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# **Child Arrangements Orders (Contact) and Domestic Abuse – An Exploration of the Law and Practice**

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# DECLARATION

This thesis is submitted to the University of Warwick in support of my application for the degree of Doctor of Philosophy. It has been composed by myself and has not been submitted in any previous application for any degree.

# ABSTRACT

This thesis explores professional perceptions of court-adjudicated child contact disputes in cases of alleged, proven and found domestic abuse. For many years, there has been significant concern about the handling of these cases by the courts, the principal concern being that a pro-contact approach dominates, which serves in practice to marginalise concerns about safety and welfare. Despite changes to the key practice direction being introduced with the aim of improving practice, concerns about the courts' resolution of these disputes is as live now as ever. There have also been significant statutory reforms in recent years, which post-date much existing research: a statutory presumption of parental involvement was introduced into the Children Act 1989; and legal aid reform fundamentally altered the landscape in which disputes over contact take place.

There is little recent research in this area, with a particular gap in the evidence base on practitioners' perceptions of current practice. This thesis responds to this gap. Thirty-eight semi-structured interviews were conducted with the key actors charged with working on contact disputes in which domestic abuse is an issue, consisting of judges (magistrate up to Circuit judge), barristers, solicitors and Cafcass practitioners. Three interviews were also conducted with representatives from organisations working with women affected by domestic abuse. This thesis makes an original contribution to knowledge by understanding judges' and practitioners' perspectives on current practice and what they see as the core challenges. The thesis explores the way in which domestic abuse is defined and evidenced in practice, along with associated structural challenges, and the outcomes reached by the courts in cases in which domestic abuse is proven or found. It also provides much-needed data on professional perceptions of the impact of the statutory presumption of parental involvement and the legal aid reforms.

In some respects, the findings in this research point to improvements in practice, in particular in relation to judicial understanding of domestic abuse. Overall, however, the thesis concludes that ideological, structural and financial tensions undermine practice. Overcoming these tensions requires further research, with the key being to find creative solutions compatible with the current climate of scarce resources.

# INTRODUCTION

The law and practice on post-separation child contact disputes in which domestic abuse is alleged has been described as a ‘cycle of failure’.<sup>1</sup> Academic research and campaigns by women’s groups over many years have uncovered problems with the handling of these cases by the courts, legal practitioners and child welfare professionals. The repeated concern has been that parents affected by domestic abuse and children are left unprotected by the legal framework and practice, with the promotion of contact dwarfing concerns over safety. Changes to legal practice in response to these concerns have been met with further concerns about compliance, prompting renewed criticisms and calls for reform.<sup>2</sup> Despite case law guidance,<sup>3</sup> and different iterations of practice guidance, being issued over time with the aim of improving practice,<sup>4</sup> criticisms remain as live today as ever. At the time of writing, the Home Affairs Committee is calling for a review of the impact on children of contact arrangements in domestic abuse cases, and Women’s Aid is calling for an independent statutory inquiry to address what it describes as ‘systemic failings’ in the family courts and to scrutinise the compatibility of legislative interpretation with the human rights of mothers affected by domestic abuse and their children.<sup>5</sup>

It is against this backdrop of major concern about the law and practice that this doctoral research was conducted. Forty-one semi-structured interviews were carried out between February 2016 and April 2017 with 10 judges, ranging from magistrate to Circuit judge,<sup>6</sup> 8 barristers, 10 solicitors, 10 Cafcass practitioners<sup>7</sup> and three

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<sup>1</sup> R. Hunter, A. Barnett and F. Kaganas, ‘Introduction: Contact and Domestic Abuse’ (2018) 40(4) *Journal of Social Welfare and Family Law* 401, 401.

<sup>2</sup> *Ibid.*

<sup>3</sup> Most significantly, see: *Re L (A Child) (Contact: Domestic Violence)*; *Re V (A Child) (Contact: Domestic Violence)*; *Re M (A Child) (Contact: Domestic Violence)*; *Re H (Children) (Contact: Domestic Violence)* [2001] Fam 260 (henceforth in footnotes ‘*Re LVMH*’).

<sup>4</sup> As discussed in this Chapter, and others, Practice Direction 12J has been amended multiple times, most recently in October 2017.

<sup>5</sup> For further detail of the Home Affairs Committee’s call for a review, which it envisages being completed by a ‘Violence Against Women and Girls and Domestic Abuse Commissioner’, see: Home Affairs Committee, *Domestic Abuse* (22 October 2018) para 28 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1015/101502.htm>> accessed 23 October 2018. And for the Women’s Aid call for an independent statutory inquiry, see: J. Birchall and S. Choudhry, “‘What About My Right Not to be Abused?’ Domestic Abuse, Human Rights and the Family Court” (Women’s Aid 2018) pp.6-7 and 52.

<sup>6</sup> Comprising: 3 magistrates; 5 District Judges; and 2 Circuit Judges.

<sup>7</sup> ‘Cafcass’ stands for the ‘Children and Family Court Advisory and Support Service’ (henceforth throughout this thesis ‘Cafcass’).

organisations which work with, and represent, women affected by domestic abuse. The research also took place following a period of significant legal change. Most notably, on 22 October 2014, section 11 of the Children and Families Act 2014 introduced into the Children Act 1989 a statutory presumption of parental involvement<sup>8</sup> and, from April 2013, legal aid was withdrawn for the vast majority of private law family law cases,<sup>9</sup> the latter radically altering the landscape in which contact disputes take place.

Earlier research into contact disputes was therefore conducted against a very different background. The lack of recent empirical research into the courts' and professionals' handling of contact disputes in which domestic abuse is alleged has been emphasised,<sup>10</sup> with the last study to have consulted legal and Cafcass practitioners on this specific issue published in 2014<sup>11</sup> and the last to have consulted judges published in 2013.<sup>12</sup> By exploring the courts' resolution of contact applications in which domestic abuse is alleged through the eyes of the key actors charged with working on these cases, this doctoral research makes an original and important contribution to filling this gap in the evidence base. It provides up-to-date insights into perceptions on how cases are being resolved, the impact of important recent developments, the challenges experienced on the front line and the areas requiring further research. It is the first study to have explored the impact of the statutory presumption of parental involvement on the resolution of cases at court.

This introductory chapter has six aims: first, to outline the current legal framework and policy context in which disputes over contact take place; second, to explain and justify the terminology used in this thesis; third, to chart the path to the adoption of Practice Direction 12J (henceforth 'PD12J'), which remains the core guidance

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<sup>8</sup> Children Act 1989, s 1(2A).

<sup>9</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>10</sup> A. Barnett, "'Greater than the Mere Sum of Its Parts': Coercive Control and the Question of Proof' (2017) 29(4) *Child and Family Law Quarterly* 379, 387. See also: L. Caffrey, 'The Importance of Perceived Organisational Goals: A Systems Thinking Approach to Understanding Child Safeguarding in the Context of Domestic Abuse' (2017) 26 *Child Abuse Review* 339, 348.

<sup>11</sup> A. Barnett, 'Contact At All Costs? Domestic Violence, Child Contact and the Practices of the Family Courts and Professionals (PhD thesis, Brunel University 2014). Published in: A. Barnett, 'Contact At All Costs? Domestic Violence and Children's Welfare' (2014) 26(4) *Child and Family Law Quarterly* 439. References in this thesis to Barnett's research are to the *Child and Family Law Quarterly* article unless otherwise stated.

<sup>12</sup> R. Hunter and A. Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Cases: Domestic Violence and Harm* (Family Justice Council 2013).

framework for the courts hearing contact applications involving domestic abuse allegations;<sup>13</sup> fourth, to provide an overview of the case law and academic research conducted since the adoption of PD12J; fifth, to situate this doctoral research within the existing evidence base, articulating its focus and original contribution to knowledge; and, finally, to outline the chapters which follow.

## **1.1 THE LEGAL FRAMEWORK AND POLICY CONTEXT**

Previously labelled ‘access’ then ‘contact’, parents applying to the court to see their children post-separation now apply for ‘child arrangements orders’, an umbrella term encompassing both contact and residence.<sup>14</sup> In deciding an application for a child arrangements order, the court is directed by section 1 of the Children Act 1989 that the child’s welfare is the paramount consideration.<sup>15</sup> The court is also directed to ‘have regard’ to the welfare factors listed in section 1(3), which include the ascertainable wishes and feelings of the child and the harm which the child has suffered or is at risk of suffering.<sup>16</sup> The ‘no order’ principle directs the court not to make an order unless doing so would be better for the child than making no order.<sup>17</sup> In practice, this means that the court can permit there to be no contact between parent and child without making a specific order for no contact, if the parent and child are not in contact at the time of the application. Since 22 October 2014, the court has also been directed by statute to presume, unless the contrary is shown, that the involvement of the applicant parent in the child’s life will further the child’s welfare.<sup>18</sup>

The courts are also expected to adhere to the guidance provided in PD12J, which was originally introduced in May 2008 and has been subject to a number of revisions, most recently in October 2017.<sup>19</sup> PD12J stipulates the steps the Family Court or High Court should take in cases in which domestic abuse is alleged or admitted, or where there is other reason to believe that the child or other party has experienced domestic

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<sup>13</sup> The courts must follow this guidance: *Re A (A Child)* [2015] EWCA Civ 486, [2016] 1 FLR 689 [48]-[49] (McFarlane LJ).

<sup>14</sup> Children Act 1989, s 8. ‘Child arrangements orders’ replaced the terms ‘contact’ and ‘residence’ on 22 April 2014: Children and Families Act 2014, Sch 2(1) para 3. As outlined below, ‘contact’ continues to be used in this thesis in order to distinguish the ‘spending time’ part of the child arrangements order from residence orders.

<sup>15</sup> *Ibid* s 1(1).

<sup>16</sup> *Ibid* s 1(3), (a) and (e) cited.

<sup>17</sup> *Ibid* s 1(5).

<sup>18</sup> *Ibid* s 1(2A), as inserted by the Children and Families Act 2014, s 11.

<sup>19</sup> The Practice Direction became ‘Practice Direction 12J’ on its entry into the Family Procedure Rules in 2010.

abuse or is at risk of domestic abuse.<sup>20</sup> These steps span from the earliest stage in which allegations are made through to the final stages when the court decides the case outcome.<sup>21</sup>

A child arrangements order for contact can direct a number of different arrangements to be put in place: unsupervised contact, where the parent and child spend time together without monitoring, either in the daytime or overnight; supervised contact, where the parent and child spend time together in a neutral setting under professional supervision; supported contact, where the parent and child spend time together in a neutral setting but without professional supervision; or indirect contact, where the parent is not permitted to see the child directly, but can send, for example, letters and birthday cards. The court also has the power to order that no contact can take place between parent and child and, if considered necessary, order that the parent cannot make further applications without leave of the court.<sup>22</sup>

The most common scenario, in practice, is that the children live with their mother post-separation and the father applies for a child arrangements order to spend time with his children.<sup>23</sup> Only a minority of parents take their post-separating parenting arrangements to court.<sup>24</sup> Within this minority of cases, allegations of domestic abuse feature prominently, with fathers more likely than mothers to be subject to these allegations,<sup>25</sup> at least at the outset.<sup>26</sup> Recent research conducted by Cafcass in conjunction with Women's Aid found that in nearly two-thirds (62%) of the 216 cases examined, domestic abuse was alleged.<sup>27</sup> Other studies have found similarly high

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<sup>20</sup> Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm (October 2017), para 2 (henceforth in footnotes 'PD12J').

<sup>21</sup> Ibid.

<sup>22</sup> Children Act 1989, s 91(14). See for example: *Re N (Section 91(14) Order)* [1996] 1 FLR 356; *Re F (Restrictions on Applications)* [2005] EWCA Civ 499, [2005] 2 FLR 950.

<sup>23</sup> See for example: J. Hunt and A. Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) p.1; M. Harding and A. Newnham, *How Do County Courts Share the Care of Children Between Parents?* (Nuffield Foundation 2015) p.80. This was also described as the norm by interviewees within this doctoral research.

<sup>24</sup> See for example: Hunt and Macleod (note 23 supra) p.3; V. Peacey and J. Hunt, *Contact Problems in Separated Families* (Nuffield Foundation and Gingerbread 2009) p.5; Harding and Newnham (note 23 supra) p.14.

<sup>25</sup> See for example: Harding and Newnham (note 23 supra) p.23; Cafcass and Women's Aid, *Allegations of Domestic Abuse in Child Contact Cases: Joint Research by Cafcass and Women's Aid* (Cafcass and Women's Aid 2017) pp.3 and 23.

<sup>26</sup> Some interviewees within this doctoral research reported that it is common for fathers alleged to have been abusive to make counter allegations against the mother in response. N = 8: B07, C02, C06, C07, J07-CJ, R03, S08 and S09.

<sup>27</sup> Cafcass and Women's Aid (note 25 supra) pp.3, 5, 8 and 23.

proportions of cases involving allegations of domestic abuse, ranging from 49% up to 90%.<sup>28</sup> Allegations of domestic abuse are regularly accompanied by other allegations relevant to welfare. In the recent Cafcass and Women's Aid study, for example, only 14 of the 133 cases that featured domestic abuse allegations did not also feature other potential welfare factors, such as substance abuse.<sup>29</sup> The minority of cases which reach court are, therefore, complex and high risk.

The consistent message from Governments of all political leanings has been that children should maintain relationships with both parents following parental separation.<sup>30</sup> The growth of concern about the impact on children of divorce and separation has been traced back to the final two decades of the twentieth century, in which maintaining father-child contact post-separation acquired its status as the 'key' to keeping up the 'separated but continuing' family.<sup>31</sup> Concern about the need to promote co-operative parenting post-separation, and in particular to safeguard the role of the father in the post-separation family, has not abated in recent years.<sup>32</sup> Claims of bias against fathers within the family justice system have similarly endured.<sup>33</sup> Indeed, such was the level of concern about public perceptions of bias against fathers in the family justice system that the Coalition Government introduced the statutory presumption of parental involvement on 22 October 2014, despite there being no empirical foundation to the perception that the courts are biased against fathers<sup>34</sup> and widespread opposition to the reform in the light of its incompatibility

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<sup>28</sup> See for example: HMICA, *Domestic Violence, Safety And Family Proceedings: Thematic Review Of The Handling Of Domestic Violence Issues By The Children And Family Court Advisory And Support Service (CAFCASS) And The Administration Of Family Courts In Her Majesty's Courts Service* (HMCS 2005) p.17; R. Aris and C. Harrison, *Domestic Violence and the Supplemental Information Form C1A* (Ministry of Justice Research Series 17/07 2007) p.11; Harding and Newnham (note 23 supra) p.43.

<sup>29</sup> Cafcass and Women's Aid (note 25 supra) p.24. This overlap between domestic abuse and other welfare factors was not a focus of this doctoral research.

<sup>30</sup> See for example: HM Government, *Parental Separation: Children's Needs and Parents' Responsibilities* (2004) Cm 6273 pp.1-2; Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A System with Children and Families at its Heart* (2012) Cm 8273 p.3. For further discussion, see for example: J. Fortin, J. Hunt and L. Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults who Experienced Parental Separation in their Youth* (Sussex Law School 2012) p.2.

<sup>31</sup> F. Kaganas (1999) cited in C. Piper, 'Commentary on *Re L (A Child) (Contact: Domestic Violence)*' in R. Hunter, C. McGlynn and E. Rackley, *Feminist Judgments: From Theory to Practice* (Hart 2010) p.115. See also: L. Trinder, M. Beek and J. Connolly, *Making Contact Work* (Joseph Rowntree 2002) p.1; A. Wade and C. Smart, *Facing Family Change: Children's Circumstances, Strategies and Resources* (Joseph Rowntree 2002) p.1; M. Maclean, *Together and Apart: Children and Parents Experiencing Separation and Divorce* (Joseph Rowntree Foundation 2004) p.1; R. Hunter, A. Barnett and F. Kaganas (note 1 supra) 403-44.

<sup>32</sup> See for example: Department for Education and Ministry of Justice, *Consultation: Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life* (Department for Education and Ministry of Justice 2012) para 3.1.

<sup>33</sup> See for example: *ibid*.

<sup>34</sup> See for example: Harding and Newnham (note 23 supra) pp. 81 and 104.

with existing evidence bases.<sup>35</sup> The impact of this presumption on cases in which domestic abuse is an issue is explored in Chapter 5.

Existing alongside this concern to support the continued role of the father in the post-separation family has been the political will to strengthen the legal framework to tackle domestic abuse. In December 2015, a new offence of perpetrating controlling or coercive behaviour in an intimate or family relationship entered the statute book, aimed at compensating for the shortcomings of the existing legal framework<sup>36</sup> by rendering non-physical forms of abuse a specific criminal offence.<sup>37</sup> And, at the time of writing, the Government is reviewing responses to its consultation to introduce a Domestic Abuse Bill, which would house a range of measures from prevention to rehabilitation.<sup>38</sup> As Chapter 3 notes, of most relevance to the child contact context are the proposals on the way in which domestic abuse is defined, with a new statutory definition proposed and an emphasis on raising awareness of economic abuse.<sup>39</sup> Whether the changes will mitigate the enduring negative impact of the financial tensions which have existed for many years remains to be seen.<sup>40</sup>

The most fundamental financial changes to affect the child contact space in recent years have been the reforms to legal aid, with legal aid withdrawn for the vast majority of child arrangements disputes from April 2013.<sup>41</sup> Legal aid was retained for victims of domestic abuse but, as Chapter 6 explores, concerns have been raised about the scope of this exception. The legal aid reforms also formed part of a radical ideological overhaul of the family justice system, in which the out of court resolution of private law family law disputes has been increasingly valorised.<sup>42</sup> The neo-liberal emphasis on private ordering has put mediation on a pedestal above court-

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<sup>35</sup> See the discussion in Chapter 5 of this thesis.

<sup>36</sup> For discussion, see for example: V. Bettinson and C. Bishop, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?' (2015) 66(2) *Northern Ireland Legal Quarterly* 179.

<sup>37</sup> Serious Crime Act 2015, s 76.

<sup>38</sup> The consultation ran from 8 March 2018 to 31 May 2018. Further information about the consultation can be accessed here: Gov.UK, 'Domestic Abuse Bill Consultation' (28 June 2018) <<https://www.gov.uk/government/consultations/domestic-abuse-bill-consultation>> accessed 9 November 2018.

<sup>39</sup> HM Government, *Transforming the Response to Domestic Abuse: Government Consultation (Full Version)* (March 2018) <<https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/>> accessed 9 November 2018 pp.11-13.

<sup>40</sup> See Chapter 6 for discussion of financial tensions and their impact on contact disputes in which domestic abuse is an issue.

<sup>41</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>42</sup> For discussion, see: A. Barlow, R. Hunter, J. Smithson and J. Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Socio-Legal Studies 2017).



adjudicated resolution.<sup>43</sup> Whilst mediation is not considered appropriate in cases involving domestic abuse, concern has been raised about the inadequacies of mediation screening processes for domestic abuse, and responses to it once disclosed.<sup>44</sup> This is important because whilst this thesis focuses on court-adjudicated contact disputes, and the courts have been criticised for their handling of cases, the scope for parents to be pressured into unsafe contact arrangements outside the reach of the courts is considerable.<sup>45</sup>

## 1.2 TERMINOLOGY

This section explains and justifies the terminology employed in this thesis, focusing on the way in which domestic abuse is defined, the surrendering of gender neutrality and the decision to refer to allegations over disclosures. In addition, and in order to distinguish between spending time orders and orders on where the child should live post-separation, 'contact' is used throughout this thesis to refer to the 'spending time' part of the child arrangements order. The term 'the courts' is used synonymously with 'judges', and the categories of J0[]-M, J0[]-DJ and J0[]-CJ are used to refer to the magistrate, District Judge and Circuit Judge interviewees respectively.

### 1.2.1 'Domestic abuse'

Chapter 3 explores the way in which 'domestic abuse' is defined. As Chapter 3 discusses, whilst not entirely uncontroversial, there now exists a broad consensus within policy and legal discourses that domestic abuse is not confined to physical acts of violence.<sup>46</sup> However, there remains ambiguity over the boundaries of current definitions. The source of particular ambiguity is the status of 'coercive control'. In its current form, the cross-government non-statutory definition, which features also within PD12J, situates coercive control as a component of the definition,<sup>47</sup> and

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<sup>43</sup> For discussion, see: *ibid.*

<sup>44</sup> *Ibid* pp.44, 96-110 and 207-208.

<sup>45</sup> See for example: R. Hunter, 'Domestic Violence: A UK Perspective' in J. Eekelaar and R. George, *Routledge Handbook of Family Law and Policy* (Routledge 2014) p.322; Barlow, Hunter, Smithson and Ewing (note 42 *supra*).

<sup>46</sup> See for example the current non-statutory cross-government definition of 'domestic violence and abuse': Gov.UK, 'Domestic Violence and Abuse' (31 May 2018) <<https://www.gov.uk/guidance/domestic-violence-and-abuse>> accessed 17 June 2018.

<sup>47</sup> *Ibid.*

coercive control is often used synonymously with non-physical abuse.<sup>48</sup> Evan Stark, and others,<sup>49</sup> however, have identified coercive control as being at the core of the majority of domestically abusive relationships: in Stark's view, coercive control is not simply synonymous with non-physical abuse and is instead the driver of the perpetration of both physical and non-physical abuse.<sup>50</sup> It has been argued that other forms of domestic abuse exist, including 'partner assault'<sup>51</sup> or 'situational couple violence',<sup>52</sup> which are not characterised by coercive control and could, in theory, be confined to the particular relationship.<sup>53</sup>

This ambiguity matters within the child contact space because it impacts on the assessment of risk. When domestic abuse is understood as coercive control, it ceases to be possible to assume that the risks posed by the domestically abusive parent dissipate on separation: it is well-established that abuse often escalates on separation, since the perpetrator's motivation to control does not end with the relationship.<sup>54</sup> This means that strategies to manage risk, such as managed handovers, cannot be relied upon as a reliable safeguard against harm.<sup>55</sup>

In the light of its importance to risk assessment, it is argued in this thesis that a clearer consensus needs to be forged within the child contact context on the status of coercive control within conceptualisations of domestic abuse. In the absence of an alternative definition, this thesis adopts the definition of domestic abuse set out in PD12J, which is:

... any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over

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<sup>48</sup> See for example: S. Walby and J. Towers, 'Untangling the Concept of Coercive Control: Theorizing Domestic Violent Crime' (2018) 18(1) *Criminology and Criminal Justice* 7, 12.

<sup>49</sup> See for example: M. P. Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence* (Northeastern University Press 2008) p.6.

<sup>50</sup> E. Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007) pp.110-111; E. Stark, 'Rethinking Coercive Control' (2009) 15(12) *Violence Against Women* 1509, 1510.

<sup>51</sup> Stark, 2009 (note 50 supra) 1516.

<sup>52</sup> Johnson (note 49 supra) p.11.

<sup>53</sup> Ibid; Stark, 2009 (note 50 supra) 1516.

<sup>54</sup> See for example: L. Kelly, N. Sharp and R. Klein, *Finding the Costs of Freedom: How Women and Children Rebuild their Lives after Domestic Violence* (Solace Women's Aid 2014) p.5; F. Morrison, "'All Over Now?'" The Ongoing Relational Consequences of Domestic Abuse through Children's Contact Arrangements' (2015) 24 *Child Abuse Review* 274, 278; 'R. Thiara and C. Harrison, *Safe Not Sorry: Supporting the Campaign for Safer Child Contact* (University of Warwick 2016) p.4; D. Brennan, *The Femicide Census 2016 Findings: Annual Report on Cases of Femicide in 2016* (Women's Aid 2017) pp.18-19; Birchall and S. Choudhry (note 5 supra) p.42.

<sup>55</sup> See for example: Morrison (note 54 supra) 278.

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.<sup>56</sup>

However, the implication of Stark's argument<sup>57</sup> that coercive control sits at the heart of the majority of domestically abusive relationships is that it cannot be assumed that the risks posed by the domestically abusive perpetrator evaporate when the relationship ends. This insight is central to the risk assessment process, and these debates are explored in detail in Chapter 3.

### 1.2.2 'Mothers' and 'fathers'

Legal and policy definitions of domestic abuse are gender neutral. PD12J refers to the 'parent who has perpetrated domestic abuse' and the 'other parent'.<sup>58</sup> The cross-government definition, the definition within the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the offence of perpetrating controlling or coercive behaviour,<sup>59</sup> are similarly framed in gender-neutral terms. Gender-neutral definitions run the risk of obscuring the reality of abuse perpetration; but gender-specific definitions can exclude those not falling within their scope. It is an understatement that debates are long-standing on the extent to which domestic abuse is perpetrated asymmetrically by men against women,<sup>60</sup> or symmetrically by both women and men.<sup>61</sup> These debates are complicated by the typologies and methodologies adopted to measure the prevalence of domestic abuse in turn shaping assessments of prevalence. As Chapter 3 explores, there is a body of opinion which points to both the asymmetric and symmetric perpetration of abuse, depending on the form of abuse measured.<sup>62</sup>

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<sup>56</sup> PD12J (note 20 supra) para 3.

<sup>57</sup> A similar argument is advanced by Johnson (note 49 supra), as explored in Chapter 3.

<sup>58</sup> PD12J (note 20 supra).

<sup>59</sup> Serious Crime Act 2015, s. 76.

<sup>60</sup> See for example: R.P. Dobash, R. E. Dobash, M. Wilson and M. Daly, 'The Myth of Sexual Symmetry in Marital Violence' (1992) 39(1) *Social Problems* 71, 71; Stark (note 50 supra) p.377-378; E. Stark, 'Do Violent Acts Equal Abuse' (2010) 62 *Sex Roles* 201, 209; Walby and Towers (note 48 supra) 7.

<sup>61</sup> See for example: M. A. Straus, 'Measuring Intrafamily Conflict and Violence: the Conflict Tactics (CT) Scales' (1979) 41(1) *Journal of Marriage and Family* 75, 81-82; J. Archer, 'Sex Differences in Aggression Between Heterosexual Partners' (2000) 126(5) *Psychological Bulletin* 651, 651-652 and 655-668.

<sup>62</sup> See for example: M.P. Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57(2) *Journal of Marriage and the Family* 283, 284; A. Myhill, 'Measuring Coercive Control' (2015) 21(3) *Violence Against Women* 355, 356-357.

The weight of academic opinion points to domestic abuse being a gendered phenomenon, in which women are more likely to be victims and men perpetrators,<sup>63</sup> and the abuse women experience is more likely to be repeated, severe and pose a risk of death than abuse directed towards men by women.<sup>64</sup> Indeed, Stark's reconceptualisation of domestic abuse as coercive control is premised on coercive and controlling behaviour being inherently gendered, with men 'almost exclusively' the perpetrators and women the victims.<sup>65</sup> It is this gendered nature of coercive control which, in part, distinguishes it from other forms of harm.<sup>66</sup> He sees coercive control as sewn into the 'taken-for-granted fabric' of 'everyday lives', and in particular the 'female behaviours that are constrained by their normative confinement to women'.<sup>67</sup>

The main means used to establish control is the micro-regulation of everyday behaviours associated with stereotypical female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexually ... . These dynamics give coercive control a role in sexual politics that distinguishes it from all other crimes.<sup>68</sup>

The Crime Survey for England and Wales (CSEW), formerly the British Crime Survey, is the principal method used to record the prevalence of domestic abuse.<sup>69</sup> This is a face-to-face victimisation survey which asks a random sample of men and women resident in households in England and Wales whether they have experienced a range of offences in the last 12 months.<sup>70</sup> Since March 2005, CSEW has issued a self-completion

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<sup>63</sup> See for example: R. Dobash and R. Dobash, 'Violence Against Women in the Family' in S. A. Katz, J. Eekelaar and M. Maclean, *Cross-Currents: Family Law Policy in the US and England* (Oxford University Press 2000) p.497; R. Dobash and R. Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324, 343-346; M. Hester, *Who Does What to Whom? Gender and Domestic Violence Perpetrators* (University of Bristol and the Northern Rock Foundation 2009) p.19; M. Hester, 'Gender and Sexuality' in C. Itzin, A. Taket and S. Barter-Godfrey, *Tackling the Health Effects of Abuse and Violence* (Routledge 2010) p.99; M. Hester, 'Who Does What to Whom? Gender and Domestic Violence Perpetrators in English Police Records' (2013) 10(5) *European Journal of Criminology* 623, 634-635.

<sup>64</sup> See for example: Dobash and Dobash, 2000 (note 63 supra) p.497; Dobash and Dobash, 2004 (note 63 supra) pp.343-344; Hester, 2009 (note 63 supra) p.19; Hester, 2010 (note 63 supra).

<sup>65</sup> Stark, 2007 (note 50 supra) p.5.

<sup>66</sup> Stark, 2009 (note 50 supra) 1516.

<sup>67</sup> Stark, 2007 (note 50 supra) p.15.

<sup>68</sup> Ibid p.5.

<sup>69</sup> Office for National Statistics, *Crime in England and Wales: Year Ending March 2018* (19 July 2018) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2018>> accessed 16 October 2018. The Office for National Statistics' *Domestic Abuse in England and Wales: Year Ending March 2017* (23 November 2017) bulletin also draws on these statistics: <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseinenglandandwalesbulletintables>> accessed 16 October 2018.

<sup>70</sup> Office for National Statistics, 2018 (note 69 supra).

questionnaire on intimate violence for persons aged between 16 and 59 (74 years from April 2017).<sup>71</sup> The CSEW findings for the year ending March 2018 are consistent with previous years' data, despite the increase in the age span, with women (6.9%) being more likely to be victims of domestic abuse than men (3.7%).<sup>72</sup> Of domestic abuse taking place solely within intimate relationships – thus excluding abuse between family members – the pattern is the same, with women (5.5%) more likely to be victims than men (2.4%).<sup>73</sup> Statistics on domestic abuse experienced since the age of 16 similarly remained stable, with 26.9% of women reporting that they had experienced domestic abuse since the age of 16, as compared to 12.4% of men.<sup>74</sup> When abuse between family members is excluded, it remains the case that women (23.1%) are more likely to have been victims of domestic abuse since the age of 16 than men (9.3%).<sup>75</sup>

However, there are problems in relying on the CSEW to gauge whether men or women are more likely to be victims of domestic abuse. One of the biggest problems identified with the CSEW is its inclusion of both single and repeated acts of abuse. It is thus not limited to abuse taking place as part of a pattern,<sup>76</sup> nor does it distinguish between incidents of varying severity.<sup>77</sup> Kelly and Westmarland have argued that these pitfalls obscure the reality of the perpetration of domestic abuse, giving an exaggerated picture of the prevalence of male victims.<sup>78</sup> In their view, this has legitimised the 'de-gendering' of dialogue on the prevalence of domestic abuse and claims that domestic abuse is not a gendered phenomenon.<sup>79</sup>

All the participants in this doctoral research who commented on this issue confirmed that the typical scenario in practice is that the father applies for contact, and the mother alleges that the father has been domestically abusive. Several were, however, keen not to deny the existence of male victims. Some also reported the prevalence of

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> L. Kelly and N. Westmarland, 'Naming and Defining 'Domestic Violence': Lessons from Research with Violent Men' (2016) 112(1) *Feminist Review* 113, 115.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

counter allegations of abuse, in which the father alleges the mother has also been abusive. Without access to data on the individual cases in which counter allegations are made, it is not possible to comment on their veracity, but given what is known about the potential for them to form part of patterns of abusive behaviour,<sup>80</sup> these allegations should be approached with caution. This should also not detract from the core finding that the most common scenario within contact disputes is that the mother is the parent alleging the abuse and the father the alleged perpetrator.

As a result of interviewees' experiences, combined with the broader statistical picture, 'mother' is used throughout this thesis to refer to the parent responding to the application for contact and making the initial allegations of domestic abuse, and 'father' to the parent making the application for contact and being alleged to have been domestically abusive. This is not to deny the existence of male victims, but to acknowledge the gendered nature of the phenomenon and the most common scenarios encountered in practice.

### **1.2.3 'Allegations' and 'disclosures'**

Whether parents raising domestic abuse within proceedings should be referred to as making 'allegations' or 'disclosures' is controversial. 'Allegations' sits most comfortably with the traditional legal framework, in which the onus falls on the person raising the abuse to prove it has occurred.<sup>81</sup> It sits less comfortably with the under-reporting of domestic abuse and the barriers victims face in articulating and 'proving' the abuse they have experienced.<sup>82</sup> Referring to 'disclosures' of domestic abuse offers a response to these problems, but also carries the connotation that the abuse has occurred, prior to this being formally established.<sup>83</sup> In the light of 'allegations' being the standard terminology used within legal proceedings, 'allegations', 'alleged perpetrator' and 'alleged victim' are used in this thesis to refer

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<sup>80</sup> The Crown Prosecution Service, for example, recognises this risk of counter allegations being raised as part of ongoing domestic abuse perpetration: CPS, 'Domestic Abuse Guidelines for Prosecutors' <<https://www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors>> accessed 16 October 2018.

<sup>81</sup> See for example: *Re B (Children) (Sexual Abuse: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11 [2] (Lord Hoffman).

<sup>82</sup> See for example: C. Bishop and V. Bettinson, 'Evidencing Domestic Violence, Including Behaviour That Falls Under the New Offence Of "Controlling Or Coercive Behaviour"' (2018) 22(1) *International Journal of Evidence and Proof* 3, 6; Women's Aid, *Survival and Beyond* (Women's Aid 2018) p.23.

<sup>83</sup> Within this doctoral research, for example, C06 said the judiciary disapprove of the term 'disclosure' for this reason, and 'allegation' must be used as a result. Other Cafcass interviewees (C02 and C09), however, said 'allegation' is not used within Cafcass' practice for the reasons outlined above.

to abuse reported which is yet to be subject to formal determination as to its veracity. This terminology is adopted, however, with acceptance that it is not without its problems.

### **1.3 THE PATH TO PRACTICE DIRECTION 12J**

This thesis concentrates primarily on the post-PD12J case law and academic research. This Practice Direction was introduced in May 2008 in response to mounting concern about the handling of contact disputes in which domestic abuse was alleged. It has since been subject to revisions in response to concerns about compliance, most recently in October 2017.<sup>84</sup> This section charts the case law and academic research which preceded its introduction in 2008 in order to lay the foundation for the chapters which follow.

The seminal case on contact disputes involving allegations of domestic abuse is *Re L (A Child) (Contact: Domestic Violence)*; *Re V (A Child) (Contact: Domestic Violence)*; *Re M (A Child) (Contact: Domestic Violence)*; *Re H (Children) (Contact: Domestic Violence)* (henceforth '*Re LVMH*').<sup>85</sup> The court in this case provided guidance for the judiciary in hearing disputes over contact in which domestic abuse is alleged, and was assisted by a joint expert report prepared by consultant child psychiatrists Drs Sturge and Glaser.<sup>86</sup> *Re LVMH* represented, at least in theory, a sea change in the handling of these cases, and the courts are still required to follow its guidance. The pre-PD12J case law, research and commentary should, therefore, be analysed within two phases: pre-*Re LVMH* and post-*Re LVMH*.

#### **1.3.1 The pre-*Re LVMH* case law, research and commentary**

While judicial and academic perspectives conflict on the extent to which the decisions reached by the courts pre-*Re LVMH* were putting children into unsafe contact arrangements,<sup>87</sup> it is generally accepted that characterising this case law was, at least,

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<sup>84</sup> PD12J (note 20 supra).

<sup>85</sup> *Re LVMH* (note 3 supra).

<sup>86</sup> C. Sturge and D. Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) 30(9) *Family Law* 583. The Court did not, however, accept all of Sturge and Glaser's guidance.

<sup>87</sup> Compare, for example, Thorpe LJ's comments in *Re LVMH* (*Re LVMH* (note 3 supra 299) to the research findings reported in this Chapter.

an underestimation of domestic abuse and its relevance to contact.<sup>88</sup> A sizeable body of academic research and commentary went further, highlighting what it saw as a judicial indifference to domestic abuse.<sup>89</sup> Indeed, Hunter, Barnett and Kaganas have argued that domestic abuse was ‘virtually ignored’ until *Re LVMH*.<sup>90</sup>

The landmark pre-*Re LVMH* study is that of Hester and Radford, who explored child contact arrangements in England and Denmark.<sup>91</sup> In England, 77 professionals<sup>92</sup> and 53 mothers were interviewed between 1992 and 1995.<sup>93</sup> Hester and Radford found that a presumption existed in legal and professional discourse that contact was synonymous with the promotion of children’s welfare, which risked minimising the dangers posed by domestic abuse, leading, as a result, to unsafe contact arrangements.<sup>94</sup> The value and quality of contact for the child was rarely examined, nor was the quality of a child’s relationship with the father, with any father showing interest in seeing his child regarded as ‘good enough’.<sup>95</sup> Contact was also found not to be stopped without ‘very strong’ evidence that the child was suffering abuse as a result of maintaining contact with the father,<sup>96</sup> and mothers felt pressured to agree to contact arrangements, even when these were regarded as unsafe, to avoid being labelled as ‘unreasonable’ or ‘hostile’.<sup>97</sup>

Furthermore, women’s accounts of abuse were found often to either fall away, or failed to be raised at all, during the process.<sup>98</sup> When domestic abuse was brought to the attention of professionals and advisers, this abuse was regularly minimised, or regarded as irrelevant, to contact.<sup>99</sup> Hester and Radford recommended, as a result,

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<sup>88</sup> See for example: B. Hale, ‘The View from the Court’ (1999) 45(11) *Child and Family Law Quarterly* 377, 383-384.

<sup>89</sup> See for example the arguments of: M. Hester and L. Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (Policy Press 1996); C. Humphreys, ‘Judicial Alienation Syndrome – Failures to Respond to Post-separation Violence’ (1999) 29(5) *Family Law* 281; F. Kaganas and C. Piper, ‘Divorce and Domestic Violence’ in S. Day Sclater and C. Piper (eds), *Undercurrents of Divorce* (Ashgate 1999); and A. Barnett, ‘Contact and Domestic Violence: The Ideological Divide’ in J. Bridgeman and D. Monk (eds), *Feminist Perspectives on Family Law* (Cavendish 2000).

<sup>90</sup> Hunter, Barnett and Kaganas (note 1 supra) 401 and 404.

<sup>91</sup> Hester and Radford (note 89 supra).

<sup>92</sup> Refuge workers (18), solicitors (19), mediators (14), court welfare officers (17) and ‘others’ (9). The ‘others’ were mental health workers, contact centre staff, domestic violence unit staff and staff from male perpetrator and men’s groups: Hester and Radford (note 89 supra) p.3.

<sup>93</sup> *Ibid* p.2.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* p.3.



that there should be no presumption that contact is in the best interests of the child, and that the ‘starting point’ ought instead to be a presumption of no contact, with contact only permitted if it could take place without undermining the safety of mothers and children.<sup>100</sup>

The most widely cited review of the pre-*Re LVMH* case law is that conducted by Bailey-Harris, Barron and Pearce, and the findings from this review were consistent with those of Hester and Radford.<sup>101</sup> This review consisted of analysis of the reported case law and an empirical study of county court practice.<sup>102</sup> The conclusion reached following the review of the reported case law was that it was ‘well-established’ that the courts apply ‘a strong though rebuttable presumption in favour of contact’, and that this approach applied both to cases in which there was violence as well as cases where there was not.<sup>103</sup> The observations conducted as part of the empirical study found that the presumption in favour of contact acted as a rule, with contact very rarely denied in cases involving domestic abuse.<sup>104</sup> A key ‘backdrop’ to this was the prevalence of a ‘no fault discourse’ among district judges, who ‘almost universally’ held the belief that a forward-looking approach was required, rather than one concerned with ‘past’ conduct.<sup>105</sup> A number of others also advanced this argument about the judicial and professional<sup>106</sup> commitment to the “‘obvious” good of contact for children’<sup>107</sup> resulting in a presumption in favour of contact which undermined robust assessment of whether contact would be of genuine benefit to children.<sup>108</sup>

The language used in much of the pre-*Re LVMH* case law bears out these criticisms. The courts’ commitment to making contact happen is evident, as is the pressure put on mothers who had experienced domestic abuse to look forward, rather than

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<sup>100</sup> Ibid.

<sup>101</sup> This review was cited with approval by Thorpe LJ in *Re LVMH* (note 3 supra) 299.

<sup>102</sup> See: R. Bailey-Harris, J. Barron and J. Pearce, ‘From Utility to Rights? The Presumption of Contact in Practice’ (1999) 13 *International Journal of Law, Policy and the Family* 111.

<sup>103</sup> Ibid 123.

<sup>104</sup> Ibid 123 and 126.

<sup>105</sup> Ibid 123.

<sup>106</sup> For example, family lawyers and mediators.

<sup>107</sup> Piper (note 31 supra) p.115. Piper cites the following cases in support of this argument: *Re H (Minors) (Access)* [1992] 1 FLR 148 (CA) 152 (Balcombe LJ); *Re W (A Minor) (Contact)* [1994] 2 FLR 441 (CA) 447 (Brown LJ); *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 (CA) 128 (Bingham MR).

<sup>108</sup> See for example: C. Piper, ‘Assumptions About Children’s Best Interests’ (2000) 22(3) *Journal of Social Welfare and Family Law* 261, 261-262.

bringing up 'past' allegations of abuse. In the early case of *Williams v Williams*,<sup>109</sup> for example, the court accepted that the father had been violent towards the mother, and that some incidents had been witnessed by the children. Dunn LJ nevertheless made the following comment about the mother's attitude towards contact:

I do not underestimate the traumatic effect upon the mother of the violence that she has suffered at the hands of this man, but it is plain from the evidence that in her dealings with the children she has not sought to forget it, or push the memory into the background, or to help them to come to terms with it ... .

... If the mother stimulates, and continues to stimulate, the children's fears of their father and if the little girl continues to show signs of emotional instability which, to a large extent at any rate, appears to have been caused by the mother's action, and if the mother refuses to co-operate ... then at some future time the court may have to consider whether this mother is fit to be entrusted with the care of these children and some other arrangement will have to be made in their interests. That is not a threat, it is simply a statement of the situation.<sup>110</sup>

This focus on making contact happen, and the expectation that mothers should not be opposing contact, is also illustrated in later cases.<sup>111</sup> In *Re P (A Minor) (Contact)*,<sup>112</sup> for example, the court accepted that there had been 'some incidents of quite considerable and wholly unjustifiable and reprehensible violence by the father against the mother'.<sup>113</sup> The psychiatric expert witness at first instance presented his opinion, based on what he had been told by the mother, that contact would be a 'threatening life event'.<sup>114</sup> It was, nevertheless, held that the mother was implacably hostile and 'determined at all costs'<sup>115</sup> to prevent contact. The mother's appeal against the order

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<sup>109</sup> [1985] FLR 509. For further discussion of the early reported case law, see for example: Barnett (note 11 supra).

<sup>110</sup> Ibid 512-513.

<sup>111</sup> See for example: *Re P (A Minor) (Contact)* [1994] 2 FLR 374; *Re M (A Minor) (Contact: Conditions)* [1994] 1 FLR 272; and *Re P (Contact: Supervision)* [1996] 2 FLR 314.

<sup>112</sup> [1994] 2 FLR 374.

<sup>113</sup> Ibid 375.

<sup>114</sup> Ibid 377.

<sup>115</sup> Ibid 379.

for supervised contact was dismissed.<sup>116</sup> And in *Re M (A Minor) (Contact: Conditions)*,<sup>117</sup> the father admitted he had been violent towards the mother, although not to the extent alleged. Wall J (as he then was) emphasised that the court should be 'extremely slow to arrive' at the conclusion that there should be no contact between the child and his/her parent and that the 'normal assumption' was that children would benefit from contact with their parents.<sup>118</sup> He said that the mother's account of the violence did not represent 'cogent reasons for denying all future contact'<sup>119</sup> and issued a warning that the mother 'would be wise to reflect long and hard' before continuing her opposition to contact.<sup>120</sup>

Furthermore, in *Re P (Contact: Supervision)*<sup>121</sup> the father was imprisoned following his attempt to strangle the mother; it was also alleged that he threatened to kill the children.<sup>122</sup> The father appealed against the order for indirect contact. Wall J endorsed the principles set out in *Re O (Contact: Imposition of Conditions)*,<sup>123</sup> including that it is 'almost always' in the best interests of a child to have contact with the parent with whom the child no longer lives.<sup>124</sup> Wall J allowed the father's appeal, stating that insufficient weight had been given to the benefits to the children of seeing their father face-to-face and that there was insufficient evidence to conclude that the mother's opposition to contact would put the children at risk of severe emotional harm. Wall J also shared the concern identified by Sir Thomas Bingham in *Re O (Contact: Imposition of Conditions)*,<sup>125</sup> and Balcombe LJ in *Re J (A Minor) (Contact)*,<sup>126</sup> that reliance on the mother's hostility to contact 'gives rise to the danger ... that the more intransigent a parent becomes the more likely he or she is to get his or her way'.<sup>127</sup> An order was made for the father to have supervised contact and Wall J concluded his judgment with this warning to the mother:

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<sup>116</sup> Ibid.

<sup>117</sup> [1994] 1 FLR 272.

<sup>118</sup> Ibid 279, citing *Re KD (A Minor) (Access: Principles)* [1988] 2 FLR 139; *Re H (Minors) (Access)* [1992] 1 FLR 148, 150C; *M v M (Child: Access)* [1973] 2 All ER 81.

<sup>119</sup> *Re M* (note 117 supra) 280.

<sup>120</sup> Ibid 284.

<sup>121</sup> [1996] 2 FLR 314.

<sup>122</sup> Ibid.

<sup>123</sup> [1995] 2 FLR 124, 128C–130E.

<sup>124</sup> *Re P* (note 121 supra) 328–329.

<sup>125</sup> [1995] 2 FLR 124, 128C – 130E.

<sup>126</sup> [1994] 1 FLR 729, cited in *Re O* [1995] 2 FLR 124, 128–129.

<sup>127</sup> *Re P* (note 121 supra) 330.

Whatever she [the mother] does, these children will want to know their father as they grow up, and if she continues to obstruct contact she will in my judgment simply be storing up trouble for herself. If she impedes contact, one day the children will be old enough to see their father despite her wishes, and if they then discover that he is not the monster she has painted, they will blame her for keeping them away from their father. Her own relationship with the children in later life may thus be seriously damaged. ... I say again to both parents, that if contact can flourish in a more relaxed atmosphere, the beneficiaries will be the children.<sup>128</sup>

A gear change in judicial attitudes can be traced to the decision in *Re D (Contact: Reasons for Refusal)*,<sup>129</sup> and the case law towards the end of the 1990s demonstrated increased acceptance of domestic abuse as a ground for rebutting the presumption of contact, at least in cases involving physical violence.<sup>130</sup> The mother in *Re D* fled to a refuge having been subject to physical abuse. She also alleged the father behaved in a worrying and threatening manner towards the child, although no specific findings were made.<sup>131</sup> The father's appeal against the decision denying him direct contact was dismissed and Hale J (as she then was) called for caution in the application of the label 'implacable hostility' to mothers holding 'genuine and rationally held' fears about her own, and her children's, safety.<sup>132</sup>

Other post-*Re D*<sup>133</sup> cases also illustrate this softening in judicial attitudes towards mothers alleging domestic abuse. In *Re P (Contact: Discretion)*,<sup>134</sup> for example, Wilson J presented a more nuanced typology of 'implacable hostility', accepting that there will be cases in which the mother raises 'sound arguments for the displacement of the presumption but where there are also sound arguments which run the other way' and

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<sup>128</sup> Ibid 332.

<sup>129</sup> [1997] 2 FLR 48. See also: *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42, 54; *Re M (Contact: Violent Parent)* [1999] 2 FLR 321, 330.

<sup>130</sup> See for example: *Re A (Contact: Domestic Violence)* [1998] 2 FLR 171; *Re M (Contact: McKenzie Friend)* [1999] 1 FLR 75. For further discussion, see for example: Bailey-Harris, Barron and Pearce (note 102 supra) 123; Humphreys (note 89 supra).

<sup>131</sup> *Re D* (note 129 supra).

<sup>132</sup> Ibid 54.

<sup>133</sup> Ibid. See also: *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42, 54; *Re M (Contact: Violent Parent)* [1999] 2 FLR 321, 330.

<sup>134</sup> [1998] 2 FLR 696.

that, in these cases, the mother's hostility can be of importance, and sometimes determinative importance.<sup>135</sup> Wilson J also accepted that there will be cases where the mother's opposition to contact is 'sufficiently potent to displace the presumption that contact is in the child's interests'.<sup>136</sup> Whilst still clearly tethering children's welfare to contact, this case, nevertheless, illustrates the courts becoming more receptive to domestic abuse being a valid reason for the denial or restriction of contact.

Evident also in the post-*Re D*<sup>137</sup> case law is a shift in focus towards articulating the steps the abusive parent must take before contact can take place, rather than applying pressure on the mother to drop her opposition to contact. In *Re H (Contact: Domestic Violence)*,<sup>138</sup> for example, Wall J emphasised that this was not an implacable hostility case as the mother had 'strong and rational grounds for opposing contact'.<sup>139</sup> He criticised the Recorder for failing to discuss the work the father must undertake in order to be fit to have contact with his children, focusing instead on what was expected of the mother.<sup>140</sup> In *Re M (Contact: Violent Parent)*,<sup>141</sup> Wall J again expressed his criticism of the approach the courts had tended to take in these cases, which expected the mother subjected to the abuse to 'bring up the children with full knowledge and a positive image of their natural father and arrange for the children to be available for contact' and took it as read that a domestically abusive father should have contact without interrogating whether the father was a 'fit person to exercise contact'.<sup>142</sup>

Although not introducing radical change, these cases represent the beginnings of a change in judicial attitudes. They demonstrate the courts' increased willingness to view domestic abuse as a valid reason for the denial of contact and awareness of the father's need to change his behaviour, rather than the mother's need to overcome her opposition to contact. Furthermore, in 1999 Hale J (as she then was)

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<sup>135</sup> Ibid 703.

<sup>136</sup> Ibid.

<sup>137</sup> *Re D* (note 129 supra).

<sup>138</sup> [1998] 2 FLR 42.

<sup>139</sup> Ibid 54.

<sup>140</sup> Ibid 57.

<sup>141</sup> [1999] 2 FLR 321.

<sup>142</sup> Ibid 333.

acknowledged the lack of an evidential foundation for the view that contact automatically promotes children's welfare.<sup>143</sup> It is important, however, not to overstate the developments made in the pre-*Re LVMH* case law. The case law still adopted a strongly pro-contact stance, in which contact was positioned as the norm, even in cases of proven or found domestic abuse.<sup>144</sup> The most significant gear change came with the case of *Re LVMH*.<sup>145</sup>

### 1.3.2 The decision in *Re LVMH*

The Court of Appeal's judgment in *Re LVMH*<sup>146</sup> remains the leading authority on contact and domestic abuse. Two important developments fed into this decision: the report of the Children Act Sub-Committee of the Advisory Board on Family Law (henceforth 'the CASC Report'),<sup>147</sup> chaired by Wall J, and the joint report by the consultant child psychiatrists Drs Sturge and Glaser,<sup>148</sup> who advised on the *Re LVMH* appeals. Given their impact on *Re LVMH*, the CASC Report and the report by Drs Sturge and Glaser are outlined first, before exploring the decision itself.

#### 1.3.2.1 The CASC Report

The Court of Appeal in *Re LVMH* had advance sight of the CASC's Report. The Report outlined the CASC's conclusions from their 1999 consultation and made a number of recommendations. The consultation confirmed that the courts were failing to address domestic abuse adequately in contact disputes, with too much weight placed on the importance of contact.<sup>149</sup> A number of responses to the consultation also confirmed that the courts did not properly understand domestic abuse and its effects on resident parents and children, and that this contributed to the courts' failure to give it proper weight when assessing whether it was in children's interests to have contact.<sup>150</sup>

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<sup>143</sup> Hale (note 88 supra) 381.

<sup>144</sup> See for example: *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42 [53]-[57] (Wall J). 'Proven or found' is used in this Chapter to encompass admissions of abusive behaviour, along with externally evidenced abuse and findings made through fact-finding.

<sup>145</sup> [1998] 2 FLR 42.

<sup>146</sup> Ibid.

<sup>147</sup> The 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* (Lord Chancellor's Department 12 April 2000) (henceforth in footnotes 'CASC Report').

<sup>148</sup> Sturge and Glaser (note 86 supra).

<sup>149</sup> CASC Report (note 147 supra) pp.5 and 70.

<sup>150</sup> Ibid p.70.

The CASC made a number of recommendations to address these concerns.<sup>151</sup> Legislative reform was not considered necessary, nor was the introduction of a presumption against contact.<sup>152</sup> Instead, the CASC's principal recommendation was that a Practice Direction should be introduced by the President in order to provide guidance for the judiciary on the approach to follow in cases where domestic abuse was presented as a reason to deny or limit a parent's contact with their child.<sup>153</sup> It also emphasised the need for 'systematic' information gathering and analysis of the applications made for contact in which domestic abuse is an issue, as well as investment in research on the long-term effects on children of witnessing and/or being direct victims of domestic abuse.<sup>154</sup> The need for enhanced training on domestic abuse for the judiciary and legal profession was also highlighted.<sup>155</sup>

The CASC published guidelines for good practice which it envisaged could, if approved, form the basis for the Practice Direction (henceforth 'the CASC Guidelines').<sup>156</sup> These included that the court must, at the 'earliest opportunity', consider whether allegations of domestic abuse, if proved, would affect the court's decision on contact. If so, the court should consider the evidence required to make findings of fact and decide whether an initial hearing to make findings of fact was necessary. The court should also consider whether interim contact should be ordered before the final order, and in particular whether the resident parent and child's safety could be ensured 'before, during and after' that contact.<sup>157</sup>

The CASC emphasised that while a 'traditional concept' may have existed that a father who was violent towards the child's mother could, nevertheless, be a 'good father', this now 'needs to be questioned'.<sup>158</sup> It argued that in cases involving 'physical or psychological domestic violence' perpetrated against a parent but not the children, but 'where the children have witnessed the violence or are aware of it', the court

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<sup>151</sup> Ibid p.71.

