Lord Chancellor.