<sup>152</sup> Ibid p.53.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid pp.53-59.

<sup>157</sup> Ibid p.54.

<sup>158</sup> Ibid p.84.

‘needs carefully to consider’ the impact of the abuse on the children and the ‘messages, both open and covert’ which the father could be passing to the children during contact.<sup>159</sup> The CASC Report thus sent a strong message on the need for change in the courts’ treatment of domestic abuse within contact applications.

#### 1.3.2.2 The Sturge and Glaser Report

The Sturge and Glaser report set out a number of principles that ‘guide the advice of child psychiatrists and psychologists’ as an aid to the court in its determination of applications for contact in cases of alleged, proven or found domestic abuse.<sup>160</sup> These principles are explored in Chapter 2. Headline points from the report included that whilst contact can be beneficial to children, there is no empirical foundation for assuming that contact automatically promotes children’s welfare, particularly in cases in which the parent has perpetrated domestic abuse.<sup>161</sup> They also emphasised that the possibilities for optimal direct or indirect contact are limited in cases in which domestic abuse has occurred,<sup>162</sup> and that if any assumption is being made about contact, it ought to be that the non-resident parent should convince the court of his ability to meet his child’s needs and facilitate beneficial contact before contact should be considered.<sup>163</sup> Sturge and Glaser endorsed the CASC Report.<sup>164</sup>

#### 1.3.2.3 The judgment in *Re LVMH*

*Re LVMH* was an appeal to the Court of Appeal by four fathers, all of whom had been found to have been domestically abusive. The fathers were appealing against the dismissal of their applications for direct contact. All four fathers’ appeals were dismissed. The Court of Appeal endorsed the CASC Guidelines and partially endorsed the report prepared by Drs Sturge and Glaser. Dame Elizabeth Butler-Sloss gave the leading judgment. She called for greater awareness of domestic abuse and its relevance to contact, acknowledging that the courts may, in the past, have afforded it insufficient weight:

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<sup>159</sup> Ibid p.83.

<sup>160</sup> Sturge and Glaser (note 86 supra) 615.

<sup>161</sup> Ibid 623.

<sup>162</sup> Ibid 619.

<sup>163</sup> Ibid 623.

<sup>164</sup> Ibid 615.



The family judges and justices need to have a heightened awareness of the existence of and consequences, (some long-term), on children of exposure to domestic violence between their parents or other partners. There has, perhaps, been a tendency in the past for courts not to tackle allegations of violence and to leave them in the background on the premise that they were matters affecting the adults and not relevant to issues regarding the children.<sup>165</sup>

In particular, Butler-Sloss accepted that the 'general principle' that it is beneficial for children to have contact with their non-resident parents may have resulted, in some instances, in insufficient attention being given to the negative impact on children of living in a household in which there is domestic abuse.<sup>166</sup> She went on to say that it 'may not necessarily be widely appreciated' that domestic violence is a 'significant failure in parenting'.<sup>167</sup>

The judgment set out a number of principles for the handling of contact disputes in which domestic abuse is alleged. First, that allegations of domestic abuse should be adjudicated upon, with findings made on their veracity. Second, that in cases of proven domestic abuse, psychiatric advice would be crucial.<sup>168</sup> Third, that there is no presumption against contact in cases of proven domestic abuse, nor should there be. Fourth, that it is a 'matter of principle' that domestic abuse is not a bar to contact. Instead:

[Domestic abuse] is one factor in the difficult and delicate balancing exercise of discretion. The court deals with the facts of a specific case in which the degree of violence and the seriousness of the impact on the child and on the resident parent have to be taken into account. In cases of proved domestic violence, as in cases of other proved harm or risk of harm to the child, the court has the task of weighing in the balance the

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<sup>165</sup> *Re LVMH* (note 3 *supra*) 273.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> The impact of the restrictions on access to expert advice is discussed in Chapter 6.

seriousness of the domestic violence, the risks involved and the impact on the child against the positive factors, if any, of contact between the parent found to have been violent and the child.<sup>169</sup>

Butler-Sloss also set out a number of factors the court should consider when hearing an application for contact in which domestic abuse allegations are made. These were the conduct of the parties, both towards one another and the children, the effect of domestic abuse on the resident parent and the child, and the motivation of the parent seeking contact, which would include whether the application was a means to continue the perpetration of abuse.<sup>170</sup> In the cases in which the domestic abuse is 'serious', the extent to which perpetrators acknowledge their conduct, show an awareness of the need for change and make efforts to reform their behaviour are 'likely' to be important considerations.<sup>171</sup> Butler-Sloss was, however, concerned not to overemphasise the relevance of domestic abuse to child contact:

... I recognise the danger of the pendulum swinging too far against contact where domestic violence has been proved. It is trite but true to say that no two child contact cases are exactly the same.<sup>172</sup>

Butler-Sloss endorsed the pronouncement of Wilson J in *In Re M (Contact: Welfare Test)*<sup>173</sup> as a 'helpful summary of the proper approach to a contact application where domestic violence is a factor',<sup>174</sup> which was:

I personally find it helpful to cast the principles into the framework of the checklist of considerations set out in section 1(3) of the Children Act 1989 and to ask whether the fundamental emotional need of every child to have an enduring relationship with both his parents (section 1(3)(b)) is outweighed by the depth of harm which, in the light, inter alia, of his

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<sup>169</sup> *Re LVMH* (note 3 supra) 273.

<sup>170</sup> *Ibid* 275.

<sup>171</sup> *Ibid* 273 and 275.

<sup>172</sup> *Ibid* 273.

<sup>173</sup> [1995] 1 FLR 274

<sup>174</sup> *Re LVMH* (note 3 supra) 274.

wishes and feelings (section 1(3)(a), this court would be at risk of suffering (section 1(3)(e)) by virtue of a contact order.<sup>175</sup>

She also endorsed the principles set out by Sir Thomas Bingham MR in *Re O (Contact: Imposition of Conditions)*,<sup>176</sup> but distinguished the appeals from *Re O* on the basis that *Re O* involved implacable hostility, rather than proven domestic abuse.<sup>177</sup>

Thorpe LJ agreed with Butler-Sloss' judgment and offered additional comment. He stated that there 'appear[ed] to be universal judicial recognition of the importance of contact to a child's development',<sup>178</sup> and that Drs Sturge and Glaser's expert report 'fully identif[ed] the benefits to children of contact'.<sup>179</sup> Warning against returning to rights discourse,<sup>180</sup> Thorpe LJ set out his preference for an 'assumption in favour of contact' over a 'presumption' in favour of contact.<sup>181</sup> In his view, domestic abuse was 'one of the catalogue of factors' that could offset that assumption.<sup>182</sup> The risk, he explained, with the term 'presumption' was that it could 'inhibit or distort the rigorous search for the welfare solution'.<sup>183</sup> He was also concerned that a presumption could be relied upon by advocates and judges when they felt 'undecided or overwhelmed'.<sup>184</sup>

Thorpe LJ addressed the question of whether judges had been 'elevating a presumption in favour of contact too highly or trivialising a history of domestic violence' and concluded that this 'must remain uncertain'.<sup>185</sup> He emphasised that over the five-year period preceding this appeal, the applications and appeals to the Court of Appeal did not suggest that orders for contact were being made when they should not have been,<sup>186</sup> but he accepted the findings of Bailey-Harris, Barron and Pearce, including that district judges tended to discount past history and set the bar

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<sup>175</sup> *Re M (Contact: Welfare Test)* [1995] 1 FLR 274, 278-279.

<sup>176</sup> [1995] 2 FLR 124.

<sup>177</sup> *Re LVMH* (note 3 *supra*) 275.

<sup>178</sup> *Ibid* 294.

<sup>179</sup> *Ibid* 296. An interpretation of the research evidence challenged by S. Gilmore, 'The Assumption that Contact is Beneficial: Challenging the "Secure Foundation"' (2008) 38(Dec) *Family Law* 1226.

<sup>180</sup> *Ibid* 294-295.

<sup>181</sup> *Ibid* 295.

<sup>182</sup> *Ibid* 298.

<sup>183</sup> *Ibid* 295.

<sup>184</sup> *Ibid*.

<sup>185</sup> *Ibid* 299.

<sup>186</sup> *Ibid*.

high for the rebuttal of the presumption of contact.<sup>187</sup> In common with Butler-Sloss, however, Thorpe LJ was concerned not to overemphasise the relevance of domestic abuse:

The danger of elevating any one factor in what will always be an extremely complex evaluation is to move the pendulum too far and thus to create an excessive concentration on past history and an over-reflection of physical abuse within the determination of individual cases.<sup>188</sup>

As a result, he rejected the suggestion by Drs Sturge and Glaser that there should be an assumption against contact in cases in which there is domestic abuse.<sup>189</sup> He also questioned the need for guidelines for the courts, explaining that:

... the only direction that can be given to the trial judges is to apply the welfare principle and the welfare check list, section 1(1)(3) of the Children Act 1989, to the facts of the particular case.<sup>190</sup>

Overall, the judgment in *Re LVMH* sent a clear signal on the importance of domestic abuse being robustly considered within disputes over contact, acknowledging that it may have received insufficient attention in the past. There were, however, tensions in the judgment. Whilst rejecting a 'presumption' in favour of contact,<sup>191</sup> it is questionable why the court was willing to readily accept, or even assume, the benefits of contact but not adopt any assumption against contact in cases in which domestic abuse is found or proven. The difference in practice between an 'assumption' and 'presumption' is also questionable. Furthermore, Gilmore has criticised Thorpe LJ's claim that Drs Sturge and Glaser 'fully identifie[d]'<sup>192</sup> the benefits to children of

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<sup>187</sup> Ibid.

<sup>188</sup> Ibid 300.

<sup>189</sup> Ibid 300. See: Sturge and Glaser (note 86 supra) 623.

<sup>190</sup> *Re LVMH* (note 3 supra) 300-301.

<sup>191</sup> Ibid 295.

<sup>192</sup> Ibid 296.

contact.<sup>193</sup> And the court's lack of focus on risks of future harm has been described as an 'astonishing omission'.<sup>194</sup> The judgment was significant, therefore, but not radical.

### 1.3.3 Post-*Re LVMH* case law and research

As a result of the judgment in *Re LVMH*, the CASC's Guidelines were not initially converted into a Practice Direction; a less comprehensive and authoritative practice note was issued which summarised the key messages from *Re LVMH*.<sup>195</sup> However, whilst some cases demonstrated improved practice,<sup>196</sup> a number of appeals to the Court of Appeal following *Re LVMH*<sup>197</sup> showed that the courts were failing to follow the *Re LVMH* guidance, as well as that of the CASC. Widely recognised as one of the most obvious failings was *Re H (A Child) (Contact: Domestic Violence)*.<sup>198</sup> The Court of Appeal allowed the mother's appeal against the lower court's order for supervised contact. Wall LJ described the failure of the lower court to address *Re LVMH* as 'wholly unacceptable'<sup>199</sup> and that this, along with the failure to address the CASC Guidelines, was responsible for the judge ignoring the father's violence in making the contact order and his serious minimisation of the violence experienced by the mother.<sup>200</sup> In particular, he criticised the judge for over-reliance on the comment in *Re LVMH* on the risk of domestic abuse allegations being exaggerated,<sup>201</sup> and for failing to pay any regard to the father's attitude towards his violent behaviour.<sup>202</sup> Wall LJ attached the CASC Guidelines to the judgment and warned:

They [the CASC Guidelines] represent good practice and they are to be used. It is bad practice to ignore them. I append them to this judgment in the hope that this court will not again be presented with a case such as the present, which not only ill-serves the parties and the child, but does

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<sup>193</sup> Gilmore (note 179 supra).

<sup>194</sup> Piper (note 31 supra) p.116.

<sup>195</sup> Family Justice Council, *Report to the President of the Family Division on the Approach to be Adopted by the Court When Asked to Make a Contact Order by Consent, Where Domestic Violence has been an Issue in the Case* (January 2007) p.11.

<sup>196</sup> See for example: *M v A (Contact: Domestic Violence)* [2002] 2 FLR 921; *Re O (Contact: Withdrawal of Application)* [2003] EWHC 3031, [2004] 1 FLR 1258. For discussion of these cases, see Barnett's doctoral research (note 11 supra) p.130.

<sup>197</sup> *Re LVMH* (note 3 supra).

<sup>198</sup> [2005] EWCA Civ 1404; [2006] 1 FLR 943.

<sup>199</sup> *Ibid* [76].

<sup>200</sup> *Ibid* [79].

<sup>201</sup> *Ibid*.

<sup>202</sup> *Ibid* [80] and [81].

the system discredit, and helps to devalue the valuable and conscientious work which courts up and down the country are undertaking in an attempt to tackle the scourge of domestic violence and to minimise the effect which it has on parties and children.<sup>203</sup>

Similarly, in *Re K and S (Children) (Contact: Domestic Violence)*<sup>204</sup> Thorpe LJ expressed his dismay at how a case ‘a mere four-and-a-quarter years later, could have been conducted as though the Court of Appeal had never spoken on the issue’.<sup>205</sup> He said *Re LVMH* had ‘entirely reformed practice for the court’ and described the lower court’s failure to address the case as ‘the most serious deficiency in the trial process’.<sup>206</sup>

At the ‘Making Contact Safe’ conference in September 2004, Wall LJ voiced his concerns that too many judges and legal professionals were still not giving proper weight to domestic abuse in contact cases.<sup>207</sup> The Lord Chancellor’s Department’s monitoring of the implementation of the CASC Guidelines similarly found that court practice was inconsistent, with the Guidelines frequently not being applied.<sup>208</sup> It raised concerns in particular about the courts’ failures to hold fact-findings and the willingness of the courts to assume the benefits of contact without proper assessment of the risks it could pose to the child and resident parent.<sup>209</sup>

Research conducted post-*Re LVMH* but before the introduction of the Practice Direction confirmed these concerns about inadequate compliance with *Re LVMH* and the CASC guidance. Aris and Harrison, for example, concluded from their review of section 8 applications that ‘the assumption that contact is in the best interests of the child prevailed’.<sup>210</sup> Perry and Rainey also raised concerns following their review of

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<sup>203</sup> Ibid [142].

<sup>204</sup> [2005] EWCA Civ 1660; [2006] 1 FCR 316.

<sup>205</sup> Ibid [27].

<sup>206</sup> Ibid.

<sup>207</sup> J. Perrie, ‘Making Contact Safe’ (2004) 34(Nov) *Family Law* 837, 837.

<sup>208</sup> See the discussion in: J. Masson and C. Humphreys, ‘Facilitating and Enforcing Contact: the Bill and the Ten Per Cent’ (2005) 35(7) *Family Law* 548, 548-549.

<sup>209</sup> Ibid.

<sup>210</sup> Aris and Harrison reviewed 297 section 8 applications. See: R. Aris and C. Harrison, *Domestic Violence and the Supplemental Information Form C1A* (Ministry of Justice Research Series 17/07 December 2007) pp.v and 34.

court records and interviews with parents and judges<sup>211</sup> about the dominance of the courts' pro-contact approach and the 'apparent lack of attention' given in some cases to serious allegations of abuse.<sup>212</sup>

Tensions were, however, emerging in the case law. While, on the one hand, the Court of Appeal was expressing its criticism of the lower courts' failures to follow *Re LVMH* and the CASC Guidelines, it also started to express concerns about the pressures on the court system following *Re LVMH*. In *Re F (Restrictions on Applications)*<sup>213</sup> Thorpe LJ commented:

... there can be no doubt that the burden imposed on the courts of trial by the decision of this court in *Re L* has resulted in practical difficulties. In some instances it has burdened the already stretched resources of the trial courts with difficult factual investigations into past events and past relationships. That has undoubtedly had an impact on the productivity and speed of the family justice system.<sup>214</sup>

What existed simultaneously, therefore, was a concern that the *Re LVMH* and CASC guidance was not being followed but also a growing feeling among some members of the judiciary that implementation of the guidance was putting increasing pressure on the court system.

#### **1.3.4 The introduction of the Practice Direction**

The Practice Direction<sup>215</sup> was introduced in May 2008 in response to the concern that the courts were not following the guidance set out by the Court of Appeal in *Re LVMH* and the CASC.<sup>216</sup> In 2004, Women's Aid had published its report on 29 children from

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<sup>211</sup> Perry and Rainey reviewed 343 court records, and conducted 60 follow-up interviews with parents and 10 interviews with judges: A.Perry and B.Rainey, 'Supervised, Supported and Indirect Contact Orders: Research Findings' (2007) 21(1) *International Journal of Law, Policy and the Family* 21.

<sup>212</sup> A.Perry and B.Rainey, 'Supervised, Supported and Indirect Contact Orders: Research Findings' (2007) 21(1) *International Journal of Law, Policy and the Family* 21, 40.

<sup>213</sup> [2005] EWCA Civ 499, [2005] 2 FLR 950.

<sup>214</sup> *Ibid* [14].

<sup>215</sup> 'Residence and Contact Orders: Domestic Violence and Harm' [2008] 2 FLR 103.

<sup>216</sup> Family Justice Council (note 195 *supra*).

13 families who had been killed during contact between 1994 and 2004.<sup>217</sup> In response, Wall LJ conducted a review of the five cases in the Women's Aid's report in which the contact had been court-ordered.<sup>218</sup> Wall LJ made a number of recommendations, including that the Family Justice Council (henceforth 'the FJC') should report on the approach the court should take towards consent orders in contact cases involving domestic abuse, and on whether the parties, and in particular mothers, were being pressurised by their lawyers to agree to arrangements for contact which they did not feel were safe.<sup>219</sup> He also called for the reinforcement of the guidance set out by Drs Sturge and Glaser that it cannot be assumed that a father who has been abusive to the mother of his children is, nevertheless, a 'good father'.<sup>220</sup>

Resolution, at the request of the FJC, then conducted a postal survey of its members on contact, domestic abuse and consent orders, to which 1,056 responses were received.<sup>221</sup> The responses showed the rarity of fact-findings and orders for no contact, which occurred in only 4% and 2% of cases respectively.<sup>222</sup> One of the conclusions was that it seemed the courts were not identifying cases where violence was an issue, and that consent orders were being made without proper investigation into the safety and suitability of the arrangements for children.<sup>223</sup>

The FJC's subsequent report called for a 'cultural change' in the courts' approach, away from 'contact is always the appropriate way forward' to 'contact that is safe and positive for the child is always the appropriate way forward'.<sup>224</sup> It concluded that the assumption that contact is in the child's best interests had 'raised the bar for dismissing contact applications to a very high level',<sup>225</sup> which led too often to fact-findings not being held in cases involving domestic abuse allegations on the basis that

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<sup>217</sup> H. Saunders, *Twenty-nine Child Homicides: Lessons Still To Be Learnt on Domestic Violence and Child Protection* (Women's Aid Federation of England 2004).

<sup>218</sup> In three of those cases, the order had been made by consent: Wall LJ, *A Report to the President of the Family Division on the Publication by The Women's Aid Federation entitled "Twenty-nine Child Homicides: Lessons Still To Be Learnt on Domestic Violence and Child Protection" With Particular Reference to the Five Cases in which there was Judicial Involvement* (2006) <[https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/report\\_childhomicides.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/report_childhomicides.pdf)> accessed 19 October 2018.

<sup>219</sup> *Ibid* 8.27.

<sup>220</sup> *Ibid* 8.28.

<sup>221</sup> J. Masson, 'Consent Orders in Contact Cases: A Survey of Resolution Members' (2006) 36(Dec) *Family Law* 1041, 1042.

<sup>222</sup> *Ibid*.

<sup>223</sup> *Ibid* 1044.

<sup>224</sup> Family Justice Council (note 195 *supra*) pp.3 and 27.

<sup>225</sup> *Ibid* p.5.



‘no facts will be found that justify refusing contact’.<sup>226</sup> It found that the practice note issued after *Re LVMH* was not succeeding in changing practice, with the *Re LVMH* guidance frequently ignored.<sup>227</sup> The FJC advised that the courts needed to recognise that:

... there is no empirical evidence for the positive benefits of contact *per se* – it is the quality of relationships which contact supports that matter for children. Put another way, contact with a loving and supportive parent is in the best interests of children, contact with violent and unstable parents may not be.<sup>228</sup>

To address these problems, the FJC recommended the introduction of a Practice Direction, which would embody the *Re LVMH* decision and the CASC Guidelines, updated to reflect current best practice.<sup>229</sup> The FJC made clear that there needed to be ‘renewed emphasis’ on the paramountcy of ensuring safety in determining whether it would be in the best interests of the child to have contact,<sup>230</sup> and that before making a consent order in a case where domestic abuse has been alleged or admitted, there needed to be a robust risk assessment process.<sup>231</sup> The FJC made a number of other recommendations, including that there should be more comprehensive multi-disciplinary training on domestic abuse for the judiciary and legal practitioners.<sup>232</sup> The Practice Direction was introduced in May 2008,<sup>233</sup> and was reissued in 2009<sup>234</sup> having been amended to reflect the House of Lords’ decision in *Re B (Children) (Care Proceedings: Standard of Proof)*.<sup>235</sup>

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<sup>226</sup> Ibid.

<sup>227</sup> Ibid p.11.

<sup>228</sup> Ibid p.6.

<sup>229</sup> Ibid pp.3 and 11-12.

<sup>230</sup> Ibid p.4.

<sup>231</sup> Ibid pp.4 and 22.

<sup>232</sup> Ibid pp.4 and 23-25.

<sup>233</sup> *Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* [2008] 2 FLR 103.

<sup>234</sup> [2009] 2 FLR 1400.

<sup>235</sup> Baroness Hale confirmed that a case is only ‘part heard’ following a fact-finding hearing, as a fact-finding is ‘part of the whole process of trying the case’, rather than a ‘separate exercise’. As a result, the case should continue with the same judge after the fact-finding: [2008] UKHL 35, [2009] 1 AC 11 at [76].

## 1.4 SYNOPSIS – RESEARCH FINDINGS AND CASE LAW SINCE THE INTRODUCTION OF THE PRACTICE DIRECTION IN 2008

The introduction of the Practice Direction did not usher in radical change in the courts' approach. Indeed, the findings from studies conducted post-implementation continued to emphasise many of the concerns voiced pre-implementation.<sup>236</sup> Whilst some studies and reported cases showed improvements in judicial understandings of domestic abuse,<sup>237</sup> the headline research findings were that a de facto presumption in favour of contact dominated, with particular concerns raised about the adequacy of risk assessment<sup>238</sup> and the rarity of direct contact being refused to domestically abusive parents.<sup>239</sup> Criticism was also directed at the limited circumstances in which domestic abuse would be deemed by the courts to be relevant to the contact decision, which it was argued was confined to cases of recent and severe physical violence.<sup>240</sup> The mistrust of mothers alleging domestic abuse, with allegations perceived by judges and practitioners as a means to frustrate contact, was similarly identified as a concern.<sup>241</sup>

Most significantly, Hunter and Barnett's major study into the implementation of PD12J concluded that the FJC's call for a 'cultural shift' in the courts' approach had not been realised.<sup>242</sup> In response to their findings, PD12J was revised in April 2014, alongside the launch of the Child Arrangements Programme.<sup>243</sup> The definition of domestic abuse within PD12J was brought into line with the broader cross-government definition, which encompassed coercive control and recognised patterns

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<sup>236</sup> Despite the FJC's call for a 'cultural change': Family Justice Council (note 195 supra) pp.3 and 27.

<sup>237</sup> See for example: Barnett (note 11 supra) 439, 444. Barnett also cites the following case law in support of her argument: *Re W (Children: Domestic Violence)* [2012] EWCA Civ 528, [2014] 1 FLR 260; *Re W (Children) (Contact Order: Revocation of Direct Contact)* [2012] EWCA Civ 1788, [2012] All ER (D) 193 (Nov); *Re S (A Child)* [2012] EWCA Civ 1031, [2012] All ER (D) 265 (Jul).

<sup>238</sup> See for example: L. Trinder, J. Hunt, A. Macleod, J. Pearce and H. Woodward, *Enforcing Contact Orders: Problem-Solving or Punishment* (University of Exeter 2013) p.63.

<sup>239</sup> See for example: M. Coy, K. Perks, E. Scott and R. Tweedale, *Picking Up the Pieces: Domestic Violence and Child Contact* (Rights of Women 2012) pp.61 and 81; Barnett (note 11 supra) 439, 451-454.

<sup>240</sup> See for example: Coy, Perks, Scott and Tweedale (note 239 supra) p.51; R. K. Thiara and A. K. Gill, *Domestic Violence, Child Contact and Post-Separation Violence: Issues for South Asian and African-Caribbean Women and Children: A Report of Findings* (NSPCC 2012) pp.98 and 120; Hunter and Barnett (note 12 supra) pp.5, 21 and 72; Barnett (note 11 supra) 444-445 and 461-462.

<sup>241</sup> See for example: Hunter and Barnett (note 12 supra) p.35. See also: Barnett (note 10 supra) 394-396. For discussion of the false allegations narrative, see Chapter 3.

<sup>242</sup> Hunter and Barnett (note 12 supra) pp.8, 17 and 72-73.

<sup>243</sup> Practice Direction 12B – Child Arrangements Programme.

of abusive behaviour.<sup>244</sup> A statement of ‘General Principles’ was included as a ‘judicial aid to the application of the Practice Direction’, a ‘prescription of clearer expectations’ was set out for fact-findings and ‘tighter provisions’ were introduced in relation to interim child arrangements orders.<sup>245</sup>

Concerns about insufficient weight being given to domestic abuse within court-adjudicated contact disputes did not, however, abate following these 2014 revisions. Indeed, many of the same concerns again continued to be reiterated.<sup>246</sup> In response to concerns about poor practice and varied compliance with PD12J, in October 2017 PD12J was revised again, following a review conducted by Mr Justice Cobb.<sup>247</sup> Significant in initiating this review was the Nineteen Child Homicides report by Women’s Aid and the work of the All-Party Parliamentary Group on Domestic Violence.<sup>248</sup> Whilst many of Cobb’s recommendations were implemented, others were diluted or omitted. The 2017 changes to PD12J are highlighted where relevant in the Chapters which follow and are summarised in the thesis’ Conclusion. The extent to which the amendments will effect meaningful change in the courts’ approach remains unknown, but criticisms of the law and practice remain as live now as ever.<sup>249</sup>

## 1.5 ORIGINALITY AND FOCUS OF THIS DOCTORAL RESEARCH

This section explains the methodologies of the key post-PD12J studies in order to situate this doctoral research within the existing evidence base, and to lay the foundation for the discussion of these studies in the later chapters. It then articulates the original contribution this doctoral research makes to advancing this evidence base and summaries the focus of this research.

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<sup>244</sup> For discussion of these changes, see: The Hon. Mr Justice Cobb, *Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm – Report to the President of the Family Division* (January 2017)

para 7.

<sup>245</sup> Ibid.

<sup>246</sup> See: Women’s Aid, *Nineteen Child Homicides* (Women’s Aid 2016); All-Party Parliamentary Group on Domestic Violence, *Parliamentary Briefing: Domestic Abuse, Child Contact and the Family Courts* (All-Party Parliamentary Group on Domestic Violence and Women’s Aid 2016); HC Deb 15 September 2016, vol 614, col 1082.

<sup>247</sup> The Hon. Mr Justice Cobb (note 244 supra).

<sup>248</sup> Women’s Aid (note 246 supra); All-Party Parliamentary Group on Domestic Violence (note 246 supra). Alongside publication of its report, Women’s Aid launched its Child First campaign: Women’s Aid, ‘Child First: Safe Child Contact Saves Lives’ <<https://www.womensaid.org.uk/childfirst/#1505733276441-27958007-8312>> accessed 5 November 2018.

<sup>249</sup> For calls for a review of the law and practice, see: Birchall and Choudhry (note 5 supra); Home Affairs Committee (note 5 supra).

### 1.5.1 Methodologies – key post-PD12J studies

The evidence base built since the introduction of PD12J in 2008 can be split into three parts: first, studies based on mothers' or practitioners' perspectives of current practice;<sup>250</sup> second, studies based on reviews of court files;<sup>251</sup> and third, studies which map or assess the outcomes of contact generally or the courts' decisions on contact specifically.<sup>252</sup> The most recent research, published in 2018 by Birchall and Choudhry, adds to the evidence base on survivors' perspectives of contact proceedings, and explores domestic abuse, human rights and contact.<sup>253</sup> This research was based on online surveys, along with focus group discussions and individual telephone interviews to follow up on the survey findings.<sup>254</sup> Its adoption of a human rights lens is significant because this has not featured prominently in previous studies.<sup>255</sup>

The major post-Practice Direction study based on practitioners' perspectives was conducted by Hunter and Barnett. Hunter and Barnett's survey of 623 judicial officers and practitioners,<sup>256</sup> published in 2013, was the first to collect data on the incidence and outcomes of fact-finding hearings, and also provided important insights into final orders.<sup>257</sup> Other important studies based on interviews and/or surveys with practitioners and/or mothers affected by domestic abuse involved in court-adjudicated disputes over contact include the following. Barnett's doctoral research was published in 2014 and was based on semi-structured interviews with 29 barristers, solicitors and Cafcass Family Court Advisers, along with a review of the

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<sup>250</sup> Thiara and Gill (note 240 supra); Coy, Perks, Scott and Tweedale (note 239 supra); Hunter and Barnett (note 12 supra); Barnett (note 11 supra); Birchall and Choudhry (note 5 supra).

<sup>251</sup> Harding and Newnham (note 23 supra); Cafcass and Women's Aid (note 25 supra).

<sup>252</sup> Fortin, Hunt and Scanlan (note 30 supra); Trinder, Hunt, Macleod, Pearce and Woodward (note 238 supra).

<sup>253</sup> Birchall and Choudhry (note 5 supra). This research was conducted in 2017 and 2018.

<sup>254</sup> All survivors were self-selected, had experiences of the family court in the last five years and had their cases completed. The research comprised: an online survey of 63 survivors of domestic abuse; a follow-up online survey with 14 women focusing specifically on the human rights implications of contact; two focus group discussions with nine survivors to follow up on the survey findings; and nine individual telephone interviews with survivors, again to follow up on the survey findings: Birchall and Choudhry (note 5 supra) pp.14-16.

<sup>255</sup> The adoption of this lens within the child contact space has recently been emphasised as significant: Hunter, Barnett and Kaganas (note 1 supra) 403 and 421-422.

<sup>256</sup> The responses were from: Circuit judges (37); family District judges (121); family Magistrates (141); Magistrates' clerks (23); family barristers (111), solicitors (121) and Cafcass Family Court Advisers (56); and 'others' (13) (comprising domestic violence advocates, children's guardians and expert witnesses): Hunter and Barnett (note 12 supra) pp.13-14.

<sup>257</sup> Ibid. Hunter and Barnett's research was carried out between October and December 2011.

reported case law.<sup>258</sup> Coy et al's study was published in 2012, and was based on interviews with 34 women involved in contact proceedings and a survey of 113 legal professionals.<sup>259</sup> Thiara and Gill's 2012 study was based on 71 interviews with professionals,<sup>260</sup> 45 women and 19 children.<sup>261</sup>

Research based on reviews of court files have also made an important contribution to the existing evidence base. The most significant review of court files was conducted by Harding and Newnham and was based on reviews of a retrospective sample of 197 files from 2011.<sup>262</sup> This study provided insights into how the courts share the care of children between parents, both in cases with and without concerns about domestic abuse.<sup>263</sup> More recent is Cafcass and Women's Aid's joint report on allegations of domestic abuse in child contact cases, which was based on reviews of 216 case files and was published in July 2017.<sup>264</sup> This research, however, does not distinguish between allegations and proven or found domestic abuse, which limits somewhat the insights it can provide into current practice.

The headline findings from these studies are broadly consistent, despite the different methodologies adopted, and the research conducted since the revisions to PD12J in 2014 has not pointed to any radical change in the courts' approach. Assessments of whether the courts are reaching the 'right' outcomes in individual cases, however, continues to be hindered by the lack of longitudinal data on the long-term outcomes of court-ordered contact for children. The two studies which provide some insight on this suggest that 'right' outcomes are not being reached in all cases, and identify the courts' pro-contact approach as a distraction to assessments and management of

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<sup>258</sup> Barnett (note 11 supra). Barnett reviewed all the relevant reported case law from May 2008 to September 2013. Barnett's interviews predominantly took place in 2011, with a minority taking place in 2010.

<sup>259</sup> 53 solicitors, two trainee solicitors, 56 barristers and two legal executives: Coy, Perks, Scott and Tweedale (note 239 supra) pp.19-20. The interviews were conducted between February and July 2012.

<sup>260</sup> Domestic violence services (18), Cafcass (17), contact centres (7), solicitors (7), barristers (7), judges (4), children's guardians (2), CYP and families (2) and multi-agency professionals group discussion (10): Thiara and Gill (note 240 supra) pp.8-9.

<sup>261</sup> Ibid pp.8-11. Thiara and Gill's research was conducted between June 2008 and April 2010.

<sup>262</sup> The sample was comprised of section 8 cases disposed of through final order between February and August 2011 from five County Courts in England Wales. Eighty-eight percent (174) of cases involved disputes between parents. Forty-one percent (71) of applications were for contact. See further: Harding and Newnham (note 23 supra) pp.8, 11 and 110.

<sup>263</sup> Ibid.

<sup>264</sup> The 216 case files were taken at random from a sample of 15,160 cases which closed to Cafcass between April 2015 and March 2016, with the data collected between June and July 2016. See further: Cafcass and Women's Aid (note 25 supra) pp.4-5.

risk.<sup>265</sup> Fortin et al's study is the only study since the introduction of PD12J to have assessed the impact of contact on the lives of children, which was conducted through telephone surveys with 398 young adults who experienced parental separation prior to the age of 16, and follow-up qualitative interviews with 50 participants.<sup>266</sup> Whilst only a minority of these young adults had court-ordered contact, Fortin et al concluded that their findings were, nevertheless, highly pertinent to the courts' resolution of cases. As part of Trinder et al's study, the safety of court-ordered contact was assessed through a review of 215 court files.<sup>267</sup>

### 1.5.2 Originality of this doctoral research

This doctoral research makes an original contribution to knowledge in three principal respects. First, the majority of the studies outlined above predate major developments, including the reforms to legal aid, the introduction of the criminal offence of controlling or coercive behaviour,<sup>268</sup> and the addition of the statutory presumption of parental involvement to the Children Act 1989. The majority also predate the 2014 amendments to PD12J. This doctoral study provides important and current data on the impact of these developments, focusing on the reforms to legal aid and the statutory presumption. Indeed, this study is the first to provide empirical data on the perceived impact of the statutory presumption on child contact disputes in which domestic abuse is alleged. It is also the first to consult the key professional actors on the impact of legal aid reform in the domestic abuse and child contact context. In the light of the significance of these developments, they are explored in Chapters 5 and 6 respectively.

Second, while some existing studies have consulted judges and practitioners on their perspectives on current practice, few have gained access to the judiciary, and the lack of current data on judicial and professional perceptions of, and responses to,

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<sup>265</sup> Trinder, Hunt, Macleod, Pearce and Woodward (note 238 supra) pp.61-64; Fortin, Hunt and Scanlan (note 30 supra) pp.xvii and 222.

<sup>266</sup> Fortin, Hunt and Scanlan (note 30 supra). For earlier research, see for example: L. Trinder, M. Beek and J. Connolly, *Making Contact: How Parents and Children Negotiate and Experience Contact After Divorce* (Joseph Rowntree Foundation 2002). For an exploration of the availability and use of feedback by judges, see: J. Masson, *Developing Judgment: The Role of Feedback for Judges in Family Court* (University of Bristol 2015).

<sup>267</sup> The case files were taken from March to April 2012 and November 2011 to October 2012. See further: Trinder, Hunt, Macleod, Pearce and Woodward (note 238 supra).

<sup>268</sup> Serious Crime Act 2015, s 76. This development is touched on in Chapter 3.

domestic abuse has been emphasised.<sup>269</sup> As Barnett has stressed, there has been ‘no research or monitoring data’ on ‘judicial and professional perceptions of and responses to domestic abuse in child arrangements and contact cases’ over the past three years.<sup>270</sup> This doctoral research speaks to this gap in the evidence base by providing insights into how the judiciary, legal and child welfare practitioners view the courts’ resolution of cases in which domestic abuse is found or proven.

Third, this doctoral research provides unique insights into the challenges faced by those charged with implementing the law in working on contact disputes in which domestic abuse is alleged, found or proven. At a time of financial stress, with resources squeezed across the family justice system, building the empirical evidence base on these challenges is key, both to understanding current practice and finding workable solutions to current problems.

### **1.5.3 Focus of this doctoral research**

This thesis takes as its focus private law child contact disputes adjudicated through the court system in which domestic abuse is alleged, found or proven. It concentrates on the cases in which the parent has been subjected to domestic abuse, although abuse subjected to children, either directly or indirectly, also comes within its scope. The research seeks to understand judicial and practitioners’ perspectives on how cases involving allegations and proven or found domestic abuse are being resolved by the courts and the challenges involved. It also seeks to understand perceptions of the impact of recent developments in law and practice, focusing on the statutory presumption of parental involvement and legal aid reform. The research addresses the way in which domestic abuse is defined and evidenced through to the final outcomes reached.

There are two principal exclusions from the focus of this research. First, concern has been raised about the adequacy of screening for domestic abuse within out-of-court

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<sup>269</sup> Barnett (note 10 *supra*) 387.

<sup>270</sup> *Ibid.* See also Caffrey on the need for research on the impact of the statutory presumption of parental involvement: L. Caffrey, ‘The Importance of Perceived Organisational Goals: A Systems Thinking Approach to Understanding Child Safeguarding in the Context of Domestic Abuse’ (2017) 26 *Child Abuse Review* 339.

dispute resolution, in particular in relation to mediation.<sup>271</sup> Whilst awareness of these broader issues is important, this thesis does not extend to out-of-court dispute resolution.<sup>272</sup> The research encompasses both court-adjudicated contact and consent orders, but the extent to which the courts interrogate the safety of consent orders was not a specific focus.<sup>273</sup> This research also does not seek to provide insight into the enforcement of orders.

Second, this thesis focuses on Cafcass practitioners' perspectives of court practice, rather than exploring specifically Cafcass' handling of cases. This introduces a degree of artificiality into the research, since the majority of interviewees reported that the courts follow Cafcass' recommendations. If the courts are criticised for being too pro-contact, it is possible, therefore, that similar criticisms could be directed towards Cafcass. This research does provide insights into the financial tensions affecting Cafcass' practice<sup>274</sup> in the light of the importance of Cafcass to the courts' determination of cases.

## 1.6 OUTLINE OF CHAPTERS

Chapter 1 outlines the methodology for this research. It sets out the following: the research aims and questions; the literatures reviewed; the rationale for adopting a qualitative socio-legal approach; the theoretical perspectives and values which underpinned the project; the data collection and analysis methods employed; the awareness and management of researcher influence; and the safeguards put in place to ensure data ethics compliance and confidentiality.

Chapter 2 focuses on the evidence base on the benefits and risks of contact in the context of domestic abuse, along with that on the impact of domestic abuse on children. A detailed exploration of these evidence bases is necessary because they sit at the core of the question of whether children should have contact with parents who

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<sup>271</sup> See: P. Morris, 'Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting' (2013) 35(4) *Journal of Social Welfare and Family Law* 445, 453; Barlow, Hunter, Smithson and Ewing (note 42 supra) pp.44, 96-110 and 207-208.

<sup>272</sup> For a recent and important research study focused on experiences of out-of-court family dispute resolution in England and Wales, see: Barlow, Hunter, Smithson and Ewing (note 42 supra).

<sup>273</sup> Save to note that concern has been raised about the making of these orders. See for example: Masson (note 221 supra) 1044; Hunter and Barnett (note 12 supra) p.72; Hunter, Barnett and Kaganas (note 1 supra) 408.

<sup>274</sup> See Chapter 6.



have perpetrated domestic abuse. Chapter 2 concludes that the evidence bases support a conclusion that contact with a domestically abusive parent can, in theory, bring benefits to children but, crucially, that contact also carries significant risks. There is, as a result, no empirical foundation for any assumption that children should have contact, or that contact will automatically benefit children, which sits uncomfortably with the pro-contact stance reported by interviewees throughout the thesis.

Chapter 3 goes on to explore how domestic abuse is defined and evidenced in contact disputes. It sets out current legal and policy definitions, analysing the extent to which these definitions are adopted in practice through the lens of interviewees' responses. It also explores the boundaries of these definitions and associated challenges, again through interviewees' responses. This Chapter articulates the crucial link between defining and evidencing domestic abuse: whilst the courts' theoretical understanding of domestic abuse may have improved, this is being undermined in practice by the structural barriers that exist in evidencing abuse, with the current incident-based model ill-suited to capturing the lived reality of domestic abuse. It concludes with a call for research into the creation of a new evidential model, along with the production of more comprehensive guidance on the definition of domestic abuse and its boundaries.

Chapter 4 then moves on to explore the more concrete issue of the impact of proven or found domestic abuse on the courts' decisions on contact, addressing whether the courts promote contact in these cases, whether concerns about safety and welfare are minimised, and what outcomes tend to be reached. It highlights areas of consensus and disagreement among interviewees, the principal area of consensus being that the courts promote contact, with the refusal of direct contact a rare outcome, and the principal area of disagreement being the extent to which the courts unduly minimise domestic abuse in the pursuit of promoting contact. This Chapter also addresses what happens once cases leave court, exploring the extent to which cases are brought back for review and highlighting the risks involved by the restrictions in access to reviews. It echoes previous calls for investment in research to

support the production of more detailed guidance for the judiciary on the relevance of abuse to contact.<sup>275</sup>

Chapter 5 builds on Chapter 4 by assessing the extent to which the statutory presumption of parental involvement, introduced into the Children Act 1989 by the Children and Families Act 2014, is changing practice. The introduction of this presumption was not well-supported either within academic or practitioner communities, with concerns raised that it could detract from the welfare of the child and lead to contact being ordered more readily in cases in which domestic abuse is an issue. This Chapter charts the path to reform and the applicability of the presumption to cases in which domestic abuse is found or proven. It explores interviewees' perspectives on its impact, concluding that it has not impacted either the courts' decision-making process or its resolution of disputes because the courts' pro-contact stance was well-established prior to the reform. This Chapter endorses previously articulated concerns that the presumption has symbolically reinforced the importance of contact, which remains unhelpful, if not dangerous, in cases involving domestic abuse, even if it is not changing practice. It then moves on to consider the argument that there should be a presumption against contact, concluding on the basis of interviewees' responses that such reform would not find support in practice.

Chapter 6 concludes the substantive chapters with an exploration of the intense financial challenges which are undermining the resolution of contact disputes in which domestic abuse is alleged, found or proven. It focuses on the impact of legal aid reform, since this was the issue which most concerned interviewees. It also considers the related impact of the pressures on, and changes to, the court process, including the lack of court time and access to expert assessment. The lack of funding for external support services is also explored, focusing on Cafcass as an over-stretched resource and the under-resourcing of supervised contact centres. It concludes that criticisms of the courts should be tempered by sensitivity to the intensely challenging environment in which decisions on contact are being taken and warns that this

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<sup>275</sup> See for example: Hunter and Barnett (note 12 supra) p.72. This need for guidance was also emphasised by J06-DJ and R03. R03 said: 'I think there needs to be like a ... a proper discussion about what is and isn't relevant when it comes to allegations of domestic violence and contact'.

environment is not one conducive to ensuring that the safety and well-being of children and parents is protected.

## **1.7 CONCLUSION**

*Re LVMH* and the introduction of PD12J represented major developments in the law and practice on child contact disputes in which domestic abuse is alleged, found or proven. Whilst these developments and their impact should not be downplayed, existing research and commentary suggests that the law and practice still has significant distance to travel before the problems in this space are resolved. This doctoral research responds to the current gap in the evidence base, providing insight into the way in which cases are being resolved, the impact of recent developments, the problems with the law and practice and the challenges for those charged with working on these cases. Some of the findings from this thesis are more positive than those of previous studies, particularly in relation to judicial understanding of domestic abuse and the harm it causes both to children and parents. Overall, however, it concludes that ideological, structural and financial tensions undermine practice. Overcoming these tensions requires further research, with the key being to find creative solutions which work within a climate of limited resources.

# CHAPTER 1

## METHODOLOGY

This doctoral research generates insights into current practice by examining the perspectives of the key actors charged with working on contact cases in which domestic abuse is an issue. Socio-legal empirical research of this kind is vital since there is ‘no research or monitoring data’ available on ‘judicial and professional perceptions of and responses to domestic abuse in child arrangements and contact cases’ for the past three years.<sup>1</sup> The purpose of this Chapter is to explain and justify the methodological decisions taken within this research, including the choice of methods.<sup>2</sup> The Chapter has seven parts which outline the research decisions made and the limitations of the choices employed. First, the research aims and questions are outlined. Second, the literatures which informed the research are noted. Third, the rationale for adopting a qualitative socio-legal approach to explore the research aims and questions is explained. Fourth, the theoretical perspectives and values underpinning the research are articulated. Fifth, the data collection and analysis methods employed are discussed. Sixth, researcher influence is explored. And finally, confidentiality and ethics are addressed.

### 1.1 RESEARCH AIMS AND QUESTIONS

This doctoral research has three core aims:

1. To explore practitioners’ perspectives on how cases involving both allegations and proven or found domestic abuse<sup>3</sup> are being resolved at court, shedding

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<sup>1</sup> A. Barnett, “‘Greater than the Mere Sum of Its Parts’: Coercive Control and the Question of Proof” (2017) 29(4) *Child and Family Law Quarterly* 379, 387. On the need for monitoring of the impact of the statutory presumption of parental involvement, see also: L. Caffrey, ‘The Importance of Perceived Organisational Goals: A Systems Thinking Approach to Understanding Child Safeguarding in the Context of Domestic Abuse’ (2017) 26 *Child Abuse Review* 339.

<sup>2</sup> This thesis makes the distinction between methodology and methods articulated by Savin-Baden and Howell Major. ‘Methodology’ is defined as the ‘theoretical analysis of the methods and principles appropriate to a field of study or other branch of knowledge’; and ‘methods’ as the ‘particular steps or processes taken during a study’: M. Savin-Baden and C. Howell Major, *Qualitative Research: The Essential Guide to Theory and Practice* (Routledge 2013) p.40.

<sup>3</sup> In this Chapter, and the Chapters which follow, ‘proven or found’ is used to encompass admissions of abusive behaviour, along with externally evidenced abuse and findings made through fact-finding.

light on the way in which domestic abuse is defined and evidenced through to the final outcomes reached.

2. To analyse practitioners' perspectives on recent developments in law and practice, focusing on the statutory presumption of parental involvement, introduced into the Children Act 1989 by the Children and Families Act 2014, and legal aid reform to better understand the impact of these developments.
3. To provide an opportunity for interviewees to articulate what they identify as the key challenges involved in working on contact cases in which domestic abuse is an issue to provide context for an assessment of whether the system appropriately safeguards mothers and children.

In order to meet the research aims, the issues discussed in the interviews clustered around the following six core questions:<sup>4</sup>

1. How is 'domestic abuse' defined in practice within contact proceedings? What, if any, definitional challenges exist?
2. How is the veracity of domestic abuse allegations established within contact proceedings? What, if any, evidential challenges exist?
3. What final outcomes are reached in contact disputes in which domestic abuse is found or proven?
4. What impact, if any, has the statutory presumption of parental involvement (introduced into the Children Act 1989 by the Children and Families Act 2014) had on contact disputes in which domestic abuse is alleged, found or proven?
5. What impact, if any, have the reforms to legal aid had on child contact disputes in which domestic abuse is alleged, found or proven?

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<sup>4</sup> The full interview schedules are contained in Appendix B.

6. What are the principal challenges for those working on contact cases in which domestic abuse is an issue?

The theoretical perspectives and values which informed the development of these aims and questions are explored later in this Chapter.<sup>5</sup>

## **1.2 LITERATURES DRAWN UPON WITHIN THIS RESEARCH**

Beyond the reported case law, this thesis draws on two primary literature sets. The first is 'developmental and psychological knowledge, theory and research'.<sup>6</sup> This material is explored in Chapter 2, which addresses the impact of domestic abuse on children, along with the benefits and risks of contact with a domestically abusive parent. This literature is important because it underpins the question of whether, and if so in what circumstances, children should have contact with parents who have perpetrated domestic abuse. The second is existing empirical research and commentary on the way in which applications to court for contact are handled and resolved in cases in which domestic abuse is alleged, found or proven. Chapters 3 to 6 draw on this literature, with an emphasis on research and commentary published since the introduction of Practice Direction 12J, as it is now titled, in 2008.

## **1.3 THE RATIONALE FOR ADOPTING A QUALITATIVE SOCIO-LEGAL APPROACH**

The adoption of a socio-legal approach for this doctoral research is important because, as this thesis documents, the law does not exist in a vacuum, and the current financial climate of cuts and limited resources is having a major bearing on the way in which contact disputes are being resolved.<sup>7</sup> As Chapter 6 explores, financial tensions are impacting the resolution of contact disputes in a number of ways: legal aid reform has fundamentally altered the legal landscape; the lack of funding for supervised contact centres continues to restrict opportunities for contact to take place in

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<sup>5</sup> See 1.4 below.

<sup>6</sup> C. Sturge and D. Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) 30(Sep) *Family Law* 615, 615.

<sup>7</sup> The term 'socio-legal' has been subject to different interpretations, but this thesis adopts the definition that this approach is one which acknowledges the 'context within which law exists, be that a sociological, historical, economic, geographical or other context': S. Wheeler and P. A. Thomas, 'Socio-Legal Studies' in D Hayton (ed), *Law's Futures* (Hart 2000) p.271. See also: C. Hunter, 'Introduction: Themes, Challenges and Overcoming Barriers' in C. Hunter (ed.), *Integrating Socio-Legal Studies into the Law Curriculum* (Palgrave Macmillan 2012) pp.1-3.

professionally monitored spaces; and pressures on the courts' and Cafcass' time, along with limited opportunities to instruct experts, raise questions about the extent to which the risks posed by domestically abusive parents can be robustly assessed. And, again as this thesis explores, the ideological emphasis placed on the importance of the father to the post-separation family continues to drive policy and practice in this space.

The purpose of this doctoral research – to provide insights into the perspectives of those charged with implementing the law, exploring their experiences of the resolution of disputes and their perceptions of what the key challenges are – pointed firmly towards the adoption of a qualitative approach.<sup>8</sup> One of the principal risks in reporting the findings of qualitative research is 'anecdotalism', in which the views of a minority are represented as a theme or key finding.<sup>9</sup> To mitigate against this risk, the number of interviewees making the point described is given, either in text or in a footnote, to accompany the discussion of each finding. The inclusion of direct quotes from interviewees has also been identified as important in enabling the reader to assess the extent to which the reporting of interviewees' comments is faithful to the original comments.<sup>10</sup> The data collection and analysis methods employed, and an exploration of my impact on the research as the researcher, are explored later in this Chapter.

## **1.4 THEORETICAL PERSPECTIVES AND VALUES UNDERPINNING THE RESEARCH**

It is acknowledged that all research is underpinned by ontological and epistemological assumptions, even if these are not made explicit.<sup>11</sup> It is also acknowledged that researchers are not 'neutral', and that they come to the research process with their

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<sup>8</sup> See: D. Silverman, *Doing Qualitative Research: A Practice Handbook* (Sage 2000) p.8; K. Malterud, 'The Art of Science and Clinical Knowledge: Evidence Beyond Measures and Numbers' (2001) 358(4) *The Lancet* 397, 398; Strauss and Cobin (1990) cited in N. Golafshani, 'Understanding Reliability and Validity in Qualitative Research' (2003) 8(4) *The Qualitative Report* 597, 600; M. Sandelowski, 'Using Qualitative Research' (2004) 14(10) *Qualitative Health Research* 1366, 1373-1374; Savin-Baden and Howell Major (note 2 supra) p.12.

<sup>9</sup> A. Bryman, *Social Research Methods* (4<sup>th</sup> ed, Oxford University Press 2012) pp.624-625.

<sup>10</sup> N. King, 'Using Templates in the Thematic Analysis of Text' in C. Cassell and G. Symon (eds), *Essential Guide to Qualitative Methods in Organizational Research* (Sage 2004) p.268; V. Braun and V. Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 93.

<sup>11</sup> See, for example: C. Ramazanoglu and J. Holland, *Feminist Methodology: Challenges and Choices* (Sage 2002) p.16; Braun and Clarke (note 10 supra) 85.

own experiences and values, with the extent to which steps ought to be taken to neutralise these experiences and values remaining open to debate.<sup>12</sup> Of most influence in shaping the research agenda for this study was feminist theory. This section outlines the ontological and epistemological assumptions which underpin this study and explains the impact of feminist theory. A positionality statement is provided later in this Chapter, which sets out the experiences and values I brought to this study as a researcher. The steps taken to minimise my impact on the data collection and analysis are also explored later in this chapter.

#### **1.4.1 Ontological and epistemological assumptions**

This thesis is broadly underpinned by the critical realist assumption that 'the way we perceive facts, particularly in the social realm, depends partly upon our beliefs and expectations'.<sup>13</sup> In common with realist perspectives, it is accepted that there is knowable 'truth' which can be understood through research but, the thesis also accepts the relativist assumption that the way that 'truth' is understood by individuals is filtered through their own experiences and perspectives.<sup>14</sup> However, acceptance of some objective reality is crucial if research is to be used to effect change in practice.<sup>15</sup>

This thesis works with the assumption, therefore, that it is possible to develop understanding of how contact disputes are being resolved in practice through research, and that the empirical evidence base can, and should, be used to reach an objective view on how cases should be resolved. For example, in the light of the empirical evidence base, there can now be little dispute over the conclusion that experience of, and exposure to, domestic abuse is harmful to children. But this thesis also accepts that the insights into court practice provided by the barristers, solicitors, Cafcass practitioners and domestic abuse organisations interviewed will be shaped by their own subjective experiences and belief frameworks. Whether these interviewees,

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<sup>12</sup> S. Reinharz, *Feminist Methods in Social Research* (Oxford University Press 1992) p.34; J. J. Scheurich, 'A Postmodernist Critique of Research Interviewing' (1995) 8(3) *International Journal of Qualitative Studies in Education* pp.239, 241; L. Parker and L. Roberts, 'Critical Race Theory and Its Use in Social Science Research' in B. Somekh and C. Lewin (eds). *Theory and Methods in Social Research* (2<sup>nd</sup> ed, Sage 2011) 82.

<sup>13</sup> M. Bunge, 'Realism and Antirealism in Social Science' (1993) 35 *Theory and Decision* 207, 231.

<sup>14</sup> V. Braun and V. Clarke, *Successful Qualitative Research* (Sage 2013) p.27.

<sup>15</sup> Ibid p.27.



for example, felt the courts over-promote contact at the expense of sensitivity to the risks it poses will depend on their own experiences of court practice, and their belief frameworks on whether children ‘need’ contact and the harms caused to children by contact, or a lack of contact, with a parent who has perpetrated domestic abuse.

#### **1.4.2 The influence of feminist theory**

This section outlines the influence of feminist theory on both the way in which this doctoral research was created and how it has shaped the research agenda within this space more broadly. In the light of the diversity of perspectives which make up feminist approaches, care has to be taken in discussing these perspectives in a manner which implies uniformity.<sup>16</sup> That said, as Munro has argued, there are ‘resemblances’ which ‘unite, albeit at times precariously, and often strategically’ feminist approaches.<sup>17</sup> Taken as a body of theoretical scholarship, the importance of feminist research in raising awareness of problems with the law and practice, and pushing for reform, within the child contact space is unparalleled.

One of the central criticisms of the law and practice voiced by feminist researchers and commentators has been the presentation of the welfare of the child as the neutral standard upon which decisions on contact are based. It has been argued that far from being neutral, the welfare of the child operates as a ‘mechanism of power that serves particular interests’.<sup>18</sup> And the Children Act 1989 has been identified in particular as cementing a role for fathers in the post-separation family,<sup>19</sup> with the welfare of the child conflated in legal and professional discourse with the perceived ‘need’ for children to have contact with their fathers.<sup>20</sup> This, in turn, it has been argued, has secured the ‘hegemonic status of the importance of the father within the modern family’,<sup>21</sup> with the centrality of contact to children’s welfare now an ‘uncontestable

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<sup>16</sup> V. Munro, ‘The Master’s Tools? A Feminist Approach to Legal and Lay Decision-Making’ In: D. Watkins and M. Burton (eds), *Research Methods in Law* (2<sup>nd</sup> ed, Routledge 2018) p.194.

<sup>17</sup> Ibid p.196. See also: R. Hunter, ‘The Gendered “Socio” of Socio-Legal Studies’ in D. Feenan (ed), *Exploring the “Socio” of Socio-Legal Studies* (Palgrave Macmillan Socio-Legal Studies 2013) pp.206-208.

<sup>18</sup> A. Barnett, ‘Contact and Domestic Violence: The Ideological Divide’ in J. Bridgeman and D. Monk (eds), *Feminist Perspectives on Child Law* (Cavendish Publishing 2000) p.132.

<sup>19</sup> Ibid p.140.

<sup>20</sup> Ibid p.130.

<sup>21</sup> Ibid. See also: H. Reece, ‘UK Women’s Groups’ Child Contact Campaign: “So Long as it is Safe” (2006) 18(4) *Child and Family Law Quarterly* 538, 548.

[sic] “truth”’,<sup>22</sup> despite being based on a ‘selectiv[e]’ and ‘simplifie[d]’ interpretation of ‘expert knowledge from non-legal discourses’.<sup>23</sup>

It has been argued within feminist research that the consequence of this elision of the welfare of the child with the perceived need to safeguard children’s contact with their fathers post-separation is that there is a risk of unsafe contact arrangements being made, since mothers who raise concerns about contact are labelled as deviant, with their opposition to contact seen as selfish rather than a genuine concern for children’s welfare.<sup>24</sup> It has also been argued that the pro-contact approach is incompatible with the need to determine each case as unique.<sup>25</sup>

Feminist analyses have also challenged what are perceived to be the unequal, and gendered, standards of behaviour expected of mothers and fathers as parents. The argument has been that in order for a mother to acquire the label of ‘good parent’, she must go out of her way to promote contact.<sup>26</sup> Any opposition to contact attracts the mother the label of ‘bad parent’.<sup>27</sup> Fathers, on the other hand, rarely attract the label of ‘bad parent’, acquiring the ‘good parent’ status easily through any willingness to maintain contact with their children and refrain from the perpetration of abusive behaviour.<sup>28</sup> And even when fathers perpetrate domestic abuse, it has been argued that their status as the ‘safe family man’ remains secure because of the ideological separation of domestic abuse from contact.<sup>29</sup> The default position, it has been argued, is that fathers are viewed as safe and family-orientated, whereas mothers are seen as ‘implacably hostile’.<sup>30</sup>

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<sup>22</sup> F. Kaganas and S. D. Sclater, ‘Contact Disputes: Narrative Constructions of “Good” Parents’ (2004) 12(1) *Feminist Legal Studies* 1, 5.

<sup>23</sup> Ibid 12.

<sup>24</sup> Barnett (note 18 supra) p.132; F. Kaganas and S. D. Sclater, ‘Contact Disputes: Narrative Constructions of “Good” Parents’ (2004) 12(1) *Feminist Legal Studies* 1, 13.

<sup>25</sup> Kaganas and Sclater (note 22 supra) 5-6.

<sup>26</sup> F. Kaganas, ‘Contact, Conflict and Risk’ in S. D. Sclater and C. Piper (eds), *Undercurrents of Divorce* (Ashgate 1999) p.113-114; Kaganas and Sclater (note 22 supra) 13.

<sup>27</sup> J. Wallbank, ‘Getting Tough on Mothers: Regulating Contact and Residence’ (2007) 15(2) *Feminist Legal Studies* 189, 214; C. Piper, ‘Commentary on *Re L (A Child) (Contact: Domestic Violence)*’ in R. Hunter, C. McGlynn and E. Rackley, *Feminist Judgments: From Theory to Practice* (Hart 2010) p.115.

<sup>28</sup> Kaganas (note 26 supra) p.113-114; Barnett (note 18 supra) p.146; R. Collier, ‘A Hard Time to be a Father: Reassessing the Relationship Between Law, Policy and Family Practices’ (2001) 28(4) *Journal of Law and Society* 520, 540; Kaganas and Sclater (note 22 supra) 13 and 19.

<sup>29</sup> C. Smart, ‘Power and the Politics of Child Custody’ in C. Smart and S. Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (Routledge 1989) pp.10-11; C. Smart, ‘The Legal and Moral Ordering of Child Custody’ (1991) 18(4) *Journal of Law and Society* 485, 497-499; Barnett (note 18 supra) pp. 129 and 137.

<sup>30</sup> Barnett (note 18 supra) p.130.

Informed by my background working for a women's refuge, supporting women affected by domestic abuse, I approached this doctoral project with a sympathy for these concerns about the law and practice. These concerns shaped my interest in this topic and, in turn, my decision to pursue this doctoral study to explore this area of law and practice. There are two interrelated reasons that this thesis does not adopt a specific feminist lens to the data analysis itself. First, that this is an empirical project aimed at hypothesis, rather than theory, building in order to generate new insights into an area of law and practice which has not been subject to similar enquiry for some years, and one which has been subject to significant developments which post-date existing studies. To this end, whilst the interview schedules were built with knowledge of the existing literature, the thesis takes an inductive thematic approach, in the sense that the study was data-driven, with the findings emerging from the data collected.<sup>31</sup> This is one of the hallmarks of empirical research in which data has 'primacy'<sup>32</sup> and the researcher is 'open to data and the theories that might emerge from it'.<sup>33</sup> It is also an approach commonly associated with qualitative research more broadly.<sup>34</sup> Throughout this thesis, the findings are then triangulated against those from existing studies, exploring points of consensus and difference.

Second, it was necessary to take steps to ensure access and the acceptability of the findings to a wider audience. Part of how this project was pitched to the judiciary and Cafcass, and to the other interviewees for whom permission to interview was not needed, was that the project was not aimed at 'testing' existing theory, but was instead exploratory, with the research giving 'voice' to interviewees to explain their perspectives on current practice and its challenges. This is not to deny the importance of feminist theory, or the scope to conduct further research through a feminist lens, but to state that this was not the function of this project. This need to secure access and 'maximis[e] "pathways to impact"' has been identified as a particular tension for feminist researchers.<sup>35</sup> Munro, for example, has argued that these demands can

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<sup>31</sup> J. Dean, P. Furness, D. Verrier, H. Lennon and C. Bennett, 'Desert Island Data: An Investigation into Researcher Positionality' (2018) 18(3) *Qualitative Research* 273, 282.

<sup>32</sup> Savin-Baden and Howell Major (note 2 supra) p.14.

<sup>33</sup> M. Burton, 'Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries' In: D. Watkins and M. Burton (eds), *Research Methods in Law* (2<sup>nd</sup> ed, 2018 Routledge) p.70.

<sup>34</sup> Silverman (note 7 supra) p.8.; Savin-Baden and Howell Major (note 2 supra) p.14.

<sup>35</sup> Munro (note 16 supra) p.209.

mandate the ‘re-packaging of findings into concepts and remedial mechanisms that the “legal community” already acknowledges, and can more readily digest and action’.<sup>36</sup>

Whilst this thesis does not adopt a deliberately feminist lens to the process of data analysis, it nevertheless accepts the argument that researchers are not ‘neutral’ and that, in turn, themes do not ‘emerge’ passively during the data analysis process.<sup>37</sup> The inherently active role played by the researcher throughout the research process is, therefore, acknowledged. Since this research strives to provide a voice to interviewees, steps were taken to minimise this researcher impact on the data collection and analysis. These steps are discussed later in this chapter, although it is also accepted that researcher impact can never be eradicated completely.<sup>38</sup>

## **1.5 METHODS – DATA COLLECTION AND ANALYSIS**

Within this section, the decisions taken in relation to data collection and analysis are explained.

### **1.5.1 Data collection**

The principal method used for data collection was interviews. Interviews are the most well-established qualitative data collection method and were chosen for this project because they are recognised as having particular strengths in exploring experiences and perceptions, which is the focus of this thesis.<sup>39</sup> Outlined below is: the rationale behind the adoption of semi-structured interviews; the process followed in developing the interview schedules, including the use of vignettes; the piloting of the interview schedules; the conducting of the interviews, including the decisions taken in relation to sampling and the experience of ‘elite’ interviewing.

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<sup>36</sup> Ibid.

<sup>37</sup> Braun and Clarke (note 10 supra) 80 (see also 78-80).

<sup>38</sup> See 1.6 below.

<sup>39</sup> J. H. Rubin and I. S. Rubin, *Qualitative Interviewing: The Art of Hearing Data* (Sage 1995); Savin-Baden and C. Howell Major (note 2 supra) 358.

#### 1.5.1.1 The rationale behind the adoption of semi-structured interviews

The importance of striking a balance in this study between supporting its exploratory nature and enabling comparability across, and within, the different professional groups interviewed drove the decision to use semi-structured interviews over structured or unstructured interviews. One of the particular strengths of semi-structured interviews is that the researcher is able to:

... keep more of an open mind about the contours of what he or she needs to know about, so that concepts and theories can emerge out of the data.<sup>40</sup>

The review of the existing literature enabled core themes to be developed on questions which would advance the existing evidence base through inclusion in this study, but the study was not aimed at rigidly 'testing' existing theories. It was intended to be exploratory, giving interviewees the space to identify the issues which they felt were the most significant, as well as enabling understanding of how the findings from this study related to the existing literature.

The adoption of semi-structured interviews proved significant because interviewees raised issues which were not covered by the original interview schedule. The most dominant of these was a concern about the existence, and in some interviewees' experience prevalence, of false allegations. The original interview schedule did not contain any questions on false allegations but, after several interviewees independently identified it as an issue, it was added to the later schedules in order to ensure consistency and to build a richer picture of interviewees' perspectives. Concern about the dominance of perceptions of the prevalence of false allegations is emerging as an important theme within current commentary on this topic,<sup>41</sup>

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<sup>40</sup> I. Seidman, *A Guide for Researchers in Education and the Social Sciences* (Teachers College Press 2006) p.12. The notion of themes passively 'emerging' out of the data has, however, been disputed: Braun and Clarke (note 10 supra).

<sup>41</sup> See for example: Barnett (note 1 supra) 394-396; J. Birchall and S. Choudhry, "'What About My Right Not to be Abused?' Domestic Abuse, Human Rights and the Family Court' (Women's Aid 2018) p.10. There is also growing concern about the parental alienation discourse, and in particular the way in which mothers who oppose contact are accused of alienating their children against the non-resident parent. See for example: L. Trinder, J. Hunt, A. Macleod, J. Pearce and H. Woodward, *Enforcing Contact Orders: Problem-Solving or Punishment* (University of Exeter 2013) pp.3 and 61; D. Eaton, S. Jarman and L. Lustigman, 'Parental Alienation: Surely the Time has Come to Effect Change?' (2016) 46(May) *Family Law* 581; Hunter, Barnett and Kaganas (note 1 supra) 404.

underlining the importance of its inclusion as an issue within this doctoral research and the strengths of the flexibility permitted by semi-structured interviewing.

A further, and related, strength of semi-structured interviews over structured interviews is that they provide the freedom to respond to answers from interviewees by asking follow-up questions.<sup>42</sup> In an exploratory project of this kind, this freedom is crucial. The ability, for example, to ask interviewees why certain outcomes would be reached, or how significant a problem an issue raised was, enabled a comprehensive account of interviewees' perspectives to be collected, which would not have been possible had the interviews been entirely structured.<sup>43</sup>

#### 1.5.1.2 Developing the interview schedules

Prior to developing the interview schedules, a review of the existing research and commentary was conducted. As outlined above, and as part of this review, the formation of the interview schedules was influenced by concerns about current practice voiced within feminist research and commentary. Within this doctoral project, familiarity with the existing literature was important in order to ensure that the research could make a meaningful and original contribution to the evidence base.<sup>44</sup> The risk of this familiarity unduly narrowing the scope of the study was mitigated by three factors:<sup>45</sup> first, that existing research pre-dated important developments, including the statutory presumption of parental involvement introduced by the Children and Families Act 2014; second, that the interview questions were open-ended and exploratory, rather than narrowed to testing existing theories; and third, that the interviews were semi-structured, which provided interviewees with the space to raise issues not contemplated by the interview schedules.

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<sup>42</sup> P. B. Bart and P.H. O'Brien, 'Stopping Rape: Effective Avoidance Strategies', 1984 (10)(1) *Signs: Journal of Women in Culture and Society* 83, 85; S. Halliday and P. Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press 2009) p.233-235; R.S. Barbour and J. Schostak, 'Interviewing and Focus Groups' In: B. Somekh and C. Lewin (eds). *Theory and Methods in Social Research*, (2<sup>nd</sup> edition, Sage Publications Ltd 2011) p.62; T. May, *Social Research: Issues, Methods and Process* (4<sup>th</sup> ed, Open University Press 2011) p.134.

<sup>43</sup> A strength of semi-structured and unstructured interviewing identified by: Halliday and Schmidt (note 42 supra) p.233.

<sup>44</sup> For discussion, see for example: A. G. Tuckett, 'Applying Thematic Analysis Theory to Practice: A Researcher's Experience' (2005) 19(1-2) *Contemporary Nurse* 75, 78-79.

<sup>45</sup> For discussion of the risk of familiarity narrowing the scope of the study, see: Braun and Clarke (note 10 supra) 86; Burton (note 33 supra) pp.68-69.

The interview schedules were designed to capture data on both what happens at the allegations stage, including broad questions on how domestic abuse is defined and evidenced, all the way through to final orders in cases of proven or found domestic abuse. Interviewees were also asked to comment on the impact, if any, of the statutory presumption of parental involvement, along with the reforms to legal aid,<sup>46</sup> and two fictional vignettes.

#### 1.5.1.2.1 Vignettes

Vignettes involve 'presenting respondents with one or more scenarios and then asking them how they would respond when confronted with the circumstances of that scenario'.<sup>47</sup> While the benefits of vignettes in eliciting rich and relevant data have been emphasised, there is relatively little written within the methodological literature on their use in qualitative inquiry.<sup>48</sup> The decision to use vignettes within this study was informed principally by the desire to move interviewees' focus from a general discussion about how cases are resolved and the challenges encountered in practice to a more specific discussion about how individual cases are resolved and associated challenges.

This is important because whilst it may be straightforward to explain in abstract terms what 'safe' contact looks like, this can be more challenging when confronted with an individual scenario. Furthermore, the vignettes were designed to tease out the extent to which non-physical and physical forms of abuse receive different responses in practice. Vignette One was focused on non-physical abuse, with one incident of physical violence, and Vignette Two focused on a pattern of physical abuse,

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<sup>46</sup> In the light of the importance of the judiciary not being drawn into areas of political controversy, the judges interviewed were only asked to comment on their experiences of hearing cases involving litigants in person, rather than legal aid policy more broadly.

<sup>47</sup> Bryman (note 9 supra) p.263. See also: N. E. Schoenberg and H. Ravdal, 'Using Vignettes in Awareness and Attitudinal Research' (2000) 3(1) *International Journal of Social Research Methodology* 63, 63; R. Hughes and M. Huby, 'The Construction and Interpretation of Vignettes in Social Research' (2004) 11(1) *Social Work & Social Sciences Review* 36.

<sup>48</sup> Schoenberg and Ravdal (note 47 supra) 63; C. Bradbury-Jones, J. Taylor and O. R. Herber, 'Vignette Development and Administration: A Framework for Protecting Research Participants' (2014) 17(4) *International Journal of Social Research Methodology* 427, 428. Some of the key texts which exist include: R. Hughes and M. Huby, 'The Application of Vignettes in Social and Nursing Research' (2002) 37(4) *Journal of Advanced Nursing* 382; and R. Hughes and M. Huby, 'The Construction and Interpretation of Vignettes in Social Research' (2004) 11(1) *Social Work & Social Sciences Review* 36.

accompanied by non-physical abuse. Interviewees were asked both closed and open questions; using a combination of these questions is recognised as striking a helpful balance between eliciting relevant insights and being open to new lines of inquiry.<sup>49</sup>

There are three principal limitations to the use of vignettes. The first is implausibility: if the vignettes are not accepted by interviewees as realistic, they are unlikely to elicit rich data.<sup>50</sup> Vignettes can be informed by a number of different sources to increase their plausibility, including the existing literature and first-hand experiences.<sup>51</sup> The vignettes in this doctoral research were created using real-life examples drawn from existing research,<sup>52</sup> as well as from my own experiences of working for a women's refuge.<sup>53</sup> Of the interviewees who commented on the plausibility of the vignettes, the majority said both scenarios represented common scenarios encountered in practice.<sup>54</sup> In relation to Vignette One, some made minor qualifications, such as turning the gas on being an atypical tool<sup>55</sup> and it being unusual for a father to specify the form of contact he was seeking,<sup>56</sup> but the core of the vignette was, nevertheless, accepted as realistic. J05-CJ was alone in identifying Vignette One as atypical, reporting that:

It's atypical because you do not tend to get ... it may be changing because of the change in the law but, on the whole, people are much more likely to tell you about the physical domestic violence rather than this. ... So there's usually so much of the physical stuff that the emotional stuff is somewhat ... is not emphasised very much so I don't think that is typical.

In relation to Vignette Two, more interviewees identified this vignette as atypical, but this was still a minority. Reasons given were that it is rare for alleged perpetrators to

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<sup>49</sup> See, for example: R. Hughes and M. Huby, 'The Construction and Interpretation of Vignettes in Social Research' (2004) 11(1) *Social Work and Social Sciences Review* 36, 42-43.

<sup>50</sup> N. Jenkins, M. Bloor, J. Fischer and J. Neale, 'Putting It In Context: the Use of Vignettes in Qualitative Interviewing' (2010) 10(2) *Qualitative Research* 175, 186; Bryman (note 9 supra) p.263.

<sup>51</sup> See, for example: Bradbury-Jones, Taylor and Herber (note 48 supra) 431.

<sup>52</sup> The scenarios were informed by those described in: M. Harding and A. Newnham, *How Do County Courts Share the Care of Children Between Parents?* (Nuffield Foundation 2015).

<sup>53</sup> See 1.6.1.1 below.

<sup>54</sup> In relation to Vignette One, n = 21: B01, B03, B04, B06, B07, C01, C03, C04, C05, C10, J01-M, J02-M, J03-M, J08-DJ, J10-DJ, R01, R02, S06, S07, S09 and S10. In relation to Vignette Two, n = 12: B01, B02, B03, B05, S03, S09, S10, C01, C02, C03, J01-M and J02-M. J05-CJ said that the atypical components aside, the scenario was typical.

<sup>55</sup> N = 4: B06, B07, J08-DJ and S09.

<sup>56</sup> C05.



admit any abuse<sup>57</sup>, that allegations of rape are uncommon,<sup>58</sup> the interviewee having not encountered a case like this in practice,<sup>59</sup> and that it is rare for abuse allegations to be as 'extreme'.<sup>60</sup> Overall, both vignettes were accepted as plausible by interviewees, thus increasing the likelihood of rich data being elicited from their responses.

The second limitation is the challenge in striking a balance in the level of detail contained within the vignettes: the vignette has to be accessible but should not be over-simplified.<sup>61</sup> This was the biggest challenge with their use within this doctoral research given the range and complexity of factors which influence the courts' decision-making. In the light of the exploratory nature of the study, and the interviews being time-limited, it was not possible to craft scenarios which included the full suite of information which would be available in practice. Several interviewees identified issues on which they would want more information before being able to make firm assessments, and some said they could not make any assessment without further information. The need to provide short and self-contained vignettes thus introduced a degree of artificiality into the exercise. This did not, however, undermine the insights provided, particularly since these could be triangulated with interviewees' general comments about the way in which cases are resolved in practice. Omitting certain key details, such as the children's wishes and feelings, in some ways also proved instructive, since insights could be gained from observing which issues interviewees independently identified as lacking the necessary information within the scenarios.

The final limitation concerns the reality of interviewee responses: there is a risk that what interviewees say they would do in response to the vignette scenario is not congruent with how they would actually behave if faced with that scenario in practice.<sup>62</sup> This is arguably less of a risk in this doctoral research in relation to the non-

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<sup>57</sup> J05-CJ and S01.

<sup>58</sup> B07, C10 and J05-CJ.

<sup>59</sup> S06.

<sup>60</sup> J08-DJ.

<sup>61</sup> See, for example: Bradbury-Jones, Taylor and Herber (note 48 supra) 434.

<sup>62</sup> See, for example: C. Barter and E. Renold, "'I Wanna Tell You A Story': Exploring the Application of Vignettes in Qualitative Research with Children and Young People' (2000) 3(4) *International Journal of Social Research Methodology* 307, 312-313; Bradbury-Jones, Taylor and Herber (note 48 supra) 434.

judicial interviewees, since they were reporting how the judiciary would approach the cases based on their experiences of practice. It could, however, exist as a risk in relation to the judges, who were asked to comment on how they, as individuals, would respond to the scenarios. That the findings from the vignettes were consistent with interviewees' general comments on how cases involving allegations of domestic abuse are being resolved in practice suggests that this limitation did not arise within this study. The piloting of the interviews within each of the professional groups also provided an opportunity to cross-check interviewee responses to the vignettes with their more general comments on practice.

#### 1.5.1.3 Piloting the interview schedules

The first interview within each professional group was treated as the 'pilot' interview. Had the data collected from these interviews not been deemed satisfactory, the interview would have been disregarded and changes made to the schedules. This was not necessary, meaning that all the 'pilot' interviews formed part of the final data set. No major changes were made to the interview schedules and, as outlined above, such is the nature of semi-structured interviewing that flexibility is built into the schedules to enable them to develop in line with the interviews conducted in any event.

#### 1.5.1.4 Conducting the interviews

The semi-structured interviews were conducted face-to-face, save for one interview which was conducted by telephone. While alternative methods of conducting interviews are gaining popularity, including telephone and Skype interviews, face-to-face interviewing continues to be regarded as the most effective.<sup>63</sup> Outlined below are the two most significant issues on the way in which the interviews were conducted: the decisions taken in relation to sampling; and the experience of 'elite' interviewing.

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<sup>63</sup> See for example: R. Dicker and J. Gilbert, 'The Role of the Telephone in Educational Research' (1988) 14(1) *British Educational Research Journal* 65, 68; J. E. Sturges and J. K. Hanrahan, 'Comparing Telephone and Face-to-Face Qualitative Interviewing: A Research Note' (2004) 4(1) *Qualitative Research* 107, 108 and 110; G. Novick, 'Is there a Bias Against Telephone Interviews in Qualitative Research?' (2008) 31(4) *Research in Nursing and Health* 391, 395; A. Irvine, P. Drew and R. Sainsbury, "'Am I Not Answering Your Questions Properly?" Clarification, Adequacy and Responsiveness in Semi-structured Telephone and Face-to-face Interviews' (2013) 13 *Qualitative Research* 87, 88-89.

#### 1.5.1.4.1 *Sampling – size, strategies and frame*

Forty-one semi-structured interviews were carried out within one county in England between February 2016 and April 2017 with 10 judges, ranging from magistrate to Circuit judge,<sup>64</sup> 8 barristers, 10 solicitors, 10 Cafcass practitioners and three organisations which represent women affected by domestic abuse. There are ‘no rules for sample size in qualitative inquiry’.<sup>65</sup> Whilst there are no fixed categories, the 41 interviews conducted puts it in the larger sample size category for qualitative research.<sup>66</sup> This sample size struck a balance between enabling sufficient data to be collected to build a comprehensive picture within each of the professional groups on perspectives of current practice and ensuring that the data set was a manageable size for a doctoral project led by one researcher, with sufficient time available to conduct thorough data analysis.

A stratified sample was deliberately chosen in order to include interviewees with different roles in, and experiences of, the family justice system. This was important because interviewees’ backgrounds could shape their responses: solicitors who predominantly represent alleged victims, for example, might have different perspectives to those who predominantly represent alleged perpetrators.<sup>67</sup> A stratified sample enabled as many viewpoints as possible to be raised. In relation to the judges interviewed, permission to conduct the interviews was first obtained from the President of the Family Division. Once permission was obtained, all the magistrates, District and Circuit Judges within the research county were contacted with an invite to interview. The same approach was followed in relation to the Cafcass interviews, but permission to conduct the interviews was obtained this time through Cafcass’ research permission and ethics channels. In relation to the barristers and solicitor interviewees, an invite to interview was sent to every barrister and solicitor within 10 locations within the research county who was listed as practising in private

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<sup>64</sup> Comprising: 3 magistrates; 5 District Judges; and 2 Circuit Judges.

<sup>65</sup> M. Q. Patton, *Qualitative Research & Evaluation Methods* (3<sup>rd</sup> ed, 2002 Sage) p.244.

<sup>66</sup> See for example: M. Sandelowski, ‘Sample Size in Qualitative Research’ (1995) 18 *Research in Nursing & Health* 179, 180.

<sup>67</sup> At interview, interviewees were asked if they predominantly represented alleged victims or alleged perpetrators in order to ensure the sample contained a diversity of viewpoints.

family law on the following directories: Bar Council Direct Access Portal; Waterlow's Directory; Law Society's 'Find a Solicitor'; and Resolution's 'Find a Member'.<sup>68</sup>

An invite to interview was also sent to every refuge and outreach team within the research county, along with larger national women's organisations. The national organisations were contacted specifically because it became apparent that resourcing limitations affecting the refuge and outreach communities restricted their capacity to participate in research. The national organisations thus acted, in some respects, as the representatives for these smaller communities who could not participate. The perspectives of domestic abuse organisations were sought in the light of their involvement in the court process supporting parents affected by domestic abuse.

The criteria for participation for the professional groups in this research were: experience of working on court-adjudicated contact disputes in which domestic abuse is alleged and found or proven; location of practice within the research county; and capacity and willingness to participate in the research.<sup>69</sup> Whilst the sample was stratified, in the sense that interviewees from different professional groups with a range of experiences were sought, the interviewees were self-selected, which means the sampling in this research employs purposive convenience sampling. It is acknowledged that convenience sampling is not regarded as 'gold standard':<sup>70</sup> it is possible that interviewees' willingness to participate in the research, for example, could be shaped by them having particularly strong views on the research topic, which could colour the data collected. This doctoral research does not, however, make generalisability claims, which limits the significance of this problem.<sup>71</sup> It was also the sampling method advocated by those charged with safeguarding access to the judiciary and Cafcass interviewees.

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<sup>68</sup> Some barristers were also found through searching the chambers' websites listed on the directories above.

<sup>69</sup> In relation to the domestic abuse organisations, these did not have to be located within the research county but did have to have experience of supporting or representing women involved in private law contact disputes in which domestic abuse is alleged.

<sup>70</sup> Bryman (note 9 supra) pp.201-202.

<sup>71</sup> Bryman (note 9 supra) p.201.

#### 1.5.1.4.2 'Elite' interviewing

Categorising interviewees into binary categories of 'elites' and 'non-elites' should be avoided,<sup>72</sup> but this does not mean that interviewing different groups will be a uniform experience. An expanding body of literature identifies some features of interviewing which may be particularly associated with groups falling into the broad category of 'elite'. This category is not subject to a uniform definition, but it relates in broad terms to 'individuals or groups who ostensibly have closer proximity to power or particular professional expertise'.<sup>73</sup> Judges are regarded as falling within this 'elite' category.<sup>74</sup> There are a number of challenges associated with elite interviewing, and two of the principal challenges are explored below.

One of these challenges is securing judicial participation in interview-based research.<sup>75</sup> This challenge has been attributed to pressures on judicial time, but also a nervousness towards engagement in this type of research.<sup>76</sup> It has been suggested that there are benefits to being a postgraduate researcher in this context: unlike established academics, postgraduate researchers tend to be viewed as non-threatening, which has been shown to increase the willingness of members of the judiciary to be interviewed.<sup>77</sup> It is not known if this was a factor in the decision to permit this research, but securing access to the judiciary was invaluable as part of this project.

A further challenge identified once access has been obtained has been the existence of a power imbalance between interviewer and interviewee,<sup>78</sup> and in particular the risk that elite interviewees can dominate the interview.<sup>79</sup> This did not emerge as a

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<sup>72</sup> K. E. Smith, 'Problematising Power Relations in "Elite" Interviews' (2006) 37(4) *Geoforum* 643, 651-652; W.S. Havey, 'Strategies for Conducting Elite Interviews' (2011) 11(4) *Qualitative Research* 431, 439.

<sup>73</sup> K. Lancaster, 'Confidentiality, Anonymity and Power Relations in Elite Interviewing: Conducting Qualitative Policy Research in a Politicised Domain' (2017) 20(1) *International Journal of Social Research Methodology* 93, 93.

<sup>74</sup> Halliday and Schmidt (note 42 supra) p.75; Lancaster (note 73 supra) 93.

<sup>75</sup> Halliday and Schmidt (note 42 supra) p.75. For discussion of this issue outside of this jurisdiction see, for example: J. L. Pierce, 'Research Note: Interviewing Australia's Senior Judiciary' (2002) 37(1) *Australian Journal of Political Science* 131, 132 and 140.

<sup>76</sup> Halliday and Schmidt (note 42 supra) p.75.

<sup>77</sup> Ibid p.77.

<sup>78</sup> See for example: R. Mikecz, 'Interviewing Elites: Addressing Methodological Issues' (2012) 18(6) *Qualitative Inquiry* 482, 484.

<sup>79</sup> See, for example: C. Welch, R. Marschan-Piekkari, H. Pettinen and M. Tahvanainen, 'Corporate Elites as Informants in Qualitative International Business Research' (2002) 11 *International Business Review* 611, 614 and 620-621.

problem within this doctoral project: the judicial interviewees spoke openly about their experiences and perceptions of practice, were willing to follow the interview schedule and whilst some raised issues not covered by the schedule, this information was provided to enhance the research rather than dominate the process. The extent to which a linear power imbalance exists between 'elite interviewee' and 'interviewer' has, in any event, been questioned, as has the notion that 'elite' interviewees exist as a 'homogenous group'.<sup>80</sup>

### **1.5.2 Data analysis – grounded/inductive thematic analysis**

Each of the 41 interviews was audio-recorded and transcribed verbatim. As far as possible, each interview was transcribed immediately after it had taken place. The transcripts were later checked against the recordings to ensure transcription accuracy. Albeit time-consuming, verbatim transcription was an important step in becoming immersed in the data,<sup>81</sup> and notes were made during the transcription process of potential themes.<sup>82</sup> A grounded/inductive thematic analysis was then conducted on the data collected, with NVivo used to facilitate this analysis. This thesis accepts thematic analysis as a method<sup>83</sup> and describes it as follows:

Thematic analysis is a method for identifying, analysing and reporting patterns (themes) within data.<sup>84</sup>

This thesis employs what has been described as 'grounded' or 'inductive' thematic analysis, in which the themes identified are 'strongly linked to the data themselves' rather than the data being 'fit[ted]' into a 'pre-existing coding frame, or the researcher's analytic preconceptions'.<sup>85</sup> Unlike theoretical thematic analysis, therefore, the analysis was not shaped by theory or theoretical concepts,<sup>86</sup> with analysis instead developed from the bottom up.<sup>87</sup> Furthermore, the approach used in this thesis may also be regarded as 'grounded' in the sense that some themes

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<sup>80</sup> Lancaster (note 73 supra) 97.

<sup>81</sup> C. M. Bird, 'How I Stopped Dreading and Learned to Love Transcription' (2005) 11(2) *Qualitative Inquiry* 226, 227.

<sup>82</sup> As discussed in: Braun and Clarke (note 10 supra) 87.

<sup>83</sup> This has been debated: J. Attride-Stirling, 'Thematic Networks: An Analytic Tool for Qualitative Research' (2001) 1 *Qualitative Research* 385, 386-387; Braun and Clarke (note 10 supra) 79.

<sup>84</sup> Braun and Clarke (note 10 supra) 78-79.

<sup>85</sup> Ibid 83.

<sup>86</sup> Ibid 84.

<sup>87</sup> Ibid 83.

emerged from the interviews which were not anticipated within the original interview schedules, and which were subsequently incorporated into the interview schedules.<sup>88</sup>

Unlike grounded theory, however, this study was not aimed at theory-building – with ‘theory’ defined as ‘a set of concepts related to each other through logical patterns of connectivity’<sup>89</sup> – but was rather aimed more broadly at understanding practitioners’ perspectives with a view to building hypotheses and identifying areas in need of further research. While there is overlap between grounded theory and thematic analysis, thematic analysis provides an alternative to grounded theory because with thematic analysis:

... researchers need not subscribe to the implicit theoretical commitments of grounded theory if they do not wish to produce a fully worked-up grounded-theory analysis.<sup>90</sup>

Three strengths of thematic analysis justify its adoption as the data analysis method within this research. The first is that it follows a methodical and traceable process, which means the path to the arrival at the findings can be understood by those other than the researcher.<sup>91</sup> The second is that it is a good fit with research aimed at understanding the perspectives of different groups, and also enables points of consensus and difference to be identified.<sup>92</sup> The third is that it is data-driven, in that the themes developed are firmly rooted in the data collected.<sup>93</sup> This form of analysis, therefore, lends itself well to an exploratory project of this kind, which is aimed at understanding how those charged with implementing the law navigate and perceive current practice, rather than testing a pre-set theory or hypothesis. It also provides the flexibility to give interviewees the space to discuss the issues they feel are most important, and for these to drive the data analysis, which is one of the aims of the project.

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<sup>88</sup> Bryman (note 9 supra) pp.567-568. See also: R. Aitken and V. E. Munro, *Domestic Abuse and Suicide: Exploring the Links with Refuge’s Client Base and Work Force* (Warwick Law School and Refuge) p.36.

<sup>89</sup> M. Birks and J. Mills, *Grounded Theory: A Practical Guide* (Sage Publications 2011) p.113.

<sup>90</sup> Braun and Clarke (note 10 supra) 81. See also: Dean, Furness, Verrier, Lennon and Bennett (note 31 supra) 282.

<sup>91</sup> King (note 10 supra) p.268.

<sup>92</sup> Ibid p.257; Braun and Clarke (note 10 supra) 1-2.

<sup>93</sup> Braun and Clarke (note 10 supra) 83.

The data coding used was 'semantic' rather than 'latent', in the sense that the project was aimed at exploring the views that the participants held, not investigating why they held those views.<sup>94</sup> Starting with the solicitor transcripts, the transcripts were read to conduct inductive line by line coding using NVivo, with care taken to ensure that the context in which interviewees' comments were made was not lost within the coding process.<sup>95</sup> During the coding of the solicitors' transcripts, relevant codes were brought together to form themes and sub-themes, building up a coding framework.<sup>96</sup> This was an iterative process, and the transcripts were re-read to check the accuracy and consistency of the coding and the themes developed. Checks were also made to ensure that nothing had been missed in the initial coding rounds, with amendments made where relevant.<sup>97</sup> The aim was to develop themes which were 'specific enough to be discrete ... and broad enough to capture a set of ideas contained in numerous text segments'.<sup>98</sup> The coding framework was then used to code the transcripts of the other interviewee groups, but with an eye open always to the possibility of new themes emerging within the different groups. A report on the key themes was then produced, which summarised the main findings from all of the professional groups. A sample of transcripts, the coding framework and the report on the data analysis were checked by my supervisors as the analysis process progressed.

## 1.6 RESEARCHER INFLUENCE

While the impact of subjectivity and positionality within social research 'remain[s] relatively underexplored and untested empirically',<sup>99</sup> an important characteristic of qualitative research is transparency about the impact of researcher influence on the study.<sup>100</sup> This is because:

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<sup>94</sup> Ibid 84.

<sup>95</sup> See the emphasis placed on the importance of context by: Bryman (note 9 supra) p.578.

<sup>96</sup> Braun and Clarke (note 10 supra) 89-90.

<sup>97</sup> As discussed by, for example: King (note 10 supra) p.261-263; Braun and Clarke (note 10 supra) 91-92.

<sup>98</sup> J. Attridge-Stirling, 'Thematic Networks: An Analytic Tool for Qualitative Research' (2001) 1(3) *Qualitative Research* 385, 392; L. S. Nowell, J. M. Norris, D. E. White and N. J. Moules, 'Thematic Analysis: Striving to Meet the Trustworthiness Criteria' (2017) 16 *International Journal of Qualitative Methods* 1, 10.

<sup>99</sup> Dean, Furness, Verrier, Lennon and Bennett (note 31 supra) 274.

<sup>100</sup> Savin-Baden and Howell Major (note 2 supra) pp.12-13. See also: Braun and Clarke (note 10 supra) 78-80 and 88.



... a different researcher, or the same researcher in a different frame of mind, might write a different report from the same data.<sup>101</sup>

As Burton has emphasised, it is important to be transparent about the ‘limitations of any given methodology’ in order to:

... provide the reader with the information and reassurance they need to evaluate the substantive findings of the research.<sup>102</sup>

The researcher makes a series of choices about what to study, which questions to ask and how to conduct the study, and it is important for there to be openness about how these choices were made.<sup>103</sup> The researcher’s motivations for conducting the research have been identified as particularly crucial.<sup>104</sup> To this end, a positionality statement is included below, which sets out the experiences and beliefs I brought to the research, my potential influences on the research and the steps taken to minimise my impact.<sup>105</sup> The purpose of providing this statement is to support readers in their assessment of the credibility of my findings.<sup>106</sup>

Furthermore, the draft interview schedules were checked by my supervisors and the Chair of the departmental Research Ethics Committee, and a sample of the interview transcripts was checked by my supervisors, along with the coding framework and final data analysis report. The importance of supervisor input in ‘validat[ing] or counter[ing]’ the interpretation of data in this regard has been emphasised.<sup>107</sup> The verbatim transcription and use of NVivo for the grounded thematic analysis also ensured the route to the arrival at the thesis’ conclusions was fully mapped and open to external interrogation.<sup>108</sup>

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<sup>101</sup> A. Brown, ‘Qualitative Method and Compromise in Applied Social Research’ (2010) 10(2) *Qualitative Research* 229, 238. See also: H. Starks and S. B. Trinidad, ‘Choose Your Method: A Comparison of Phenomenology, Discourse Analysis, and Grounded Theory’ (2007) 17(10) *Qualitative Health Research* 1372, 1376.

<sup>102</sup> Burton (note 33 supra) p.68.

<sup>103</sup> Ibid p.12.

<sup>104</sup> See for example: M. Schratz and R. Walker, *Research as Social Change: New Opportunities for Qualitative Research* (Routledge 1995) pp.5 and 14.

<sup>105</sup> See further: *ibid*.

<sup>106</sup> *Ibid*.

<sup>107</sup> Dean, Furness, Verrier, Lennon and Bennett (note 31 supra) 286.

<sup>108</sup> However, confidentiality and data sharing agreements render external access to the interview transcripts unfeasible, since the transcripts contain information which could lead to interviewee identification despite anonymisation.

### **1.6.1 Positionality statement**

Set out below is a reflection on the relevance of my professional experiences to this doctoral project, an outline of my training in research methods and the steps I took to minimise my impact on the study.

#### **1.6.1.1 Relevance of my professional experiences working at a women's refuge and for the Law Commission**

My motivation to pursue doctoral research within this area stemmed from my interest in the topic developed during my LLB studies at the University of Warwick and my experience of volunteering for a women's refuge for a year after graduation. I worked in the outreach team for this refuge, running the drop-in sessions, providing initial support to victims and arranging follow-up support. This experience was relevant to this project in a number of respects. First, the starting point within the refuge was that each woman who reported abuse was genuine, which has obvious differences to the way in which the legal system is premised in relation to child contact disputes. The second was that the experience enabled me to observe first-hand the barriers victims face in reporting the abuse experienced to external services and accessing support. Taken collectively, these experiences gave me a sympathy with women who had experienced domestic abuse, and a degree of scepticism towards claims that false allegations are prevalent. And third, I also observed within this experience the negative impact of domestic abuse on children, and the risks posed by post-separation contact, including women's safe locations being disclosed through contact. I did not, therefore, commence this project with the attitude that children automatically 'need' contact and I was sensitive to the risks contact can pose.

Having worked for the women's refuge, I went on to work for the Law Commission for two years. The Commission's function is to keep the law and practice under review, conducting objective analysis of legal problems and consulting a range of stakeholders, from members of the public to senior judges, to understand perspectives on reform. This experience also shaped my approach to conducting this doctoral research because it provided invaluable training on how to understand, and

represent accurately, the views of different groups, and how to minimise researcher impact. Whilst my personal views, therefore, may be more sympathetic to parents alleging abuse than those alleged to have been abusive, I also understand how to maintain an open-mind within research, and the imperative of exploring and representing accurately the views of all participants involved in research, regardless of whether their views align with my own.

#### 1.6.1.2 Research methods training

Prior to commencing the fieldwork for this project, I completed three ESRC doctoral training modules (Qualitative Research, Quantitative Research and the Practice of Social Research). I also undertook advanced NVivo training. I have also had experience working with leading academics on research projects, which developed my skills in carrying out qualitative research, enabled me to put theory into practice and to understand the requirements for the conducting of rigorous research.

#### 1.6.1.3 Reflexivity and the steps taken to minimise researcher influence

I had fortnightly supervision meetings in the early stages of the project and during the fieldwork. These meetings enabled me to talk through my experiences of conducting the research, and I also kept a record of observations throughout the fieldwork process. By transcribing verbatim the interviews, and using NVivo to conduct the analysis, I have been able to be transparent about the steps taken to arrive at the thesis' conclusions. The input from my supervisors in checking the draft interview schedules, the sample of transcripts, the coding framework and the data analysis report was also invaluable in enabling me to ensure that the data collection and analysis were performed as neutrally and accurately as possible.

### **1.7 CONFIDENTIALITY AND ETHICS**

Ensuring the '[p]rotection of research participants' is the 'bedrock of all well-conducted research'.<sup>109</sup> Two of the key principles of research ethics involved in

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<sup>109</sup> Bradbury-Jones, Taylor and Herber (note 48 supra) 427.

protecting participants are informed consent and the avoidance of harm.<sup>110</sup> Permission to conduct this study was obtained from the School of Law's Ethics Adviser at the University of Warwick. The University of Warwick's ethics procedures were then followed throughout the research process, including those on informed consent. Each interviewee was given an Information Sheet which explained the purpose and focus of the research, their role within the research, their right to withdraw from the research, the steps that would be taken to safeguard their data and who to contact if they had concerns about the research. Interviewees also completed a consent form, confirming their acceptance of the information on the Information Sheet, their willingness to participate and be audio-recorded, along with the acceptance of the use of their data. These forms are included in Appendices C and D.

In order to ensure that no interviewee would come to any harm through their participation in the research, all interviewees have been anonymised. The county in which the research took place has also been anonymised. In the light of there being relatively few judges practising nationally, the genders of the judges have also not been revealed, in case this could lead to the research county being identified through jigsaw recognition.

## **1.8 CONCLUSION – REFLECTIONS ON THE APPROPRIATENESS OF THE METHODOLOGY**

The adoption of a qualitative socio-legal approach using semi-structured interviews was well-suited to the project's aims of exploring the attitudes and experiences of a range of professional interviewees. The semi-structured nature of the interviews enabled a balance to be struck between supporting comparability across responses and allowing openness to new lines of enquiry. Had a socio-legal lens not been adopted, it would not have been possible to produce findings which are sensitive to the intensely challenging environment in which practitioners must currently work. The biggest challenge encountered during the research process was the volume of issues to be covered in the interviews, which made some of the interviews time-pressured. That said, by covering a range of issues, it was possible to understand the

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<sup>110</sup> Bryman (note 9 supra) pp.135-138. See also: M. Bulmer, 'The Ethics of Social Research' in N. Gilbert, *Researching Social Life* (3<sup>rd</sup> ed, Sage 2008).

links between different parts of the system and understand the functioning of the system as a whole.

# CHAPTER 2

## CONTACT – BENEFITS AND RISKS

This Chapter provides an overview of the evidence base on the benefits and risks of contact in the context of domestic abuse, and the impact of domestic abuse on children. It is necessarily more descriptive than the chapters which follow, since this evidence base underpins every debate on this topic. Each decision taken on contact must be tailored to the individual child, but it remains imperative that the evidence base is robust and accessible to those charged with implementing the law, and that it informs practice.<sup>1</sup> The risk otherwise is that decisions will be taken without empirically-founded knowledge that the outcome reached is likely to promote children's best interests. As this Chapter sets out, the core messages from the existing evidence base are that children can benefit from contact post-separation, but that the benefits of contact cannot be assumed, and contact can pose significant risks, both to children and parents. Assessments of whether contact should take place with a parent who has been domestically abusive must thus hinge on a delicate balancing exercise, carefully weighing the benefits against the risks.

As explored within this chapter, and those which follow, interviewee responses suggest there are some tensions between professional perspectives and the existing evidence base. While some messages from research on the risks posed by contact have permeated practice, a pro-contact stance continues to drive the resolution of disputes and, overall, domestic abuse tends to be regarded as an obstacle to direct contact that can be overcome in the majority of cases. The view endures that direct abuse of children poses greater risks than indirect abuse, and that parental separation and the management of handovers represent sufficient safeguards against risk in cases in which the child has not been directly abused.

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<sup>1</sup> The importance of this has also been emphasised by Fortin et al: J. Fortin, J. Hunt and L. Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults who Experienced Parental Separation in their Youth* (Sussex Law School 2012).

This thesis argues that further research is needed into establishing how empirical evidence can be more robustly embedded into decision-making, which calls for investment both in building the evidence base on the long-term impact on children of contact and in understanding how empirical evidence can be used effectively and reliably in practice. The need to build further the evidence base is underlined both in this Chapter and Chapter 4, since assessments of the extent to which the ‘right’ outcomes are being reached in practice is hindered by the lack of long-term data on the impact on children of contact with a domestically abusive parent,<sup>2</sup> with a particular lack of data on the impact of exposure to non-physical coercive and controlling behaviours.

This Chapter takes as its focus what is known from the existing evidence base on the impact of domestic abuse on children, along with the benefits and risks of contact with a domestically abusive parent. The research discussed spans a range of jurisdictions that have addressed these issues. It is important to explore this evidence base since it demonstrates why the benefits of contact should not be assumed, a message which, as the later Chapters go on to discuss, sits uncomfortably with the current pro-contact stance taken in policy and practice. The research evidence on the impact of domestic abuse on children in general is first addressed. The benefits and risks of post-separation contact are then explored, before turning to the conditions which need to exist for ‘safe’ and ‘beneficial’ contact to take place.

## **2.1 THE IMPACT OF DOMESTIC ABUSE ON CHILDREN**

The evidence base on the impact of domestic abuse on children has a number of significant findings for assessments of whether post-separation contact can, and should, go ahead. First, that children’s responses to domestic abuse are not homogenous. Second, that there is an interrelationship between domestic abuse and parents’ direct abuse of their children. Third, that children are harmed both through witnessing domestic abuse and exposure to it more indirectly. Fourth, that non-physical abuse does not pose fewer risks to children’s safety and well-being than physical violence. And, fifth, that domestic abuse undermines parenting capacity,

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<sup>2</sup> With the exception of: Fortin, Hunt and Scanlan (note 1 supra).

which in turn can negatively affect children. In the light of it being well-established that abuse is more likely to intensify than dissipate on separation,<sup>3</sup> and that contact can facilitate the continuation of abuse,<sup>4</sup> these findings should be highly pertinent to the courts' decision-making. This section explores each of these findings in turn.

### **2.1.1 Children's responses to domestic abuse are not homogenous**

It is well-established that domestic abuse can have a detrimental impact on children's well-being and development, whether children are directly abused, witness the abuse first-hand or are exposed to it more indirectly. Most children exposed to domestic abuse will be negatively affected by it in some way, but children's responses to domestic abuse are not homogenous.<sup>5</sup> A number of factors, including the child's age and gender, will shape the impact of the abuse.<sup>6</sup> These can be 'protective' or 'vulnerability' factors, depending on whether they give the child greater resilience to the abuse or undermine the child's resilience.<sup>7</sup> In Thiara and Humphreys' recent study, for example, children within the same family were affected in different ways by the abuse perpetrated by their father.<sup>8</sup> This underlines the importance of thorough investigation and risk assessments in each individual case to the safeguarding of children's welfare.

This finding that children's responses to domestic abuse are not homogenous is likely to be more than familiar to family lawyers and judges. The Children Act 1989 is premised on the basis that each child is different, with the evaluation of children's best interests conducted through assessing the factors in the section 1(3) welfare checklist applied to each child.<sup>9</sup> As explored in Chapter 5, however, the new statutory

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<sup>3</sup> See for example: M. P. Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57(2) *Journal of Marriage and Family* 283, 286.

<sup>4</sup> See for example: C. Humphreys and R. Thiara, *Routes to Safety: Protection Issues Facing Abused Women and Children and the Role of Outreach Services* (Women's Aid Federation of England 2002) p.90; R. K. Thiara and C. Humphreys, 'Absent Presence: The Ongoing Impact of Men's Violence on the Mother-Child Relationship' (2017) 22 *Child and Family Social Work* 137, 142.

<sup>5</sup> See for example: A. Mullender, G. Hague, U. Imam, L. Kelly, E. Malos and L. Regan, *Children's Perspectives on Domestic Violence* (Sage 2002) p.79; Thiara and Humphreys (note 4 supra) p.143.

<sup>6</sup> Ibid.

<sup>7</sup> T. Moore et al (1990) cited in M. Hester, C. Pearson, N. Harwin with H. Abrahams, *Making an Impact – Children and Domestic Violence* (2<sup>nd</sup> edn, Jessica Kingsley Publishers 2006) p.68.

<sup>8</sup> Thiara and Humphreys (note 4 supra) p.143.

<sup>9</sup> See, for example, the comments of Munby LJ in a different context but nevertheless remaining relevant: *Re F (A Child)* (Permission to Relocate) [2012] EWCA Civ 1364, [2013] 1 FLR 645 [37]. As Chapter 5 explores, the new presumption of parental involvement arguably stands in tension with this approach.



presumption of parental involvement sits uncomfortably within this approach. And the courts' commitment to the promotion of contact, as explored in Chapters 4 and 5, raises questions about the extent to which decisions taken on contact are unaffected by general assumptions, or presumptions, that contact is beneficial to all children.

### **2.1.2 There is an interrelationship between domestic abuse and parents' direct abuse of children**

Awareness of the interrelationship between the perpetration of domestic abuse and parents' abuse of their children began to develop in the 1980s, gaining momentum in the 1990s.<sup>10</sup> Research in the UK initially lagged behind the US, Australia and Canada in recognising and exploring this link.<sup>11</sup> The problem identified with the original evidence base was that it was fractured, with different methodologies being employed, as well as different theoretical and conceptual frameworks, with an over-emphasis on physical abuse.<sup>12</sup> With some exceptions,<sup>13</sup> the tradition in US research of relying on large-scale quantitative research also attracted criticism for its failure to explore the intricacies of domestically abusive behaviour and the context in which it occurs.<sup>14</sup> While not without its own limitations, UK research has been identified as having a stronger commitment to phenomenological and critical social research.<sup>15</sup>

There is now a sizeable evidence base on the overlap between domestic abuse and parents' abuse of their children, with studies employing a range of methodologies. While the plurality of methodologies makes direct comparisons difficult, it has, nevertheless, enabled a comprehensive picture to be established and it remains

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<sup>10</sup> See for example the discussion in: L. Radford and M. Hester, *Mothering Through Domestic Violence* (Jessica Kingsley Publishers 2006) p.50.

<sup>11</sup> Ibid pp.50-52. Examples of research from outside the UK: J. L. Edleson, 'Children's Witnessing of Adult Domestic Violence' (1999) 14(8) *Journal of Interpersonal Violence* 839; J. L. Edleson, L. F. Mbilinyi, S. K. Beeman and A. K. Hagemaster, 'How Children are Involved in Adult Domestic Violence' (2003) 18(1) *Journal of Interpersonal Violence* 18; J. L. Edleson, D. Daro and H. Pinderhughes, 'Finding a Common Agenda for Preventing Child Maltreatment, Youth Violence and Domestic Violence' (2004) 19(3) *Journal of Interpersonal Violence* 279. Research conducted in the UK includes, for example: Mullender, Hague, Imam, Kelly, Malos and Regan (note 5 supra).

<sup>12</sup> Radford and Hester (note 10 supra) pp.50-51.

<sup>13</sup> See for example: E. Stark and A. Flitcraft, *Women At Risk: Domestic Violence and Women's Health* (Sage 1996); J. L. Edleson, 'Studying the Co-occurrence of Child Maltreatment and Domestic Violence in Families' in S. Graham-Bermann and J. Edleson, *Domestic Violence in the Lives of Children: The Future of Research, Intervention and Social Policy* (American Psychological Association 2001).

<sup>14</sup> See: R. Dobash and R. Dobash, *Women, Violence and Social Change* (Routledge 1992) pp. 274-276; Radford and Hester (note 10 supra) p.51.

<sup>15</sup> Radford and Hester (note 10 supra) pp.51-52.

possible to identify some core themes. Understanding this link between abuse perpetrated towards a parent and abuse perpetrated towards children is crucial, since it warns against any assumption that abuse directed towards a parent at the time of the contact application will always be confined to that parent, with there being no guarantee that the perpetrator will not move on to abuse directly the child in the future.

It is well-established that a parent who is domestically abusive is more likely than a non-domestically abusive parent to be abusive towards a child.<sup>16</sup> Hester et al's review concluded that despite differences in methodology and definition, a core finding uniting the existing research in the UK and North America is that parents who are domestically abusive may also be physically and/or sexually abusive to their children, and that the abuse of children may take place as a direct component of the abuse directed towards mothers.<sup>17</sup> Practitioners should, therefore, always be alert to the potential co-existence of domestic abuse and the abuse of children.<sup>18</sup>

Findings on the co-occurrence of abuse to children and domestic abuse have consistently clustered around 30 to 60 percent,<sup>19</sup> with only a few studies falling outside this range.<sup>20</sup> The focus of these studies has predominantly been on physical abuse.<sup>21</sup> Several studies have documented the physical abuse children are subjected to at the hands of their domestically abusive fathers.<sup>22</sup> These studies have tended to be based on mothers' accounts,<sup>23</sup> and analysis of these studies needs to take place

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<sup>16</sup> C. Sturge and D. Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) 30(Sep) *Family Law* 615, 621.

<sup>17</sup> M. Hester, C. Pearson, N. Harwin with H. Abrahams, *Making an Impact – Children and Domestic Violence* (2<sup>nd</sup> edn, Jessica Kingsley Publishers 2006) pp.41-61. See also: C. McGee, *Childhood Experiences of Domestic Violence* (Jessica Kingsley Publishers 2000) p.214.

<sup>18</sup> Hester, Pearson, Harwin with Abrahams (note 17 supra) p.60-61; Radford and Hester (note 10 supra) pp.52-53.

<sup>19</sup> McGee (note 17 supra) p.51; Hester, Pearson, Harwin with Abrahams (note 17 supra) pp.41-61.

<sup>20</sup> See for example: M. Shepard and M. Raschick, 'How Child Welfare Workers Assess and Intervene Around Issues of Domestic Violence' (1999) 4(2) *Child Maltreatment* 148, 151.

<sup>21</sup> For a review see: S. Holt, H. Buckley and S. Whelan, 'The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature' (2008) 32(8) *Child Abuse & Neglect* 797, 800.

<sup>22</sup> See for example: J. L. Edleson, 'The Overlap Between Child Maltreatment and Woman Battering' (1999) 5(2) *Violence Against Women* 134, 149-150; L. Radford, S. Sayer and AMICA, *Unreasonable Fears? Child Contact in the Context of Domestic Violence: A Survey of Mothers' Perceptions of Harm* (1999, Women's Aid Federation of England); J. D. Osofsky, 'Prevalence of Children's Exposure to Domestic Violence and Child Maltreatment: Implications for Prevention and Intervention' (2003) 6(3) *Child and Family Psychology Review* 161, 167; R. K. Thiara, 'Continuing Control, Child Contact and Post-separation Violence' in R. K. Thiara and A. K. Gill (eds), *Violence Against Women in South Asian Communities: Issues for Policy and Practice* (Jessica Kingsley 2010) p.165.

<sup>23</sup> See for example: M. Hester and L. Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (Policy Press 1996); Radford, Sayer and AMICA (note 22 supra); Thiara (note 22 supra).

with an awareness of the risk of both under- and over-reporting.<sup>24</sup> Some studies have, however, interviewed children directly,<sup>25</sup> and some have spoken both to mothers and children.<sup>26</sup> Others have been based on reviews of court or social service records.<sup>27</sup> While underreporting makes it difficult to gauge prevalence, some studies have also pointed to the significant minority of children who are sexually abused by domestically abusive fathers.<sup>28</sup>

The murder of children by their domestically abusive parents brings into even sharper focus the link between domestically abusive behaviour and harm to children.<sup>29</sup> Most recently, Women's Aid published its report on 19 children who were killed by domestically abusive parents during contact.<sup>30</sup> The report, which was based on serious case reviews published between January 2005 and August 2015, was a follow-up to its 2004 report on 29 children killed by a domestically abusive parent between 1994 and 2004.<sup>31</sup> Cases resulting in the death of a child are extreme, but they underline the importance of practitioners being alert to the significant risks domestically abusive parents can pose to children.

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<sup>24</sup> See for example: Edleson (note 11 supra) 843; J. E. McIntosh, 'Children Living With Domestic Violence: Research Foundations for Early Intervention' (2003) 9(2) *Journal of Family Studies* 219, 221; Holt, Buckley and Whelan (note 21 supra) 798.

<sup>25</sup> See for example: Mullender, Hague, Imam, Kelly, Malos and Regan (note 5 supra); Humphreys and Thiara (note 4 supra) p.31.

<sup>26</sup> See for example: McGee (note 17 supra) pp.51-53.

<sup>27</sup> See for example: M. Maynard, 'The Response of Social Workers to Domestic Violence' in J. Pahl (ed), *Private Violence and Public Policy* (Routledge 1985); H. Cleaver and P. Freeman, *Parental Perspectives in Cases of Suspected Child Abuse* (HMSO 1995); J. Gibbons, S. Conroy and C. Bell, *Operating the Child Protection System: A Study of Child Protection Practices in English Local Authorities* (HMSO 1995); T. Brown, M. Frederico, L. Hewitt and R. Sheehan, 'The Child Abuse and Divorce Myth' (2001) 10 *Child Abuse Review* 113, 116-117.

<sup>28</sup> See for example: L. A. McCloskey, A. J. Figuerdo and M. Koss, 'The Effect of Systematic Family Violence on Children's Mental Health' (1995) 66(5) *Child Development* 1239, 1246; J. Smith, D. Berthelsen and I. O'Connor, 'Child Adjustment in High Conflict Families' (1997) 23(2) *Child Care, Health and Development* 113, 119-120; L. Radford, S. Sayer and AMICA (note 22 supra); T. Brown, M. Frederico, L. Hewitt and R. Sheehan, 'Revealing the Existence of Child Abuse in the Context of Marital Breakdown and Custody and Access Disputes' (2000) 24(6) *Child Abuse and Neglect* 849, 854; McGee (note 17 supra) pp.40-41 and 59; N. D. Kellog and S. W. Mernard, 'Violence Among Family Members of Children and Adolescents Evaluated for Sexual Abuse' (2003) 27 *Child Abuse & Neglect* 1367, 1372-1373.

<sup>29</sup> Channel 4, 'The Channel 4 Dispatches Child Homicide Study' (1999) pp.5-6 <[http://www.channel4.com/media/dispatches\\_downloads/Dispatches\\_Child\\_Homicide\\_Research.pdf](http://www.channel4.com/media/dispatches_downloads/Dispatches_Child_Homicide_Research.pdf)> accessed 18 October 2018; H. Saunders, *Twenty-Nine Child Homicides: Lessons Still to be Learnt on Domestic Violence and Child Protection* (Women's Aid 2004). This prompted a review of consent orders in relation to contact and domestic abuse, see: J. Masson, 'Consent Orders in Contact Cases: A Survey of Resolution Members' (2006) 36(Dec) *Family Law* 1041. Most recently, see: Women's Aid, *Nineteen Child Homicides* (Women's Aid 2016). See also: London Borough of Greenwich, *A Child in Mind: Protection of Children in a Responsible Society: The Report of the Commission of Inquiry into the Circumstances Surrounding the Death of Kimberly Carlile* (London Borough of Greenwich 1987); M. O'Hara, 'Child Deaths in the Context of Domestic Violence: Implications for Professional Practice' in A. Mullender and R. Morely (eds), *Children Living with Domestic Violence: Putting Men's Abuse of Women on the Child Care Agenda* (Whiting and Birch 1994) p.59; Radford and Hester (note 10 supra) pp.57-58; L. Harne, *Violent Fathering and the Risks to Children: The Need for Change* (The Policy Press 2011) p.19.

<sup>30</sup> Women's Aid (note 29 supra).

<sup>31</sup> Saunders (note 29 supra).

Domestically abusive fathers' direct emotional and psychological abuse of children has also been recorded.<sup>32</sup> The evidence that exists suggests that the emotional and psychological abuse experienced by children can mirror the abuse directed towards mothers.<sup>33</sup> Examples of non-physical abuse children may be subjected to include name-calling and humiliation.<sup>34</sup> It is also now known that children may be directly implicated in their abuse of their mothers. This may take the form of the perpetrator encouraging the child to be abusive towards their mothers,<sup>35</sup> or by the father abusing the child as a means to further abuse the mother.<sup>36</sup> As explored later in this Chapter, however, non-physical domestic abuse continues to receive less attention within existing research than the physical abuse of children. This may be explained by the recognition of non-physical forms of abuse, and coercive and controlling behaviour more generally, being a relatively recent development in legal and policy spheres.

The challenge facing those charged with risk assessment and decision-making on contact in practice is to establish the level of risk posed by the father to the child in each individual case. Establishing this level of risk is rendered more difficult by children often being unwilling to report the abuse suffered, owing to fear and/or threats made by the perpetrator.<sup>37</sup> The courts must thus be alert to the overlap between domestic abuse and the direct abuse of children, and to the possibility of under-reporting. And any assumption that domestic abuse directed at a parent can be divorced from assessments of children's safety and well-being should be challenged. As Chapter 4 later explores, it appears that this message from the evidence base is not yet fully permeating practice. A pro-contact stance continues to guide practice and the assumption that a father can perpetrate domestic abuse but, nevertheless, be a 'good parent' also appears not yet to have lost its influence.

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<sup>32</sup> See for example: Radford, Sayer and AMICA (note 22 supra); McGee (note 17 supra) pp.49-51; E. Katz, 'Beyond the Physical Incident Model: How Children Living With Domestic Violence Are Harmed By and Resist Regimes of Coercive Control' (2016) 25(1) *Child Abuse Review* 46, 47-48.

<sup>33</sup> See for example: Radford, Sayer and AMICA (note 22 supra); McGee (note 17 supra) p.49-51 and 58-59.

<sup>34</sup> See for example: McGee (note 17 supra) pp.49-51.

<sup>35</sup> See for example: Radford and Hester (note 10 supra) pp. 30 and 32; R. K. Thiara and A. Gill, *Domestic Violence, Child Contact and Post Separation Violence: Issues for South Asian and African-Caribbean Women and Children: A Report on Findings* (NSPCC 2012) p.40; Thiara and C. Humphreys (note 4 supra) 141.

<sup>36</sup> See for example: Hester and Radford (note 23 supra); McGee (note 17 supra) pp.45-46.

<sup>37</sup> See for example: J. Forman, *Is There a Correlation between Child Sexual Abuse and Domestic Violence? An Exploratory Study of the Links Between Child Sexual Abuse and Domestic Violence in a Sample of Intrafamilial Child Sexual Abuse Cases* (Women's Support Project 1995) p.26; McGee (note 17 supra) pp.56-57 and 207.

### 2.1.3 Indirect abuse of children – children are harmed through witnessing and exposure to domestic abuse

While the direct risks posed to children by domestically abusive parents are significant, drawing too sharp a distinction between direct and indirect abuse is problematic. It is well-established that children will be aware of the abuse perpetrated towards their parent, even if not directly abused themselves,<sup>38</sup> and that children are harmed both by witnessing and broader exposure to domestic abuse.<sup>39</sup> Children may witness first-hand the abuse of their mothers,<sup>40</sup> or may be exposed to the abuse more indirectly by, for example, noticing their mothers' injuries.<sup>41</sup> A consistent finding within the existing evidence base is that exposure to domestic abuse is damaging to children, both in the short- and the long-term.<sup>42</sup> Indeed, exposure to domestic abuse is now considered to be as harmful to children as direct abuse.<sup>43</sup> The effects on children of exposure are varied. It can lead to children living in fear of the continuation of abuse, which has been found to have deleterious effects on children's emotional welfare.<sup>44</sup> Children can also be traumatised by the fear that their domestically abusive parent might kill their other parent.<sup>45</sup> A link between exposure to domestic abuse and children's development of behavioural problems has also been established.<sup>46</sup>

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<sup>38</sup> P. Parkinson and C. Humphreys, 'Children Who Witness Domestic Violence: The Implications for Child Protection Practice' (1998) 10 *Child and Family Law Quarterly* 147, 149-151; Sturge and Glaser (note 16 supra) 619; Mullender, Hague, Imam, Kelly, Malos and Regan (note 5 supra) pp.207-208; J. Swanston, L. Bowyer and A. Vetere, 'Towards a Richer Understanding of School-age Children's Experiences of Domestic Violence: The Voices of Children and Their Mothers' (2014) 19(2) *Clinical Child Psychology and Psychiatry* 184, 188.

<sup>39</sup> See for example: R. E. Dobash and R. P. Dobash, 'The Nature and Antecedent of Violent Events' (1984) 24(3) *British Journal of Criminology* 269, 282; Sturge and Glaser (note 16 supra) 619; M. Coy, K. Perks, E. Scott and R. Tweedale, *Picking Up the Pieces: Domestic Violence and Child Contact* (Rights of Women and CWASU 2012) p.25.

<sup>40</sup> See for example: McCloskey, Figueroa and Koss (note 28 supra) 1241-1247; McGee (note 17 supra) pp.61-66.

<sup>41</sup> See for example: Mullender, Hague, Imam, Kelly, Malos and Regan (note 5 supra) p.93; Holt, Buckley and Whelan (note 21 supra) 800.

<sup>42</sup> J. Kolbo, E. H. Blakely and D. Engleman, 'Children Who Witness Domestic Violence: A Review of Empirical Literature' (1996) 11(2) *Journal of Interpersonal Violence* 281, 289-29; Hester and Radford (note 23 supra); Humphreys and Thiara (note 4 supra) p.31; K. M. Kitzmann, N. K. Gaylord, A. R. Holt and E. D. Kenny, 'Child Witnesses to Domestic Violence: A Meta-analytic Review' (2003) 71(2) *Journal of Consulting and Clinical Psychology* 339, 345; H. Cleaver, I. Unell and J. Aldgate, *Child Abuse – Parental Mental Illness, Learning Disability, Substance Misuse and Domestic Violence* (2<sup>nd</sup> ed, Department of Health 2011) p.94; Edleson (note 11 supra) 844; Hester, Pearson, Harwin with Abrahams (note 17 supra) pp.67-68; McGee (note 17 supra) pp.70-73; Mullender, Hague, Imam, Kelly, Malos and Regan (note 5 supra) pp.109-112; Radford and Hester (note 10 supra) pp.59-62; Holt, Buckley and Whelan (note 21 supra) 799.

<sup>43</sup> Sturge and Glaser (note 16 supra) 619.

<sup>44</sup> See for example: Ibid.

<sup>45</sup> See for example: Ibid 620.

<sup>46</sup> See for example: Ibid.

Where there is less consensus is on what it is specifically about exposure to domestic abuse that has the most significant impact, with opinion varying on whether it is the severity of the abuse, or how direct children's exposure is to the abuse.<sup>47</sup> It is difficult to isolate the impact of exposure on children's well-being as there are a number of other overlapping factors which can have a negative impact.<sup>48</sup> Grouping all children together, failing to distinguish between children who are both directly abused by their parents and witness domestic abuse, and children who solely witness abuse, can also limit the extent to which children's experiences are understood.<sup>49</sup> Furthermore, much of the research evidence is based on mothers' accounts of abuse, rather than first-hand accounts of children, which is significant because mothers' perspectives on the impact of exposure on children will be filtered through their own perspectives.<sup>50</sup>

These ambiguities within the evidence base should not detract from the core finding that exposure to domestic abuse is harmful to children. This is significant for assessments of whether contact can, and should, go ahead post-separation because even if it is accepted that the child will not be directly harmed by the perpetrator during contact, there is a significant body of evidence which points to the prevalence of post-separation abuse and how contact is often the vehicle for its continuation.<sup>51</sup> What this means is that those charged with making the decisions on contact must be alert to the risk that children will continue to be exposed to domestic abuse, even once the parents' relationship has ended. And the lack of consensus on what it is about exposure which causes harm to children again highlights the importance of awareness of children's varied responses, with the impact of exposure on each child as an individual needing to be carefully assessed.

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<sup>47</sup> G. K. Kantor and L. Little, 'Defining the Boundaries of Child Neglect: When Does Domestic Violence Equate with Parental Failure to Protect?' (2003) 18(4) *Journal of Interpersonal Violence* 338, 351-352 cf. E. N. Jouriles, R. McDonald, W. D. Norwood, H. Shinn Ware, L. Collazos Spiller and P. R. Swank, 'Knives, Guns and Interparent Violence: Relations with Child Behaviour Problems' (1998) 12(2) *Journal of Family Psychology* 178, 190-192. See further: Holt, Buckley and Whelan (note 21 supra) 800.

<sup>48</sup> Jouriles, McDonald, Norwood, Shinn Ware, Collazos Spiller and Swank (note 47 supra) 178-179; Holt, Buckley and Whelan (note 21 supra) 798.

<sup>49</sup> See for example: Edleson (note 11 supra) 844-845; Holt, Buckley and Whelan (note 21 supra) 798.

<sup>50</sup> See for example: Edleson (note 11 supra) 843; Holt, Buckley and Whelan (note 21 supra) 798; J. E. McIntosh (note 24 supra) 221.

<sup>51</sup> See for example: Mullender, Hague, Imam, Kelly, Malos and Regan (note 5 supra) pp.202-203; Humphreys and Thiara (note 4 supra) p.90.

#### **2.1.4 Non-physical abuse does not pose fewer risks to children than physical abuse**

As Chapter 3 explores, coercive control is not a new concept.<sup>52</sup> Its encompassing within the cross-government definition of domestic abuse and Practice Direction 12J is, however, relatively recent. One of the major problems with the existing evidence base is that it is almost entirely focused on children's exposure to physical violence. Coercive control can involve physical violence, but there has, to date, been relatively little research into the impact on children of exposure to non-physical forms of coercive and controlling behaviour. Katz's study, which was based on semi-structured interviews with 15 mothers and 15 children,<sup>53</sup> was among the first to explore the impact on children of exposure to non-physical coercive and controlling behaviours.<sup>54</sup>

Katz found that domestically abusive fathers used coercive and controlling behaviours to isolate mothers and children, restricting their time and movement, and preventing them from accessing sources of support, which in turn restricted mothers' and children's 'space for action'.<sup>55</sup> As a result children had limited access to 'resilience-building and developmentally-helpful persons and activities'.<sup>56</sup> Katz concluded that this was at least as harmful to children's emotional development and behaviour as any physical violence perpetrated towards mothers.<sup>57</sup>

As awareness of the impact of coercive control grows, Katz has identified the need for a more nuanced approach to assessments of the impact of domestic abuse on children, exploring in greater depth whether children are being subjected to coercive control-based domestic abuse<sup>58</sup> or 'situational couple violence'.<sup>59</sup> As discussed in

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<sup>52</sup> See Chapter 3 at 3.1.1. and 3.1.2.

<sup>53</sup> The majority of the children were aged 10-14: Katz (note 32 supra).

<sup>54</sup> Ibid. See also: J. E. M. Callaghan, J. H. Alexander, J. Sixsmith and L. C. Fellin, *Beyond "Witnessing": Children's Experiences of Coercive Control in Domestic Violence and Abuse* (2015) 33(10) *Journal of Interpersonal Violence* 1551.

<sup>55</sup> 'Space for action' is a term which emerged from earlier research to represent the agency to say and do things: N. Westmarland and L. Kelly, 'Why Extending Measurements of "Success" in Domestic Violence Perpetrator Programmes Matters for Social Work' (2013) 43(6) *British Journal of Social Work* 1092, 1100-1103; Katz (note 32 supra) 52-57.

<sup>56</sup> Katz (note 32 supra) 55.

<sup>57</sup> Ibid.

<sup>58</sup> See further: E. Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007); E. Stark, *Looking Beyond Domestic Violence: Policing Coercive Control* (2012) 12(2) *Journal of Police Crisis Negotiations* 199; P. Lehmann, C. A. Simmons, V. K. Pillai, 'The Validation of the Checklist of Controlling Behaviours (CCB): Assessing Coercive Control in Abusive Relationships' (2012) 18(8) *Violence Against Women* 913.

<sup>59</sup> Katz (note 32 supra) 56.

Chapter 3, ‘situational couple violence’ refers to the perpetration of violence in response to a specific stimulus, rather than the abuse forming part of a deliberate and sustained effort to gain control.<sup>60</sup> This distinction, Katz argues, is crucial because children subjected to coercive control-based domestic abuse will have different needs to children affected by situational couple violence, and these needs must be understood in order for children to receive appropriate support.<sup>61</sup> Coercive control-based domestic abuse is considered to be particularly harmful to children,<sup>62</sup> with children needing support to regain their ‘space for action’.<sup>63</sup> That said, and as Chapter 3 emphasises, drawing distinctions between different types of abuse is complex and great care must be exercised before categorising abuse as ‘situational’.

The recognition of the harms caused by non-physical coercive control has a further consequence. As Chapter 4 explores, the courts’ approach is that contact ought to go ahead provided the risks posed by the father can be managed, with handovers a common risk management strategy, in which the mother and father are kept separate as the child is passed to the care of the father. The problem with this approach, as Chapter 3 explores, is that when domestic abuse is understood to have coercive control at its heart, the extent to which the risks posed by the domestically abusive parent can be robustly managed by the management of handovers comes into question, since coercive control is about exerting power and control. This exertion of power and control does not dissipate simply because the relationship has ended.<sup>64</sup> Indeed the research evidence points to the likelihood of its intensification on separation,<sup>65</sup> and the fear children can experience of future abuse does not abate simply because the mother and father are no longer in physical contact.

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<sup>60</sup> M. P. Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence* (Northeastern University Press 2008) p.18.

<sup>61</sup> Katz (note 32 supra) 56.

<sup>62</sup> Ibid 57.

<sup>63</sup> Ibid. On the importance of this to mothers experiencing domestic abuse see: Westmarland and Kelly (note 55 supra) 1100.

<sup>64</sup> See for example: Johnson (note 3 supra) 286.

<sup>65</sup> Ibid.



### 2.1.5 Domestic abuse undermines parenting capacity

In addition to the harm caused to children by being directly abused or exposed to domestic abuse, children can also be negatively impacted through their parents' parenting capacity being undermined by domestic abuse. While not the case for all mothers,<sup>66</sup> it has been found that domestic abuse can result in some mothers finding it difficult to respond to their children's needs whilst they are still suffering from the effects of the abuse themselves.<sup>67</sup> Furthermore, domestically abusive fathers can deliberately undermine mothers in front of children and/or encourage children to undermine their mothers' parenting.<sup>68</sup> A child's mother being obliged to live in a state of perpetual fear has also been found to harm children.<sup>69</sup> The interrelationship between mothers' and children's well-being is receiving increasing recognition, as is the way in which abuse can destabilise the relationship between mother and child.<sup>70</sup> As Chapter 4 explores, however, the extent to which the courts are sufficiently sensitive to the relevance of the impact of domestic abuse on the child's mother remains uncertain.

In comparison to the evidence base on the impact of domestic abuse on mothers, and the interrelationship between mothers' and children's well-being, relatively little is known about the parenting capacity of domestically abusive fathers.<sup>71</sup> It is clear that domestic abuse is a failure in parenting, both in terms of the failure to safeguard the child's physical and/or emotional well-being and the failure to protect the mother of

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<sup>66</sup> For a study documenting mothers' resilience in the face of domestic abuse and the steps taken to compensate for the effects of the abuse on their children see: C. Casaneuva, S. L. Martin, D. K. Runyan, R. P. Barth and R. H. Bradley, 'Quality of Material Parenting Among Intimate-partner Violence Victims Involved with the Child Welfare System' (2008) 23 *Journal of Family Violence* 413.

<sup>67</sup> See for example: A. Wyndham, 'Children and Domestic Violence: the Need for Supervised Contact Services When Contact With A Violent Father is Ordered/Desired' (1998) 51(3) *Australian Social Work* 41, 43.

<sup>68</sup> See for example: Mullender, Hague, Imam, Kelly, Malos and Regan, (note 5 supra) p.162; Harne (note 29 supra) pp.146-147.

<sup>69</sup> Mullender, Hague, Imam, Kelly, Malos and Regan, (note 5 supra) p.159.

<sup>70</sup> See for example: A. A. Levendosky, S. M. Lynch and S. A. Graham-Bermann, 'Mothers' Perceptions of the Impact of Women Abuse on Their Parenting' (2000) 6 *Violence Against Women* 248, 267; A. A. Levendosky and S. A. Bermann, 'Parenting in Battered Women: The Effects of Domestic Violence on Women and Their Children' (2001) 16(2) *Journal of Family Violence* 171, 187-188; Mullender, Hague, Imam, Kelly, Malos and Regan, (note 5 supra) pp.156-177; A. A. Levendosky, A. C. Huth-Bocks, D. L. Shipiro and M. A. Semel, 'The Impact of Domestic Violence on the Maternal-Child Relationship and Preschool-age Children's Functioning' (2003) 17(3) *Journal of Family Psychology* 275, 285; A. Morris, 'Gendered Dynamics of Abuse and Violence in Families: Considering the Abusive Household Gender Regime' (2009) 18 *Child Abuse Review* 414, 414-415 and 424-425; C. Humphreys, R.K. Thiara and A. Skamballis, 'Journal of Family Violence Readiness to Change: Mother-Child Relationship and Domestic Violence Intervention' (2011) 41 *British Journal of Social Work* 166, 167; Thiara and Humphreys (note 4 supra) 138.

<sup>71</sup> Holt, Buckley and Whelan (note 21 supra) 801.

the child, but there is a lack of research into abusive fathers' parenting capacity.<sup>72</sup> Studies have started to address this gap, but few have asked domestically abusive fathers directly about the impact of their abusive behaviour on children and their own parenting capacity.<sup>73</sup> Much of the evidence instead consists of mothers' perceptions of fathers' parenting. This research based on mothers' perceptions has been critical. Mothers have warned of domestically abusive fathers' deficient, and in some cases dangerously deficient, parenting skills.<sup>74</sup> The majority of the 45 women interviewed as part of Thiara and Gill's research, for example, emphasised the inadequate parenting skills of domestically abusive fathers, reporting that the fathers took little to no responsibility for their children both before and after separation.<sup>75</sup> Whilst mothers' insights are crucial, reliance on these accounts alone has its limitations because mothers' perceptions will be shaped by their own experiences. This gap in the evidence base is significant because understanding fathers' parenting capacity is important if a multi-faceted assessment of the risks and benefits of contact is to be conducted.

Harne's study is one of the few to have consulted domestically abusive fathers on their views on parenting, alongside interviews with ten partners who had experienced domestic abuse and four perpetrator programme co-ordinators. Her conclusions from the interviews with both fathers and mothers were that domestically abusive fathers tend not to acknowledge the physical and emotional abuse they direct towards their children.<sup>76</sup> Contact was seen by these fathers as serving their emotional needs, with children's feelings and fears largely ignored.<sup>77</sup> Stanley et al's study also involved interviews with domestically abusive fathers and their partners. Their findings were more positive about domestically abusive fathers' awareness of the impact of their

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<sup>72</sup> Sturge and Glaser (note 16 supra) 624.

<sup>73</sup> See for example the discussion in: Thiara (note 22 supra) p.164.

<sup>74</sup> See for example: L. Radford, M. Hester, J. Humphreys and K. Woodfield, 'For the Sake of the Children: The Law, Domestic Violence and Child Contact in England' (1997) 20(4) *Women's Studies International Forum* 471, 477; C. Harrison, 'Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence' (2008) 14(4) *Violence Against Women* 381, 385-286, 391-393 and 397-398; Thiara (note 22 supra) p.169; Coy, Perks, Scott and Tweedale (note 39 supra) p.65.

<sup>75</sup> R. K. Thiara and A. K. Gill, *Domestic Violence, Child Contact and Post-separation Violence: A Report of Findings* (NSPCC 2012) p.46. See also: S. Day Sclater and F. Kaganas, 'Contact: Mothers, Welfare and Rights' in A. Bainham, B. Lindley, M. Richards and L. Trinder (eds), *Children and Their Families: Contact, Rights and Welfare* (Hart Publishing 2003) p.161.

<sup>76</sup> L. Harne, 'Violence, Power and the Meanings of Fatherhood in Issues of Child Contact' (PhD thesis, University of Bristol 2004) pp.340-349.

<sup>77</sup> Ibid.

abusive behaviour on children.<sup>78</sup> Perpetrator programmes were found to have a positive impact in some cases in increasing fathers' awareness of the harm caused by domestic abuse.<sup>79</sup>

Some research conducted outside this jurisdiction has lamented the focus on the inadequacies of domestically abusive men as parents, and the lack of involvement of these fathers in research examining their parenting capacity. Perel and Peled described the reliance on men's (ex)-partners' accounts to assess domestically abusive fathers' parenting as 'methodologically problematic'.<sup>80</sup> Although recognising that their research was not representative, they concluded from their interviews with 14 abusive men, all of which were conducted in central Israel, that domestically abusive men's parenting may be more multifaceted than has been appreciated in research previously.<sup>81</sup> They drew attention to the vulnerability of these fathers, and to the tension some of the fathers felt between wanting to maintain contact with their children and their awareness of the impact of their abuse on children.<sup>82</sup> Other research, however, has highlighted a mismatch between fathers' attitudes and actions. Rothman *et al*'s larger-scale research examined the views of 464 domestically abusive fathers from the US and Canada, and concluded that the fathers were, on the whole, aware of the negative impact of their abusive behaviour on their children.<sup>83</sup> These fathers did not, however, commonly take steps to end the abuse.<sup>84</sup>

The limited research into the parenting capacity of domestically abusive fathers, and the jurisdictional variation in where the studies took place, makes it difficult to synthesise the different findings from these studies. However, in the light of the evidence base outlined above on the risks domestically abusive parents pose to

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<sup>78</sup> N. Stanley, N. Graham-Kevan and R. Borthwick, 'Fathers and Domestic Violence: Building Motivation for Change through Perpetrator Programmes' (2012) 21(4) *Child Abuse Review* 264, 272. Stanley et al conducted 47 interviews with 21 men and 13 partners (see: 266-267).

<sup>79</sup> Ibid.

<sup>80</sup> G. Perel and E. Peled, 'The Fathering of Violent Men: Constriction and Yearning' (2008) 14(4) *Violence Against Women* 457, 460.

<sup>81</sup> Ibid 478-479.

<sup>82</sup> Ibid 464-473 and 478-479. See also: G. Litton Fox, J. Sayers and C. Bruce, 'Beyond Bravado: Fatherhood as a Resource for Rehabilitation of Men Who Batter' (2002) 32(3-4) *Marriage & Family Review* 137, 157-160; G. Litton Fox and M. L. Benson, 'Violent Men, Bad Dads? Fathering Profiles of Men Involved in Intimate Partner Violence' in R. D. Day and M. E. Lamb (eds), *Conceptualizing and Measuring Father Involvement* (Lawrence Erlbaum 2004) pp.359-384.

<sup>83</sup> E. F. Rothman, D. G. Mandel and J. G. Silverman, 'Abusers' Perceptions of the Effect of Their Intimate Partner Violence on Children' (2007) 13(11) *Violence Against Women* 1179, 1187-1188.

<sup>84</sup> Ibid.

children – whether through direct harm, indirectly through exposure to abuse or through undermining the resident parent’s parenting capacity – any assumption that a domestically abusive parent can still be a ‘good’ parent is open to challenge.

As Chapter 4 explores in relation to the courts’ approach, there are some tensions here between the evidence base and interviewees’ accounts of judicial practice, with reports that practice continues to be shaped by the assumption that a father can perpetrate domestic abuse but still be a ‘good’ parent.<sup>85</sup> Some of the barristers interviewed also separated domestic abuse from domestically abusive fathers’ parenting capacity. B01 said that ‘some abusive parents are very good parents; they are just not very good partners’. B04 made a similar point, arguing that abuse between parents is not necessarily relevant to the relationship between the abusive parent and child because a parent being domestically abusive does not automatically mean that the parent cannot look after his child. B06 similarly adhered to the view that ‘someone can be a terrible person to another person but actually an OK parent’.

Furthermore, and again as Chapter 4 explores in relation to the courts’ approach, some interviewees emphasised the importance of children maintaining a relationship with their fathers, even when the child’s experience of that father is unlikely to be positive. J04-DJ, for example, said that contact does not have to be direct but ensuring some contact takes place is crucial, even if the relationship is not a particularly positive one. J08-DJ made a similar point that even if the father ‘isn’t a particularly nice person, he is still their father’ and should have a relationship with his child wherever possible, but this judge qualified this by stipulating that the father should be able to ‘show the child love and bring something to the child’s life’. R03 and S07 also emphasised that a child only has one father, so even if that father has his faults, he should have a relationship with his child, as long as it is safe to do so.

The discussion which follows in Chapter 3 on the extent to which there are different types of domestically abusive behaviour is also relevant to debates on fathers’ parenting capacity. J04-DJ, for example, separated ‘inherently violent people who are

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<sup>85</sup> See Chapter 4 at 4.1.1.1.

a risk to children' from 'people who find themselves in a situation of violence because of the breakdown of a relationship'. This judge suggested that parents who are not inherently abusive may not necessarily present a danger to the child, giving the example of a father who loses his temper during an argument and lashes out at the mother having been hit first by her. J04-DJ warned that it can, however, be difficult to 'weed out' these different types of perpetrator. As Chapter 3 explores, there is some support for this view that there are different categories of domestic abuse, but, as J04-DJ acknowledged, great care is needed in drawing these distinctions and there is no authority for the view that domestic abuse, whatever its form, should be dismissed as irrelevant to contact.

As the later Chapters discuss, as a professional group the solicitors tended to be among the most critical of the courts' approach to the resolution of contact disputes involving domestic abuse, and some also voiced criticisms of the parenting capacity of domestically abusive fathers. Four solicitors were concerned about perpetrators of domestic abuse being negative role models for children, which they felt could result in children mimicking fathers' abusive behaviour.<sup>86</sup> S05 saw this as a particular problem in relation to coercive control. S05 and S09 highlighted domestically abusive fathers' lack of boundaries and routines as problems.

While the evidence base on the parenting capacity of domestically abusive parents is limited, there is a strong evidence base on the risks domestically abusive parents pose to children and the interrelationship between the undermining of the abused parent's parenting capacity and the welfare of children. A conclusion that a domestically abusive parent can still be a 'good' parent is, therefore, open to challenge. As Chapter 3 explores, there is an argument that there are different shades of domestic abuse, but imposing categories on domestic abuse must be approached with caution and does not justify the dismissal of some forms of domestic abuse as irrelevant to contact.

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<sup>86</sup> S02, S05, S08 and S09.

## 2.2 THE BENEFITS AND RISKS OF POST-SEPARATION CONTACT

In comparison to the evidence base on the impact of domestic abuse on children, the evidence base on the benefits and risks of post-separation contact is relatively small. With the exception of Fortin et al's study,<sup>87</sup> discussed below, there has been little monitoring of the long-term outcomes for children who maintain contact with domestically abusive parents, and there is a pressing need for further research to be conducted into the impact of court-ordered contact on children. As Chapter 4 explores, this need for data is particularly acute within the current legal framework, in which the opportunities for review and long-term monitoring of the impact of court decisions are limited. Without this data, it is difficult to assess with confidence whether the 'right' outcomes are being reached, save for the well-established knowledge that each outcome must be specifically tailored to the unique needs and experiences of individual children. This section explores the guidance which exists on the benefits and risks of post-separation contact. The evidence base above on the impact of domestic abuse on children remains highly relevant to decisions on whether children should have contact, particularly in the light of the prevalence of post-separation abuse and the role contact can play in facilitating the continuation of abuse.<sup>88</sup>

The consultant child psychiatrists Drs Sturge and Glaser were charged with preparing the expert's report for the court in the seminal case of *Re L (A Child) (Contact: Domestic Violence)*; *Re V (A Child) (Contact: Domestic Violence)*; *Re M (A Child) (Contact: Domestic Violence)*; *Re H (Children) (Contact: Domestic Violence)*.<sup>89</sup> Their report explored children's needs, the benefits and risks of contact, the circumstances in which post-separation contact should, and should not, take place and how assessments on contact should be made. The report does not represent the current law since the Court of Appeal stopped short of accepting the report outright, and the report has been criticised by Eekelaar for reaching no more of a helpful conclusion than "'contact is good (but only when it is good)'"'.<sup>90</sup> The report, nevertheless,

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<sup>87</sup> Fortin, Hunt and Scanlan (note 1 supra).

<sup>88</sup> Mullender, Hague, Imam, Kelly, Malos and Regan (note 5 supra) pp.202-203; Humphreys and Thiara (note 4 supra) p.90.

<sup>89</sup> [2001] Fam 260.

<sup>90</sup> J. Eekelaar, 'Contact – Over the Limit' (2002) 32(Apr) *Family Law* 271, 271.

continues to represent the most respected authority on contact and domestic abuse. As a result, it is discussed below in some detail, alongside insights from existing studies and this doctoral research. Sturge and Glaser's overall conclusion was that the possibilities for optimal direct or indirect contact, where the child's needs are met consistently, and both parents support the contact, are limited in cases in which domestic abuse has occurred.<sup>91</sup> Consequently, the assessment of whether contact should take place involves a 'balancing act', weighing up the benefits of contact against the risks.<sup>92</sup>

### **2.2.1 The general benefits of contact**

Sturge and Glaser summarised the accepted principles from 'developmental and psychological knowledge, theory and research' on children's basic developmental needs.<sup>93</sup> These include the need for 'warmth and approval and the development of positive self-esteem' and a 'sense of security, stability, continuity and "belongingness"'.<sup>94</sup> Contact can play a number of roles in responding to these needs. It can, for example, support the child in building his or her identity through the sharing of information and knowledge, which in turn can help to bolster the child's self-esteem.<sup>95</sup> It can also help the child to establish and maintain meaningful and beneficial relationships.<sup>96</sup> Contact with fathers can be particularly important for children in providing the child with a male role model and helping them to understand their identity and appreciate their self-worth.<sup>97</sup>

In principle, direct contact between a child and his or her non-resident parent can benefit the child by helping to rebuild relationships, providing information and knowledge, establishing and maintaining meaningful relationships and allowing the child to feel accepted, unique and special.<sup>98</sup> The absence of direct contact can have a number of negative effects on children. For example, without direct contact, children

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<sup>91</sup> Sturge and Glaser (note 16 supra) 619.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid 615.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid 616.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid 617.

<sup>98</sup> Ibid.

have no means to assess who their father is for themselves, instead building up a picture of the 'unseen, imagined villain'.<sup>99</sup> This is significant because children of domestically abusive parents can fear that they too will become abusive.<sup>100</sup> If the child can see some good in their parent, alongside appreciating that abusive behaviour is wrong, it can improve their self-image.<sup>101</sup> A lack of direct contact can also deny children the opportunity to maintain, or establish, relationships with their paternal family.<sup>102</sup>

Indirect contact, as a more limited form of contact, meets fewer of children's needs, but it can still enable the child to have access to information about their non-resident parent and help them to feel valued through the knowledge their parent wants to maintain a relationship.<sup>103</sup> Indirect contact may also provide some opportunity for repair of relationships and keep the door open for more substantial contact.<sup>104</sup> The success of indirect contact, however, often rests heavily on the quality of the facilitation of the contact by the resident parent.<sup>105</sup>

There was clear support among the interviewees in this doctoral study for these arguments that contact is beneficial to children post-separation. As Chapter 4 explores, this drives the pro-contact stance which characterises practice, even in cases of proven or found domestic abuse. Several interviewees, both from within the judicial and non-judicial interviewee groups, spoke of children's 'rights' to grow up knowing both their parents.<sup>106</sup> Some identified specific benefits of contact to children, highlighting many of those set out by Sturge and Glaser. These included: enabling children to build their identity;<sup>107</sup> providing children with the sense of security that they have two parents who love them;<sup>108</sup> supporting children to form their own relationships and understand their emotions;<sup>109</sup> the provision of (male) role

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<sup>99</sup> Ibid 625.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid 617.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> N = 12: B01, B03, B05, C03, J01-M, J03-M, J05-CJ, J06-DJ, J07-CJ, J08-DJ, S04 and S05.

<sup>107</sup> J10-DJ.

<sup>108</sup> J10-DJ.

<sup>109</sup> J04-DJ.



models;<sup>110</sup> and the lowering of children's anxiety about their non-resident parent by providing some sense of 'normality'.<sup>111</sup> Others were concerned that unless children are given the opportunity to get to know their father, they will construct their own image of him.<sup>112</sup> This could be a positive one, which can then cause distress to the child later in life if he or she realises this is inaccurate,<sup>113</sup> or it could be negative, with children building up fathers as 'monsters, as evil'.<sup>114</sup> This, some interviewees' said, can negatively affect children's self-image and self-worth.<sup>115</sup> Crucially, however, while there may be benefits to children maintaining contact with domestically abusive fathers, there is no evidential foundation for assuming these benefits.

### **2.2.2 The lack of an evidential foundation for assuming the benefits of contact**

While contact can benefit children, there is no guarantee that contact will be beneficial to any individual child.<sup>116</sup> The evidence base on whether contact in general promotes children's welfare is inconclusive,<sup>117</sup> and in cases involving a domestically abusive parent the evidence is even less certain.<sup>118</sup> Sturge and Glaser were quick to emphasise that much depends on the age of the child, the stage the child has reached in his or her development, the child's individual characteristics and the capacity of the non-resident parent to understand and respond to the needs of their child.<sup>119</sup> They were clear that all decisions on contact should thus be tailored to the needs of the individual child in question and contact should not be taking place unless its purpose and the benefits it will bring to the child are evident.<sup>120</sup>

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<sup>110</sup> J08-DJ.

<sup>111</sup> C07.

<sup>112</sup> B01, B02, C07 and J04-DJ.

<sup>113</sup> B01 and J04-DJ.

<sup>114</sup> C07 (quoted), B01 and B02.

<sup>115</sup> B01 and B02.

<sup>116</sup> See for example: P. R. Amato and B. Keith, 'Parental Divorce and the Well-Being of Children: A Meta-Analysis' (1991) 110(1) *Psychological Bulletin* 26, 39; B. Rodgers and J. Pryor, *Divorce and Separation: Outcomes for Children* (Joseph Rowntree 1998) p.41; B. Hale, 'The View from the Court' (1999) 45(11) *Child and Family Law Quarterly* 377, 381; Sturge and Glaser (note 16 supra) 617.

<sup>117</sup> J. Pryor and B. Rodgers, *Children in Changing Families: Life after Parental Separation* (Blackwell Publishers 2001) pp.205-206; J. Dunn, 'Contact and Children's Perspectives on Parental Relationships' in A. Bainham, B. Lindley, M. Richards and L. Trinder (eds), *Children and their Families: Contact, Rights and Welfare* (2003 Hart Publishing) pp.27-28; J. Dunn, 'Annotation: Children's Relationships with their Non-Resident Fathers' (2004) 45(4) *Journal of Child Psychology and Psychiatry* 659, 659; S. Gilmore, 'Contact/Shared Residence and Child Well-Being: Research Evidence and its Implications for Legal Decision-Making' (2006) 20(3) *International Journal of Law, Policy and the Family* 344, 360-361; Fortin, Hunt and Scanlan (note 1 supra) p.1.

<sup>118</sup> See for example: Pryor and Rodgers (note 117 supra) p.207; Sturge and Glaser (note 16 supra) 617.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid 616.

Their view was that no automatic assumption should be made that contact with a parent who is, or has been, domestically abusive will further a child's welfare.<sup>121</sup> They recommended that if any assumption is being made it 'should be in the opposite direction':<sup>122</sup> the non-resident parent should convince the court of his ability to meet his child's needs and facilitate beneficial contact before contact should be considered.<sup>123</sup> They advocated a requirement of domestically abusive parents explaining to the court the action they will take to support the child in overcoming the abuse suffered.<sup>124</sup> The Court of Appeal in *Re L (A Child) (Contact: Domestic Violence)*; *Re V (A Child) (Contact: Domestic Violence)*; *Re M (A Child) (Contact: Domestic Violence)*; *Re H (Children) (Contact: Domestic Violence)* did not, however, accept Sturge and Glaser's view that there should be an assumption against contact.<sup>125</sup>

Sturge and Glaser are not alone in issuing warnings about the dangers in assuming the benefits of contact. Hunt and Roberts have also emphasised the importance of avoiding assumptions on the benefits of contact in cases where there is no established relationship between parent and child.<sup>126</sup> And Fortin has expressed concern about child contact policies being premised on the assumption that contact with the non-resident parent is beneficial to children since this assumption is 'not supported by research'.<sup>127</sup> Gilmore has similarly argued that the research evidence points to the nature and quality of contact being most crucial to children's adjustment, rather than the mere existence of contact, with there being no justification for generalising about the benefits of contact.<sup>128</sup> Indeed, no study has concluded that 'bad' contact is better for children than not having contact at all; nor has any study found that contact with a domestically abusive parent is automatically beneficial. What the existing research suggests is that while contact can have benefits, it can also pose significant risks to children and parents.<sup>129</sup>

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<sup>121</sup> Ibid 623.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid 623-624.

<sup>125</sup> [2001] Fam 260, 300 (Thorpe LJ).

<sup>126</sup> J. Hunt and C. Roberts, *Child Contact with Non-Resident Parents: Family Policy Briefing 3* (Oxford University Press 2004) p.3.

<sup>127</sup> J. Fortin, *Children's Rights and the Developing Law* (3<sup>rd</sup> ed, Butterworths 2009) p.498.

<sup>128</sup> S. Gilmore, 'The Assumption that Contact is Beneficial: Challenging the "Secure Foundation"' (2008) 38(Dec) *Family Law* 1226, 1227-1228. See also: Gilmore (note 117 supra).

<sup>129</sup> See below at 2.2.3.

As Chapter 4 explores, there are tensions between these warnings about the dangers in assuming the benefits of contact and interviewees' reports of the current approach adopted by the courts. The findings from this research are consistent with those from previous studies that the courts take a risk-management approach to contact:<sup>130</sup> contact, of some form, will take place in the vast majority of cases in which a parent is found or proven to have been domestically abusive, and the focus is on how that contact can be made 'safe'. Reliance on a partial view of the evidence base to support this pro-contact stance was evident in some interviewees' responses. Some justified the pro-contact stance, for example, through reference to 'research evidence', or to it being well-established evidentially that children benefit from having a relationship with both parents.<sup>131</sup>

Furthermore, some interviewees identified a lack of contact as inherently harmful to children.<sup>132</sup> This, again, sits uncomfortably with the evidence base and the guidance of Sturge and Glaser that the possibilities for optimal contact are limited in cases in which domestic abuse has occurred.<sup>133</sup> Some felt that children resent their mothers as they grow up if they do not have contact with their fathers, with mothers blamed for the lack of contact.<sup>134</sup> Others said that outcomes for children are poorer if they grow up knowing only one parent.<sup>135</sup> The risk of children who do not have contact being unable to form relationships, or understand their emotions, was also emphasised.<sup>136</sup>

As the later Chapters also emphasise, whilst a pro-contact stance cannot automatically be equated with unsafe outcomes, its existence should, nevertheless, be questioned in cases of proven or found domestic abuse. The approach to these cases which finds most support in the existing evidence base is a neutral, but risk-sensitive, one: contact can be beneficial, but the benefits cannot be assumed, and

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<sup>130</sup> M. Harding and A. Newnham, *How Do County Courts Share the Care of Children Between Parents?* (Nuffield Foundation 2015) p.46.

<sup>131</sup> N = 4: B01, B05, J04-DJ and J08-DJ.

<sup>132</sup> N = 6: B01, B05, C07, J04-DJ, J08-DJ and S07.

<sup>133</sup> Sturge and Glaser (note 16 supra) 619.

<sup>134</sup> N = 5: B02, B03, B05, J04-DJ and J05-CJ.

<sup>135</sup> N = 2: B05 and J08-DJ.

<sup>136</sup> N = 1: J04-DJ.

thorough assessment must be conducted of the risks posed by the domestically abusive parent. Chapter 5 explores the option of taking a step further in adopting a presumption against contact in cases of proven or found domestic abuse.

### **2.2.3 The risks posed to children by contact with a domestically abusive parent**

The only major study to have explored the long-term outcomes for children of contact with a domestically abusive parent through the lens of young adults' perspectives warns against any assumption that children automatically benefit from contact and emphasises its risks. Fortin et al's study was based on telephone surveys with 398 young adults who experienced parental separation prior to the age of 16, and follow-up qualitative interviews with 50 participants.<sup>137</sup> The study concluded that the courts' approach of assuming 'contact is almost always in the interests of children' was 'not sufficiently nuanced',<sup>138</sup> and that the courts' focus should be on ensuring 'good' contact, rather than simply ensuring it takes place,<sup>139</sup> a finding also made by other studies.<sup>140</sup> The young adults within this study whose parents had been domestically abusive either found contact unsafe or felt the abuse had a negative impact on their relationship with their non-resident parents.<sup>141</sup> Fortin et al argued that their findings supported Sturge and Glaser's advice on the psychological harm contact with a domestically abusive parent can cause to children.<sup>142</sup>

Sturge and Glaser also warned of the risks posed by post-separation contact, cautioning that if taking place inappropriately, contact can be harmful to children.<sup>143</sup> If direct contact engenders further conflict, the child's emotional well-being and stability can suffer, with the child feeling responsible for the conflict and torn between their parents.<sup>144</sup> The risk of the child being physically, sexually or emotionally abused during contact was also emphasised, particularly when the perpetrator is using contact as a means to continue the perpetration of abuse.<sup>145</sup> Indirect contact presents

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<sup>137</sup> Fortin, Hunt and Scanlan (note 1 supra).

<sup>138</sup> Fortin, Hunt and Scanlan (note 1 supra) p.xvii.

<sup>139</sup> Ibid.

<sup>140</sup> See for example: Harding and Newnham (note 130 supra) p.108.

<sup>141</sup> Fortin, Hunt and Scanlan (note 1 supra) p.222.

<sup>142</sup> Ibid.

<sup>143</sup> Sturge and Glaser (note 16 supra) 617.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid 618.

fewer obvious routes for the perpetrator to continue the perpetration of abuse but may, nevertheless, still pose risks to children, such as providing the perpetrator with an opportunity to undermine the resident parent or obtain information on the resident parent and child's whereabouts.<sup>146</sup> One of the principal risks identified with post-separation contact is that it provides a vehicle for the continuation of pre-separation abuse.

### 2.2.3.1 Contact as the vehicle for the continuation of domestic abuse

Studies, across a range of methodologies, have consistently pointed to the prevalence, and in many cases intensification, of abuse post-separation and the risks contact can pose to children as a result.<sup>147</sup> As Jaffe et al have argued 'separation is not a vaccination against domestic violence'.<sup>148</sup> Several studies have pointed to the deliberate use of contact by domestically abusive parents as a vehicle for the continuation of abuse.<sup>149</sup> Indeed, it has been suggested that children may be more likely to witness domestic abuse post-separation than pre-separation.<sup>150</sup> Any assumption that children will automatically cease to be subject to abuse, whether directly or indirectly, as a result of the relationship ending is, thus, erroneous.

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<sup>146</sup> Ibid 619.

<sup>147</sup> See for example: Radford, Sayer and AMICA (note 22 supra); T. Hotton, 'Spousal Violence After Marital Separation' (2001) 21(7) *Juristat* 1, 1; Mullender, Hague, Imam, Kelly, Malos and Regan (note 5 supra) pp.202-203; Humphreys and Thiara (note 4 supra) p.90; Coy, Perks, Scott and Tweedale (note 39 supra) pp.27, 29 and 31; Thiara and Gill (note 35 supra) pp.139 and 140-142; F. Morrison, 'All Over Now? The Ongoing Relational Consequences of Domestic Abuse Through Children's Child Contact Arrangements' (2015) 24 *Child Abuse Review* 274, 282-283.

<sup>148</sup> P. G. Jaffe, N. K. D. Lemon and S. E. Poisson, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (Sage Publications 2003) p.19. See also: A. Buchanan, J. Hunt, H. Bretherton and V. Bream, *Families in Conflict: Perspectives of Children and Parents on the Family Court Welfare Service* (Policy Press 2001) p.48; C. Humphreys and R. K. Thiara, 'Neither Justice nor Protection: Women's Experiences of Post-separation Violence' (2003) 25(3) *Journal of Social Welfare and Family Law* 195, 199.

<sup>149</sup> See for example: Hester and Radford (note 23 supra) 61; L. Radford, M. Hester, J. Humphreys and K. Woodfield, 'For the Sake of the Children: The Law, Domestic Violence and Child Contact in England' (1997) 20(4) *Women's Studies International Forum* 471, 477; S. Walby and J. Allen, *Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (Home Office Research Study 276 2004) p.70; R. K. Thiara, C. Humphreys, A. Skamballis and A. Mullender, *Talking to My Mum: Developing Communication Between Mothers and their Children in the Aftermath of Domestic Violence* (University of Warwick 2006) p.56; D. A. Brownridge, 'Violence Against Women Post-Separation' (2006) 11(5) *Aggression and Violent Behaviour* 514, 523; Radford and Hester (note 10 supra) pp.91-95; Harrison (note 74 supra) 382 and 385; Thiara (note 22 supra) pp.167 and 172-173; Coy, Perks, Scott and Tweedale (note 39 supra) p.10; Thiara and Gill (note 35 supra) pp.99 and 138-143; S. Holt, 'Post-separation Fathering and Domestic Abuse: Challenges and Contradictions' (2013) 24(3) *Child Abuse Review* 210, 211 and 216; Morrison (note 147 supra) 278-279.

<sup>150</sup> Thiara and Gill (note 35 supra) p.17. See also: Hester and Radford (note 23 supra); Hotton (note 147 supra) 1; J. L. Hardesty and G. H. Chung, 'Intimate Partner Violence, Parental Divorce, and Child Custody: Directions for Intervention and Future Research' (2006) 55(2) *Family Relations* 200, 201.

Morrison's research in Scotland with 18 children and 16 mothers emphasised this danger in assuming the abuse will cease once the relationship ends.<sup>151</sup> Three children said they were physically abused during contact and two mothers voiced their suspicions that their children were sexually abused during contact.<sup>152</sup> The majority of children were reported to have been emotionally abused during contact.<sup>153</sup> Furthermore, in Coy *et al*'s research, based on 34 telephone interviews with women and 113 online survey responses from legal professionals, the use of contact to continue the perpetration of abuse was raised by both the women and a substantial proportion of the professionals.<sup>154</sup> Each of the 34 women experienced some form of post-separation abuse and several reported the severity of the abuse escalating following separation, a finding consistent with previous research.<sup>155</sup> Over three quarters (78%) of the 45 women interviewed by Thiara and Gill also experienced some form of post-separation abuse.<sup>156</sup> In Humphreys and Thiara's research, 49 of the 100 women had contact arrangements in place, and 14 reported child contact being used by their ex-partners to find them.<sup>157</sup> Forty-one percent said that they had experienced post-separation abuse due to contact arrangements,<sup>158</sup> and only four women found contact to be unproblematic.<sup>159</sup> Twenty-seven women experienced major ongoing problems with contact.<sup>160</sup>

Handover has been identified as one of the times during contact at which women, and in some cases children, are most vulnerable to suffering further abuse. In the early study conducted by Hester and Radford, for example, nearly all of the 53 women involved in the research suffered abuse during contact handovers.<sup>161</sup> And nearly all of the 34 women interviewed more recently as part of Coy *et al*'s research were so

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<sup>151</sup> Morrison (note 147 *supra*) 282-283. See also: F. Morrison and F. Wasoff, 'Child Contact Centres and Domestic Abuse Victim Safety and the Challenge to Neutrality' (2012) 18(6) *Violence Against Women* 711, 716-717.

<sup>152</sup> Morrison (note 147 *supra*) 280.

<sup>153</sup> *Ibid.*

<sup>154</sup> Coy, Perks, Scott and Tweedale (note 39 *supra*) pp.19-20.

<sup>155</sup> *Ibid.* p.27. Examples of earlier research and commentary include: L. Radford, M. Hester, J. Humphreys and K-S. Woodfield, 'For the Sake of the Children: The Law, Domestic Violence and Child Contact in England' (1997) 20(4) *Women's Studies International Forum* 471, 477; Harrison (note 74 *supra*) 386.

<sup>156</sup> Thiara and Gill (note 35 *supra*) p.25.

<sup>157</sup> Humphreys and Thiara (note 4 *supra*) p.90.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.* See also: C. Humphreys and R. K. Thiara, 'Neither Justice nor Protection: Women's Experiences of Post-separation Violence' (2003) 25(3) *Journal of Social Welfare and Family Law* 195, 199-207.

<sup>160</sup> Humphreys and Thiara (note 4 *supra*) p.92. See also: Hester and Radford (note 23 *supra*) pp.3 and 23; Thiara (note 22 *supra*) pp.157, 167 and 172.

<sup>161</sup> Hester and Radford (note 23 *supra*) pp.26-27.

fearful of handover that they had to involve their family and friends to mitigate the perceived safety risks.<sup>162</sup>

As the later Chapters explore, the professional groups within this doctoral research who were most critical of current court practice were the domestic abuse organisations and solicitors. The domestic abuse organisations were particularly concerned about the use of contact as a vehicle to continue the perpetration of abuse. Some of the solicitor interviewees also felt it is not only the risk of the abuse continuing between the parents post-separation which is significant, but also the risk of the child being exposed to the abuse directed towards the perpetrator's new partner. S08, S09 and S10 emphasised the cyclical nature of domestic abuse, raising the concern that unless fathers address their behaviour, they will go on to be abusive to their next partners. S09 was particularly concerned about the likelihood of children witnessing this abuse and the capacity of these fathers to provide role models to children. In her view, 'we are creating the next generation of dysfunctional adults'.

In the light of the use of contact as a vehicle for the continuation of abuse, it is difficult to sustain an argument that the child is no longer at risk once the relationship ends. This, again, underlines the importance of robust risk assessments, tailored to each individual child, along with the need to interrogate the extent to which contact will be both safe and beneficial, rather than accepting this at face value.

### **2.3 NECESSARY REQUIREMENTS FOR 'SAFE' AND 'BENEFICIAL' CONTACT**

It has been emphasised that there is 'surprisingly little evidence' on the factors which promote positive relationships between children and their non-resident parents,<sup>163</sup> with the evidence base on the impact of contact on children in general being 'strikingly thin'.<sup>164</sup> In cases of domestic abuse, Sturge and Glaser summarised the evidence on the conditions that should exist to justify a conclusion that contact will

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<sup>162</sup> Coy, Perks, Scott and Tweedale (note 39 supra) p.29. See also: H. Rhoades, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *International Journal of Law, Policy and the Family* 71, 82.

<sup>163</sup> Fortin, Hunt and Scanlan (note 1 supra) p.2.

<sup>164</sup> Ibid p.4.

have more advantages than disadvantages for a child as follows: at least some acknowledgement of the abuse perpetrated; at least some willingness to accept responsibility for the abuse; full acceptance of the unacceptability of the abuse; full commitment to the child and a genuine interest in his or her welfare; a desire to make amends to the child and support him or her in developing appropriate values and attitudes; regret and an awareness of the impact of the abusive behaviour on their former partner, both in the past and present; and a commitment to sustaining contact.<sup>165</sup>

The absence of any but the final condition was felt to pose a threat to the child's well-being and emotional development.<sup>166</sup> Without these conditions, Sturge and Glaser argued, children having contact with their domestically abusive parent would be at increased risk of developing aggressive and violent behaviours, becoming perpetrators themselves or entering domestically abusive relationships and forging 'disturbed inter-personal relationships'.<sup>167</sup> The wishes and feelings of the child should also be given weight, with the weight varying with the age of the child.<sup>168</sup>

Some interviewees within this doctoral research gave their perspectives on the circumstances in which there should be no contact between a child and a parent who is, or has been, domestically abusive. All were hypothetical responses based on their own perspectives, rather than accounts of current practice. Current practice is discussed in Chapter 4. Commonly identified as a hypothetical indicator that contact should not take place was a father's lack of insight and/or failure to comply with a domestic abuse perpetrator programme,<sup>169</sup> which is consistent with Sturge and Glaser's suggested conditions above. Others have similarly emphasised the importance of fathers taking responsibility for their abusive behaviour before contact takes place.<sup>170</sup>

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<sup>165</sup> Sturge and Glaser (note 16 supra) 624.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> N = 6: C01, C02, C04, C05, J05-CJ and J06-DJ.

<sup>170</sup> See for example: Holt (note 149 supra) 219-220.



On the whole, however, the circumstances given by interviewees as hypothetical examples of when contact should not take place were more extreme than those outlined by Sturge and Glaser. These included: a mother being at risk of being killed or the child being at risk of harm;<sup>171</sup> a mother having had to flee into hiding, with contact inappropriate because of the severity of the abuse and it being impossible to facilitate;<sup>172</sup> cases where the child has been directly harmed;<sup>173</sup> a high risk of physical or emotional harm, coupled with a father's lack of insight and inability to make a positive contribution to a child's life;<sup>174</sup> if the father has a serious criminal background, the abuse has been witnessed by the children and the father shows no insight into his behaviour;<sup>175</sup> if the prospect of contact taking place causes extreme distress to the child, even if the father has undertaken work to address his behaviour and shows insight;<sup>176</sup> extreme trauma in children;<sup>177</sup> the possibility of re-traumatising the child;<sup>178</sup> when the risks of the contact are high;<sup>179</sup> when there are welfare concerns;<sup>180</sup> and a father's inability to regulate his behaviour.<sup>181</sup> As Chapter 4 explores, the majority of interviewees' experiences of practice were that no direct contact is a rare outcome for a domestically abusive parent, indicating that the circumstances in which contact is not deemed 'safe' or 'beneficial' are slim, and that there is some alignment between interviewees' hypothetical examples and real-life experiences of practice.

## 2.4 CONCLUSION

There are important lessons for the courts from the existing evidence base on the impact of domestic abuse on children: that children's responses to domestic abuse are not homogenous; that they should be alert to the possibility of overlap between domestic abuse and abuse of the child; that children are harmed by witnessing, and broader exposure to, domestic abuse; that non-physical abuse does not pose fewer risks to children's safety and well-being as physical abuse; and that domestic abuse

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<sup>171</sup> C02.

<sup>172</sup> J05-CJ.

<sup>173</sup> J05-CJ.

<sup>174</sup> C01.

<sup>175</sup> C04.

<sup>176</sup> C08.

<sup>177</sup> C07 and B05.

<sup>178</sup> C03.

<sup>179</sup> C08,

<sup>180</sup> S01

<sup>181</sup> B01.

can undermine the parenting capacity of both the mother and father. The evidence base on the risks and benefits of contact suggests that contact with a domestically abusive parent can benefit children, but there is no empirical foundation for assuming the benefits of contact. Indeed, in the light of the risks posed by contact with a domestically abusive parent, if an assumption is to be made, there is more support for an assumption against contact than one in favour.<sup>182</sup>

Some of these messages from the evidence base are permeating practice. As Chapter 3 explores, some interviewees' responses point to developments in the courts' theoretical understanding of domestic abuse and the risks it poses, with particular developments in understanding of non-physical abuse. However, there are also tensions. Structural barriers in evidencing domestic abuse were identified as undermining the weight given to non-physical abuse in practice. The notion that a father can be domestically abusive but, nevertheless, be a 'good' father has not yet entirely lost its influence. The pro-contact stance reported by interviewees throughout the thesis is not justified by the empirical evidence base and, in the light of contact being a vehicle for the continuation of abuse post-separation, it is questionable whether contact should be promoted so readily. As Chapter 4 also concludes, what is needed to advance the evidence base and practice is further research into the long-term outcomes for children of contact with a domestically abusive parent, in order to deepen understanding of what 'safe' and 'beneficial' contact really means and support the court in its decision-making in individual cases.

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<sup>182</sup> As argued by Sturge and Glaser (note 16 supra 623).

# CHAPTER 3

## DEFINING AND EVIDENCING DOMESTIC ABUSE

Definitions of ‘domestic abuse’ have evolved over time and remain complex. The current widely-accepted definition within policy and legal guidance encompasses a range of abusive behaviour, both physical and non-physical. The forthcoming Domestic Abuse Bill looks set to recognise further the harms caused by non-physical abuse.<sup>1</sup> Furthermore, following the enactment of the Serious Crime Act 2015, there is now a specific criminal offence of perpetrating coercive or controlling behaviour in an intimate or family relationship.<sup>2</sup> In theoretical terms at least, therefore, gone are the days in which domestic abuse is conceptualised as confined to physical acts of violence. The boundaries of definitions of domestic abuse are not, however, fixed, and the extent to which, in practice, there has been a transformative shift in the way in which domestic abuse is understood within court-adjudicated contact disputes is far from certain.

Evidencing domestic abuse is notoriously challenging in all areas of law, reliant as it is on the willingness, and capacity, of the victim to come forward and articulate her experiences, and the quality of responses from those responsible for responding to domestic abuse. There are major barriers to evidencing all forms of domestic abuse, but non-physical abuse presents particular challenges: it is intangible, it can be subtly perpetrated, it may not be obviously visible, and it can masquerade as innocent acts when viewed superficially in isolation, disguising a far more sinister pattern of abusive behaviour. Traditional incident-based models are ill-equipped to identify these patterns since they are not built to examine the whole picture of abusive behaviour.

This Chapter explores the way in which domestic abuse is defined and evidenced in disputes over contact through the lens of the findings from this doctoral research and the existing literature. By doing so, it lays the foundation for Chapter 4, which

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<sup>1</sup> See: Gov.UK, ‘Domestic Abuse Bill Consultation’ (28 June 2018) <<https://www.gov.uk/government/consultations/domestic-abuse-bill-consultation>> accessed 15 October 2018.

<sup>2</sup> Serious Crime Act 2015, s 76.

addresses the impact of proven, found or accepted domestic abuse on the decisions taken by the court. Understanding the way in which domestic abuse is defined and evidenced is crucial, since unless allegations of abuse are put to the court, and then either accepted, found through fact-finding or evidenced externally, the abuse cannot, in theory,<sup>3</sup> impact the final contact decision. The first part of this Chapter takes as its focus the evolution of the definition of domestic abuse, before turning in the second part to the evidencing of domestic abuse.

This Chapter argues that definitions of domestic abuse have now put beyond doubt that domestic abuse is not confined to physical acts of violence, and there is evidence that awareness of coercive control is beginning to permeate professional practice. However, there remains ambiguity in practice over the status of coercive control within current definitions and there is still significant distance to travel before a wholesale cultural shift takes place to recognise the harm it causes and its relevance to contact. Significant in holding back this cultural shift is the way in which existing systems for evidencing domestic abuse continue to be premised on an incident-based model, ill-suited to assessing the risks posed by patterns of abusive behaviour. As the way in which domestic abuse is understood develops, so too should the way in which it is tested and evidenced, and this calls for a new approach which moves away from the traditional incident-based model.

### **3.1 DEFINING DOMESTIC ABUSE**

The first part of this Chapter explores the way in which domestic abuse is defined in disputes over contact. It opens with an outline of ‘coercive control’, explaining the importance of its recognition and its significance to disputes over contact. It then turns to the cross-government definition of domestic abuse, and the definition in Practice Direction 12J (henceforth ‘PD12J’). A number of questions are then explored, drawing on interviewees’ perspectives within this doctoral research: first, the extent to which there are different forms of domestic abuse and how this impacts on assessments of risk; second, whether non-physical abuse is now recognised as

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<sup>3</sup> J03-M, however, spoke of the courts using questioning to obtain some acceptance from the alleged perpetrator to avoid the need for a formal fact-finding and C06 spoke of the importance of remaining alert during risk assessment to the potential for allegations to be true, even if they have not been formally established as true.

domestic abuse within definitions employed in practice; and third, whether there are shades of severity of domestic abuse, and in particular whether non-physical abuse is taken as seriously as physical abuse in assessing the risks posed by contact.

### 3.1.1 Coercive control and its relevance to disputes over contact

Whilst originally a concept recognised primarily by feminist researchers and activists, coercive control is becoming a mainstream concept, with the harms it causes increasingly understood.<sup>4</sup> Coercive control now features within legal and policy guidance, and it has also received considerable media coverage.<sup>5</sup> Many will be familiar with the storyline of the coercive and controlling behaviour perpetrated by Rob Titchener in BBC Radio 4's 'The Archers'.<sup>6</sup> Evan Stark has arguably had the most significant impact in re-conceptualising domestic abuse, pinpointing coercive control at its core and calling for its criminalisation.<sup>7</sup> Stark is not the first to discuss power and control in relation to domestic abuse,<sup>8</sup> nor is he alone in locating a loss of freedom at its heart,<sup>9</sup> but his name is the most associated with this concept.

The essence of Stark's argument is that coercive control is an 'offense to liberty' since it 'prevents women from freely developing their personhood, utilizing their capacities,

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<sup>4</sup> See, for example, the discussion in: C. Wiener, 'Seeing What is "Invisible in Plain Sight": Policing Coercive Control' (2017) 56(4) *The Howard Journal of Crime and Justice* 500, 501.

<sup>5</sup> See, for example, BBC Radio 4, 'Woman's Hour: Coercive Control' (27 March 2018) <<https://www.bbc.co.uk/programmes/b09wpmvm>> accessed 16 October 2018.

<sup>6</sup> For a summary of the storyline, see: BBC Radio 4, 'The Archers – Helen and Rob: The Full Story' <<http://www.bbc.co.uk/programmes/articles/KVL2b9gBzsJ8xfKzSGQrCj/helen-and-rob-the-full-story>> accessed 16 October 2018.

<sup>7</sup> E. Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007).

<sup>8</sup> See also, for example: S. Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Pluto Press 1982) pp.317-319; E. Pence and M. Paymar, *Education Groups for Men Who Batter: The Duluth Model* (Springer Publishing 1993) p.3; K. A. Yllö, 'Through a Feminist Lens: Gender, Power and Violence' in R. J. Gelles and D. R. Loseke (eds), *Current Controversies on Family Violence* (Sage Publications 1993) pp.19-24; M. P. Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57(2) *Journal of Marriage and the Family* 283, 284; R. E. Dobash and R. P. Dobash, K. Cavanagh and R. Lewis, *Changing Violent Men* (Sage Publications 2000); and R. P. Dobash and R.E. Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324, 328 and 343. See also: S. M. Edwards, 'Coercion and Compulsion – Re-imagining Crimes and Defences' (2016) 12 *Criminal Law Review* 876, 878; C. K. Sanders, 'Economic Abuse in the Lives of Women Abused by an Intimate Partner: A Qualitative Study' (2015) 21(1) *Violence Against Women* 3, 4.

<sup>9</sup> See for example: M. A. Dutton and L. A. Goodman, 'Coercion in Intimate Partner Violence: Toward a New Conceptualization' (2005) 52(11/12) *Sex Roles* 743, 750 and 754-755; V. Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2005) 65(3) *Louisiana Law Review* 989, 990-1002; and E. Williamson, 'Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control' (2010) 16(2) *Violence Against Women* 1412, 1420 and 1422.

or practising citizenship'.<sup>10</sup> It is perpetrated as a process, not an isolated incident.<sup>11</sup> In turn, the harm caused by coercive control is not determined so much by the objective severity of the abuse but rather its cumulative effect,<sup>12</sup> with the repeated perpetration of 'routine but minor' violence causing as much harm as life-threatening attacks.<sup>13</sup> Coercive control is woven into the reality of the 'taken-for-granted fabric of the everyday',<sup>14</sup> which renders the abuse less tangible but no less serious than physical abuse.<sup>15</sup> It undermines women's autonomy and self-worth, limits their access to resources and deprives them of their privacy and sources of support.<sup>16</sup>

Whilst often represented as such, coercive control is not synonymous with non-physical abuse. Its recognition does, however, mandate that non-physical abuse is taken seriously as domestic abuse. Coercive control can be perpetrated without physical abuse, but physical abuse may form part of the methods used to exert dominance and control.<sup>17</sup> An Independent Domestic Violence Adviser within Wiener's research provided a graphic example of how physical and non-physical abuse can be 'interweaved' as part of a pattern of coercive control:

Her story was that everything was groovy, no issues, they got married they went on their honeymoon, and ... [t]here was a horrific, traumatic incident when he strangled her almost to death with the bathroom towel . . . So then after that for that six years of their relationship – ... he never ever again used physical violence on her but whenever there was a moment of tension he would go to the bathroom and he would bring out a towel, and he would put it on the table. And that was the sign; and then she would just be, like, "and then I would just give in – I would just do whatever it is he was trying to get me to do".<sup>18</sup>

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<sup>10</sup> Stark (note 7 supra) p.4.

<sup>11</sup> Ibid p.205.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid pp.13-14.

<sup>14</sup> Ibid p.15 and 274.

<sup>15</sup> Ibid pp.13-14.

<sup>16</sup> Ibid p.5.

<sup>17</sup> See, for example: R. Hunter, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Review* 734, 740; Stark (note 7 supra) p.5; L. Harne, *Violent Fathering and the Risks to Children: The Need for Change* (Policy Press 2011) p.5.

<sup>18</sup> Wiener (note 4 supra) 507. See also: Pence and Paymar (note 8 supra) p.3; Johnson (note 8 supra) 284; M. P. Johnson and K. J. Ferraro, 'Research on Domestic Violence in the 1990s: Making Distinctions' (2000) 62(4) *Journal of Marriage and the Family* 948, 949.

In this case, one physically violent act was used as ‘an instrument of terror’ to exert control over the victim.<sup>19</sup> In other cases, physical abuse may not be ‘needed’ at all to exert control, and coercive control may be perpetrated through non-physical abuse alone.<sup>20</sup> Tactics such as turning the gas on and telling the victim she had done so can be used, for example, as a means to make the victim feel she is ‘losing her mind’.<sup>21</sup> The abuse perpetrated might also start through non-physical forms and develop into physical abuse.<sup>22</sup> The point here is that in order to detect coercive control, it is the whole relationship which must be assessed, rather than seemingly isolated incidents or basing risk assessment solely on whether the abuse is physical or non-physical.<sup>23</sup> It is also necessary to exercise caution in dismissing allegations as ‘historic’: the strangulation with the bathroom towel happened six years before, but the dangerous pattern of coercive and controlling behaviour endured long after.

The harm caused to children by exposure to non-physical coercive and controlling abuse was explored in Chapter 2. It has been argued in the context of police responses to domestic abuse that the recognition of coercive control can support the police to ‘make more informed decisions about risk’.<sup>24</sup> It is submitted that the same argument applies to the child contact context: greater understanding of coercive control provides an opportunity for the courts and practitioners to understand more robustly the risks posed by a domestically abusive parent post-separation in a number of respects.

First, it puts the onus on the courts and practitioners to assess the risks posed by the domestically abusive parent through the lens of the parties’ relationship as a whole, rather than focusing on individual incidents. To return to the example above, had the putting of the bathroom towel on the table been viewed in isolation from the strangulation, this would appear to be an innocent act, when the reality was that it

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<sup>19</sup> Wiener (note 4 supra) 507.

<sup>20</sup> See for example: Johnson (note 8 supra) 287.

<sup>21</sup> See for example: Williamson (note 9 supra) 1415; M. Coy, K. Perks, E. Scott and R. Tweedale, *Picking Up the Pieces: Domestic Violence and Child Contact* (Rights of Women 2012) p.22. This is one of the tactics built into Vignette One, discussed in Chapter 4.

<sup>22</sup> See for example: Johnson (note 8 supra) 287.

<sup>23</sup> See for example: Hunter (note 17 supra) 774; Stark (note 7 supra) p.106; J. Herring, ‘The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow* [2011] UKSC 3’ (2011) 33(3) *Journal of Social Welfare and Family Law* 297, 301.

<sup>24</sup> Wiener (note 4 supra) 501.

formed part of a sinister pattern of abusive behaviour, characterised by control.<sup>25</sup> Had the strangulation been viewed as an isolated incident, the state of terror created by the perpetrator following that incident would similarly not have been detected.

Second, understanding coercive control means it cannot be assumed that the abuse will end on separation and calls into question previously accepted mechanisms for ensuring 'safe' contact.<sup>26</sup> For example, by understanding that abuse is perpetrated as part of a pattern, which may or may not involve physical abuse, and is perpetrated with power and control at its core, managed handovers cease to be a sufficient safeguard against future abuse. It is known that the perpetration of coercive control-based domestic abuse intensifies over time,<sup>27</sup> with separation being a trigger for the escalation of abuse,<sup>28</sup> and victims being particularly vulnerable to severe injury or death at this time.<sup>29</sup> The perpetrator may intensify the perpetration of abuse in response to his partner's resistance of his control, or in order to 'display' his control, even if his partner does not resist it.<sup>30</sup>

Thirdly, recognising coercive control warns against an assessment of risk based on whether the abuse perpetrated is physical or non-physical. It also warns against gauging the severity of the abuse, and risk of future abuse, on the basis of individual incidents of physical abuse. It is increasingly recognised that the harm caused by non-physical abuse is different, but no less serious, than the harm caused by physical abuse.<sup>31</sup> There is also no guarantee that the perpetration of non-physical abuse during the relationship means physical abuse will never be perpetrated post-separation, since the perpetrator's methods of control can change in response to the change in

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<sup>25</sup> Ibid 507.

<sup>26</sup> See for example: R. Hunter and A. Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council 2013) p.34; A. Barnett, "'Greater Than the Mere Sum of its Parts': Coercive Control and the Question of Proof" (2017) 29(4) *Child and Family Law Quarterly* 379, 384.

<sup>27</sup> See for example: Johnson (note 8 supra) 286.

<sup>28</sup> See for example: Coy, Perks, Scott and Tweedale (note 21 supra) p.27; Hunter and Barnett (note 26 supra) p.34. See also: B. Featherstone and S. Peckover, 'Letting Them Get Away with It: Fathers, Domestic Violence and Child Welfare' (2007) 27(2) *Critical Social Policy* 181, 182; P. Ornstein and J. Rickne, 'When Does Intimate Partner Violence Continue After Separation?' (2013) 19(3) *Violence Against Women* 617, 627-629.

<sup>29</sup> See for example: D. A. Brownridge, 'Violence Against Women Post-Separation' (2006) 11 *Aggression and Violent Behaviour* 514, 519; D. Brennan, *The Femicide Census 2016 Findings: Annual Report on Cases of Femicide in 2016* (Women's Aid 2017) p.5.

<sup>30</sup> Johnson (note 8 supra) 286.

<sup>31</sup> See 3.1.5.1. below. See also: Hunter (note 17 supra) 741.



context.<sup>32</sup> As a result, and as Stark has argued in the context of police responses to domestic abuse, the 'level of control an offender is exercising is a far better way to ration scarce police resources than the level of violence'.<sup>33</sup>

Finally, understanding coercive control should provide the courts and practitioners with greater sympathy for the challenges victims face in reporting and articulating the abuse to which they have been subjected.<sup>34</sup> It can be difficult to articulate experiences of any form of abuse, but non-physical abuse can be particularly challenging, since it is often intangible and can appear 'insignificant' or 'petty'.<sup>35</sup> Furthermore, the victim may not even be aware that she is a victim of abuse, or its extent, at the time of the court proceedings.<sup>36</sup>

In the light of its relevance to disputes over contact, it is to be welcomed that coercive control has been recognised within the current cross-government definition of domestic abuse, and the definitions within PD12J and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (henceforth 'LASPO'). It has been argued that coercive control characterises the majority of domestically abusive relationships<sup>37</sup> but, as explored in the next section, current definitions continue to be structured with coercive control as a component, rather than the core, of the definitions. This is an important distinction because current definitions risk the creation of delineated categories of 'forms' of abuse, overlooking the nuanced overlap which can exist between physical and non-physical abuse. As Barnett has argued:

The binary juxtaposition of physical and psychological/emotional abuse fails to capture the embodied physicality and brutality of coercive control, although it may well result in psychological and emotional harm and have that intent.<sup>38</sup>

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<sup>32</sup> See for example: Johnson (note 8 supra) 286.

<sup>33</sup> E. Stark, 'Looking Beyond Domestic Violence: Policing Coercive Control' (2012) 12(2) *Journal of Police Crisis Negotiations* 199, 202.

<sup>34</sup> An argument also made by Wiener in the context of police responses to domestic abuse: Wiener (note 4 supra) 501.

<sup>35</sup> Williamson (note 9 supra) 1415.

<sup>36</sup> A point made by J04-DJ.

<sup>37</sup> See for example: Stark (note 7 supra) p.275.

<sup>38</sup> Barnett (note 26 supra) 381.

As explored below, there also remains ambiguity over the boundaries of current definitions, and it is submitted that further work is required to develop the definition of domestic abuse and support practitioners on the ground to understand its relevance to risk assessment.

### **3.1.2 Current definitions and the recognition of coercive control**

The development of the evidence base in recent years as to what constitutes domestic abuse has encouraged a move away from a concentration on the physical incident model, with it now being better understood that abuse can be perpetrated as part of a pattern characterised by coercive control. While there is no single definition of domestic abuse in England and Wales, the definitions of most relevance to disputes over contact are the cross-government non-statutory definition, and the definitions within PD12J and LASPO, all of which now recognise coercive control. There is also now the criminal offence of coercive or controlling behaviour brought in by the Serious Crime Act 2015 (henceforth 'SCA 2015'), but this Act does not specifically define coercive control.

The original 2005 cross-government definition of 'domestic violence' read:

Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.<sup>39</sup>

A number of significant amendments were made to this definition in 2012. The definition shifted from being one of 'domestic violence' to 'domestic violence and abuse'. The perpetration of 'domestic violence and abuse' as part of a pattern, rather than 'any incident' in the singular, was recognised and coercive and controlling

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<sup>39</sup> Gov.UK, 'New Definition of Domestic Violence and Abuse to Include 16 and 17 Year Olds' (5 November 2012) <<https://www.gov.uk/government/news/new-definition-of-domestic-violence-and-abuse-to-include-16-and-17-year-olds>> accessed 25 October 2018.

behaviour was brought within the definition.<sup>40</sup> The current non-statutory cross-government definition of 'domestic violence and abuse' reads:

[A]ny incident or pattern of incidents of controlling, coercive, 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. The abuse can encompass, but is not limited to: psychological, physical, sexual, financial [and] emotional[.]

Controlling behaviour is a range 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 is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.<sup>41</sup>

Despite it initially being proposed that legal aid should only be available in cases in which 'there is an ongoing risk of physical harm from domestic violence',<sup>42</sup> both the definition in LASPO and PD12J now mirror this cross-government definition.<sup>43</sup> The recent domestic abuse consultation set out the Government's plans to affirm its current non-statutory cross-government definition in statute.<sup>44</sup> At this stage, the only significant textual change proposed in the move to a statutory definition is to replace 'financial' with 'economic' abuse in order to encompass more fully abuse which

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<sup>40</sup> The definition was also applied to 16 year-olds and above but abuse taking place between those below the age of 16 and family members falls outside the scope of this thesis, since this study focuses solely on parents over the age of 16. The cross-government definition has always been gender-neutral.

<sup>41</sup> Gov.UK, 'Domestic Violence and Abuse' (31 May 2018) <<https://www.gov.uk/guidance/domestic-violence-and-abuse>> accessed 17 June 2018.

<sup>42</sup> Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (2010) Cm 7967 p.42.

<sup>43</sup> There are some minor differences between the definitions, but these are of no semantic significance in relation to contact disputes in which domestic abuse is alleged. See: Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, Part 1, s 12(9); Practice Direction 12J – Child Arrangements & Contact Orders: Domestic Abuse and Harm (October 2017) para 3 (henceforth in footnotes 'PD12J'). The definition of domestic abuse in PD12J was brought into line with the cross-government definition following its revision in April 2014.

<sup>44</sup> HM Government, *Transforming the Response to Domestic Abuse: Government Consultation (Full Version)* (March 2018) <<https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/>> accessed 17 June 2018 p.12.

restricts victims' access to 'basic resources such as food, clothing and transportation' or forces victims into financial contracts.<sup>45</sup>

In some respects, there is now greater clarity about how the courts should be defining domestic abuse in disputes over contact. PD12J, echoing the cross-government definition, has put beyond doubt that the courts should not confine their concerns to incidents of physical abuse, but should be alert to patterns of abusive behaviour, which may be physical, non-physical or both. However, in addition to the ambiguity over the status of coercive control, there remain several other areas of ambiguity in relation to disputes over contact. The first concerns the extent to which there are different forms of domestic abuse and what this means for risk assessment. The second is the empirical question of whether the broad definition now sitting within PD12J, encompassing physical and non-physical abuse, reflects the perceptions of judges charged with resolving disputes over contact in practice. And the third is the weight to be given to different forms of abuse, and in particular whether non-physical abuse is considered to pose the same level of risk as physical abuse.

It is possible that there will be additional guidance on the parameters of the definition in the near future. The Government set out within its recent domestic abuse consultation that it is proposing to introduce 'underpinning statutory guidance for professionals who have safeguarding obligations' to accompany its statutory definition.<sup>46</sup> This guidance would:

... provide more detail on the typologies and nuances of domestic abuse;  
the circumstances where we expect the [statutory] definition to be used;  
and elaborate and provide context on, for example, the gendered nature  
of domestic abuse and features of abusive relationships[.]<sup>47</sup>

In the light of the importance of understanding the typologies and nuances of domestic abuse to risk assessment, it is to be hoped this guidance will be issued. For now, however, the courts must continue to navigate the boundaries of the existing

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<sup>45</sup> Ibid p.13.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

definition themselves. This Chapter now turns to the perspectives of interviewees within this doctoral research on the definition of domestic abuse and its boundaries.

### **3.1.3 Navigating the boundaries of the definition – is all abuse ‘domestic abuse’?**

The cross-government definition of domestic abuse, and the definitions within PD12J and LASPO, recognise that abuse can be perpetrated in different ways – including psychological, physical, sexual, financial and emotional – but these definitions do not envisage different types of domestic abuse, nor do they address whether all abuse within relationships is automatically ‘domestic abuse’. But whether all abusive behaviour falls under the same umbrella of ‘domestic abuse’ strikes at the core of questions on whether children should have contact with domestically abusive parents and, if so, what safe and beneficial contact looks like. If, for example, it is accepted, that some abusive behaviour can truly be a ‘one-off’ within a relationship, then there may be a stronger argument to suggest that contact can take place safely post-separation, so long as the parents do not come into contact, because, at least in theory, the risk posed by the perpetrator is confined to the relationship which no longer exists. If domestic abuse, however, is conceptualised with coercive control at its heart, then the extent to which safe and beneficial contact can be secured post-separation comes seriously into question, since the risks posed by the perpetrator do not simply evaporate once the relationship ends.<sup>48</sup>

This issue speaks to a long-running tension between different schools of thought on how domestic abuse should be conceptualised. Put in the most basic terms, the ‘family violence perspective’ sees abuse as perpetrated by both men and women and locates this abuse within the context of familial ‘conflict’.<sup>49</sup> The opposing school of thought is the ‘violence against women’ or ‘feminist perspective’, which sees abuse through the lens of power and control, and identifies perpetrators as predominantly

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<sup>48</sup> See above at 3.1.1.

<sup>49</sup> See for example: M. A. Straus, ‘Measuring Intrafamily Conflict and Violence: the Conflict Tactics (CT) Scales’ (1979) 41(1) *Journal of Marriage and Family* 75; M. Straus and R. Gelles, *Physical Violence in American Families* (Transaction Publishers 1990).

male.<sup>50</sup> Johnson has been influential in both the US and UK in arguing that the differences between these two perspectives stems substantially from the fact that they concern 'different phenomena'.<sup>51</sup>

In advancing debates on definition, Johnson has advanced a typology of domestic abuse, distinguishing between four forms of intimate partner violence.<sup>52</sup> The core of his argument is that 'all family violence is abhorrent, but not all family violence is the same'.<sup>53</sup> His typology is as follows. First, there is 'intimate terrorism' – violence is used by the perpetrator as a means to exert control over his or her partner.<sup>54</sup> This is identified as the most commonly accepted understanding of domestic abuse.<sup>55</sup> It is most closely aligned with Stark's concept of coercive control,<sup>56</sup> and represents the best fit with the violence against women or feminist perspective.<sup>57</sup> This concept of intimate terrorism is gendered, with men identified as the perpetrators and women the victims.<sup>58</sup> Second, 'violent resistance' – one partner is an 'intimate terrorist' and the other uses violence to resist the abuse but not to exert control.<sup>59</sup> Third, 'mutual violent resistance' – both partners use violence as a means to gain control.<sup>60</sup> Finally, 'situational couple violence' – one party, or both parties, uses violence, which may be repeated and severe, but the violence is not perpetrated as part of any attempt to control.<sup>61</sup> This final form – situational couple violence – represents the abuse studied within the family violence perspective and is gender neutral.<sup>62</sup>

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<sup>50</sup> See, for example: R. E. Dobash and R. Dobash, *Violence Against Wives: A Case Against the Patriarchy* (Free Press 1979); Dobash and Dobash, 2004 (note 8 supra); Stark (note 7 supra); and E. Stark, 'Rethinking Coercive Control' (2009) 15(12) *Violence Against Women* 1509.

<sup>51</sup> Johnson (note 8 supra) 284.

<sup>52</sup> M. P. Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence* (Northeastern University Press 2008) p.6.

<sup>53</sup> Johnson (note 8 supra) 293.

<sup>54</sup> Johnson (note 52 supra) p.26.

<sup>55</sup> *Ibid* p.1.

<sup>56</sup> Stark (note 7 supra) pp.104-105. See also: C. Hanna, 'The Paradox of Progress: Translating Evan Stark's Coercive Control into Legal Doctrine for Abused Women' (2009) 15(12) *Violence Against Women* 1458, 1464. Stark does not, however, endorse Johnson's choice of terminology, and Stark and Johnson's concepts are not identical. See: further Johnson (note 52 supra) p.91.

<sup>57</sup> Johnson (note 8 supra) 284.

<sup>58</sup> *Ibid*.

<sup>59</sup> Johnson (note 52 supra) p.14.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*.

<sup>62</sup> M.P. Johnson, 'Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence' (2006) 12(11) *Violence Against Women* 1003, 1010-1011.

Situational couple violence, therefore, sits apart from the other three as control is not the overall objective of the violence.<sup>63</sup> Instead, it is the dynamics of the particular relationship that result in the violence.<sup>64</sup> Johnson suggests that situational couple violence is likely to be infrequent and mild, such as ‘a push or a slap’,<sup>65</sup> with frequent and severe violence more likely to be intimate terrorism.<sup>66</sup> Neither frequency nor severity are, however, determinative.<sup>67</sup> Johnson is not alone in distinguishing between different forms of abuse taking place between couples. Stark draws a distinction between partner assault and coercive control,<sup>68</sup> identifying a number of factors which separate the two, including the extent to which coercive control constrains the victim’s autonomy and basic freedoms.<sup>69</sup>

There is, therefore, authority for the view that not all abusive behaviour can be grouped homogenously together under the label ‘domestic abuse’. Several interviewees within this doctoral research spoke of the need to distinguish ‘genuine’ domestic abuse from ‘out of character’ abuse, which can occur within a particular relationship or on separation.<sup>70</sup> B01, for example, said:

When relationships break down, emotions get tense, people become heightened. People say and do things which are completely out of the ordinary which don’t reflect their normal pattern of behaviour and you have to be able distinguish between the person who is genuinely abusive day in, day out and an abusive person who behaved badly due to complex emotional relationship breakdown and all the fears that go with that ... .

J07-CJ also suggested abuse can occur as the product of the ‘flash points of the breakdown’:

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<sup>63</sup> Johnson (note 52 supra) p.61.

<sup>64</sup> Ibid p.60.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid p.69.

<sup>67</sup> Ibid.

<sup>68</sup> Stark (note 7 supra) pp.104-105; Stark, 2009 (note 50 supra) 1516. Stark also distinguishes between ‘assaults’ and ‘fights’: Stark (note 7 supra) pp.104-105.

<sup>69</sup> Ibid 1516. And see: Stark (note 7 supra) pp.104-106.

<sup>70</sup> N = 10: B01, B02, B03, B08, C07, S01, S05, J04-DJ, J07-CJ and J08-DJ.

... at the point where somebody says, “I am leaving” or “I can’t cope with this anymore”, their respective behaviours start to deteriorate.

And B08 pointed to the prevalence of abuse occurring as a product of a particular relationship:

... I think an awful lot of the cases we see are people where it just was a really toxic combination and provided you two don’t have a relationship with each other, you can both go off and be adequately functional in different relationships.

These interviewees said these distinctions matter because they impact the courts’ assessment of risk, with abuse perpetrated ‘out of character’,<sup>71</sup> or in the ‘heat of the moment’,<sup>72</sup> considered to pose fewer, or no, risks post-separation. J04-DJ, for example, said:

... where you’ve got violence that occurs at a breakdown when it’s a very stressful emotional time you can, even if there’s physical violence, you can sort of put that in context and say well, OK: he was, or she was, violent at that particular time but they were in the middle of a row. They were about to separate. They both say “yes, we shouldn’t have done it” but that doesn’t necessarily mean they are going to be violent to the children.

However, any conclusion that abuse within the parties’ relationship, or on separation, does not pose a risk post-separation to either the parent or child would have to be cautiously reached. Distinctions between Johnson’s ‘situational couple violence’ and ‘intimate terrorism’ may be easier to draw in theory than in reality. Johnson accepts that what may appear at first glance to be situational couple violence may in fact be intimate terrorism,<sup>73</sup> and that the ‘considerable variability’ in the ‘nature of the violent acts involved in controlling and noncontrolling violence’, means there is

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<sup>71</sup> Wording used by B01.

<sup>72</sup> Wording used by J04-DJ.

<sup>73</sup> Johnson (note 52 supra).



‘considerable overlap between them in terms of the “seriousness” of the violence’.<sup>74</sup> And Stark makes the similar point that there are no rigid distinctions, since partner assaults can develop into coercive control, so the assumption should be that abuse between partners is coercive control until proved otherwise.<sup>75</sup> Indeed, previous studies have highlighted the risk that cases are being ‘misread’ as consisting of mutual conflict, when they actually involve domestic abuse.<sup>76</sup> Caution also needs to be exercised in labelling one party as the ‘cause’ of the abuse, since a strategy of perpetrators is to manipulate situations to make the victim feel responsible for the abuse.<sup>77</sup>

Furthermore, any assessment of risk needs to take into account the significant body of evidence which shows the prevalence of post-separation abuse, and the likelihood of abuse escalating in severity over time,<sup>78</sup> and in particular on separation.<sup>79</sup> It cannot be assumed that an abusive incident occurring at the point of separation is an isolated incident which is not indicative of a risk of future abuse post-separation.

Breaking down abusive behaviour into different strands has a further consequence. It raises the question of whether all the strands should be viewed as domestic abuse, or whether domestic abuse should solely be conceptualised as abuse underpinned by power and control. Expressed differently, and to borrow the phrasing used by Reece, the question is whether ‘control tactics’ should be regarded as the ‘defining feature’ of domestic abuse or a ‘species’ of domestic abuse.<sup>80</sup> As noted above, the cross-government definition, and the definition within PD12J, falls more on the side of situating coercive and controlling behaviour as a ‘species’ of domestic abuse, rather than its ‘defining feature’. Some, including Reece, have argued that the approach of defining domestic abuse as coercive control ‘represents a remarkable downplaying of

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<sup>74</sup> Johnson (note 62 supra) 1006.

<sup>75</sup> Stark, 2009 (note 50 supra) 1516. See for further discussion: Hanna (note 56 supra) 1464.

<sup>76</sup> See for example: L. Trinder, J. Hunt, A. Macleod, J. Pearce and H. Woodward, *Enforcing Contact Orders: Problem-Solving or Punishment* (University of Exeter 2013) p.61.

<sup>77</sup> See, for example: Dobash and Dobash, 1979 (note 50 supra) p.137.

<sup>78</sup> See for example: Johnson (note 8 supra) 286.

<sup>79</sup> See for example: See for example: Coy, Perks, Scott and Tweedale (note 21 supra) p.27; Hunter and Barnett (note 26 supra) p.34. This prevalence of post-separation abuse was recognised by The Hon. Mr Justice Cobb in his review of PD12J: *Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm – Report to the President of the Family Division* (January 2017) para 9(c).

<sup>80</sup> See for example the discussion in: H. Reece, ‘Feminist Anti-Violence Discourse as Regulation’ in S.D. Sclater, *Regulating Autonomy: Sex, Reproduction and Family* (eds) (Hart Publishing Ltd 2009) p.45.

the physical', particularly if acts of physical or sexual violence are not regarded as domestic abuse unless accompanied by 'the appropriate cluster of control tactics'.<sup>81</sup> This sits uncomfortably with the argument that the majority of domestic abuse is perpetrated with power and control at its core, and that it is the level of control which should determine the assessment of abuse severity, not the physical abuse perpetrated.<sup>82</sup>

In order to support robust risk assessment within child contact proceedings, it is submitted that this tension should be resolved, and that further research would be beneficial into providing guidance to those charged with deciding cases on the risks posed by the different, but overlapping, strands which make up domestic abuse. Regardless of this tension, however, one core point remains constant: in order to understand what is happening within a relationship, and thereby to assess the level of risk posed by the domestically abusive parent in relation to contact, it is necessary to look at the parties' relationship as a whole. Only then does it become possible to understand if an incident is genuinely an isolated 'one-off', or whether that incident forms part of a broader pattern of abusive behaviour. Examining the parties' relationship as a complete picture, however, stands in tension with the current incident-based approach to testing allegations of abuse within contact proceedings. It also presents challenges in the light of the pressures on court time, as Chapter 6 explores, since this approach is more resource-intensive than focusing on isolated incidents. Before turning to the issue of evidencing domestic abuse, this Chapter first addresses two remaining questions on the way in which domestic abuse is defined in disputes over contact.

#### **3.1.4 Implementing the definition – is both physical and non-physical abuse recognised as domestic abuse in practice?**

Whilst there remains ambiguity over the positioning of coercive control within definitions of domestic abuse, PD12J puts beyond doubt that the courts should be alert to both physical and non-physical domestic abuse.<sup>83</sup> The empirical question is

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<sup>81</sup> Ibid p.46.

<sup>82</sup> Stark (note 33 supra) 202.

<sup>83</sup> PD12J (note 43 supra) para 3.

whether this definition in PD12J translates into judges conceptualising domestic abuse in practice as encompassing both physical and non-physical abuse. This section explores the working definitions of domestic abuse employed by judicial interviewees within this doctoral research, as well as the perceptions of judicial definitions of the non-judicial interviewees.

Interviewees were not asked directly to comment on the definition of domestic abuse contained in PD12J, but all 10 judges emphasised that domestic abuse can be non-physical as well as physical. J04-DJ, for example, said, ‘as far as I am concerned, abuse is abuse whether it’s physical or emotional’. Some judges made the point that whilst non-physical forms of abuse were not regarded as domestic abuse in the past, they are now recognised within the definition of domestic abuse.<sup>84</sup> J08-DJ, for example, said:

... it’s more increasingly recognised that it [non-physical abuse] is a form of abuse, helped of course by the government’s, not definition, but you know, explanation of what behaviour might cover domestic abuse. It is realised that that can be very demoralising to somebody and very demeaning and makes them feel very worthless and unable to take control of their own destiny really. If someone is telling you you are no good eventually you believe it, don’t you ... .

Only J05-CJ, whilst making clear his/her recognition of non-physical abuse, expressed doubt about whether non-physical abuse is seen as domestic abuse by other members of the judiciary:

... I did a lot of it [domestic abuse cases] in practice so I am very sympathetic to the victims of domestic violence. ... I think therefore I might be more ready to identify, see and give weight to the more emotional side of it ... I don’t know. I am not sure how much that is yet being picked up generally.

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<sup>84</sup> J07-CJ and J08-DJ.

With the exception of this doubt expressed by J05-CJ, these findings on judicial awareness of the harms caused by non-physical abuse suggest significant movement in the courts' attitudes to domestic abuse. Previous studies have not made such positive findings. Hunter and Barnett, for example, found that there were significant differences between the 'social science understanding' of domestic abuse, which encompassed power and control, and 'legalistic' understandings of domestic abuse, which tended to be adopted by lawyers and judges, and were premised on incidents of physical abuse and corroborating evidence.<sup>85</sup> Coy et al made similar findings, concluding that 'domestic violence is mostly understood by courts only as physical abuse, with the coercive and controlling dimensions rarely recognised'.<sup>86</sup> These studies of course predated the SCA 2015 and the 2014 changes to PD12J, and it may well be that these have had an impact on judicial understandings of abuse. Barnett concluded from her more recent review of the reported case law that whilst some trial judges demonstrated understanding of coercive control, and were able to identify it, it remains unknown whether this is representative of the 'majority of the judiciary in the lower courts'.<sup>87</sup>

Practitioners' perspectives in this doctoral research on the courts' level of understanding of coercive control and non-physical abuse were mixed. Of the practitioners that commented, the majority, who predominantly were barristers and Cafcass practitioners, corroborated judges' own assessment of their practice, expressing the view that judges are alert to both physical and non-physical domestic abuse.<sup>88</sup> Slightly fewer,<sup>89</sup> and predominantly the solicitors and domestic abuse organisations, were less convinced that judges view non-physical abuse as domestic abuse. S09 was among the most critical, stating that the courts continue to equate domestic abuse with 'broken bones':

... most of the judges ... have sat for a long time or have been in the industry for a long time, so they tend to assume that domestic abuse has

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<sup>85</sup> Hunter and Barnett (note 26 supra) pp.5, 21, 64 and 72-73.

<sup>86</sup> Coy, Perks, Scott and Tweedale (note 21 supra) p.60.

<sup>87</sup> Barnett (note 26 supra) 398.

<sup>88</sup> N = 13: B01, B03, B04, B06, B07, B08, C01, C03, C04, C05, C07, S01 and S03.

<sup>89</sup> N = 9: B02, C08, R02, R03, S02, S05, S08, S09 and S10. B02 said that unless the Cafcass practitioner flags up non-physical coercive control, it will be a 'great challenge to get a judge to see it as important'. S05 made a similar point about the importance of Cafcass' assessment to judicial understandings of domestic abuse. C08 qualified her response by stating that understanding varies by judge.

to mean broken bones, when you can have just as many people attempting suicide or coming to significant harm ... from coercive and controlling behaviour. And that includes sexually coercive behaviour. Very, very common. You know, criticising a woman if she doesn't participate in sexual acts that a man wants, and she doesn't want ... goading her, withdrawing ... love and affection until, in the end, she complies. So, I think that is relevant, but I think the courts tend to see it "Well, you agreed to let him do these terrible things" and there's no understanding of it. You know – "Why did you agree if it's so terrible? You were a participant. We are not really interested".

Some called for enhanced judicial training as a result.<sup>90</sup> R02 was also among the most critical of the courts and spoke of the challenges in:

... trying to get them [judges] to understand coercive control and the pattern of abuse and particularly when that's extending beyond when the relationship ends. We know that most women experience domestic abuse obviously after the relationship ends and ... there seems to be a real lack of understanding, particularly on coercive control. Things like financial abuse, controlling money and bank accounts, and how that extends after relationships have ended and taking that into account when looking at contact.

R03 was similarly unconvinced that coercive control is yet fully understood in practice, directing criticism at both the courts and lawyers:

Everyone thinks that coercive control is this new, lesser form of domestic violence that has been tacked onto the original definition – "oh, we'll just add the lesser form on and if there is no physical or sexual violence" ... or even if there is sexual violence, most male solicitors and barristers, or even female barristers, don't seem to get that that is a big deal and they

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<sup>90</sup> N = 3: R02, S09 and S10.

don't understand that it's not a new lesser form of domestic violence that we are making a big fuss about. It's the power imbalance which is at the core of all domestic violence, isn't it, and that physical violence is just one of the expressions of what is essentially at the core. And I think there is a problem with the legal profession. They are seen as experts because they are experts in law but there is a real lack of understanding.

S02 also felt allegations of psychological abuse have little bearing on the courts' decision-making process because the courts continue to fail to understand the harm caused by these non-physical forms of abuse, despite research evidence which documents the harm caused. S08's experience was that allegations of coercive and controlling behaviour tended to be dismissed as 'tit for tat' if there is no external evidence, with one parent's word standing against the other. S10, whilst less critical of the courts overall, shared this view that judges are not yet fully conceptualising non-physical abuse as domestic abuse:

I still think courts are not that alive to the fact that domestic abuse is just not physical ... verbal, emotional psychological, financial, all of those things and a lot of women have said to me ... emotional, psychological abuse is worse than if he had just hit me ... because it is constant and it is eroding your self-worth and, you know, you haven't got a bruise but inside you are hurting because of what he said so I do think that's harder for the courts to get their head around.

Furthermore, that the recognition of coercive control within the SCA 2015 might not yet have permeated judicial practice within family law proceedings has been alluded to by the new President of the Family Division, who said:

... it may be that the family system needs to make sure that it is up to speed with developments in criminal law where, under the Serious Crime Act 2015, s 76, it is now a criminal offence for one person who is

connected with another person to engage in ‘controlling or coercive’ behaviour towards the other so as to have a serious effect on them.<sup>91</sup>

Overall, the judges were clear on their understanding that both physical and non-physical abuse come within the definition of domestic abuse, but the practitioners were divided in their perspectives on judges’ recognition of non-physical abuse. Crucially, however, over half<sup>92</sup> of the practitioners who felt the courts understood that domestic abuse is not limited to physical abuse qualified their stance by explaining that this theoretical understanding does not mean that non-physical abuse is taken seriously in practice, since judicial responses hinge on the extent to which allegations can be evidenced. This suggests it is difficult to isolate an assessment of the courts’ working definition of domestic abuse from questions of evidence. This relationship between definition and evidence is explored in the second part of this Chapter.<sup>93</sup>

### **3.1.5 Testing the contents of the definition – are there different shades of severity of domestic abuse?**

A further area of ambiguity within the cross-government definition of domestic abuse, and the definition in PD12J, is the weight to be given to different forms of abuse in assessing the risks posed by contact. This is left to the court to decide, considering all the facts of the case. There are two principal issues. The first is that in the light of the recognition that has now been given within PD12J to the perpetration of non-physical abuse, there is an important question to be asked about the extent to which non-physical abuse should be regarded as posing the same level of risk post-separation to parents and children as physical abuse. The second is the extent to which there are shades of severity of domestic abuse more generally, with some forms of abusive behaviour posing fewer risks than others. While it may feel uncomfortable to question whether some forms of abuse are more serious than others – because all forms of abuse should, as a matter of principle, be regarded as serious – the issues here are important because they inform assessments of whether contact can take place safely post-separation and, if so, what ‘safe’ contact looks like.

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<sup>91</sup> The Rt Hon Sir Andrew McFarlane, ‘Holding The Risk: The Balance Between Child Protection and The Right To Family Life’ (2017) 47(Jun) *Family Law* 610, 617. This point was also made by R02.

<sup>92</sup> N = 8: B04, B06, C01, C03, C04, C05, S01 and S03.

<sup>93</sup> See 3.2 below.

### 3.1.5.1 Is non-physical abuse deemed as serious as physical abuse?

In *Yemshaw v London Borough of Hounslow*,<sup>94</sup> Lord Brown argued that the justification for providing protection to victims of domestic abuse in relation to legal categorisations of homelessness was the:

... obvious need for the speedy re-housing of those identified as being at risk of violence in order to safeguard their physical safety, and partly in the comparative ease with which this particular class of prospective victims can be identified. With the best will in the world I find it difficult to accept that there is quite the same obvious urgency in re-housing those subject to psychological abuse, let alone that it will be possible to identify this substantially wider class of prospective victims, however precisely they may be defined, with anything like the same ease.<sup>95</sup>

Lord Brown's argument is two-fold: first, that non-physical abuse does not pose the same risks to victims' safety as physical abuse; and second, that victims of non-physical abuse are harder to identify than victims of physical abuse. These remarks were made in the context of the definition of domestic abuse to be adopted for the purposes of assessing homelessness, but they are nevertheless pertinent to the child contact context. Lord Brown's second argument – that victims of non-physical abuse are harder to identify than victims of physical abuse – is persuasive, for the reasons outlined in the second part of this Chapter.<sup>96</sup> His first, however, is questionable.

The problem with Lord Brown's argument that non-physical abuse does not pose the same risks to victims' safety as physical abuse is that it fails to appreciate the severity of harm which can be caused by non-physical abuse. It is commonly reported by victims, for example, that non-physical abuse is more damaging, and its effects longer-lasting, than physical abuse.<sup>97</sup> Lord Brown also fails to appreciate the way in which

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<sup>94</sup> [2011] UKSC 3, [2011] 1 WLR 433.

<sup>95</sup> Ibid [57]. Italics emphasis in original; underlined emphasis added.

<sup>96</sup> See 3.2 below.

<sup>97</sup> See for example: Hunter (note 17 supra) p.741; Stark (note 7 supra) pp.13-14. This point was also emphasised by S10.



abuse may initially be perpetrated through non-physical means but progress to physical abuse.<sup>98</sup> A significant body of commentary and research points to the dangers in dismissing non-physical abuse as posing fewer risks to victims' safety for these reasons.<sup>99</sup> In terms of risk assessment in contact disputes, therefore, it should not automatically be assumed that the absence of physical abuse means that children, or their parents, will be safe during post-separation contact. The impact of the abuse on the parent is also significant, since this could affect parenting capacity, which is identified as a risk factor for children within PD12J.<sup>100</sup>

The members of the judiciary interviewed for this doctoral research showed considerable sensitivity to these arguments, at least when speaking in abstract terms. Four judges were of the view that non-physical abuse can pose greater risks than physical abuse.<sup>101</sup> J02-M said non-physical abuse tends to have a longer-lasting impact. J03-M identified non-physical abuse as the 'most disturbing' form of abuse, particularly because perpetrators often consider it to be normal behaviour. J04-DJ emphasised that 'abuse is abuse whether it's physical or emotional', but again emphasised that non-physical abuse can be more damaging than physical, a point echoed by J01-M. J04-DJ added that non-physical abuse is 'harder to control and protect a child from'. This judge reported that perpetrators of non-physical abuse are more likely to direct the abuse towards children, in the light of their desire to 'control everything around them', with physical abuse being more likely to be limited to specific 'stressors', which may not relate to the children.

Other judges spoke of non-physical abuse being treated as seriously as physical abuse.<sup>102</sup> J10-DJ explained that allegations of physical and non-physical abuse should no longer be treated differently as a result of revisions to the definition of domestic abuse in PD12J. J07-CJ also said that whilst non-physical and physical abuse may have been treated differently in the past, this is no longer the case. J05-CJ explained that his/her approach is to view non-physical abuse as just as harmful as physical abuse,

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<sup>98</sup> See for example: Johnson (note 8 supra) 287.

<sup>99</sup> See: Hunter (note 17 supra) 774; E. Stark, 'Commentary on Johnson's "Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence"' (2006) 12(11) *Violence Against Women* 1019, 1020; Stark (note 7 supra) pp.85, 106 and 111.

<sup>100</sup> PD12J (note 43 supra) para 4.

<sup>101</sup> J01-M, J02-M, J03-M and J04-DJ.

<sup>102</sup> N = 3: J05-CJ, J07-CJ and J10-DJ.

but that s/he could not comment on whether this represented the judiciary's approach more generally. Two judges<sup>103</sup> did not think it was possible to discuss the relative severity of physical and non-physical abuse since it is rare to have cases with allegations of non-physical abuse alone.

In the light of the mixed perspectives on whether the courts recognise non-physical abuse as domestic abuse, the practitioners and domestic abuse organisations unsurprisingly again had different perspectives on the courts' perceptions of the relative severity of physical and non-physical abuse. As discussed above, several non-judicial interviewees took the view that judges do not even recognise non-physical abuse within their working definitions of domestic abuse, let alone treat it as posing as high a level of risk as physical abuse.<sup>104</sup> Among the 13 interviewees who thought the courts recognise non-physical abuse as domestic abuse, eight said that, at least in theory, the courts treat non-physical and physical abuse on a par in terms of severity, or view non-physical abuse as more serious.<sup>105</sup> B06, for example, said the courts no longer 'put physical violence on a pedestal above mental and psychological'. B08 felt the courts are more concerned by controlling behaviour than physical abuse because the opportunities for the continuation of physical abuse can be limited post-separation, but this is not the case with non-physical abuse. B07 said the courts are concerned both by physical and non-physical abuse, but that their responses vary depending on the severity of the allegations.

Some interviewees were more tentative, expressing doubts about the extent to which non-physical forms of abuse are taken seriously in practice in assessing whether contact should go ahead.<sup>106</sup> B05 said the courts' approach to allegations of non-physical abuse depends on the extent of the allegations of control. C08 felt the weight given to non-physical allegations depended on the judge hearing the case. C07's experience was that while the courts understand non-physical abuse, in practice physical abuse is given more weight within risk assessment.

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<sup>103</sup> J06-DJ and J09-DJ.

<sup>104</sup> N = 9: B02, C08, R02, R03, S02, S05, S08, S09 and S10. In addition, R01 did not comment on whether the courts view non-physical abuse as domestic abuse but, nevertheless, said that non-physical abuse is not taken as seriously as physical abuse by the courts in practice.

<sup>105</sup> N = 8: B04, B06, B07, B08, C03, C05, S01 and S03.

<sup>106</sup> N = 3: B05, C07 and C08.

Crucially, the point made by several interviewees that it is not possible to isolate assessments of the courts' conceptualisation of domestic abuse from the challenges in evidencing domestic abuse are relevant again here. What these interviewees said was that whilst non-physical abuse may, in theory, form part of the courts' definition of domestic abuse, and be seen as serious, in practice non-physical abuse is not always taken seriously because of the challenges which exist in evidencing this form of abuse.<sup>107</sup> B06, for example, said:

... so courts tend in my experience more and more to actually take a ... not laid back stance but they don't take those allegations [of non-physical coercive control] too seriously in the absence of police reports, non-molestation orders, some finding in the past.

He felt it also often came down to whether the allegations are generalised: if the non-physical allegation is a general one, such as 'he was always controlling', the court will be reluctant to pursue the allegation; but if the allegations are specific, such as 'he never let me go out; he took all my cards', then these will be taken more seriously. He attributed this approach to the pressures on court time to finalise cases by getting contact started. C10 felt that the courts were beginning to take non-physical abuse seriously, having in the past not seen physical and non-physical abuse 'equally at all', but her view was the courts will always consider physical abuse to be more serious than non-physical abuse because there is 'tangible evidence'. She was more confident that Cafcass was capturing the harms caused by non-physical abuse, and felt there needed to be a societal and cultural shift in how domestic abuse is understood:

... I think it's not just about the court. I think it's a cultural issue. It is a society issue. But I think at Cafcass what I have learned ... we do have tools to fit ... to assess all types of violence and we do place the same amount of importance on coercion and control, and emotional abuse, as

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<sup>107</sup> N = 8: B04, B06, C01, C03, C04, C05, S01 and S03. C09 did not comment on the relative severity of physical and non-physical abuse in the eyes of the court but said that allegations of non-physical abuse are more difficult for the court as a result of the challenges involved in evidencing non-physical abuse.

we do with physical violence. I think it will take a while for the courts to grapple with that.

This again underlines the tensions between the way in which domestic abuse is conceptualised and the way in which it is evidenced, which is explored in the second part of this Chapter.<sup>108</sup>

### 3.1.5.2 What constitutes 'serious' domestic abuse?

Beyond the question of whether physical and non-physical forms of abuse are deemed equally serious in assessing the risks posed by contact, there is a broader question of whether some forms of abuse, whether physical or non-physical, are more 'serious' than others. There are a number of arguments against the creation of a hierarchy of abuse. One is that the form of abuse perpetrated is not a reliable indicator of the impact that abuse will have on the victim, since the same abuse can have a different impact on the victim at different stages in her life.<sup>109</sup> Another, and arguably the most fundamental, is that abuse which may appear on the surface to be 'minor' or 'low-level' can, in practice, pose significant risks to victims', and children's, safety.<sup>110</sup> As discussed above, this is what drives Stark's argument that the extent of control is the more reliable indicator of risk than the level of violence perpetrated at a particular period of time.<sup>111</sup>

The perpetration of coercion and control has been identified as telling of the likelihood of abuse continuing post-separation, with separation flagged as a critical time at which women are particularly at risk of physical harm or death.<sup>112</sup> Three of the senior police officers consulted as part of Wiener's research, for example, emphasised the way in which domestic homicide cases are most often considered, erroneously, to be 'low risk' at preliminary stages of assessment.<sup>113</sup> This again emphasises the importance of those charged with responding to domestic abuse being alert to the

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<sup>108</sup> See 3.2 below.

<sup>109</sup> See, for example, the discussion in: Reece (note 80 supra) pp.41-42.

<sup>110</sup> See for example: Wiener (note 4 supra) 504.

<sup>111</sup> Stark (note 33 supra) 202.

<sup>112</sup> See for example: Ornstein and Rickne (note 28 supra) 627-629; Barnett (note 26 supra) 384.

<sup>113</sup> Wiener (note 4 supra) 504.

perpetration of abuse as part of a pattern, since incidents may appear minor when viewed in isolation, but far more dangerous when the broader pattern is observed.<sup>114</sup>

As noted above, four judges interviewed identified non-physical abuse as among the most serious forms of domestic abuse.<sup>115</sup> Other examples given of ‘serious’ domestic abuse given by judges included: abuse witnessed by children;<sup>116</sup> abuse leading to the granting of non-molestation orders;<sup>117</sup> criminal convictions;<sup>118</sup> ‘serious’ physical abuse ‘running alongside mental health difficulties’;<sup>119</sup> police call outs, medical and school reports;<sup>120</sup> serious sexual abuse;<sup>121</sup> abuse directed towards children;<sup>122</sup> use of weapons;<sup>123</sup> strangulation;<sup>124</sup> abuse leading to GP or medical intervention;<sup>125</sup> grievous bodily harm;<sup>126</sup> abuse leading to hospitalisation;<sup>127</sup> and rape.<sup>128</sup>

The barristers and solicitors gave the following examples of what they thought judges deem ‘serious’ domestic abuse: ‘serious’ injury;<sup>129</sup> ongoing abuse;<sup>130</sup> abuse leading to cautions and convictions;<sup>131</sup> direct harm to children;<sup>132</sup> sexual abuse of children;<sup>133</sup> abuse witnessed by children;<sup>134</sup> physical violence;<sup>135</sup> sexual abuse;<sup>136</sup> broken bones;<sup>137</sup> hospitalisation;<sup>138</sup> abuse evidenced by medical or police records;<sup>139</sup> persistent

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<sup>114</sup> Ibid.

<sup>115</sup> J01-M, J02-M, J03-M and J04-DJ.

<sup>116</sup> J02-M, J04-DJ and J08-DJ.

<sup>117</sup> J02-M.

<sup>118</sup> J02-M, J03-M.

<sup>119</sup> J10-DJ.

<sup>120</sup> J03-M.

<sup>121</sup> J03-M.

<sup>122</sup> J04-DJ.

<sup>123</sup> J05-CJ.

<sup>124</sup> J05-CJ.

<sup>125</sup> J07-CJ.

<sup>126</sup> J04-DJ.

<sup>127</sup> J07-CJ.

<sup>128</sup> J04-DJ, J08-DJ, J09-DJ and J10-DJ.

<sup>129</sup> B03.

<sup>130</sup> B03.

<sup>131</sup> B03.

<sup>132</sup> B04 and S02.

<sup>133</sup> S04.

<sup>134</sup> B04 and S08.

<sup>135</sup> S07.

<sup>136</sup> S07.

<sup>137</sup> B07 and S09.

<sup>138</sup> B07.

<sup>139</sup> B08.

breaches of non-molestation orders;<sup>140</sup> bites to the face;<sup>141</sup> rape;<sup>142</sup> and strangulation to the point of near-death.<sup>143</sup>

Examples given by interviewees across the practitioner groups of what constitutes ‘lower-end’ domestic abuse in the eyes of the courts included: controlling behaviour not witnessed by children;<sup>144</sup> shouting;<sup>145</sup> relatively ‘low-level’ physical contact;<sup>146</sup> ‘low-level harassment’;<sup>147</sup> mutual shoving at the time of the breakup;<sup>148</sup> cases where the victim has not needed to seek medical or emotional assistance;<sup>149</sup> arguments that become ‘slightly physical’, such as a push;<sup>150</sup> a slap to the face;<sup>151</sup> and ‘situational’ abuse.<sup>152</sup>

Some interviewees said it was not possible to comment on categorisations of severity. Whilst still giving some examples, J08-DJ said all forms of domestic abuse are serious and highlighted the risks involved in categorising different levels of domestic abuse, particularly as abuse can affect people in different ways. This judge suggested, for example, that abuse such as persistent phone calls and heavy breathing could have more severe an impact on someone than being punched or slapped. B07 and J07-CJ were also of the view that the severity of abuse depends, to an extent, on the victim’s response. B05 and B06 suggested perceptions of severity vary from judge to judge.

Overall, while the judges made their understanding of non-physical abuse clear, their responses here, along with those of the practitioner interviewees, suggest that what is perceived as ‘serious’ abuse in practice tends to be physical abuse and abuse for which there is external evidence. Whilst it cannot be assumed that forms of abuse not listed by interviewees are regarded as lacking severity, when combined with the findings from Chapter 4, the conclusion emerges that domestic abuse is rarely

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<sup>140</sup> S04.

<sup>141</sup> S09.

<sup>142</sup> B04 and S08.

<sup>143</sup> S09.

<sup>144</sup> B01.

<sup>145</sup> B07.

<sup>146</sup> B07.

<sup>147</sup> S04.

<sup>148</sup> J05-CJ.

<sup>149</sup> J07-CJ.

<sup>150</sup> J02-M.

<sup>151</sup> S10.

<sup>152</sup> B08.

deemed sufficiently 'serious' to merit contact being denied to the domestically abusive parent. Interviewees' responses here also suggest the continued dominance of the incident model, in which the focus is on specific incidents, rather than the whole picture of abusive behaviour.

### **3.2 STRUCTURAL DIFFICULTIES IN EVIDENCING DOMESTIC ABUSE**

The preceding discussion on definitions has shown that while there remains ambiguity over the boundaries of current definitions, and interviewees had different perspectives on the quality of judges' understanding of domestic abuse, there is nevertheless evidence of developments in judicial understanding of non-physical abuse. Developments in judicial understanding can only go so far, however, if parents alleging domestic abuse are unable to prove the abuse experienced. Court adjudication of contact disputes is premised on the existence of a factual matrix, with the court expected to determine which of the allegations can be found as 'facts'. And, as this section will argue, here lies one of the principal problems: parents who have experienced domestic abuse face major challenges in evidencing the abuse alleged and, if the abuse cannot be proven or found to have taken place, it cannot impact the final decision.<sup>153</sup>

PD12J emphasises the centrality of establishing a factual matrix to the resolution of contact disputes in which domestic abuse is alleged. It directs the court at all stages, and in particular at the First Hearing Dispute Resolution Appointment, to assess whether domestic abuse is being raised and, if raised, identify the factual and welfare issues involved.<sup>154</sup> If contested, any of the factual and welfare issues deemed relevant to determining the outcome of the application for contact should be tried 'as soon as possible and fairly'.<sup>155</sup> PD12J also directs the court to decide at the earliest opportunity whether a fact-finding will be necessary and provides guidance on how this decision should be taken.<sup>156</sup>

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<sup>153</sup> C06, however, spoke of the importance of remaining alert during risk assessment to the potential for allegations to be true, even if they have not been formally established as true.

<sup>154</sup> PD12J (note 43 *supra*) paras 5, 9 and 14. The 2014 and 2017 iterations of PD12J are broadly similar in relation to the guidance given on fact-findings.

<sup>155</sup> *Ibid* para 5. Judicial perceptions of 'relevant' domestic abuse are discussed in Chapter 4.

<sup>156</sup> *Ibid* paras 16-20.

A number of issues are raised by PD12J, on which this doctoral research sheds light. First, the extent to which parents alleging domestic abuse make generalised or specific allegations. Second, the extent to which parents are able to produce external evidence of the abuse alleged, thus potentially negating the need for fact-finding. And third, how allegations of domestic abuse are tested in the absence of external evidence, and in particular how regularly fact-findings are held. This section addresses these issues and, by doing so, expresses support for the argument that there is a need for a new evidential model which is better suited to identifying patterns of coercive and controlling behaviours.

### **3.2.1 Do parents alleging domestic abuse make generalised or specific allegations?**

The current model for testing allegations in contact proceedings is incident-based, with fact-findings premised on the notion of there being specific, clearly articulated ‘facts’ to be found. To this end, PD12J directs the court in cases in which a fact-finding is deemed necessary to determine whether the ‘key facts in dispute’ can be listed in a Scott Schedule, documenting the allegations and the replies of the respondent in relation to ‘each individual allegation or complaint’.<sup>157</sup> There is increasing recognition within academic research and commentary on the barriers this model presents to victims of domestic abuse, particularly in relation to coercive control.<sup>158</sup> As explored above,<sup>159</sup> coercive control is not perpetrated as ‘neat’ testable, isolated incidents. Instead, a series of seemingly ‘minor’ or ‘innocent’ acts can combine to form a dangerous pattern of abusive behaviour, which cannot be readily separated into discrete ‘incidents’ to be tried. It is understandable, therefore, that victims may be unable to present anything other than generalised allegations of abuse, particularly if they are only just coming to terms with the abuse experienced.

There is a nod within PD12J to the need for the court to consider what evidence would be required to ‘determine the existence of coercive, controlling or threatening

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<sup>157</sup> Ibid para 19(c).

<sup>158</sup> See for example: Barnett (note 26 supra) 380 and 398-400; Wiener (note 4 supra) 500.

<sup>159</sup> See above at 3.1.1.



behaviour, or of any other form of domestic abuse’,<sup>160</sup> which moves the court, to an extent, away from the physical incident model. This doctoral research was not aimed at testing compliance with PD12J, but interviewees’ responses do not suggest that the incident-based model has yet lost its dominance. Barnett’s review of the reported case law also did not find use of this provision.<sup>161</sup>

Many of the judicial interviewees reported the prevalence of generalised allegations, identifying this as a problem.<sup>162</sup> Some suggested this was particularly common in cases in which the allegations are non-physical.<sup>163</sup> The judges discussing this problem explained that in response to generalised allegations, it is necessary to tease out carefully what the specific allegations are.<sup>164</sup> J01-M, for example, said:

You’ve got to try to find a way to create the facts that you are going to base your ultimate decision on so, again, you’ve just got to keep digging.

The most common method described by judges to tease out allegations was to focus the parent making the allegations on articulating a limited number of specific incidents.<sup>165</sup> J01-M, for example, continued:

You have to decide exactly what basis you are going to make your decisions on so what you would do is say “OK, you’re alleging that this happened, that happened, that happened”. You select a token of several incidents, perhaps three, possibly five maximum and really you just examine and cross-examine until you get to the point where you think “I’m convinced of one decision or the other”. But you do have to try and focus because without specifics, you can’t make a ruling on a

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<sup>160</sup> PD12J (note 43 supra) para 19(d). The 2014 and 2017 iterations of PD12J express this provision in similar, but not identical, terms.

<sup>161</sup> Barnett (note 26 supra) 394.

<sup>162</sup> N = 7: J01-M, J03-M, J04-DJ, J06-DJ, J08-DJ, J09-DJ and J10-DJ. The remaining judicial interviewees did not comment.

<sup>163</sup> N = 4: J01-M, J03-M, J04-DJ and J09-DJ.

<sup>164</sup> N = 7: J01-M, J03-M, J04-DJ, J06-DJ, J08-DJ, J09-DJ and J10-DJ.

<sup>165</sup> N = 5: J01-M, J03-M, J06-DJ, J07-CJ and J08-DJ. J03-M said the court will ask the mother to specify ‘no more than four or five specific allegations’. J06-DJ said the court has to focus parents on the ‘five most serious’ allegations. J07-CJ said the court will ask the parent to ‘choose your best 10’. J08-DJ said parents will be asked to give ‘five or six specific allegations of behaviour’.

generalisation so you have to say “The Bench believes this happened on this date in the way described by mum”.

Whilst limits to court time prohibit the exploration of an unlimited number of allegations,<sup>166</sup> this practice of focusing on ‘a few “sample” incidents’ has been criticised because it can mean ‘that the full extent of the risk posed to the mother and child is minimised or even invisible’.<sup>167</sup>

Furthermore, while in some cases victims of domestic abuse may be able to produce specific allegations in response to the teasing out of allegations described by the judges above, the risks of victims not being able to do this are clear. Some interviewees said it is not possible to overcome the problem of generalised allegations. S09, for example, explained the problem victims face as follows:

And the difficulty is actually particularising it because most victims don’t keep a note of everything. It’s just like “he makes me ... he keeps controlling me”. So, unless they are keeping a diary of every single thing, it’s hard to particularise to a judge who just thinks “Oh well, this is rubbish”.

J04-DJ accepted that it is not always possible to get to the bottom of generalised allegations and explained that the court’s task then becomes one of trying to ensure children do not lose their relationships with the non-resident parent but all the time weighing up the risks involved. The challenges for the court in striking the balance described by J04-DJ are palpable, since the court is having to risk assess in the dark about the extent of the risk posed by the perpetrator.

Combined with the findings in Chapter 6 on the pressures on court time, there is reason for concern about the extent to which the courts are able to get to the bottom of allegations, particularly when they are generalised. The existence of external evidence can support the cases of victims presenting with generalised allegations but,

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<sup>166</sup> A point emphasised, for example, by J06-DJ.

<sup>167</sup> Barnett cited in Barnett (note 26 supra) 394. See also: Hunter and Barnett (note 26 supra) pp.40-41 and 72.

as interviewees within this doctoral research emphasised, external evidence of the abuse is often not readily available.

### 3.2.2 Is external evidence available to substantiate allegations?

If there is external evidence of domestic abuse, it is possible that a sufficient factual matrix can be established without the need for a fact-finding. PD12J directs, for example, that one of the considerations for the court in cases in which the alleged victim is in receipt of legal aid is whether the evidence required to access legal aid provides a sufficient factual basis to advance the case.<sup>168</sup> In addition, the court will also consider whether other evidence exists which sufficiently establishes the facts.<sup>169</sup> As Chapter 6 explores, however, there have been major barriers to victims being able to produce the evidence required to access legal aid, and over half of all interviewees within this doctoral research identified a lack of evidence, beyond the parties' own testimonies, as a problem, and one which presents significant challenges both for parents alleging abuse and for those charged with assessing the veracity of allegations.<sup>170</sup>

Only two interviewees who commented on the availability of external evidence<sup>171</sup> said that parents alleging domestic abuse are often able to produce external evidence of the abuse alleged. One was J08-DJ, who said that police evidence is common, but evidence from a GP less common, and the other J06-DJ, who agreed that police evidence is common, but emphasised that this is only if the abuse is 'significant'. The experience of the majority of interviewees who commented was that it is rare for

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<sup>168</sup> PD12J (note 43 supra) para 17(c).

<sup>169</sup> Ibid para 17(d). The barriers victims face in securing external proof of the abuse experienced have been widely emphasised. Problems with legal aid eligibility are discussed in Chapter 6 and for broader discussion of the challenges victims face in proving abuse in relation to the offence of coercive or controlling behaviour, see for example: V. Bettinson and C. Bishop, 'Is The Creation of A Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?' (2015) 66(2) *Northern Ireland Legal Quarterly* 179, 184 and 196-197; L. Kelly and N. Westmarland, 'Naming and Defining 'Domestic Violence': Lessons from Research with Violent Men' (2016) (112)(1) *Feminist Review* 113, 114 and 116; V. Bettinson, 'Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?' (2016) 3 *Criminal Law Review* 165, 173-176; S. M. Edwards, 'Coercion and Compulsion – Re-imagining Crimes and Defences' (2016) 12 *Criminal Law Review* 876, 886; C. Bishop and V. Bettinson, 'Evidencing Domestic Violence, including Behaviour that falls under the New Offence of "Controlling or Coercive Behaviour"' (2018) 22(1) *International Journal of Evidence and Proof* 3, 23.

<sup>170</sup> N = 29: B07, B08, C01, C02, C03, C04, C05, C07, C09, C10, J01-M, J02-M, J03-M, J04-DJ, J05-CJ, J07-CJ, J09-DJ, J10-DJ, R01, R02, R03, S01, S02, S05, S06, S07, S08, S09 and S10.

<sup>171</sup> Defined as evidence beyond the parents' own testimonies.

external evidence to be present which can support the allegations.<sup>172</sup> Among the judges, for example, J09-DJ reported that it is 'very common' for external evidence to be lacking, J04-DJ agreed that there is no external evidence in 'most' cases and J07-CJ said external evidence does not exist in 80% of cases. J10-DJ gave a slightly lower account, stating that it is 'reasonably common' for evidence to be lacking. A handful of interviewees thought that the availability of evidence varies.<sup>173</sup> J05-CJ, for example, said that there is more likely to be external evidence in cases in which the mother is represented, with evidence more likely to be lacking in cases of self-representation, an experience shared by S06.

The pivotal nature of external evidence to the courts' determination of cases was emphasised by several interviewees, and these interviewees made a number of different but related points.<sup>174</sup> S02, for example, said the court could be persuaded to consider allegations regarded as 'historic', but only if it can be established that the victim told a friend or relative about what had happened and could explain why she could not report it to the police. B08's experience was that the court will not hold fact-findings in cases in which there is only one parent's word against the other and will instead proceed with contact, if it has already started. The problem, in B08's view, with this approach is that cases are no longer brought back to court for review, so the court is having to make a 'wild guess'. B03 similarly said that allegations will not be given much weight in the absence of external evidence and S08's experience was also that the court will 'very often' dismiss allegations, particularly of non-physical abuse, as 'tit for tat' in the absence of external evidence:

You know, she'll be alleging this and then he'll be saying no, he doesn't do that and alleging something against her. And I think that's part of the reason why perhaps it gets lost in everything.

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<sup>172</sup> N = 11: B07, B08, C02, C09, J02-M, J03-M, J04-DJ, J07-CJ, J09-DJ, J10-DJ and S01. C02 qualified this by stating that there might be evidence from the child's school.

<sup>173</sup> N = 5: C03, C07, J01-M, J05-CJ and S06. S06 also suggested there would usually be some form of evidence but emphasised the importance of the role played by solicitors in supporting their clients to produce this evidence for the court.

<sup>174</sup> N = 15: B03, B04, B06, B08, C01, C03, C04, C05, C09, J06-DJ, S01, S02, S03, S05 and S08.

S05 also expressed concern about the absence of evidence negatively impacting the case outcome, warning that the courts could be at risk of making the wrong decisions in cases in which there is no external evidence:

And I think sometimes probably there is a risk that the courts have made wrong decisions because they haven't got anything else to base it on. Cafcass have gone round to see the chap and he comes across perfectly well, you know. What else are they going to base it on? ... He says "well, she is bonkers. She just doesn't want me to have a relationship with my children". It's hard. There probably have been a lot of times when maybe those kind of issues haven't been sensitively dealt with.

S05, however, emphasised the challenges facing those making the decisions in the absence of corroborating evidence, speaking in this instance about the duty on Cafcass to advise the court:

If somebody presents themselves very well and some people who are controlling and manipulative are brilliant at coming across very well. Without any firm evidence, quite rightly, how are they going to ... they have got to go to a judge who can potentially stop contact between a child and a father because of a hunch that they've got. I don't know how that can be improved. That's where I am concerned.

The lack of external evidence to substantiate allegations was identified as a particular problem in relation to non-physical abuse.<sup>175</sup> Some of the judges explained that these allegations pose particular challenges because non-physical abuse is not perpetrated as stand-alone incidents, so is hard to measure.<sup>176</sup> J04-DJ added that non-physical allegations are also harder to deal with than physical allegations because the perpetrator is manipulative, and the victim may not even be aware that she is being manipulated until a third party identifies the abuse. And, as outlined above, over half

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<sup>175</sup> N = 21: B04, B06, B07, C01, C03, C04, C05, C09, C10, J03-M, J04-DJ, J08-DJ, J10-DJ, R01, R02, R03, S01, S03, S06, S08 and S09. A minority of interviewees spoke of the availability of evidence of non-physical abuse, such as controlling the mother's phone and social media (S06) or financial control (S08).

<sup>176</sup> J03-M, J04-DJ and J08-DJ.

of the interviewees who felt the courts understood that domestic abuse is not limited to physical abuse qualified their stance by emphasising that this theoretical understanding does not mean non-physical abuse is taken seriously in practice because non-physical abuse is so difficult to evidence.<sup>177</sup>

The rarity of external evidence is consistent with it being well-known that victims of domestic abuse often do not report the abuse they suffer, will report the abuse only having been subjected to it for a considerable period,<sup>178</sup> or will be unwilling to support prosecution once reported. Home Office data for the year ending March 2017, for example, highlights how victims were unwilling to support actions in 42% of cases involving domestic abuse-related offences.<sup>179</sup> As R03 said:

When you have been controlled for 10 years and it's like mind games. Your self-esteem is broken, and you are scared all the time, and you can't make decisions about your own life. You haven't been to the police to report that. There is no evidence.

Furthermore, significant problems have also been found with police responses to domestic abuse, with these failings further limiting opportunities for evidence collection.<sup>180</sup> And some interviewees highlighted the challenges in accessing external evidence within disputes over contact, even when it exists, raising particular concerns about access to, and quality of, police evidence. B07, for example, reported the poor quality of photographs of physical abuse, with photographs produced in black and white without independent dating. C07 and J06-DJ were similarly concerned about the quality of police evidence, and J06-DJ also raised the delay in accessing this evidence as a problem. The absence of external evidence is, thus, understandable, but the consequences of this absence are significant.

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<sup>177</sup> N = 8: B04, B06, C01, C03, C04, C05, S01 and S03.

<sup>178</sup> See for example: Rights of Women, *Women's Access to Justice: A Research Report* (Rights of Women 2011) pp.13-14, 29 and 30-31.

<sup>179</sup> Based on data from 24 police forces across England and Wales: Office for National Statistics, *Domestic Abuse in England and Wales: Year Ending March 2017* (23 November 2017) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017>> accessed 25 October 2018. See also: Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), *PEEL: Police Effectiveness 2017: A National Overview* (HMICFRS 2018) p.23.

<sup>180</sup> See for example: HMICFRS 2018 (note 179 supra) pp.9 and 21-23.

The challenges both for those alleging domestic abuse and those charged with assessing the veracity of allegations in cases in which external evidence is lacking need little articulation: while Cafcass produces evidence to the court through, for example, investigating children's wishes and feelings,<sup>181</sup> its role is not to fact-find, and in the absence of external evidence, all that is left is the word of the parent alleging the abuse against that of the parent alleged to have been abusive.<sup>182</sup> As J04-DJ said, who raised this as a particular challenge, the judge in these circumstances is left to decide:

Who do I believe the most? ... Do I believe her? Do I believe him? It's hard to say.

One way of overcoming the absence of external evidence is fact-finding. Interviewees, however, reported a judicial reluctance to hold fact-findings, and some reported a reluctance to conclude that the abuse has occurred in the absence of external evidence, even when they take place.

### **3.2.3 How common are fact-findings?**

One response to the absence of external evidence is to hold a fact-finding. The majority of interviewees who commented on this issue, however, reported that fact-findings are rare.<sup>183</sup> S07, for example, reported a 'trend' of reluctance, particularly among Circuit judges, to hold fact-findings. S08 argued that the courts should be more willing to hold fact-findings as allegations of abuse are being 'swept under the carpet'. C09 said the courts avoid fact-findings 'like the plague'. R03 was among the most critical:

They [fact-findings] are not happening in a lot of cases because they are not funded ... they never did happen as much as they should do and now

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<sup>181</sup> C03, for example, identified the child's account as particularly crucial in cases in which external evidence is absent.

<sup>182</sup> As outlined above, this was a problem identified by a significant number of interviewees (n = 30: B07, B08, C01, C02, C03, C04, C05, C07, C09, C10, J01-M, J02-M, J03-M, J04-DJ, J05-CJ, J07-CJ, J08-DJ, J09-DJ, J10-DJ, R01, R02, R03, S01, S02, S05, S06, S07, S08, S09 and S10).

<sup>183</sup> N = 18: B03, B04, B07, B08, C02, C04, C06, C07, C09, C10, R03, J03-M, J04-DJ, S01, S02, S04, S05 and S07. B03 gave a slightly higher estimate of prevalence than the other interviewees but, nevertheless, said fact-finding are avoided. B06 also said fact-findings are rare but defined fact-findings only as stand-alone hearings.

they don't happen even more. In any situation where allegations of domestic violence can be knocked out as irrelevant, they will be.

These findings on the rarity of fact-findings are broadly consistent with those of Hunter and Barnett, who conducted the largest study into fact-finding practice, the findings from which informed the 2014 amendments to PD12J.<sup>184</sup> The majority of Hunter and Barnett's respondents said only 0-25% of cases in which domestic abuse is alleged involved a fact-finding, with 42% estimating that these hearings were held in under 10% of cases.<sup>185</sup> The most common reasons given for fact-findings not being held were that the allegations were 'not considered relevant', the allegations being regarded as 'old' and it being considered that the allegations would be 'more appropriately' assessed within the substantive hearing.<sup>186</sup> Most of the family lawyers in Barnett's study said that fact-findings were limited to testing 'incidents' of 'recent, severe, physical violence',<sup>187</sup> and similar findings were made by Coy et al.<sup>188</sup> These studies preceded the 2014 reforms to PD12J but it does not appear that these reforms have significantly increased the number of fact-findings, with the post-2014 studies continuing to highlight the low incidence of fact-findings.<sup>189</sup>

Interviewees within this doctoral research cited a number of reasons for fact-findings not being held, echoing some of those given in the earlier studies. The most common reasons given were: there being insufficient evidence beyond the parties' own testimonies, since this means the court cannot prove the abuse on the balance of probabilities;<sup>190</sup> the allegations being regarded as 'historic' and irrelevant as a result;<sup>191</sup> cost and delay;<sup>192</sup> and the allegations being deemed insufficiently serious.<sup>193</sup>

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<sup>184</sup> Hunter and Barnett (note 26 supra). See also: Trinder, Hunt, Macleod, Pearce and Woodward (note 76 supra) pp.63-64.

<sup>185</sup> Ibid p.22.

<sup>186</sup> Ibid. The timing of fact-findings is discussed below at 3.2.3.1.

<sup>187</sup> A. Barnett, 'Contact At All Costs? Domestic Violence and Children's Welfare' (2014) 26(4) *Child and Family Law Quarterly* 439, 449.

<sup>188</sup> Coy, Perks, Scott and Tweedale (note 21 supra) pp.48-51.

<sup>189</sup> In the Cafcass and Women's Aid review of 216 court files, 62% of the files featured allegations of domestic abuse but fact-finding hearings were only held in five cases: Cafcass and Women's Aid, *Allegations of Domestic Abuse in Child Contact Cases: Joint Research by Cafcass and Women's Aid* (Cafcass and Women's Aid 2017) p.10. See also: J. Birchall and S. Choudhry, "What About My Right Not to be Abused?" Domestic Abuse, Human Rights and the Family Court' (Women's Aid 2018) pp.25-26.

<sup>190</sup> B08, C09, J08-DJ, R02 and S07.

<sup>191</sup> J09-DJ, R02 and R03.

<sup>192</sup> S02, S04 and R03.

<sup>193</sup> S04, S08 and J04-DJ.



Other reasons included: the perception that allegations of abuse between parents, when the child is not the direct victim, do not need to be tested at fact-finding because the outcome will not affect the decision on contact;<sup>194</sup> unsupervised contact having already taken place;<sup>195</sup> Cafcass' completion of the section 7 report being seen as an alternative to fact-finding;<sup>196</sup> litigants in person being unable to cope with fact-findings;<sup>197</sup> an unwillingness to allocate blame;<sup>198</sup> fathers not contesting allegations because they do not want to run the risk of having negative findings made against them;<sup>199</sup> and the existence of convictions.<sup>200</sup>

A minority of interviewees said fact-findings take place fairly regularly or are common.<sup>201</sup> S10 reported that the courts are reluctant to hold fact-findings but will do so if the allegations are regarded as 'serious'. She said 'serious' is defined as abuse such as multiple rapes, and that abuse such as a 'slap round the face' would not reach this threshold. S10 added that her experience of fact-findings taking place regularly might not be representative since she works on the 'difficult' cases in which Guardians are appointed and parents are supported by refuge professionals. B05's experience was that fact-findings are not rare, but she felt they still do not happen sufficiently frequently as a result of resource-restrictions, with their occurrence varying from judge to judge.

### 3.2.3.1 Timing

When fact-findings take place, there are important questions about their timing. Some interviewees said stand-alone fact-findings are uncommon, with the courts now combining the fact-finding with the final hearing.<sup>202</sup> B08, for example, reported the

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<sup>194</sup> S02 and S05.

<sup>195</sup> R03.

<sup>196</sup> S04.

<sup>197</sup> S01.

<sup>198</sup> S01.

<sup>199</sup> J04-DJ

<sup>200</sup> S07.

<sup>201</sup> N = 6: C05, J05-CJ, S06, S08, S09, S10. S09 said magistrates always hold fact-findings if there are allegations of domestic abuse. S08 added the qualification that fact-findings still do not happen often enough.

<sup>202</sup> N = 10: B02, B04, B06, B08, C01, C06, J05-CJ, J07-CJ, J10-DJ and S03.

C01 said fact-findings can take place as separate hearings or as part of the final hearing but there were more combined fact-findings and final hearings. B06 wanted to see more stand-alone hearings in order to 'narrow the issues'. J05-CJ said that fact-findings will be separate when the allegations are 'serious' but will otherwise be subsumed within the final hearing. J10-DJ added the caveat that stand-alone fact-findings might take place in cases

courts being discouraged from holding separate fact-findings, and B02 said it was 'very, very difficult' to persuade the court to hold a separate fact-finding, unless the abuse is 'really, really serious'. J07-CJ's view was that, save for the cases in which 'serious' allegations are made, or those needing expert assessment of the risks to children, there had been too many separate fact-findings in the past:

In my view there was a period of time when there were far too many discrete fact-finding hearings, which could perfectly happily have been combined as the Children Act always envisaged where you make your determinations of fact, with regard to section 1 of the Children Act, and you weave those into the welfare issues that flow from those facts.

The majority, however, suggested that when fact-findings take place, they do so most often as stand-alone hearings.<sup>203</sup> J08-DJ went further, emphasising that fact-findings must take place as separate hearings:

There's case law on it ... . You have to have a break. You would normally want a section 7 then and a risk assessment based on your finding of fact and it's really important, actually, at that stage that you do have a break and step back and you let everyone go away and assimilate what you've done ... .

The problem with subsuming the fact-finding into the final hearing is that the factual matrix is not established in advance of the final hearing, a problem with current practice identified by some interviewees.<sup>204</sup> In these cases, Cafcass can be asked to provide a report in the alternative, setting out their recommendations both if the allegations are found to be true and if they are not. This can be problematic because, as some interviewees emphasised, establishing the facts is crucial for Cafcass to be

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of 'serious' domestic abuse allegations, such as rape. J02-M said whether a fact-finding is stand-alone or separate depended on the time available and complexity of the dispute.

<sup>203</sup> N = 16: B03, B05, B07, C03, C05, C07, C08, C10, J01-M, J03-M, J04-DJ, J08-DJ, J09-DJ, S07, S08 and S10. B05 added the qualification that there is usually an order for interim contact added on to the end of the fact-finding. C10 added the caveat that she had only attended two fact-findings within a one-year period.

<sup>204</sup> N = 5: B02, B04, C01, C06 and S03. J04-DJ, J08-DJ and J09-DJ identified this problem as one of the reasons for fact-findings taking place as stand-alone hearings. C07's experience was of fact-findings taking place as stand-alone hearings and emphasised that this was the best approach from Cafcass' perspective. See also: J. Doughty, N. Maxwell and T. Slater, *Review of Research and Case Law on Parental Alienation* (Cafcass Cymru 2018) p.38.

able to produce a robust report.<sup>205</sup> B02, for example, said Cafcass will ‘normally’ not produce a report in the absence of a separate fact-finding for this reason, or will ‘do such a sort of meaningless report – “well if this happened, we’d report this ...”’. J09-DJ said that Cafcass should not be asked to make recommendations in the alternative because Cafcass practitioners tend to take allegations as proven, and it can be difficult to later persuade them that the facts were not found at fact-finding. The financial tensions explored in Chapter 6 have a bearing again here, since while separate fact-findings may be desirable,<sup>206</sup> it is questionable whether they are practical within the current financial climate. Indeed, J09-DJ said other judges would justify asking Cafcass to make recommendations in the alternative on the basis of there being insufficient resources to hold separate hearings.

### 3.2.3.2 Challenges when fact-findings are held

There are further challenges even when fact-findings are held. In the absence of external evidence, the court has to make its own assessment of the cogency of the allegations.<sup>207</sup> S03, for example, reported that the way in which the victim presents in court – her appearance, voice and body language – will inform the court’s judgment. She gave the example of a parent alleging abuse tapping her fingers when in the witness box, which was perceived by the judge to give the impression she was not telling the truth. J07-CJ said that the amount of detail the parent can give will affect assessments of veracity.

There are a number of challenges in assessing the veracity of allegations based on parties’ testimonies and presentations alone. One of the most significant is that it carries the risk that the presence and quality of representation, or the presentation of the alleged victim or perpetrator, will sway the outcome, with significant trust placed in the hands of the courts to make an accurate assessment.<sup>208</sup> Some judicial interviewees, however, thought this trust was well-placed. J06-DJ, for example,

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<sup>205</sup> N = 4: B02, B04, C01 and C06. B04 made this point about expert input in general. This problem is recognised by PD12J, which suggests the court wait to request a section 7 report until after the fact-finding (para 22).

<sup>206</sup> For an argument that separate fact-finding hearings are not desirable, see: Barnett (note 26 supra) 399.

<sup>207</sup> A point emphasised by several interviewees (n = 11: B08, J02-M, J03-M, J05-CJ, J06-DJ, J07-CJ, J08-DJ, J09-DJ, J10-DJ, S03 and S06).

<sup>208</sup> For comment, see: *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11 [31] (Lord Hoffman).

emphasised that the courts should be trusted to make these assessments because a person's demeanour in the witness box is telling. Several other judges also described the capacity of judges to evaluate the quality of written evidence, body language and delivery.<sup>209</sup> In contrast, concern has been voiced within the existing literature about judicial perceptions of 'demeanour and credibility'<sup>210</sup> impacting negatively on the extent to which the parent alleging the abuse can 'prove' the abuse alleged.<sup>211</sup>

A further challenge is that the balance of probabilities standard means the onus is on the parent alleging domestic abuse to 'prove' the allegations, and the court has to reach the view that it was more likely than not that the abuse occurred,<sup>212</sup> a conclusion which some interviewees reported the courts are reluctant to reach in the absence of external evidence.<sup>213</sup> J07-CJ said that it might not be possible to decide the abuse has occurred on the balance of probabilities, but this does not mean that the allegations are untrue. J03-M also acknowledged that it is difficult to assess the veracity of allegations without external evidence, particularly in the light of the constant time pressure to which the courts are subjected. And J09-DJ said:

I would be cautious about making a very serious finding of fact, the most serious allegations, instances of rape, without having something other than the woman saying this happened because I've got to find something ... the burden of proof is still on her and I've got to find what tips it over to the 51% that it occurred and that's challenging. I'm not saying I haven't done it or wouldn't do it but I would always be cautious about doing that ...

S10 acknowledged this challenge facing the courts:

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<sup>209</sup> N = 7: J02-M, J03-M, J05-CJ, J07-CJ, J08-DJ, J09-DJ and J10-DJ.

<sup>210</sup> *Re M (Contact Refusal: Appeal)* [2013] EWCA Civ 1147, [2014] 2 FLR 685 [11] (Macur LJ) cited in Barnett (note 26 supra) 394.

<sup>211</sup> Barnett (note 26 supra) 394; R. Hunter, A. Barnett and F. Kaganas, 'Introduction: Contact and Domestic Abuse' (2018) 40(4) *Journal of Social Welfare and Family Law* 401, 411.

<sup>212</sup> See for example: *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11 [2] and [31] (Lord Hoffman).

<sup>213</sup> N = 5: B01, J03-M, J07-CJ, J09-DJ and S10.

It's really difficult because, you know the difference, with criminal the standard is beyond all reasonable doubt; civil is on the balance of probabilities so you ask yourself "is it more plausible than not that that happened?". ... I wouldn't want to be a judge because there was ... she had no medical evidence, she had no police evidence. It was her word against his. So, in that case, I think if there is any doubt a judge is going to have to say it didn't happen.

B01 articulated the consequences of this starkly, drawing on the allegation of leaving the gas on contained in Vignette One:<sup>214</sup>

... how is a judge going to find as a fact whether or not she actually left the gas on, he went sneaking around leaving the gas on, making her feel like she'd lost her mind: how is the judge ever going to make a finding about that? Impossible.

In the light of what is known about the barriers victims face in reporting the abuse to which they have been subjected, this challenge in proving the abuse to the balance of probabilities standard is a serious one. This challenge, along with the other evidential problems reported by interviewees, speaks to the limitations of the current incident-based evidentiary model and adds weight to the argument that research ought to be directed towards the development of a new model which better reflects the lived reality of domestic abuse.

### **3.3 LIMITATIONS TO THE INCIDENT-BASED MODEL FOR EVIDENCING DOMESTIC ABUSE – IS THERE A NEED FOR A NEW MODEL?**

The appeal of the 'violent incident model'<sup>215</sup> for those charged with investigating allegations of domestic abuse is clear: it is more straightforward to establish what has happened with an isolated incident in which physical harm has been caused than it is to disentangle a complex web of abusive behaviour, much or all of which may not

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<sup>214</sup> Vignette One is discussed in Chapter 4.

<sup>215</sup> Stark (note 33 supra) 200.

leave visible scars.<sup>216</sup> The problem, Stark argues, is that the violent incident model ‘bears little resemblance to the forms of oppression that drive most abused women to require outside assistance’.<sup>217</sup> His argument is, in essence, that this model misses the true harm of domestic abuse. Hunter and Barnett have also emphasised that the current incident-based model erroneously works on the basis that there is ‘a linear relationship between particular incidents and specific harms’, which fails to grasp the ‘totality of the perpetrator’s behaviour’.<sup>218</sup> One of the particular problems with current practice is, therefore, that by focusing on violent incidents, the broader picture of abusive behaviour can be overlooked.

As Stark has also argued, a further limitation of the incident-based model is that it gives rise to the ‘assumption that victims ... exercise decisional autonomy “between” episodes’, leaving victims vulnerable to the accusation that they are responsible for not preventing the abuse from continuing.<sup>219</sup> As Chapter 4 discusses, this is a justified concern: some of the interviewees within this doctoral research said the court would be critical of victims who permit abusive parents to have contact with their children post-separation before the case reaches court.<sup>220</sup> On Stark’s reasoning, however, victims may allow contact not because they think contact is safe and beneficial, but rather because they are not able to exercise their ‘decisional autonomy’ since the abuse is ongoing.<sup>221</sup> As Wiener states:

There is no ‘between’ episodes: while the violence might be sporadic, the fear it engenders is not.<sup>222</sup>

Stark’s argument in the context of police responses to domestic abuse has been that the recognition of coercive control mandates an entirely new way of policing:

Reframing domestic violence as coercive control changes everything about how law enforcement responds to partner abuse, from the

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<sup>216</sup> See, for example, the comments of police officers interviewed in: Wiener (note 4 supra) 503.

<sup>217</sup> Stark (note 33 supra) 201.

<sup>218</sup> Hunter and Barnett (note 26 supra) p.17.

<sup>219</sup> Stark (note 33 supra) 200 and 205 (quoted). See also: Stark (note 7 supra) p.115.

<sup>220</sup> See Chapter 4 at 4.2.3.2.1.

<sup>221</sup> Stark (note 33 supra) 200 and 205. See also: Stark (note 7 supra) p.115.

<sup>222</sup> Wiener (note 4 supra) 504.

underlying principles guiding police and legal intervention, including arrest, to how suspects are questioned, evidence is gathered, resources are rationed ...<sup>223</sup>

It is submitted that in the light of the major limitations of the incident-based model for accurately assessing both the short-term and long-term risks posed by perpetrators of domestic abuse, a similar gear change is needed in how allegations of domestic abuse are treated within contact disputes in the family courts. It is beyond the scope of this thesis to explore the options for implementing this new model, but there is a growing body of academic work on this issue, outside the child contact context.<sup>224</sup> And in the child contact context, Barnett has argued for a move away from the incident-based model, mooted the possibility of the ‘eliminati[on]’ of the ‘adversarial fact-finding exercise altogether in order to focus attention on risk rather than “the truth” of allegations’.<sup>225</sup>

Whatever its final form, this gear change would have to involve a shift from focusing on testing incidents of abuse to understanding the broader narrative of the perpetration of abuse. There are substantial challenges involved in realising this shift. Problems are likely to remain about how to ensure the courts understand the broader narrative when the victim may be unable to articulate this narrative.<sup>226</sup> Focusing on narratives is less ‘neat’ and, as a result, more resource-intensive, than ‘testing’ self-contained allegations. As Chapter 6 explores, the family courts are already under strain, and any change in approach would have to be sensitive to this. The concerns among interviewees in this doctoral research about the prevalence of false allegations also suggests that a new model which puts greater weight on victims’ lived experience might not be without its opponents.

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<sup>223</sup> Stark (note 33 supra) 213.

<sup>224</sup> See most recently in relation to police responses to domestic abuse: Wiener (note 4 supra) 500 and 506-511. See also: Dobash and Dobash, 2004 (note 8 supra); D. Tuerkheimer, ‘Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence’ (2004) *Journal of Criminal Law and Criminology* 959, 1019-1020; Tadros (note 9 supra) 1011-1012 and 1014; Stark (note 7 supra) p.384; Johnson (note 52 supra) pp.87-101; L. K. Anderson, ‘Gendering Coercive Control’ (2009) 15(12) *Violence Against Women* 1444, 1455; M. Hester, ‘Who Does What to Whom? Gender and Domestic Violence Perpetrators in English Police Records’ (2013) 10(5) *European Journal of Criminology* 623, 624 and 635. For concern that a new model would place too much reliance on the victim’s ability to provide an account of the abuse experienced, see the discussion in: Hanna (note 56 supra) 1465.

<sup>225</sup> Barnett (note 26 supra) 380. See also: 398-400.

<sup>226</sup> See for example the discussion in: Hanna (note 56 supra) 1466.

### 3.3.1 False allegations – a barrier to a new model?

The extent to which there is a problem of false allegations of domestic abuse being made within contact disputes is divisive. There has been considerable concern, voiced mostly within research and commentary broadly aligned with feminist perspectives, about a false allegations narrative acting to minimise, if not silence, the reports of abuse experienced by parents.<sup>227</sup> Questions on false allegations did not originally feature within the interview schedules for this doctoral research but, in the light of a number of interviewees independently raising this as an issue, it was addressed with interviewees.

The current system is premised on the basis that allegations of domestic abuse have to be ‘tested’ in order to ensure that weight is only given to domestic abuse in ‘genuine’ cases. The logic of this is clear: it is necessary to establish whether or not the abuse has happened in fact, otherwise a parent could be wrongly accused of perpetrating abuse with no recourse to clear his name. The problem, as explored above, is that there are major structural barriers to victims of domestic abuse ‘proving’ that their allegations are genuine.

Nearly three quarters of all interviewees (73%) reported experiences of false allegations being made,<sup>228</sup> but these interviewees had different perspectives on prevalence. Some identified false allegations as a specific problem.<sup>229</sup> More said false allegations exist but are rare or uncommon.<sup>230</sup> Some interviewees spoke of allegations being exaggerated but not often fabricated.<sup>231</sup> J01-M, for example, said that a high percentage of allegations are exaggerated and a minority fabricated. Others made a number of different points. Three interviewees said false allegations exist, but it is

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<sup>227</sup> See, for example: *ibid* 394-396. There is also growing concern about the parental alienation discourse, and in particular the way in which mothers who oppose contact are accused of alienating their children against the non-resident parent. See for example: Trinder, Hunt, Macleod, Pearce and Woodward (note 76 *supra*) pp.3 and 61; D. Eaton, S. Jarman and L. Lustigman, ‘Parental Alienation: Surely the Time has Come to Effect Change?’ (2016) 46(May) *Family Law* 581; Hunter, Barnett and Kaganas (note 1 *supra*) 404. See more broadly also: Doughty, Maxwell and Slater (note 204 *supra*); J. Doughty, N. Maxwell and T. Slater, ‘Parental Alienation: In Search of Evidence’ (2018) 48(Oct) *Family Law* 1304; *Re J (Children) (Contact Orders; Procedure)* [2018] EWCA Civ 115, [2018] 2 FCR 527.

<sup>228</sup> N = 30: B01, B02, B03, B05, B06, C02, C03, C04, C06, C07, C09, C10, J01-M, J02-M, J03-M, J04-DJ, J05-CJ, J06-DJ, J07-CJ, J09-DJ, J10-DJ, S01, S02, S03, S04, S05, S07, S08, S09 and S10. J03-M and S02 added the caveat that both mothers and fathers lie.

<sup>229</sup> N = 9: B01, B03, B05, C02, C06, C09, J09-DJ, S05 and S10.

<sup>230</sup> N = 12: B06, B07, C03, J01-M, J02-M, J03-M, J05-CJ, J06-DJ, J10-DJ, S03, S07 and S09.

<sup>231</sup> N = 4: B07, J01-M, J02-M and S07.



difficult to gauge prevalence because allegations are not always tested.<sup>232</sup> J07-CJ's experience was that false allegations are commonly made but could not comment with certainty on prevalence because recent caseloads colour perceptions of past cases. B02 said false allegations are made in a 'substantial minority' of cases. Some interviewees attributed the making of false allegations to the tactical use of allegations to access legal aid.<sup>233</sup>

Some interviewees explained what they saw as the consequences of false allegations. Two interviewees said that false allegations undermine genuine victims.<sup>234</sup> B01 said:

But I have acted for some women who have been severely abused. The problem is so many false allegations it actually dilutes the ones that are real. The courts are increasingly fed up with them.

S10 shared the same concern:

... when you have a woman that comes in, or a man, and they are genuine victims, they are already, I think, on the back-foot because so many people go in and go "Oh well, he did ... he did, he did" ... if I was a judge, I would be thinking, you know, I think you are automatically thinking "Is this really true? Or is she just trying to stop contact? ... Because [people] who genuinely have had that done to them, I think they are struggling to get a court to believe them because there are lots of people [who make false allegations].

Others said the main consequence is that fathers lose contact with their children whilst investigations are undertaken.<sup>235</sup> B05 said, for example, that allegations will stop contact in the interim period, and it is 'enormously difficult' to re-start it without resources:

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<sup>232</sup> C10, J04-DJ and S04. B08 also said it was difficult to gauge prevalence but did not share experiences of false allegations being made.

<sup>233</sup> N = 9: B01, B04, B05, C07, C10, S02, S06, S08 and J09-DJ. C03 disputed this assertion. S06 did not have professional experience of false allegations being made. B04 did not comment on prevalence.

<sup>234</sup> N = 2: B01 and S10.

<sup>235</sup> N = 5: B01, B05, J04-DJ, S02 and S10.

And I've seen that time and time again, where it's a really good way of preventing normally the father, I speak in general terms, but normally the father having any contact with the children. ... And it's enormously difficult to get the contact kick-started again without having the resources of professionals involved. And a robust judge to actually kick-start contact again, despite the fact that it is a breach of those children's human rights.

The findings from this doctoral research cannot be relied upon as a measure of the prevalence of false allegations because insufficient information is known about the experiences of interviewees to reach firm conclusions. It is not known, for example, in how many cases the allegations were tested and found to be false, and even then, as some interviewees stressed,<sup>236</sup> a finding that the abuse has not occurred at fact-finding does not mean the abuse has not occurred. Some interviewees also said that parents making allegations can genuinely believe them to be true, even if they are not found to be true.<sup>237</sup> The findings in this doctoral research on false allegations must thus be read with caution, but they, nevertheless, illustrate that there is some concern among professional communities about false allegations and their consequences.

Significant care is also needed in discussing false allegations because it is well-established that under-reporting of domestic abuse is a major issue.<sup>238</sup> And, even when abuse is disclosed, it may not be the full extent of the abuse experienced. As R02 said:

And you don't know what you don't know and so it could be that actually he has been raping her for the last five years but because she hasn't recognised that he has been raping her and he might have, I don't know, done other things in front of the children that she hasn't disclosed. I think that's what the key is where, you know ... it's like the iceberg thing isn't,

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<sup>236</sup> N = 5: B05, B08, J05-CJ, J06-DJ and S04.

<sup>237</sup> N = 3: C02, J06-DJ and S03.

<sup>238</sup> See for example: Rights of Women (note 178 supra).

if she is disclosing like this bit, it's probably all of this that has been going on as well [but has not been disclosed].

C10 spoke of the challenges in evidencing coercive control and warned of the risk that parents may appear to be fabricating allegations when the reality is they are suffering from the impact of domestic abuse:

... with people I suspect are being liberal with the truth ... their accounts are very inconsistent but then, again, it's not unusual if you have been traumatised for you not to remember things so there is a grey area there. It is very difficult to say 'You are lying' or not.

As noted above, there is significant resistance in the existing literature to the argument that false allegations are regularly made. Barnett has argued that the 'discursive and ideological context' in which 'coercive control has emerged' is 'already populated by images of hostile, lying mothers and victimised fathers'.<sup>239</sup> This, she argues, is because:

Judges' and professionals' perceptions of women involved in private law Children Act proceedings are informed by prevailing legal, political and child welfare discourses that valorise fatherhood and render invisible the father's conduct, giving rise to gendered subjectivities of 'implacably hostile mothers' and 'safe family men'.<sup>240</sup>

This suggests that concerns about false allegations are exaggerated, if not unfounded, and that these concerns are driven more by an ideological imperative of safeguarding the role of the father in the post-separation family than a neutral observation of false allegation prevalence. The responses from the domestic abuse organisations were most aligned with this argument, all of whom were emphatic that there is not a problem with false allegations:

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<sup>239</sup> Barnett (note 26 supra) 395.

<sup>240</sup> Ibid.

... in my time that I have been working with women who are victims of domestic abuse, I am not yet to meet one who is telling me a complete pack of lies and making it up. [R01]

People don't make it up, generally. And I think getting the courts to understand that as well, that people don't just make up claims of domestic abuse, I think is really important. [R02]

I don't think that's true at all [parents making false allegations of abuse]. I think there is a pervasive misogyny and lack of understanding throughout the profession as well ... it's a lack of understanding about domestic abuse in general and also people not understanding coercive control. [R03]

The false allegations issue again speaks to the importance of research into alternative evidentiary models. The challenge for any new model would be to strike a balance between ensuring that cases do not proceed on unfounded allegations and supporting parents subjected to domestic abuse to ensure that the full picture of the abuse suffered is understood by the court. It would also be helpful for there to be further research into the extent to which false allegations are being made, in order to advance debates through the provision of data.<sup>241</sup> Existing research aimed at quantifying the prevalence of false allegations has, however, found such allegations to be rare.

### **3.4 CONCLUSION**

There have been major developments in the way in which domestic abuse is conceptualised in legal and policy definitions, with the recognition of coercive control among the most significant. This recognition of coercive control matters because it changes the way the courts should view domestic abuse within contact disputes: the parties' whole relationship should be assessed, rather than incidents of physical violence; it should not be assumed that abuse will end on separation; and the courts

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<sup>241</sup> See for example the discussion in: Hunter and Barnett (note 26 supra) p.35.

should be sensitive to the challenges faced by those affected by abuse in reporting their experiences, particularly when the abuse is non-physical. Furthermore, coercive control is not synonymous with non-physical abuse, and artificial distinctions between physical and non-physical abuse should be avoided, but the recognition of coercive control requires that non-physical abuse is taken seriously in understanding the risks posed by contact.

Whilst the judges were emphatic that non-physical abuse is now recognised and being taken seriously as domestic abuse, the non-judicial interviewees had mixed perspectives about whether the recognition of non-physical abuse in legal and policy definitions is permeating judicial practice. And, crucially, several of those who thought the courts now understand non-physical abuse reported this theoretical understanding being undermined by the structural barriers which exist in evidencing the abuse in practice. Furthermore, some interviewees made distinctions between domestic abuse which poses risks post-separation and ‘situational’ abuse, which is confined to, or is the product of, a particular relationship. There is academic authority for such distinctions, but these distinctions are easier to apply in theory than in practice, and major risks arise if these categories are inappropriately applied. On the basis of interviewees’ responses, it is suggested that a number of interrelated developments are needed.

First, the status of coercive control within the definition of domestic abuse in PD12J ought to be clarified in order to deepen the understanding of its relevance to contact disputes in which domestic abuse is alleged. Second, investment ought to be made in developing guidance on the boundaries and nuances of domestically abusive behaviour.<sup>242</sup> Third, there is a need for research into the development of a new evidential model which better reflects the perpetration of coercive control and the lived reality of domestic abuse. As theoretical understandings of domestic abuse evolve, so too should the accompanying evidential framework. This transition will not be without its challenges, not least as a result of potential concerns about the new model opening the door to false allegations. Finding a more robust way to support

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<sup>242</sup> The need for guidance of this kind was emphasised by C07, who called for ‘some kind of threshold’ to be established to aid the courts’ assessments of the relevance of domestic abuse allegations to contact disputes, in particular in relation to coercive control versus ‘situational’ abuse.

the court to understand and investigate the full extent of allegations is, however, crucial, particularly since only proven or found abuse can impact the courts' decisions on contact, as Chapter 4 now explores.

# CHAPTER 4

## THE IMPACT OF DOMESTIC ABUSE ON CHILD CONTACT – ATTITUDES AND OUTCOMES

It is a well-known argument that the courts promote contact. This is how the judiciary have defined their approach for many years,<sup>1</sup> and the courts are now directed by statute to presume that the involvement of both parents in a child's life post-separation will further the welfare of the child, unless the contrary is shown.<sup>2</sup> This is not, in itself, problematic: while the evidence base on the importance to children of contact is far from conclusive,<sup>3</sup> it is hardly contentious to argue that parents should remain involved in their child's life post-separation if this is in line with the child's wishes and feelings, brings benefits to the child and does not pose any risk of harm to either the child or other parent. Where the issues become more difficult is if the courts' pro-contact stance remains dominant in cases in which domestic abuse is an issue, with the risks posed by contact downplayed and the benefits of contact accepted without question.

As outlined in the Introduction, the roots of the original iteration of Practice Direction 12J (henceforth 'PD12J') go back to the Children Act Sub-Committee of the Advisory Board on Family Law's report in 2000 (henceforth 'the CASC Report').<sup>4</sup> This Report raised concerns about the courts' over-emphasis of the importance of children maintaining contact with both parents following parental separation, and the lack of attention paid to the risks contact poses in cases in which one parent is domestically abusive.<sup>5</sup> The Report warned that the 'traditional concept' of a domestically abusive father nevertheless being a 'good father' had 'to be questioned', and sent a strong message on the need for a shift in the courts' approach.<sup>6</sup> The judgment in *Re L (A*

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<sup>1</sup> See for example: *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124; *Re B (A Minor) (Contact: Stepfather's Opposition)* [1997] 2 FLR 579; *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521, [2011] 2 FLR 912.

<sup>2</sup> Children Act 1989, s 1(2A).

<sup>3</sup> As discussed in Chapter 2.

<sup>4</sup> The 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* (Lord Chancellor's Department 12 April 2000).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* p.84.

*Child*) (*Contact: Domestic Violence*); *Re V (A Child)* (*Contact: Domestic Violence*); *Re M (A Child)* (*Contact: Domestic Violence*); *Re H (Children)* (*Contact: Domestic Violence*) (henceforth '*Re LVMH*')<sup>7</sup> then halted the introduction of the Practice Direction, it being felt that a practice note summarising the key messages from the case would suffice.<sup>8</sup> When it transpired that the guidance in *Re LVMH* and the CASC's Guidelines were not being followed, the 'Residence and Contact Orders: Domestic Violence and Harm' Practice Direction was issued in May 2008 (now PD12J).<sup>9</sup> Driving the introduction of the Practice Direction was the Family Justice Council's call for 'cultural change' in the courts' approach, away from 'contact is always the appropriate way forward' to 'contact that is safe and positive for the child is always the appropriate way forward'.<sup>10</sup> Keeping the roots of the original Practice Direction in mind is important because, as this Chapter explores, many of the concerns in the current literature on this topic echo those which led to the introduction of the Practice Direction in the first place.<sup>11</sup>

This Chapter draws on the interviews conducted with judges, practitioners and domestic abuse organisations within this doctoral research on the attitudes of the court towards proven or found domestic abuse within contact proceedings and the outcomes of applications for contact. While Chapter 3 explored the courts' handling of allegations of domestic abuse, this Chapter moves on to the more concrete issue of the impact of domestic abuse on the contact decision once the abuse has been found, proven or otherwise accepted. Unlike other important work conducted on this issue,<sup>12</sup> this research was not aimed at testing compliance with PD12J but was intended more broadly to explore practitioners' perspectives on the impact of found or proven domestic abuse on the outcomes of applications for contact.<sup>13</sup>

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<sup>7</sup> *Re LVMH* [2001] Fam 260 (henceforth in footnotes '*Re LVMH*').

<sup>8</sup> For discussion see for example: Family Justice Council, *Report to the President of the Family Division on the Approach to be Adopted by the Court When Asked to Make a Contact Order by Consent, Where Domestic Violence has been an Issue in the Case* (January 2007) p.11.

<sup>9</sup> [2008] 2 FLR 103. And then was reissued in 2009: [2009] 2 FLR 1400.

<sup>10</sup> Family Justice Council (note 8 supra) pp.3 and 27.

<sup>11</sup> See the Introduction to this thesis for a discussion of the pre-Practice Direction case law and research.

<sup>12</sup> See: R. Hunter and A. Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council 2013); A. Barnett, 'Contact At All Costs? Domestic Violence and Children's Welfare' (2014) 26(4) *Child and Family Law Quarterly* 439.

<sup>13</sup> 'Proven or found' is used in this thesis to encompass admissions of abusive behaviour, along with externally evidenced abuse and findings made through fact-finding.



The evidence from the interviews is analysed against the background of existing commentary and research, from the initial introduction of PD12J in May 2008 to the most recent research published in 2018. This commentary and research suggest that the ‘cultural change’<sup>14</sup> which the introduction of PD12J was intended to facilitate has not yet fully taken place, with many of the same problems with the courts’ and practitioners’ approaches continuing to be reiterated. Indeed, such was the weight of concern about current practice that PD12J was re-issued on 2 October 2017. Sir James Munby said he could not comment on the extent to which, if at all, the concerns raised about the courts’ approach were justified, but he acknowledged the existence of ‘recurring complaints in Parliament and elsewhere of inadequate compliance with PD12J’.<sup>15</sup> This doctoral research pre-dated the 2017 reforms to PD12J, so cannot provide insight into their impact, but the significance of the changes is explored in the Conclusion to this thesis.

While some earlier studies consulted judges and practitioners on their perspectives on current practice in contact disputes,<sup>16</sup> the lack of current data on judicial and professional perceptions of, and responses to, domestic abuse in this context has been emphasised.<sup>17</sup> This doctoral research speaks to this gap in the evidence base by providing insight into how the judiciary view the resolution of cases in which domestic abuse is found or proven, along with the perceptions of legal and child welfare practitioners. This Chapter now turns to an exploration of these findings, which are mapped against the findings from the post-PD12J studies outlined in the Introduction. The findings cluster around three core questions: first, how the courts balance the risks and benefits of contact; second, what outcomes are reached in cases in which domestic abuse is found and proven; and third, what happens after cases leave court. The Chapter concludes that whilst in some respects the findings present a more positive picture of practice than those from previous studies, the ‘cultural change’ is

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<sup>14</sup> Family Justice Council (note 8 supra) pp.3 and 27.

<sup>15</sup> Sir James Munby, *President of Family Division Circular: Practice Direction PD12J – Domestic Abuse* (14 September 2017).

<sup>16</sup> See for example: Hunter and Barnett (note 12 supra).

<sup>17</sup> A. Barnett, ‘“Greater than the Mere Sum of Its Parts”: Coercive Control and the Question of Proof’ (2017) 29(4) *Child and Family Law Quarterly* 379, 387. See also Caffrey on the need for research on the impact of the statutory presumption of parental involvement: L. Caffrey, ‘The Importance of Perceived Organisational Goals: A Systems Thinking Approach to Understanding Child Safeguarding in the Context of Domestic Abuse’ (2017) 26 *Child Abuse Review* 339.

yet to be fully realised, with a strongly pro-contact approach continuing to drive practice.

#### **4.1 HOW DO THE COURTS BALANCE THE RISKS AND BENEFITS OF CONTACT?**

As Chapter 2 explored, the evidence bases on the risks and benefits to children of contact with a domestically abusive parent do not provide a definitive answer on whether children should have contact. The challenge for the courts, therefore, is to weigh carefully the risks and benefits in each individual case. This section explores perceptions on how the courts balance these risks and benefits through the lens of two principal questions: whether the courts operate on a pro-contact basis; and how the courts conceptualise risk through the filter of ‘relevant’ domestic abuse.

##### **4.1.1 Do the courts operate on a pro-contact basis in cases of proven or found domestic abuse?**

A clear finding from interviewees’ responses across all practitioner groups was that the courts operate on the basis that contact ought to take place if possible, even in cases in which domestic abuse is found or proven. In reflecting on their own approaches, all but one of the judges identified<sup>18</sup> their starting point as it being better for children to have contact if possible, including in cases of proven or found domestic abuse.<sup>19</sup> J05-CJ, for example, showed awareness of the criticism commonly directed at the family courts of being too pro-contact and gave this response:

... the criticism of the family courts is probably that we try too hard [to make contact happen] but then we are just trying this balance. We think that it is a child’s right and also, I suppose experience tells us that at some point this child is going to want to know about the father and there can be a complete reaction from them, and will react against the mother, and it’s best to sort it out, if you possibly can.

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<sup>18</sup> Either directly or indirectly.

<sup>19</sup> N = 9: J01-M, J02-M, J03-M, J04-DJ, J05-CJ, J06-DJ, J07-CJ, J08-DJ and J10-DJ.

J07-CJ also emphasised the courts' pro-contact starting point, echoing the guidance given by the higher courts that domestic abuse is not a barrier to contact:<sup>20</sup>

... you generally start from the premise that domestic violence of itself is not a good reason to start from a premise of no contact unless the contrary is proved. You always start from the premise that, you know, it's likely to be of benefit to the child as long as it can be safely undertaken.

J03-M again underlined the pro-contact starting point:

We always start from the standpoint that the child has a right to have both parents in their lives, wherever it's safe and appropriate.

According to J10-DJ, the importance of contact stems from its necessity to children's identity, even when contact is only indirect. The perception that children 'need' contact was also underlined by J01-M, who commented that the courts' reluctance to order no contact or only indirect contact was:

... because what we want to try and do is for families to find ways to behave in a way that is more family orientated and to consider the needs of the children and to consider the completeness of the children's experience ... .

Furthermore, while some judges identified specific benefits of contact, discernible in other judges' responses was the perception that contact is self-evidently beneficial to children. J08-DJ, for example, said:

Well, providing that the father is capable of controlling his behaviour, children should grow up knowing both their parents. It's a given.

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<sup>20</sup> See for example: *Re LVMH* (note 7 supra) 273 (Butler-Sloss, P).

In the same vein, the judicial interviewees also suggested that the involvement of a domestically abusive father in the child's life is preferable to no involvement, provided this involvement can happen safely. J04-DJ, for example, explained the courts' balancing act as follows:

Generally, the difficulty you have is weighing up is it better for them to have a relationship with their dad, even though he is blackmailing them emotionally and being manipulative or not to have a relationship at all? And most of the time you would probably say it's better for them to have some sort of relationship and then you can in an order make conditions, you know: he is not to denigrate mother in front of the children, he is not to do this, he is not to do that.

That even the most extreme perpetration of abuse should not sever the father-child relationship was emphasised by some judicial interviewees. J06-DJ, for example, said:

You know, even children whose fathers have been murderers, they may well still have the right to know their father, it seems to me.

This judicial commitment to promoting the involvement of fathers in children's lives post-separation reinforces the findings of existing studies.<sup>21</sup>

The courts' adherence to the view that children 'need' to maintain a relationship with their fathers post-separation wherever possible, even when that father has perpetrated domestic abuse, was again confirmed by the vast majority of the

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<sup>21</sup> R. K. Thiara and A. K. Gill, *Domestic Violence, Child Contact and Post-Separation Violence: Issues for South Asian and African-Caribbean Women and Children: A Report of Findings* (NSPCC 2012) p.124; M. Coy, K. Perks, E. Scott and R. Tweedale, *Picking Up the Pieces: Domestic Violence and Child Contact* (Rights of Women and CWASU 2012) p.12; L. Trinder, J. Hunt, A. Macleod, J. Pearce and H. Woodward, *Enforcing Contact Orders: Problem-Solving or Punishment* (2013 University of Exeter) p.62; Hunter and Barnett (note 12 supra) p.72; Barnett (note 12 supra) 461; M. Harding and A. Newnham, *How Do County Courts Share the Care of Children Between Parents?* (Nuffield Foundation 2015) p.131; J. Birchall and S. Choudhry, "What About My Right Not To Be Abused?" *Domestic Abuse, Human Rights and the Family Courts* (Women's Aid 2018) pp.6 and 41. See also: C. Harrison, 'Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic Violence' (2008) 14(4) *Violence Against Women* 381, 382; All-Party Parliamentary Group on Domestic Violence, *Parliamentary Briefing: Domestic Abuse, Child Contact and the Family Courts* (All-Party Parliamentary Group on Domestic Violence and Women's Aid 2016) p.12 (henceforth in footnotes 'APPG').

domestic abuse organisation, solicitor, barrister and Cafcass interviewees.<sup>22</sup> Seven of the 10 solicitors, for example, were of the view that the courts work on the basis that some form of contact will usually take place, even between a domestically abusive parent and child.<sup>23</sup> S10 said the courts ‘bend over backwards’ to promote contact, and S01 said:

I’ve never had contact of some degree not granted, so the court must be thinking, their view is, that it’s best for the child.

The vast majority of the barristers similarly confirmed the pro-contact stance of the court.<sup>24</sup> B04, for example, referred to the ‘mantra’:

... that the court should leave no stone unturned in trying to ensure that it’s ... unless there are any compelling welfare reasons to say otherwise, that children should have a relationship with both their parents ... .

A clear finding from this research, therefore, is that the courts continue to adopt a pro-contact stance in resolving applications for contact, even when domestic abuse is found or proven, a finding consistent with those of earlier studies.<sup>25</sup> This finding is unsurprising, given that the importance of parental involvement is now enshrined in statute<sup>26</sup> and a pro-contact stance is consistent with the guidance issued by the higher courts.<sup>27</sup>

#### 4.1.1.1 Does the courts’ pro-contact stance undermine concerns about risks posed by contact with a domestically abusive parent?

While not justified by the existing evidence base,<sup>28</sup> a pro-contact stance does not automatically equate to unsafe outcomes: the judiciary may start from the position

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<sup>22</sup> Domestic abuse organisations: n = 3: R01, R02 and R03; solicitors: n = 7: S01, S02, S03, S04, S06, S09 and S10; barristers: n = 7: B01, B02, B03, B04, B05, B07 and B08; and Cafcass: n = 6: C02, C03, C04, C08, C09 and C10.

<sup>23</sup> N = 7: S01, S02, S03, S04, S06, S09 and S10.

<sup>24</sup> N = 7: B01, B02, B03, B04, B05, B07 and B08.

<sup>25</sup> See fn 21 above.

<sup>26</sup> Children Act 1989, s 1(2A). Although, as Chapter 5 explores, the vast majority of interviewees did not think the statutory presumption has had any impact on practice.

<sup>27</sup> See for example: *Re LVMH* (note 7 supra) 273 (Butler-Sloss, P).

<sup>28</sup> See the discussion in Chapter 2.

that contact is the best outcome for the child, but this does not mean domestic abuse is automatically rendered irrelevant or is given insufficient weight in balancing the risks and benefits of contact. Indeed, all of the judges interviewed were clear that the courts' pro-contact stance only extends so far as it is possible for the domestically abusive parent to be involved safely in the child's life.

The non-judicial interviewees, however, had mixed perspectives on whether the courts' pro-contact stance serves in practice to undermine welfare and safety concerns. Perceptions varied between professional groups. The barristers and Cafcass practitioners were, on the whole, less critical, voicing fewer concerns about the courts' balancing of the risks and benefits of contact. The barristers tended to provide positive accounts of judicial practice, and the Cafcass practitioners were more neutral. The domestic abuse organisations and solicitors tended, when viewed as professional groups, to be the most critical of the courts. However, their specific criticisms were articulated differently. The principal concern voiced by the domestic abuse organisations was what they saw as the courts' over-promotion of contact to the detriment of safety. This concern is explored below, along with some of the findings from the existing literature. What concerned several of the solicitors was a more specific concern about what they saw as the courts' narrow constructions of 'relevant' domestic abuse. These concerns are explored in the following section.<sup>29</sup>

The domestic abuse organisations' principal criticism of practice was that the courts are so wedded to the promotion of contact that the risks posed by contact are overlooked or minimised. R02 described the courts' approach as promoting contact 'at all costs'.<sup>30</sup> R02 lamented that despite 'well-documented, very serious domestic abuse' the abusive parent will, nevertheless, be routinely awarded contact by the court. The courts' default position was articulated as '... we are going to facilitate contact unless you can really, really prove that is really dangerous'. R02 pointed to the paradox in this context between criminal and family law approaches:<sup>31</sup>

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<sup>29</sup> See below at 4.1.2.

<sup>30</sup> This argument has also been advanced by Barnett: Barnett (note 12 supra) 450 and 461-462.

<sup>31</sup> There are parallels here with Hester's 'three planet model': M. Hester, 'The Three Planet Model: Towards An Understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence' (2011) 41(5) *The British Journal of Social Work* 837.

So, someone who is seen through the criminal justice lens as a very dangerous perpetrator of domestic abuse but, actually, in the family courts they are seen as a 'good-enough' dad.

R03 was similarly concerned by what it saw as the courts', and Cafcass', commitment to the notion that involvement of a domestically abusive father in the child's life is better than no father. The experience of this organisation was that domestic abuse is rarely regarded by the courts as a concern which would prevent contact going ahead, with domestic abuse 'not really considered to be even an issue' in determining the majority of fathers' applications for contact. R01 agreed, expressing concern about the difficulties mothers opposing domestic abuse face in challenging the inevitability of contact since the courts' mantra is that 'children deserve to have both parents'. Neither R01 nor R03 opposed the notion that children 'deserve to have both parents', but both questioned the assumption that children should always have contact, given what is known about the harm caused to children by exposure to domestic abuse.

Concerns about the courts' tolerance of 'bad', or 'good-enough', parenting are consistent with the findings and arguments within the existing literature, which has emphasised how fathers may still be seen as 'safe' despite their perpetration of abuse, with their parenting capacity either being assessed separately from their perpetration of abuse or inadequately explored.<sup>32</sup> Coy et al were critical, for example, of assessments of fathers' parenting capacity being divorced from their perpetration of abuse.<sup>33</sup> Barnett echoed this argument, finding that judicial and professional boundaries of what constitutes a 'safe family man' are broadly drawn, with contact with abusive fathers viewed as 'safe' and the 'quality' of fathers' parenting capacity rarely questioned.<sup>34</sup>

The concern expressed by the domestic abuse organisations above, and solicitors below,<sup>35</sup> that the courts do not neutrally balance the risks and benefits of contact is

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<sup>32</sup> See for example: Harrison (note 21 supra) 382; Thiara and Gill (note 21 supra) 151; Barnett (note 12 supra) 461-462; APPG (note 21 supra) p.12.

<sup>33</sup> Coy, Perks, Scott and Tweedale (note 21 supra) p.11. See also: Harrison (note 21 supra) 397.

<sup>34</sup> Barnett (note 12 supra) 461-462.

<sup>35</sup> See below at 4.1.2.

also consistent with the findings from the existing literature.<sup>36</sup> The All-Party Parliamentary Group on Domestic Violence (henceforth 'APPG') concluded that the push to make contact happen at times 'blind[s] the family court to the potential impact of domestic abuse on children', and that:

... inconsistent implementation of Practice Direction 12J and the embedded culture of "contact with the child, no matter what" has been shown to lead to unsafe child contact.<sup>37</sup>

Barnett's conclusion from her interviews with professionals was that a 'contact at all costs' approach is pursued,<sup>38</sup> and Birchall and Choudhry also recently reached the conclusion that safeguarding and children's wishes and feelings appeared, in some cases, to have been 'outweighed by a pro-contact approach'.<sup>39</sup> Harding and Newnham did not go as far as to argue that the courts promote 'contact at all costs', but they voiced concern following their case file reviews that the courts might be driven more by the end goal of progressing contact than establishing whether contact would meaningfully promote children's best interests.<sup>40</sup> They suggested there might be reason to question, as a result, whether the courts are concerned with 'making contact happen' or 'making contact work'.<sup>41</sup>

Taken collectively, the post-PD12J research suggests that the courts have not fully taken heed of the CASC's warning that the 'traditional concept' of a domestically abusive father nevertheless being a 'good father' had 'to be questioned'.<sup>42</sup> This finds support in the responses of the domestic abuse organisations and several solicitors but, as emphasised above, this was not a unanimously-held view among interviewees, with the judges emphatic about their focus on safety and the barristers and Cafcass practitioners being less critical of judicial practice. A further route to understanding

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<sup>36</sup> See for example: Coy, Perks, Scott and Tweedale (note 21 supra) p.81; Barnett (note 12 supra) 450 and 461-462; APPG (note 21 supra) pp.12 and 26; R. Thiara and C. Harrison, *Safe Not Sorry: Supporting the Campaign for Safer Child Contact* (University of Warwick 2016) pp.2, 4, 8 and 28.

<sup>37</sup> APPG (note 21 supra) pp.12 and 26.

<sup>38</sup> Barnett (note 12 supra) 450 and 461-462.

<sup>39</sup> Birchall and Choudhry (note 21 supra) p.41.

<sup>40</sup> Harding and Newnham (note 21 supra) p.108.

<sup>41</sup> Ibid. This distinction between 'making contact happen' and 'making contact work' was also discussed by Baroness Hale in *Re G (Children)* [2006] UKHL 43, [2006] 1 WLR 2305 [41].

<sup>42</sup> The Advisory Board on Family Law: Children Act Sub-Committee (note 4 supra) p.84.



how the courts balance the risks and benefits of contact is through the lens of what the courts perceive to be 'relevant' domestic abuse which will impact the final contact decision, to which this Chapter now turns.

#### **4.1.2 What constitutes 'relevant' domestic abuse which will impact on the final contact decision?**

The findings from this doctoral research suggest that the way in which the benefits and risks of contact are balanced is filtered through perceptions of whether the abuse is 'relevant' to the contact decision, which is the basis upon which PD12J is premised.<sup>43</sup> PD12J does not, however, set out when domestic abuse should be regarded as 'relevant'. This section explores interviewees' perspectives on what constitutes 'relevant' domestic abuse and considers how these findings relate to the existing literature.

Some of the practitioner interviewees made clear their view that domestic abuse is always regarded as relevant to the courts' decision, and did not elaborate on when domestic abuse would be regarded as particularly relevant.<sup>44</sup> The responses of interviewees who commented on relevance clustered around four findings: cases in which the child has not been directly abused or is not regarded as being at risk of direct harm; cases in which the abuse is regarded as insufficiently serious; cases in which the abuse is regarded as 'historic'; and cases in which the abuse is regarded as 'one-off' or 'situational'.

##### **4.1.2.1 Cases in which the child has not been directly abused or is not regarded as being at risk of direct harm**

As outlined above,<sup>45</sup> the domestic abuse organisations and solicitors were the most critical of all the practitioner groups about the courts' approach to proven and found

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<sup>43</sup> Practice Direction 12J – Child Arrangements & Contact Orders: Domestic Abuse and Harm (October 2017) para 5 (henceforth in footnotes 'PD12J'). See also: *Re V (A Child) (Inadequate Reasons for Findings of Fact)* [2015] EWCA Civ 274, [2015] 2 FLR 1472 [37] (McFarlane LJ). Interviewees within this doctoral research also emphasised that assessments of 'relevance' impact on the extent to which fact-findings will be held, since only allegations which would impact the contact decision will be examined at fact-finding. For discussion of fact-findings, see Chapter 3.

<sup>44</sup> N = 4: B03, C01, C03 and S06.

<sup>45</sup> See above at 4.1.1.1.

domestic abuse. What concerned many of the solicitors in particular were the narrow circumstances in which they thought the courts deem domestic abuse to be relevant to contact, and more specifically the courts' dismissal of domestic abuse as irrelevant to the contact decision unless the child has been abused directly. S02 was among the most critical, stating that 'it is rare for the courts to take domestic violence that seriously'. In her experience, domestic abuse would only have a bearing on case outcomes when there is a direct risk of harm to the child or direct abuse of the child. She said that even if children have witnessed abuse, this will still not impact the court's decision. She gave the example of the rape of a mother when pregnant, explaining that this would be relevant since the rape could directly harm the unborn child, but had the mother not been pregnant, the rape would not have had 'any bearing on contact'.

Even the solicitors who were less critical of the courts than S02 said that domestic abuse will not always be relevant to the courts' decision-making if the children have not been directly abused. S10, for example, stated that the courts make the right calls in 99% of cases, but felt the courts, nevertheless, fail to give sufficient weight to the knock-on impact of domestic abuse perpetrated towards mothers on children. All the other solicitors either felt that the weight given to domestic abuse when the child has not been directly abused was patchy or non-existent, save for S03 who said the courts are always concerned with the impact of abuse on children, and are acutely aware that children do not need to have been directly abused to have been affected by abuse.

The solicitors who thought the weight given to domestic abuse was patchy when a child is not the direct victim made a number of different points on when the court would regard the abuse as relevant. S05 and S07, for example, said the court might be concerned by domestic abuse if it has been witnessed by the children, but the abuse is otherwise rarely regarded as a concern. S04's experience was that abuse between parents can be regarded as relevant, but only when the harm caused is evident, the abuse has been perpetrated over a long period of time and the parent continues to be adversely affected by it. S01, S02 and S08 thought the courts do not see abuse between parents as any barrier to contact, since the separation of the

mother and father is viewed as a sufficient safeguard for contact to move forward. S09 thought the court would still make unsupervised contact orders, even if the child has witnessed abuse.

These findings suggest that the warnings within the existing literature on the risks posed to children by domestically abusive parents, even when children have not been directly abused during the relationship, are not permeating judicial practice.<sup>46</sup> They also suggest, with the exception of S03, that the courts are insufficiently sensitive to the relevance of the impact of the abuse on the primary carer to children's welfare, a finding made in previous studies.<sup>47</sup> Furthermore, as discussed in Chapters 2 and 3, once domestic abuse is conceptualised as a pattern characterised by coercive control, the separation of mother and father during contact ceases to be a sufficient safeguard against harm,<sup>48</sup> a message from the evidence base which again appears not to be permeating judicial practice. If these solicitors' experiences are indicative of broader practice, there may, therefore, be cause for concern.

As a professional group, the barristers were the most positive about judicial practice, but some, nevertheless, gave accounts of practice which corroborate the solicitors' concerns. B05, for example, reported that domestic abuse perpetrated directly towards the parent alone will be seen as relevant by the court 'but only in terms of its impact on the mother with contact moving forward'. This highlights a judicial understanding of the importance of considering the impact of abuse on mothers, an understanding identified as lacking in other studies,<sup>49</sup> but suggests the risk of the child being directly abused during contact is not necessarily being recognised.<sup>50</sup>

All of the judges were keen not to dismiss domestic abuse as irrelevant to the contact decision, but they expressed themselves in different ways in terms of its relevance when the child has not been the direct victim. The responses of some judges

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<sup>46</sup> See for example: M. Hester, C. Pearson, N. Harwin with H. Abrahams, *Making an Impact – Children and Domestic Violence* (2<sup>nd</sup> edn, Jessica Kingsley Publishers 2006) p.60-61 and pp.67-68; L. Radford and M. Hester, *Mothering Through Domestic Violence* (Jessica Kingsley Publishers 2006) pp.52-53. See further the discussion in Chapter 2.

<sup>47</sup> See for example the concerns raised by the APPG (note 21 supra) p.19. See also: A. Mullender, G. Hague, U. Imam, L. Kelly, E. Malos and L. Regan, *Children's Perspectives on Domestic Violence* (Sage 2002) p.162. See further the discussion in Chapter 2.

<sup>48</sup> See Chapter 2 at 2.2.3.1 and Chapter 3 at 3.1.1.

<sup>49</sup> See for example: Coy, Perks, Scott and Tweedale (note 21 supra) p.12; APPG (note 21 supra) p.19.

<sup>50</sup> See Chapter 2 at 2.1.2.

demonstrated the perception that abuse directed towards parents does not equate to the child being at risk of harm. J04-DJ, for example, said:

There might have been abuse between you two but that doesn't mean he is going to be dangerous for the children.

J06-DJ explained that abuse directed towards a parent rarely impacts on the decision of whether contact should go ahead because the courts' focus is on ensuring that contact can take place safely:

You know, usually contact should still take place. You know, even children whose fathers have been murderers, they may well still have the right to know their father, it seems to me. And I think that's the way the law is going. What it is about is managing the contact safely ... so it's about making it safe but, generally, I'm not sure that even if there is some quite serious abuse, I am not sure that it prevents contact taking place.

This judge was particularly open about the difficulty s/he experienced in determining if allegations of sexual abuse of the child's parent, if found to be true, would have an impact on the contact decision, attempting to balance the impact on the mother against the 'right of the child' to have contact. S/he identified the need for enhanced judicial training on identifying when, and how, domestic abuse should impact the contact decision. In the light of the importance of judges being alert to the potential for domestically abusive parents to direct their abusive behaviour towards children, even if the child has not been a direct victim at the time of proceedings,<sup>51</sup> this call for enhanced training is important. This judge still felt, however, that judicial understanding of domestic abuse had progressed significantly:

I think we all understand that continuing to witness domestic abuse, ignoring the violence is very dangerous to children. I don't think any of us have a problem with that. We are all quite well-educated in that respect,

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<sup>51</sup> See Chapter 2 at 2.1.2.

I think. Quite accepting of that. You know, the concept of judges thinking “Well, it’s alright to have a bit of a slapping about”. I think that genuinely really has gone now.

Four judges identified the relevance of the impact of the domestic abuse, and the potential impact of the contact arrangements, on the parent subjected directly to the abuse.<sup>52</sup> J06-DJ, however, expressed concern that the psychologically destabilising effect of domestic abuse on the primary carer was not being robustly addressed within the current system. This judge’s experience was that this impact on the primary carer occurred ‘actually relatively rarely’ but cautioned that this might be explained more by the court system being ‘ill-equipped to recognise ... and diagnose’ this psychological impact than its incidence being rare. The courts’ failure to identify the psychological distress caused by contact to parents has been a finding in earlier studies.<sup>53</sup>

Even among the judges who emphasised the importance of considering the safety and well-being of the mother within the assessment on whether contact should go ahead, the impact of the pro-contact stance remained clear. J05-CJ, for example, explained the tension s/he felt existed between taking into account the safety of both the mother and child, and promoting the child’s ‘right’ to contact:

And then from our point of view it’s are they the sort of things that are going to have an impact on contact? Not just on whether it’s safe for the child to have contact but whether it’s safe for the woman to have contact, so we have to look at both of those things. I would like to think we wouldn’t just dismiss any such allegations unless it’s sort of “as we were breaking up he gave me the odd shove”, which is not going to really get anywhere but ... it’s a very difficult balance because of the child’s right to see the parent and often you’ve got other information telling you the child really wants to see that parent.

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<sup>52</sup> N = 4: J05-CJ, J06-DJ, J07-CJ and J10-DJ.

<sup>53</sup> See for example: Barnett (note 12 supra) 445.

The harm caused to children by witnessing domestic abuse was also identified by other judges, who pointed out that if the child has witnessed the abuse, then the abuse will be particularly relevant to the courts' decision.<sup>54</sup> These judges were not, however, stating that abuse is irrelevant in all other circumstances.

#### 4.1.2.2 Cases in which the abuse is regarded as insufficiently serious

Some of the legal practitioner interviewees reported that abuse regarded as insufficiently serious will not impact the case outcome.<sup>55</sup> This was confirmed by some of the judicial interviewees,<sup>56</sup> and was of particular concern to some of the solicitors. S08, for example, said it had to be an 'obvious' case of serious physical violence, such as rape, before the court would consider it relevant to the case outcome. She was concerned by this discounting of 'low-level' abuse since pushing forward with contact may be the correct approach in some cases, but in others it could mean the risks posed by the domestically abusive parent are not properly assessed. She questioned, as a result, whether 'the system we have got in place at the moment is actually effectively dealing with domestic abuse'. B07 was less critical but also pointed to the extreme conditions in which domestic abuse is deemed relevant to the courts' decision on whether contact should go ahead, identifying these as cases in which the parent has been killed or has required medical treatment.<sup>57</sup>

These responses suggest that the courts are working with what Coy et al have described as an 'implicit threshold'<sup>58</sup> or 'personal calculus of threat'<sup>59</sup> on when domestic abuse is deemed relevant to the contact decision, which is set at a high level.<sup>60</sup> That the courts are working with this 'implicit threshold' or 'personal calculus' was confirmed by some of the judicial interviewees. J09-DJ, for example, questioned the relevance of financial abuse to the contact decision when there is no other evidence of control. J05-CJ identified the forms of abuse which might be identified as

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<sup>54</sup> N = 5: J02-M, J03-M, J04-DJ, J06-DJ and J07-CJ.

<sup>55</sup> N = 6: B07, S02, S04, S05, S07 and S08.

<sup>56</sup> N = 3: J04-DJ, J05-CJ and J09-DJ.

<sup>57</sup> B07 said that even in cases of medical treatment, the 'court won't necessarily stop contact but will look to ensure that the parents don't come into actual contact'.

<sup>58</sup> Coy, Perks, Scott and Tweedale (note 21 supra) p.52.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid. See also: Barnett (note 12 supra) 452.

lacking relevance to the contact decision as ‘more of the mutual shoving’, which is ‘very concentrated at the time of the breakup’. And J04-DJ said that the relevance of abuse can hinge on an assessment of its severity, with abuse limited to ‘handbags at dawn’ not impacting the contact decision.

There are numerous warnings in the existing literature on the dangers of dismissing allegations of abuse as ‘minor’. Women’s Aid, for example, has emphasised that ‘seemingly minor incidents’ can form ‘part of ongoing patterns of significant and highly dangerous controlling behaviour’.<sup>61</sup> Barnett has also warned that the filter of ‘minor’ or ‘petty’ abuse reveals a judicial failure to ‘contextualise’ the abuse within the ‘gendered power and control dynamics of domestic violence’.<sup>62</sup> Without information on the specific facts to which J05-CJ and J04-DJ were referring, it is not possible to reach conclusions on the extent to which abuse is being unduly minimised in practice, but the importance of thorough investigation, which is sensitive to the perpetration of abuse as part of a pattern, before allegations are dismissed as ‘minor’ is clear.

#### 4.1.2.3 Cases in which the abuse is regarded as ‘historic’

Some interviewees shared their experiences of the courts’ dismissal of ‘historic’ domestic abuse.<sup>63</sup> S07 suggested that parents can be disadvantaged if they raise ‘historic’ incidents, since these are seen by the court as a distraction from the best interests of the child.<sup>64</sup> S02 and S05 made similar points, and S05 was concerned in particular by what she saw as the courts’ insistence on looking forward, rather than back, particularly in cases where there is no ‘hard’ evidence. S01 said that ‘historic’ incidents of domestic abuse remain relevant, but the length of time since the abuse was perpetrated will affect the weight given to them.<sup>65</sup> Some of the comments from the judges also pointed to the potential dismissal of ‘historic’ abuse as irrelevant to

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<sup>61</sup> Women’s Aid, *Nineteen Child Homicides: What Must Change So Children Are Put First in Child Contact Arrangements and the Family Courts* (Women’s Aid 2016) p.27.

<sup>62</sup> Barnett (note 12 supra) 445.

<sup>63</sup> N = 5: B04, B07, S02, S05 and S07.

<sup>64</sup> That the parent raising the domestic abuse needs to be mindful of her presentation in court more generally was also highlighted, with S06 pointing out that it is important, as the parent’s solicitor, to manage carefully the way in which domestic abuse is raised so that raising the abuse does not ‘inflammate the situation’.

<sup>65</sup> S01 was not critical of this approach.

the contact decision.<sup>66</sup> J09-DJ, for example, said that in cases where the couple have been together for a ‘number of years’ and the parent only makes the allegations at the stage of the case reaching court, then these allegations, even if found to be true, would not have a bearing on the court’s decision on contact.

Along with the filter of ‘minor’ domestic abuse, the courts’ dismissal of ‘past’ or ‘historic’ domestic abuse has also been raised as a concern within existing studies. Hunter and Barnett found that allegations of abuse were being dismissed on the basis of them being too ‘old’, and a minority of their respondents stated that they would advise their clients not to put allegations to the court if they are ‘old’ or ‘historic’.<sup>67</sup> Barnett also identified a problem with ‘old’ or ‘historical’ domestic abuse being regarded as irrelevant to the contact decision, which she attributed to the courts’ legalistic conceptualisation of domestic abuse as isolated incidents.<sup>68</sup> This trend can also be discerned within some of the reported case law.<sup>69</sup> The problem with this approach is that, as Hunter and Barnett have emphasised, dismissing allegations as ‘historic’ can overlook how they form part of ‘a pattern of controlling behaviour, in which ‘old’ incidents have a continuing terrorizing effect’.<sup>70</sup>

#### 4.1.2.4 Cases in which the abuse is regarded as ‘one-off’ or ‘situational’

As Chapter 3 explored, there is an argument that there are different strands of domestic abuse, with some abuse being ‘situational’, and confined to a particular relationship, and other abuse being characterised by coercive control, which endures after the relationship has ended.<sup>71</sup> Some interviewees used this distinction in the context of proven or found domestic abuse.<sup>72</sup> B02 said a ‘key’ indicator of when domestic abuse will impact the courts’ decisions on contact will be when the abusive parent ‘basically cannot contain themselves’, as opposed to when the abuse is perpetrated as a ‘one-off event when someone has lost control’. J04-DJ made the

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<sup>66</sup> N = 2: J05-CJ and J09-DJ.

<sup>67</sup> Hunter and Barnett (note 12 supra) pp.27 and 34.

<sup>68</sup> Barnett (note 12 supra) 445.

<sup>69</sup> See for example: *Re V (A Child) (Inadequate Reasons for Findings of Fact)* (note 43 supra) [34] and [37] (McFarlane LJ); *Re K (Contact)* [2016] EWCA Civ 99, [2017] 1 FLR 530 [13] (King LJ). For further discussion, see for example: Barnett (note 17 supra) 391-392.

<sup>70</sup> Hunter and Barnett (note 12 supra) p.17. See also: Barnett (note 12 supra) 445.

<sup>71</sup> See Chapter 3 at 3.1.3.

<sup>72</sup> N = 4: B02, J04-DJ, J05-CJ and J07-CJ.



same point, emphasising the importance of establishing if the parent is inherently abusive or whether the abuse was limited to a particular situation. J07-CJ agreed, explaining that domestic abuse will be relevant to the contact decision when it looks likely to continue. J04-DJ's reference to 'handbags at dawn' further suggests the courts are working on the basis of drawing distinctions between 'domestic abuse' and abuse which is mutually perpetrated, with the latter not of concern to the court. J05-CJ also made this point, explaining that abuse would not be regarded as relevant when it is 'all very concentrated at the time of the breakup':

... I think it's recognised at the time of the breakup people don't always behave at their best, so I think if it's very much limited at the time of the breakup and there's no other suggestion of it and it wasn't particularly bad [it would not be regarded as relevant].

As Chapter 3 emphasises, immense care has to be exercised before reaching the conclusion that abuse perpetrated within a relationship is not coercive control-based domestic abuse.<sup>73</sup> There are risks, therefore, in using these distinctions within a filter of 'relevant' domestic abuse, and it is crucial that abuse is not readily dismissed as situational without first undertaking thorough investigation. In the light of the tendency of abuse to escalate on separation,<sup>74</sup> the extent to which reliable assessments can be made of the likelihood of abuse ceasing on separation is also in doubt.

#### 4.1.2.5 Should there be a filter of 'relevant' domestic abuse?

If there were clear-cut circumstances in which domestic abuse is 'relevant' or 'irrelevant' to the contact decision, the logic of using such a filter is clear. The problem is that there are no neat categories in relation to domestic abuse, particularly when

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<sup>73</sup> See Chapter 3 at 3.1.3. The APPG also raised concerns about the courts' assumption that abuse ends on separation: APPG (note 21 *supra*) p.12.

<sup>74</sup> See for example: M. P. Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57(2) *Journal of Marriage and Family* 283, 286; A. Mullender, G. Hague, U. Imam, L. Kelly, E. Malos and L. Regan, *Children's Perspectives on Domestic Violence* (Sage 2002) pp.202-203; C. Humphreys and R. Thiara, *Routes to Safety: Protection Issues Facing Abused Women and Children and the Role of Outreach Services* (Women's Aid Federation of England 2002) p.90.

the abuse is conceptualised with coercive control at its core: that the child has not been directly abused at the time of the contact application does not mean that the child will not become a direct victim post-separation; that abuse is considered ‘minor’ does not mean this abuse does not form part of a high-risk pattern of coercive and controlling behaviour; that physical abuse was perpetrated in the ‘past’ is no guarantee that it will not be used as an instrument of control post-separation; and that abuse appears to be confined to a particular relationship is no guarantee that the abuse does not have coercive control at its core, with the risks posed by the domestically abusive parent enduring after separation. How the courts’ pro-contact stance and use of the ‘relevance’ filter translates into outcomes in cases of proven or found domestic abuse is the focus of the next section.

## **4.2 OUTCOMES – HOW DOES THE PRO-CONTACT STANCE TRANSLATE INTO OUTCOMES IN CASES OF PROVEN OR FOUND DOMESTIC ABUSE?**

Judicial authority is clear that proven or found domestic abuse is no automatic barrier to contact.<sup>75</sup> PD12J similarly does not rule out contact in cases of proven or found domestic abuse, instead setting out a number of factors for the court to consider in deciding whether to make an order for contact<sup>76</sup> and instructing the court to ‘ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.’<sup>77</sup> This reference to ‘unmanageable’ rather than ‘any’ risk suggests that the expected approach is risk management, in which contact should go ahead provided the risk of harm can be controlled.<sup>78</sup> PD12J also makes clear that when direct contact is not deemed appropriate, the court has to consider if an order for indirect contact would be safe and beneficial for the child, again sending the message to the court of the importance of maintaining some form

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<sup>75</sup> *Re LVMH* (note 7 supra) 273 (Butler-Sloss P).

<sup>76</sup> PD12J (note 43 supra) para 37. This provision in the 2014 iteration of PD12J was expressed in similar terms.

<sup>77</sup> *Ibid* para 35. See also para 36. This wording is new within the 2017 iteration of PD12J. The 2014 iteration directed the court to ensure that any order for contact will be ‘safe and in the best interests of the child’. The courts must follow the approach set out in *Re L* (note 7 supra) and PD12J. See for example, *Re W (Children: Domestic Violence)* [2012] EWCA Civ 528, [2014] 1 FLR 260.

<sup>78</sup> Harding and Newnham found evidence of this risk management approach prior to the revisions to PD12J made in 2017 (note 21 supra) p.46. ‘Risk management’ was also the terminology used by J03-M in describing the approach adopted by the court in contact disputes in which domestic abuse is an issue.

of contact wherever possible.<sup>79</sup> The version of PD12J in force at the time of the interviews expressed these messages in broadly similar terms, and it is suggested that the 2017 amendments will not introduce major change to the courts' approach.<sup>80</sup>

The question of how the courts' pro-contact stance translates into outcomes in cases of proven or found domestic abuse is assessed here through two lenses: first, interviewees' experiences of outcomes reached in cases in which domestic abuse is found or proven; and second, interviewees' perspectives on two fictional vignettes. The core findings through both lenses are consistent with those from existing research: it is extremely rare for some form of contact to be refused, even when the parent has perpetrated domestic abuse; orders for direct contact are common; and the aim, wherever considered possible and safe to do so, is to progress contact from monitored to less monitored forms.<sup>81</sup>

#### **4.2.1 How common is the outcome of no contact in cases of proven or found domestic abuse?**

There are two ways in which a domestically abusive parent can leave court without any contact: the court can expressly prohibit contact from taking place through an order; or the court can use the 'no order' principle,<sup>82</sup> with the effect that contact will not take place, but the court has not specifically ordered against contact. A consistent finding across all the practitioner groups in this doctoral research was that it is extremely rare for an abusive parent to be refused any form of contact by the court, whether through a specific order or no order. All of the representatives from the domestic abuse organisations,<sup>83</sup> eight solicitors,<sup>84</sup> six barristers,<sup>85</sup> eight Cafcass practitioners<sup>86</sup> and eight judges<sup>87</sup> said it would only be in an extremely rare case that the domestically abusive parent would leave court with no contact at all. As B02 said:

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<sup>79</sup> PD12J (note 43 supra) para 39. The wording in the 2014 and 2017 iterations of PD12J are almost identical on this point.

<sup>80</sup> The reference to 'unmanageable risk of harm' is new in the 2017 iteration of PD12J. The 2017 iteration of PD12J is discussed in the Conclusion to this thesis.

<sup>81</sup> See below at 4.2.1 and 4.2.3.

<sup>82</sup> Children Act 1989, s 1(5).

<sup>83</sup> N = 3: R01, R02 and R03.

<sup>84</sup> S01, S02, S04, S05, S07, S08, S09 and S10.

<sup>85</sup> B01, B02, B04, B05, B07 and B08.

<sup>86</sup> C01, C03, C04, C05, C06, C07, C09 and C10.

<sup>87</sup> J01-M, J02-M, J04-DJ, J05-CJ, J06-DJ, J08-DJ, J09-DJ and J10-DJ.

I can probably count on the fingers of one hand in thirty-five years when there's no [contact].

A number of solicitor and domestic abuse organisation interviewees in particular described the 'extreme' circumstances which have to exist before the courts would be willing to refuse contact. S02, who was among the most critical of the courts' approach, said that fathers can have done 'horrendous things to women' but still be permitted contact with their children by the court, since the court does not want to give up on contact. S10's experience was that no contact outcomes tended to be reserved for cases such as those in which there have been convictions for multiple rapes and false imprisonment of the parent, or when the child has been directly abused.

The relevance of 'serious' abuse coupled with a father being unable to 'control' himself to orders for no contact was also underlined by some interviewees. R03 said the court would only be willing to refuse contact in cases where there is 'some pretty serious child abuse', or the domestic abuse is seen to be perpetrated in such an 'obsessive' manner that the perpetrator cannot 'control himself'. S04 said that the refusal of contact tended to be confined to the cases of 'really serious' violence and those in which 'it's obvious that the father hasn't learned any lessons and is continuing with his behaviour' by, for example, consistently breaching protective orders. S05 agreed that fathers who persistently breach protective orders will not be viewed favourably by the court and gave the following example to illustrate the circumstances which have to exist before contact will be refused: contact could be refused if the mother was physically and emotionally abused when pregnant, the abuse was witnessed by children, the children were attacked directly, and the father then continued to breach protective orders.

The barrister and Cafcass practitioner interviewees gave similarly extreme examples of when contact would be refused. C03, for example, described the '[r]eally, really grave' circumstances which have to exist before the court will order no contact, such as where the abusive parent is 'really, really dangerous, someone who will be

perceived as a really dangerous perpetrator or someone who has not got the insight'. C09 said that contact will only be refused when the abuse is 'going to be either repeated, transmitted to the child or is not going to change'. B02 said the type of abuse which has to be present before the court will order no contact would have to be at the level of, for example, an abusive parent having been imprisoned for assaults on the child.

That it is only in 'extreme' cases that contact would be refused was also confirmed by the majority of the judges. J04-DJ, for example, explained that it would have to be a 'very, very high end' case to justify a no contact outcome, such as where the child has not formed a view on contact and the father is a 'sexual predator' who has been 'found guilty of or a finding of fact for sexual abuse'. J06-DJ said the courts' approach is geared towards managing contact through, for example, requiring the parent to go on a perpetrator programme, rather than refusing contact. J01-M emphasised that a father retains a 'right' to contact, even in extreme cases:

Probably only 10%, 15% maybe, of cases that we look at where we could say really no contact is ... obviously if you've got a mass murderer as a dad you don't want to see that dad, but he still has a right, still his child, so you've got to be looking at everything.

A minority of interviewees had greater experience of no contact orders being made but their responses still suggested that such orders are not being regularly made.<sup>88</sup> B06 said orders for no contact are made, but this is an outcome reached reluctantly by the court. J03-M said that orders for no contact are 'not uncommon', but when describing the scenarios which would result in no contact, said that these were 'relatively rare'. J07-CJ said that orders for no contact are neither rare nor commonplace. Only three interviewees across the practitioner groups suggested the courts regularly make orders for no contact,<sup>89</sup> although C02 had not had a case resulting in no contact 'for some time'. Significantly, S03 worked predominantly on

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<sup>88</sup> The remaining interviewees did not comment on prevalence.

<sup>89</sup> B03, C02 and S03.

the more 'serious' cases and acknowledged that her experiences may not, therefore, be representative.

Existing research based on parents' and practitioners' perceptions of outcomes corroborates this finding that an outcome of no contact is extremely rare in cases of proven or found domestic abuse. Barnett concluded from her interviews with practitioners that the no contact outcome had 'almost passed into the realms of the unimaginable'.<sup>90</sup> None of the 71 professionals interviewed in Thiara and Gill's research could think of examples from their professional experience over a 10-year period in which some form of contact, whether direct or indirect, had not been ordered.<sup>91</sup> Twenty-five of the 31 cases in Coy et al's study which involved court proceedings resulted in an order for contact being made,<sup>92</sup> with the remaining cases either at an early stage of proceedings, or an order was pending.<sup>93</sup> Nearly three quarters of respondents (73%) in Hunter and Barnett's study said that orders for no contact were made 'occasionally',<sup>94</sup> which suggests these orders are more prevalent than the other studies indicate but that they are, nevertheless, uncommon. In the most recent study published by Birchall and Choudhry, 11% of the women surveyed said they left court with a no contact order,<sup>95</sup> which also suggests that no contact orders are not non-existent but are, nevertheless, rare.<sup>96</sup>

Harding and Newnham's case file reviews similarly identified the refusal of contact as an uncommon outcome.<sup>97</sup> Proven domestic abuse alone was found rarely to be a reason to order no contact; it was instead domestic abuse coupled with additional factors, such as fathers' attitudes, which tipped the balance away from contact.<sup>98</sup> In the Cafcass and Women's Aid joint review of case files, no contact orders were found to be an extremely rare outcome (only 2% of cases), and cases in which no order was

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<sup>90</sup> Barnett (note 12 supra) 454.

<sup>91</sup> Thiara and Gill (note 21 supra) p.106.

<sup>92</sup> Coy, Perks, Scott and Tweedale (note 21 supra) p.61.

<sup>93</sup> Ibid.

<sup>94</sup> Hunter and Barnett (note 12 supra) p.56.

<sup>95</sup> It is unclear from the wording of the study if the order was specifically that there should be no contact, or whether the court declined to make an order for contact: Birchall and S. Choudhry (note 21 supra) p.38.

<sup>96</sup> Ibid.

<sup>97</sup> Harding and Newnham (note 21 supra) pp.103 and 131.

<sup>98</sup> Ibid pp.77-78.

made were also rare (8% of cases).<sup>99</sup> This, however, was based on allegations of domestic abuse; it is not known in how many cases of proven or found domestic abuse the outcome was no contact. Taken as a whole, the findings from this doctoral research and the existing studies indicate clearly that it is a highly unusual outcome for a domestically abusive parent to leave court without some form of contact.

#### 4.2.1.1 How common are orders for direct contact in cases of proven or found domestic abuse?

The next question is how often *direct* contact is ordered in cases of proven or found domestic abuse. ‘Direct’ contact means that the parent and child will see each other face-to-face, but this could take the form of supervised or supported contact at a contact centre, contact supervised by a relative, or unsupervised contact.<sup>100</sup> All but one judge indicated that most orders for contact in cases involving proven or found domestic abuse are for a form of direct contact, although indirect contact can be a more common outcome than no contact at all.<sup>101</sup> J08-DJ, for example, said s/he has ‘been a judge [for a long time]’<sup>102</sup> and ‘could probably count on both hands the number of no or indirect only orders’ s/he has made. Several of the practitioner interviewees and domestic abuse organisations shared this view.<sup>103</sup> R01, for example, explained that in the past six years of working with victims of domestic abuse, she had only ‘known of one case where it has just been letterbox contact with dad’.

This finding that it is uncommon for a parent not to be permitted direct contact, even in cases of proven or found domestic abuse, is consistent with the findings from existing research based on parents’ and practitioners’ experiences of outcomes. Many of the practitioner interviewees in Barnett’s research, for example, reported that no direct contact was ‘hardly ever’ or ‘very rarely’ the outcome of an application for

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<sup>99</sup> The report sets out that no order was made in 12% of cases but 5 of these cases were withdrawn, bringing the percentage down to 8%: Cafcass and Women’s Aid, *Allegations of Domestic Abuse in Child Contact Cases: Joint Research by Cafcass and Women’s Aid* (Cafcass and Women’s Aid 2017) p.21.

<sup>100</sup> Although the most recent iteration of PD12J now directs the court that: ‘Where a risk assessment has concluded that a parent poses a risk to a child or to the other parent, contact via a supported contact centre, or contact supervised by a parent or relative, is not appropriate’. See: PD12J (note 43 supra) para 38.

<sup>101</sup> N = 9: J01-M, J02-M, J03-M, J04-DJ, J05-CJ, J06-DJ, J08-DJ, J09-DJ and J10-DJ.

<sup>102</sup> Time period redacted to avoid risk of jigsaw identification.

<sup>103</sup> N = 15: B01, B02, B05, B07, C01, C03, C07, C09, C10, S02, S04, S07, R01, R02 and R03. The remaining interviewees did not comment, rather than stating that orders for no direct contact are commonplace.

contact, even once it was accepted that there had been domestic abuse.<sup>104</sup> Of the final orders for contact in Coy et al's study, direct forms of contact outnumbered indirect forms.<sup>105</sup> Research based on case file reviews have also found that domestic abuse is not a barrier to direct contact. Harding and Newnham found that proven or investigated<sup>106</sup> domestic abuse was present in 32% of cases in which overnight contact was ordered and 26% of the daytime face-to-face contact orders.<sup>107</sup> And in Women's Aid and Cafcass' recent research, 50% of cases involving domestic abuse allegations ended with a form of direct contact, with the remainder being no direct contact (19%) or unknown (31%).<sup>108</sup> Again, however, the insights provided by this study are limited by its focus on allegations of domestic abuse; it is not known what outcomes were reached in cases of proven or found domestic abuse.

#### 4.2.2 Is unsupervised contact the end goal in cases of proven or found domestic abuse?

Direct contact is of course an umbrella term encompassing different forms of contact with different levels of monitoring. The contact could take place on a supervised or supported basis at a contact centre, be supervised by a relative, or take place on an unsupervised basis. Some studies have expressed concern about the prevalence of unsupervised contact orders for domestically abusive parents.<sup>109</sup> Hunter and Barnett's major study, however, found that the most common final orders following either admission of domestic abuse or positive findings of fact were reported to be for supervised contact, indirect contact or supported contact.<sup>110</sup> The problem with this approach, as Hunter and Barnett pointed out, is that supported and supervised contact cannot continue indefinitely.<sup>111</sup> Beyond the anecdotal evidence given by some respondents, what was unknown was how long the supervised and supported contact

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<sup>104</sup> Barnett (note 12 supra) 451.

<sup>105</sup> Coy, Perks, Scott and Tweedale (note 21 supra) p.61.

<sup>106</sup> Defined as 'allegations of domestic violence which would have met the LASPO criteria for evidence or were serious enough to have prompted investigation': Harding and Newnham (note 21 supra) p.106.

<sup>107</sup> Harding and Newnham's review was based on a retrospective sample of 174 parent case files from 2011: *ibid.*

<sup>108</sup> This was based on a sample of 133 cases: Cafcass and Women's Aid (note 99 supra) p.21.

<sup>109</sup> See for example: Coy, Perks, Scott and Tweedale (note 21 supra) p.69; Birchall and Choudhry (note 21 supra) p.38.

<sup>110</sup> Hunter and Barnett (note 12 supra) p.56. These orders were judge-made or were made by consent.

<sup>111</sup> *Ibid* p.56.



arrangements endured, and whether, and if so on what basis, they were ‘progressed’ on.<sup>112</sup>

It is, therefore, significant that the staggering of contact – in which contact is started off on a supervised or supported basis with supervision or support decreasing over time – was highlighted as common practice by a significant proportion of interviewees within this doctoral research.<sup>113</sup> These interviewees reported that even if unsupervised contact is not granted at the outset, the courts work on the basis that contact should be progressed wherever possible, building up from more restrictive forms of contact to the end goal of unsupervised contact. Only a minority of interviewees had experience of orders for long-term supervised contact.<sup>114</sup> Interviewees who did not specifically identify the courts’ approach as being that contact should be built up to unsupervised also emphasised that supervised contact only ever takes place in the short term.<sup>115</sup>

It appears, therefore, that the aim is to progress contact over time, even if unsupervised contact is not ordered at the outset. J02-M, for example, described contact is a ‘work in progress’, in which the courts ‘always try and work to the next level’. S05 also said that the ‘goal is always to progress’ contact on. S09 said that parents ‘have just got to play the game for long enough’, so if the parent acts remorsefully, claims to be a reformed person and undertakes a period of supported or supervised contact, they will be given unsupervised contact. This was also the approach adopted by the court in the experience of R01, who said that even in cases in which the parent ‘has been convicted as a risk to children’, the court might order supervised contact ‘but the end goal is always to bring that down to [unsupervised] contact’. This echoes the conclusions of Thiara and Gill.<sup>116</sup> Harding and Newnham also

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<sup>112</sup> Ibid p.57.

<sup>113</sup> N = 20: B02, B03, B05, B06, B07, C07, C08, J02-M, J03-M, J04-DJ, J05-CJ, J08-DJ, R01, R03, S01, S02, S05, S06, S07 and S09. J03-M said that long-term supervised contact ‘is not unbelievable’ but had not had experience of a case in which this was ordered.

<sup>114</sup> N = 5: B06, J05-CJ, J07-CJ, J10-DJ and S03. B06, J05-CJ, J07-CJ and S03 defined supervised contact as including supervision by relatives. B06 and J05-CJ said there can be long-term orders for contact supervised by relatives, but these are not ‘typical’. J10-DJ said there are major resourcing restrictions with long-term supervised contact, which limit its feasibility as a solution in practice.

<sup>115</sup> N = 6: B04, C09, C10, J06-DJ, S08 and S10. S10 had experience of cases being supervised long-term, but nevertheless described long-term supervision as a rare outcome.

<sup>116</sup> Thiara and Gill (note 21 supra) p.105. The interviews were conducted with: professionals (71 interviews), women (45 interviews) and children (19 interviews). The ‘professionals’ comprised: domestic violence services (18), Cafcass

found in their case file review that the courts took a ‘pragmatic, problem-solving attitude’ towards the risks posed by domestic abuse,<sup>117</sup> with the supervision of handovers, or the arrangement of handovers to take place at school, seen as satisfactory methods for minimising risk.<sup>118</sup> The courts’ goal, they found, was to increase contact gradually.<sup>119</sup> This practice was raised as a concern by the APPG.<sup>120</sup>

The extent to which this approach is appropriate hinges on the quality of monitoring processes and the robustness of risk assessment. Two of the domestic abuse organisations were concerned about the artificiality of observed contact sessions, and the ease with which domestically abusive parents can perform well during these sessions but remain a risk to the child or other parent. R01 was particularly worried about the weight placed on observed contact sessions as a measure of whether contact ought to progress since ‘some people are good at putting on a show’ when they are under observation. This was also the point emphasised by R03, who thought the courts’ end goal was shared care, subject to satisfactory reports along the way. R03 found this practice concerning since reports tend only to capture overtly abusive behaviour and not perpetrators’ more pernicious manipulation of the system by portraying themselves as ‘charming’.<sup>121</sup> C07 voiced concern about the extent to which risk can be managed in the long-term with staggered orders. She identified the prevalence of staggered orders as stemming from the pressure to reach final orders and warned that:

... of course it’s much easier in the short-term to manage risk and make assessments and think how you are going to manage it but it’s the unknown in the long-term ... .

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(17), contact centres (7), solicitors (7), barristers (7), judges (4), children’s guardians (2), CYP and families (2) and multi-agency professionals group discussion (10).

<sup>117</sup> Harding and Newnham (note 21 supra) p.108.

<sup>118</sup> Ibid p.106.

<sup>119</sup> Ibid p.108.

<sup>120</sup> APPG (note 21 supra) p.19.

<sup>121</sup> For similar concerns raised in the existing literature, see for example: F. Morrison, “‘All Over Now?’ The Ongoing Relational Consequences of Domestic Abuse through Children’s Contact Arrangements’ (2015) 24 *Child Abuse Review* 274, 279.

While some interviewees did not think long-term supervised contact was in children's best interests,<sup>122</sup> evident in other interviewees' responses was the significance of the lack of resourcing for supervised contact in pushing the progression of contact to less restrictive forms.<sup>123</sup> S02's experience was that the courts are now willing to take more risks in progressing contact because contact cannot continue long-term on a supervised basis:

The problem with supervised contact is that it is mega expensive. When you are talking about proper supervised contact – in a room, it is being recorded with a person there making notes who is a social worker/some type of thing like that, you are looking at £100 an hour, plus admin fees, plus everything and it's usually a minimum of two hours. So, a lot of people can't afford it. And I think with the changes to legal aid, or it being obliterated, the court, I think ... got to be careful, I think that they do take more risks than they used to. Because they have to weigh out 'should this child have a relationship with its father?' over him not being in a position to afford to move forward because no-one else is going to pay for that supervised contact. [emphasis added]

R03 also commented on it having become a mantra of practitioners that contact cannot stay supervised:

... everyone is like "well, there is an expectation that you are going to move on after a certain amount of time from supervised". And I am like "Why? This isn't based on the father becoming safe". ... I don't understand what it is about supervised, the five sessions of supervision, which is meant to alter something in his head to stop him from being a risk or he wasn't a risk in the first place.

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<sup>122</sup> N = 6: B03, B07, C08, C09, C10 and J04-DJ.

<sup>123</sup> N = 5: C07, C10, J04-DJ, J08-DJ and S02. In addition to supervised contact not being seen as beneficial to children, C10 and J04-DJ also thought the push to move away from supervised contact was resource-driven.

Some interviewees expressed the different concern that when the parent cannot afford the supervised sessions, contact ceases or will only be indirect.<sup>124</sup>

Whilst care needs to be taken not to oversimplify practice and downplay developments in judicial understanding of domestic abuse, the overall finding that the courts' goal is to promote contact, building up to unsupervised forms wherever possible, is not entirely dissimilar to findings from the pre-PD12J case file reviews.<sup>125</sup> While unsupervised contact may now be a less common immediate outcome in response to an application for contact than it was prior to the introduction of PD12J, there is evidence that the courts' approach is to stagger contact orders, building up to less restrictive forms of contact. And the major question is how robust the monitoring is of this staggering of contact. The concerns voiced by interviewees above, along with the limited capacity to bring cases back to court for review<sup>126</sup> and the financial tensions discussed in Chapter 6, give reason for concern about the quality of this monitoring.

#### 4.2.3 Vignettes

In addition to providing insights into the outcomes reached in cases in which domestic abuse is found or proven based on their own practice experience, interviewees were asked to comment on the likely outcome in two fictional vignettes, taking all of the allegations as proven.<sup>127</sup> Taking the allegations as proven does of course introduce some artificiality into the exercise, and interviewees' responses should be read with this qualification in mind.<sup>128</sup> The vignettes still have the strength, however, of moving interviewees' focus from the macro to the micro. Taken as a whole, interviewees' responses to the vignettes corroborate the findings above on interviewees' perspectives on the outcomes usually reached in contact disputes in which domestic

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<sup>124</sup> N = 2: B08 and J10-DJ.

<sup>125</sup> See for example: A. Perry and B. Rainey, 'Supervised, Supported and Indirect Contact Orders: Research Findings' (2007) 21(1) *International Journal of Law, Policy and the Family* 21, 29 and 40; J. Hunt and A. Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008, pp.9, 11, 16, 18 and 84. See also: R. Aris and C. Harrison, *Domestic Violence and the Supplemental Information Form C1A* (Ministry of Justice Research Series 17/07 December 2007) p.34.

<sup>126</sup> See below at 4.3.1.

<sup>127</sup> The majority of interviewees commented on the vignettes, but some interviewees did not due to lack of time in the interview (C06, C07 and J09-DJ).

<sup>128</sup> Interviewees were also asked if the court would hold a fact-finding in either vignette, the core finding being that interviewees thought a fact-finding was more likely in Vignette Two than Vignette One. Space, however, prohibits a discussion of these findings.

abuse is found or proven: direct contact is the norm; a risk management approach is adopted, in which the focus is on finding ways for contact to take place safely; and the goal is to progress contact from more restrictive forms to unsupervised contact, wherever it is considered safe and possible to do so.

#### 4.2.3.1 Vignette One<sup>129</sup>

A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother opposes all contact. She alleges that the father has been emotionally and psychologically abusive towards her throughout their seven-year relationship. She maintains that the father used to try to make her feel like she was losing her mind by, for example, putting the gas on and claiming the mother had forgotten to turn it off. She also alleges that he grabbed her arm at the end of their relationship, causing it to bruise. The mother also maintains that the children witnessed the abuse. She is currently receiving outreach support from her local refuge and says she is very frightened of the father. She recently received a letter at her friend's house, which she claims was from the father, with the message 'R.I.P'. The father denies all the allegations.

Five interviewees thought this would be a no contact case, three of whom were judges.<sup>130</sup> Driving some of these interviewees' conclusions that no contact would be ordered was the risk of physical harm. S03 attributed the no contact outcome to both the father turning the gas on, since this could have killed the mother and the children, and the R.I.P letter, since this is a direct threat. S03 added that had the only incident been the bruise, then that would not be seen as a reason to stop contact going ahead. B06 also thought the R.I.P letter could 'swing' the court away from ordering contact because 'it's potentially a death threat, essentially', and that the impact of the contact on the primary carer would also influence the outcome. B06 did not think, however, that the court would close the door to contact and said the court would tell the parties

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<sup>129</sup> C09 and J07-CJ discussed Vignette One but did not comment on the final outcome. J07-CJ did not think it was possible to comment at all on likely outcomes without understanding more about the resilience of the children, their relationship with their mother and father, and the impact of contact on the mother.

<sup>130</sup> B06, J03-M, J05-CJ, J06-DJ and S03. C01 thought the most likely outcome was an initial period of supervised contact, but also said that no contact might be the outcome if the six-year old was 'terrified of the father'.

to return to court in a year's time to look again at the possibility of contact.<sup>131</sup> J05-CJ also qualified this outcome by saying that there could be contact if psychiatric assessment concluded the father had the capacity to change.

J06-DJ said the R.I.P letter was significant because it called into question the father's ability to support a 'positive relationship between mother and child', a stance which presents some challenge to the argument that the courts are only concerned by physical violence.<sup>132</sup> C10 would not have supported contact on account of the children being young and 'very vulnerable', the children's witnessing of the abuse, the escalation of the abuse from non-physical to physical, the mother's ongoing fear, the continuation of the abuse post-separation, and the threat to kill through the RIP letter. However, C10 did not think the court would accept this no contact recommendation as a result of the likely lack of external evidence.

All of the other interviewees who commented on this Vignette (85%) were of the view that direct contact would be ordered, but interviewees had different perspectives on what form this direct contact would take. Just under a quarter (24%), including the three domestic abuse organisations, said that unsupervised contact would be the outcome in this case.<sup>133</sup> The most common explanation given for the unsupervised contact outcome was the absence of direct physical harm to the children,<sup>134</sup> an explanation which sits uneasily with the evidence base on the harm to children caused by exposure to domestic abuse.<sup>135</sup> Some interviewees said the absence of 'high-level' physical violence explained the unsupervised contact outcome, since the non-physical abuse would not be regarded as sufficiently serious to concern the court.<sup>136</sup> The domestic abuse organisations did not think the children's witnessing of the abuse would be regarded as significant.<sup>137</sup>

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<sup>131</sup> B06's view was that if the R.I.P letter was taken out of the equation, then supervised contact would be the most likely outcome. The impact on the mother of the contact could, however, shape the court's assessment of whether direct contact should go ahead.

<sup>132</sup> See for example: Coy, Perks, Scott and Tweedale (note 21 supra) 51; Barnett (note 12 supra) 444-445.

<sup>133</sup> N = 8: B01, J08-DJ, R01, R02, R03, S02, S08 and S09. In addition, if there was no external evidence (police or GP evidence) S07's view was that the contact ordered would be unsupervised. B01 said suggested the outcome might be re-thought if the abuse continued 'from a distance' but it 'would be a struggle' for the mother to argue for no contact.

<sup>134</sup> N = 5: B01, R01, R03, S02 and S09.

<sup>135</sup> See below at 2.1.3.

<sup>136</sup> N = 4: R01, R03, S02 and S09.

<sup>137</sup> N = 2: R01 and R03.

The only judge to suggest unsupervised contact as the outcome in this case was J08-DJ. This judge explained that this outcome was shaped by the abuse in this case being ‘very much in the relationship’, while acknowledging the risk that the children could be implicated in the abuse of the mother:<sup>138</sup>

... once you take away the relationship, the children may not be impacted upon, but it would depend on the extent he wanted to use the children to continue to emotionally coerce the mother.

In order to minimise the risks of the abuse continuing post-separation, J08-DJ identified ensuring the parents do not come into contact with one another through managed handovers and contact books<sup>139</sup> as significant.

Just over a quarter of interviewees (26%) identified supervised contact at a contact centre as the most likely outcome.<sup>140</sup> Crucially, however, the majority of these interviewees (67%) suggested that contact would only be supervised initially, and would progress on away from the supervised setting, provided safeguards, such as arranged handovers, were put in place.<sup>141</sup> Just over 20% of interviewees said direct contact would take place but did not specify the form.<sup>142</sup> Most of these interviewees said the contact would take place at a contact centre but did not specify whether this would be supervised or supported.<sup>143</sup> Three barristers identified contact supervised by relatives as the most likely outcome, with the aim being to progress that contact away from relative involvement.

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<sup>138</sup> J08-DJ also suggested that there ought to be supported contact during the interim period of risk assessment, but this could not then continue indefinitely as a final outcome.

<sup>139</sup> Books in which contact arrangements and information about the children are recorded as a means of communication between the parents.

<sup>140</sup> N = 9: B03, C01, C03, C04, C05, J01-M, S01, S05 and S06. S05’s principal reason for saying that there would be contact was that the mother would not be able to prove the allegations. S01 said the contact could also be supervised by a relative.

<sup>141</sup> N = 6: C03, C04, J01-M, S01, S05 and S06. In addition, C01 suggested supervised contact would only be ordered for an initial period but did not confirm the contact would move to unsupervised. S01 said the contact could be supervised by a relative if it does not take place at the contact centre.

<sup>142</sup> 21%, n = 7: B02, C08, J02-M, J04-DJ, J10-DJ, S04 and S07.

<sup>143</sup> N = 5: B02, J02-M, J10-DJ, S04 and S07. If there was no external evidence, S07’s view was that the contact ordered would be unsupervised.

B08 and S10 stood apart from the other interviewees in stating that the father might be asked to complete a domestic abuse perpetrator programme. B08 thought the court might be willing to allow him supervised contact during the completion of this programme, but this would depend on the extent of the mother's objections to contact, while S10 thought that supported contact might be progressed at the half-way review stage subject to satisfactory performance.

#### 4.2.3.2 Vignette Two<sup>144</sup>

A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother claims that the father was physically and emotionally abusive to her for five out of the seven years of their relationship. She alleges, for example, that he raped her on several occasions, and that he would regularly punch her in the stomach and head. She has never reported the abuse before now, save for one occasion at the end of the relationship when she called the police. She has been staying in a refuge (with the children) since the separation. She says she is petrified of the father harming her and the children.

The mother and father separated three months ago. For the first two months following separation, the father had unsupervised contact with the children for three hours a week. The mother, however, ceased contact one month ago, prompting the father's application for a child arrangements order. She says she allowed contact at the outset because she was so afraid of the father. The mother maintains she stopped contact because she was concerned about the impact it was having on the children, who she says were coming home from contact very upset and quiet. The father accepts he has been abusive in the past, although not to the extent alleged by the mother, but claims he is now a changed man and is willing to

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<sup>144</sup> Most interviewees commented on outcomes, but some did not. C05, C09, J06-DJ, J07-CJ and S10 said it was not possible to provide a view on the likely outcome without further information/action, such as the appointment of a Guardian, a psychological assessment, reports from the school, Cafcass' assessment or police checks. C09 said this could be a no contact case, or it could be one in which supervised contact is ordered, but further information would be required to make a firm assessment. B01 said contact would be the outcome, but could not comment on the form. R01 thought the outcome would turn on which particular judge was hearing the case on the day, but nevertheless emphasised the likelihood of contact going ahead.



seek help. The mother initially opposed all contact but then said she would agree to contact if it is always supervised.

As with Vignette One, the majority of interviewees agreed that direct contact would be ordered in this case if the allegations were found or proven, but there was again a lack of consensus on what form that direct contact would take. There was, however, more consistency overall than with Vignette One. The goal of progressing contact over time to less restrictive, and ideally unsupervised, forms again existed here as a key theme.

In common with Vignette One, only three interviewees thought this case would, or could, end without the father being granted contact in some form.<sup>145</sup> B06 further qualified this response, suggesting there might be supervised contact, owing to the mother being willing to agree to this, but there could still be a no contact outcome if Cafcass did not think there should be supervised contact. The vast majority of interviewees, however, thought this case would result in a form of direct contact. Half of all interviewees who commented on Vignette Two said the father would be asked to complete a perpetrator programme, and contact would progress subject to satisfactory performance.<sup>146</sup> This is somewhat out of step with previous studies, which have not found such a willingness to require fathers to complete domestic abuse perpetrator programmes.<sup>147</sup> Some of the respondents in Hunter and Barnett's study, for example, said that these programmes were 'not a practical option' owing to them taking 'too long' to complete.<sup>148</sup>

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<sup>145</sup> B06, C10 and J03-M. J03-M's view was that this case would not be heard by magistrates as a result of the sexual abuse. His/her prediction, however, was that no direct contact would be ordered and s/he suggested that the court might be willing to consider indirect contact. B02 thought that contact would be ordered because the father made admissions but added the caveat that a no contact outcome could result if the father did not accept any of the abuse. C10 said the court would be more willing to accept Cafcass' recommendation of no contact with this Vignette than Vignette One because there is more evidence.

<sup>146</sup> N = 15: B02, B08, C01, C02, C03, C04, C08, J04-DJ, J05-CJ, J08-DJ, S01, S02, S05, S08 and S09. C02 added the caveat that if there was any threat to kill then the court would order no contact.

<sup>147</sup> See for example: Hunter and Barnett (note 12 supra) p.50; Cafcass and Women's Aid (note 99 supra) p.10.

<sup>148</sup> Hunter and Barnett (note 12 supra) p.50.

Thirty percent of interviewees said that contact would be supervised at the outset but would move to a less restrictive form of contact over time.<sup>149</sup> J02-M, for example, explained that:

... we would want to be getting that [contact] back on track again pretty quickly because if that is allowed to lapse for too long, they start forgetting and it's a stranger coming to them.

S04 said that the contact would 'start slowly at a contact centre' but the court would keep the contact under review. B04 also thought the initial period of supervised contact would be followed by a review. R03 identified the likely outcome as staggered shared care, commencing with supervised contact and then building contact up in 'stages' through contact in the community to shared care with supervised handovers. R03 expressed concern about this approach. S03's view was that the contact might be supervised at a contact centre whilst assessments are made of whether any relatives could act as a 'protective factor' and supervise the contact, and contact could then progress on from relative supervision.

One barrister<sup>150</sup> thought that the contact would be supervised 'ideal[ly]' by a 'friendly granny', or potentially a 'professional supervisor' in order to 'get it [contact] up and running'. B05 qualified this by saying that if the father did not accept any of the abuse then the supervision would have to be 'professional' and the court would see whether he would be willing to engage in 'therapy'.

Just two interviewees<sup>151</sup> identified unsupervised contact as the immediate outcome in this case. J01-M explained that the outcome would be unsupervised because the child had not been harmed directly:

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<sup>149</sup> N = 9: B03, B04, B07, J02-M, R03, S03, S04, S06 and S07. S07 thought the courts would aim to progress contact on from the supervised setting, subject to the father behaving satisfactorily at the supervised contact sessions. S06 added the qualification that supervised contact might not be ordered if the mother did not support any form of contact. B04 thought the father might be 'pointed in the direction of some form of therapy' but did not specify the form.

<sup>150</sup> B05.

<sup>151</sup> J01-M and R02. R02 added the caveat that the outcome could turn on the particular judge hearing the case on the day. J10-DJ said more tentatively that unsupervised contact might take place but indicated this might not be the immediate outcome.

... there is no risk to the child in terms of, you know, the rape so we are not considering whether or not the child is going to be a victim of sexual abuse. ... there's no indication here that the child has been subjected to the same sort of thing ... that kind of "I am more powerful than you" type scenario. ... So, again, you've to say "Alright, that behaviour was extreme and it's not something we would condone but it's not a risk to that child."

Two further themes emerged clearly from the responses to this second vignette that cast light on the factors that may have an influence on the outcomes of cases of this kind.

*4.2.3.2.1 What is the relevance of the mother permitting the father unsupervised contact with the children and then stopping that unsupervised contact?*

Uniting the majority of interviewees (62.5%) who discussed the mother initially allowing contact was the view that the mother had undermined, or at least weakened, her case by allowing this unsupervised contact.<sup>152</sup> The majority of these interviewees were barristers and solicitors, along with the domestic abuse organisations. These interviewees said the courts would question why unsupervised contact cannot continue since the mother had permitted unsupervised contact in the past. Some commented in particular on the difficulty the mother would face in defending the decision to allow contact if she had concerns about safety.<sup>153</sup> B01, for example, said:

So, if you were cross-examining her, you would be putting to her – "well you can't possibly have thought your children would be at risk, otherwise you wouldn't let them go, would you?". So you've got to say in the witness box "I would put my children at risk; I would put myself above my children", very difficult thing to say and then you would gun her down about the fact that she wasn't a fit mother and she wasn't able to see

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<sup>152</sup> N = 15: B01, B02, B03, B05, B07, B08, J01-M, J03-M, R01, R02, S02, S05, S07, S09 and S10. S06 and S08 identified the mother's initial support of unsupervised contact as relevant, since the father would use this to his advantage, but did not comment on how the court would view the initial period of unsupervised contact.

<sup>153</sup> N = 5: B01, B02, B08, J01-M and J03-M.

what was in the best interests of the children so she would be in some real difficulty.

And B08 said:

... it's going to harm her case. Yes. Because ... I mean ... and she's put herself in a difficult situation hasn't she because either it's harmful for the children having contact with their dad, in which case what the hell do you think you were doing or it's not harmful, in which case what the hell do you think you were doing stopping it. So, yes, she's put herself in a bad position. And, really, the big thing here is it was really dangerous, but you let him ... you thought you would keep yourself safe by going to a refuge, but you would send the children off and at that point, most women will go "Well, I didn't think they would come to any harm". Well then, we will have contact then shan't we?

And J03-M said:

... when I looked through that my first inclination was look, OK. A mother's instinct is normally to protect their child so even if she was terrified of this man you would think that the first thing she would do is say "I can't have my children in his company". And it would be strange, in my view, if she allowed direct unsupervised contact with him in those circumstances.

J01-M expressed sympathy with the mother but again explained that the assumption would be that since the mother permitted contact, she must have thought it was safe. S07 also said the court would not look favourably upon the mother because:

... she [the mother] might be totally naïve but if you are concerned for yourself, you should be more concerned for your children, if you see what I mean. That's the view that is taken.

Some interviewees reported that the relevance of the mother's initial support of contact was that the court would question whether the abuse alleged is true. B08 said:

... if she thinks they were in danger, she is protecting herself in a refuge, she thinks the children are in danger but she's going to let them go and have unsupervised contact. I don't care if she was scared. That is a really, really bad thing to have done if she genuinely believes that. And so we are all going to think that actually she said that – that's a bit of post-fact rationalisation and she's now got enough gumption to think "I really hate you and I want you out of my life; not that I thought the children were in harm's way at that stage but now I am thinking because the ladies at Women's Aid have got me all psyched up so I now brave enough to tell you to f\*\*k off".

J03-M said the court would doubt whether the abuse perpetrated is as serious as that described by the mother, but the mother's initial support of contact would 'not necessarily' be the 'determining factor' in deciding whether contact can continue. B07 said the court would want an explanation as to why contact was permitted and by allowing the contact, the allegations are rendered 'that much staler'. B05 did not say the court would question the veracity of the mother's allegations as a result of her permitting contact but did say that it would be difficult for her to explain why contact started and then ceased. J05-CJ was not among the interviewees who thought the mother had undermined or weakened her case by allowing contact but, nevertheless, agreed that the mother's initial support of contact would lead the court to question whether she had fabricated the allegations, if the father denied the abuse.

R01, R02 and S09 were particularly critical of the courts' perception that the mother had undermined her case, explaining that there are a number of reasons why women may permit contact initially and later oppose it following an application for contact by the abusive parent, reasons which are not properly understood by the court. S09 said that it 'makes sense' that the mother would allow contact after separation but the courts 'don't understand that for one minute'. R01 said:

... something that can happen is that upon immediate separation, the children might be 'I want to see my dad, why aren't you letting me see my dad? ... And mum feels under pressure to allow the children to see, so at the beginning she might agree to everything and she might allow contact to go ahead and then while that contact is going ahead, that's when there could be possible ongoing emotional type blackmail going on 'tell mum this, tell mum that, what's mum doing, has she got a new boyfriend, is she doing this, is she doing that?', Children are coming back and saying all these kinds of things to mum and mum has now got the opportunity to have her brain back and think for herself a bit more so the contact might start and then she might go, 'do you know what? This isn't happening anymore. I'm bigger and I'm stronger now and I can cope with it, and I'm not going to allow my children to be put in this situation'. So, then she might stop it, and ... he obviously will take it court.

R02 also explained that giving in to the abusive parent's demands may be viewed by the abused parent as their 'only option' in the immediate aftermath of an abusive relationship, as the parent copes with the 'upheaval' of separation and navigates the route deemed most likely to keep herself, and her children, safe. R02 said that mothers might permit contact out of fear, but also as a means to appease the father in order to minimise the risks posed by him to herself and her children, knowing that they might be more at risk following separation. As these parents begin to recover from the abuse suffered, and particularly following the intervention of support services such as solicitors, R02 said they can begin to see the other options and that contact is not in the best interests of their children. R02 added that the other, and in some cases overlapping, possibility is that the mother does not want to stop contact.<sup>154</sup> the opposition to contact is triggered when the abusive parent demonstrates his incapacity to look after the children, the children return from contact 'scared or traumatised' or the children witness the abusive parent's abuse of someone else.

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<sup>154</sup> Mothers' support for contact has been found in other studies. See for example: Coy, Perks, Scott and Tweedale (note 21 supra) 62; Thiara and Harrison (note 36 supra) 11.

A significant minority of interviewees (37.5%), however, did not think the mother had undermined her case in this way, even if the father attempted to use the previous contact as part of his case.<sup>155</sup> This minority particularly consisted of judges and Cafcass practitioners. R03 thought the mother may face this argument from the other party but felt the court would be receptive to the mother's concerns, provided they remained rooted in the welfare of the children. J05-CJ said the mother's actions would be understood as 'general confusion' and would not undermine her case, provided the allegations were proven or found. C02, C04 and C08 agreed that it is understandable why the mother initially permitted contact, and that the court would be sensitive to this. J08-DJ and J10-DJ displayed the level of judicial understanding R01, R02 and S09 in particular identified as lacking. J08-DJ said that the mother had explained why she allowed the contact in the first place and then stopped it, so her initial granting of contact would not undermine her case. And J10-DJ said:

So, you would not easily simply reinstate the arrangements because they might have been hit upon because of the pressure. All the background of abuse, the mother being frightened and thinking to herself ... it's not said in this but very often you'll get them saying 'Yes, I know that was ... that's what happened but I was too terrified to disagree and if he hadn't done that, he would have done this that and the other'.

B02 also said the court would understand the mother's reasons for initially allowing contact and emphasised that judicial understanding of domestic abuse had improved significantly:

... there's been I think more of a shifting of attitudes from judges. I could see 15 years ago, I judge would have simply said possibly with some allegations as serious as this "well, you allowed it, you knew what had happened so get on with it". I don't think it would be viewed quite so simplistically today. Judges are a lot better trained. They do understand.

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<sup>155</sup> N = 9: B06, C01, C02, C04, C08, J05-CJ, J08-DJ, J10-DJ and R03.

It's very interesting – you could see that they are obviously told on their courses that most often women will put up with about 13 incidences of domestic violence before they report it. And you could tell the point at which they had all been told that because they all started talking about it in their judgments! But it does show they are being educated more and ... I would expect a judge not to view that as determinative but to still view it as relevant.

B06 did not think the mother had undermined her case by allowing contact but added the qualification that the mother would have done so had the level of domestic abuse perpetrated not been 'so serious'. C01 thought it would be relevant to the court's determination of the case but there would be no automatic presumption of contact continuing:

... [the granting of contact] certainly would be relevant but it wouldn't be a presumption in favour of contact continuing just because it had been because that needs to be balanced with the mother saying she is frightened and did it because she felt threatened by the father so yes, that would certainly not suggest it's necessarily in their interests for it to continue.

Other interviewees gave less definite responses on the relevance of the mother's initial granting of contact. C03 and J04-DJ identified this as a factor that Cafcass would investigate. J07-CJ said it would not automatically be the case that contact would continue because unsupervised contact had been permitted previously, and the court would want to assess whether her support of contact was a 'feature of him being controlling' or whether she had falsified the allegations.

That the majority of interviewees thought that the mother had undermined or weakened her case by allowing contact again highlights problems with the current incident-based model. As Chapter 3 explored, Stark has criticised the assumption underpinning this model that victims 'exercise decisional autonomy "between"



episodes'.<sup>156</sup> Reliance on previous contact taking place as a measure of whether the mother is being genuine in her allegations, and whether contact is safe to continue, is not, therefore, reliable since, as some interviewees emphasised, the mother's initial support of contact may have been the product of the abuse subjected to her and her consequent lack of 'decisional autonomy'.<sup>157</sup> The other factor identified by interviewees as significant was the father's acceptance of some of the abuse and his claim to be a 'changed man', a factor which also carries risks if used as a measure of whether contact should take place.

#### 4.2.3.2.2 *What is the relevance of the father accepting some of the abuse and claiming to be a 'changed man'?*

That the father has accepted that he has been abusive, albeit not to the extent alleged by the mother, and claims to be a 'changed man' was identified by some interviewees as significant to the courts' willingness to allow contact.<sup>158</sup> B05, for example, suggested that the father's attitude opened the door to less restrictive contact. Several interviewees identified the father's attitude as relevant since some acceptance of the abuse would gain him entry onto a domestic abuse perpetrator programme.<sup>159</sup> S02 said that entry onto the programme would 'satisf[y] the judge, to a certain extent, that they've kind of got rid of any problems that they might have had'. When asked if the outcome would have been different had the father not accepted any behaviour, however, S02 said 'I don't think they [the courts] would care'. B07 said completion of the programme would be seen as a 'favourable step by most courts' because it 'reduces the risk of repetition, which is what the court is often very concerned about'. B07 did not, however, think that the father's attitude would

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<sup>156</sup> E. Stark, 'Looking Beyond Domestic Violence: Policing Coercive Control' (2012) 12(2) *Journal of Police Crisis Negotiations* 199, 200 and 205 (quoted). See also: E. Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007) p.115.

<sup>157</sup> This point has also been emphasised by: Cafcass and Women's Aid (note 99 supra) p.3.

<sup>158</sup> N = 8: C03, C04, B05, B08, S02, S03, S06 and R02. B08 added, however, that the father would need to demonstrate what he has done to change. B04, C09 and J02-M suggested the relevance of the father's attitude would depend on the extent of his acceptance.

<sup>159</sup> N = 12: B02, B07, B08, C01, C02, C04, J05-CJ, J08-DJ, S01, S02, S09 and S10. However, J05-CJ doubted the extent to which the father would be able to change. B02 added the qualification that the relevance of the father's admissions depended on how much of the abuse he accepted.

necessarily change the case outcome. B03 said the father's attitude was relevant and the court would consider if anger management therapy would be required.<sup>160</sup>

That a claim to be a 'changed man' is significant to case outcomes has been identified in previous studies. Harding and Newnham, for example, found that domestic abuse alone was rarely regarded as a reason to deny direct contact, with the attitudes of fathers often shaping the contact decisions.<sup>161</sup> Barnett also found that fathers' attitudes, in either failing to admit the abuse perpetrated or accept the courts' findings, could also sway the court away from direct contact, but this alone may be insufficient to prevent direct contact if the abuse is not deemed sufficiently serious.<sup>162</sup>

One of the challenges in attributing weight to abusive parents' claims to have changed their ways, however, is ascertaining whether the claims are genuine. R02 raised particular concerns about this, stating that the 'changed man' 'rhetoric' is 'unfortunately ... quite popular in the family courts'.<sup>163</sup> R02 and R03 both emphasised as a problem the inequality they felt existed between the abused and abusive parents' capacities to present themselves in the courtroom, with perpetrators knowing how to 'play the system':

... these [perpetrators of domestic abuse] are incredibly clever, manipulative people who know how to play the system and when you have been through an abusive relationship and you are feeling frightened, scared, unsure, really traumatised then your ability to advocate for yourself and your children is massively impinged by that versus someone who is coming across as very calm, very eloquent, very charming, very smart, well-presented and we've got a court system that is based on social constructions of gender and patriarchy so it's quite difficult to navigate your way through that I think. [R02]

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<sup>160</sup> The consensus within the existing literature is that referrals should not be made to anger management for perpetrators of serious domestic abuse. See for example: Coy, Perks, Scott and Tweedale (note 21 supra) p.58; Trinder, Hunt, Macleod, Pearce and Woodward (note 21 supra) p.95.

<sup>161</sup> Harding and Newnham (note 21 supra) pp.97, 99, 103 and 131.

<sup>162</sup> Barnett (note 12 supra) 452.

<sup>163</sup> Barnett has raised similar concerns: *ibid* 450-451 and 461-462.

C02 agreed that the father's claims would have to be treated with care, and for his progress on any domestic abuse perpetrator programme to be carefully monitored, since some solicitors coach their clients to accept allegations.

Some interviewees, however, did not think the court would accept the father's claims at face value, instead requiring proof of the positive actions the father had taken to achieve this change in attitude and behaviour.<sup>164</sup> S05, for example, emphasised that there would not be a presumption that the father had changed simply because he was willing to accept he had been abusive. J05-CJ said s/he was 'somewhat sceptical' about whether the father would be able to change if the abuse is 'as bad' as the mother has reported.

Some interviewees had mixed perspectives on the extent to which completion of a perpetrator programme should be relied upon as a safeguard against the risks the domestically abusive parent may pose to the child or parent.<sup>165</sup> C02 was confident that perpetrators would not be able to manipulate their way through these programmes. She warned that some solicitors advise their clients to accept allegations but felt confident the programmes identify 'tokenistic' acceptance:

... you have to bare your soul and I don't think you can do that ... in a tokenistic way for a period of six months.

Other interviewees were more sceptical about the effectiveness of the programmes. B05, for example, said:

But, I mean therapy is, again, it's not the cure-all. And I appreciate that perhaps in the 70s, 80s and 90s we might have thought so but it's not a cure-all. It's a means of getting someone to think differently but it doesn't necessarily work.

B08 similarly expressed doubt about the extent to which these programmes can change behaviour and highlighted the risk that perpetrators can progress through the

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<sup>164</sup> N = 6: B01, B08, J01-M, J05-CJ, J10-DJ and S05.

<sup>165</sup> Concern about the effectiveness of perpetrator programmes has also been raised in the existing literature. See for example: Coy, Perks, Scott and Tweedale (note 21 supra) 59. For a major review of the effectiveness of perpetrator programmes, see: L. Kelly and N. Westmarland, *Domestic Violence Perpetrator Programmes: Steps Towards Change (Project Mirabal Final Report)* (Durham University and London Metropolitan University 2015).

programmes without genuine change:

... they get all the words and then you get it all trotted out and you think “You don’t understand or believe a single word of that, but you have been taught the response that is the approved response. The thing that the professionals would wish you to say or think. ... it is difficult for people to change.

#### 4.2.3.3 Comparing Vignettes One and Two

Among the interviewees who commented on the relative severity of Vignette One and Two, there was a consensus that Vignette Two would be regarded by the court as more serious.<sup>166</sup> S10, for example, described Vignette Two as ‘much more serious’ than Vignette One. C04 said that Vignette Two would be regarded as more serious because it is more likely the children will be aware of, or witness, physical abuse than pick up on psychological abuse. R01’s explanation was different, stating that Two would be regarded as more serious than One because:

... to a judge, to the outside world, physical is like ‘whoa’ because obviously the penultimate is homicide isn’t? And that’s we are always trying to ensure doesn’t happen.

This adds some weight to the findings in Chapter 3 that while theoretical understandings of what constitutes domestic abuse may have improved, physical abuse continues to be regarded as more serious in practice than non-physical abuse. Sitting at odds with this, however, is the finding that more interviewees said no contact would be ordered in Vignette One than Vignette Two. This could be explained by there being fewer predictions of orders for unsupervised contact in relation to Vignette Two, with a greater emphasis placed on the need for the father to work on changing his behaviour through the completion of a perpetrator programme. The contact predicted in relation to Vignette Two was, therefore, more restrictive than that in Vignette One. It is also possible that where the problem lies in relation to non-physical abuse is not the weight given to it once proven but getting to the stage in

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<sup>166</sup> N = 11: B01, B04, B05, B07, C04, C10, J03-M, J08-DJ, R01, S06 and S10.

which the non-physical abuse is proven in the first place, since, as Chapter 3 explored, several interviewees emphasised the major challenges which exist in evidencing non-physical abuse. The responses to both vignettes also suggest that there is some diversity in practice as to what outcomes are perceived as appropriate by the courts. This point was made by a number of interviewees, as the next section will discuss.

#### **4.2.4 Are judicial outcomes consistent?**

While a clear finding from interviewees' responses, both in relation to their experiences of practice and their responses to the vignettes, was that a pro-contact stance guides practice, several interviewees said that the outcomes of cases can turn on the particular judge hearing the case on the day, with some judges being more pro-contact than others.<sup>167</sup> B07, for example, said:

Different judges and different groups of tribunal, different judges in a group have different views, so it's impossible to predict with certainty what a result will be in any particular case.

Furthermore, B02 said that there is judicial consistency in the sense that all judges work on the basis that there should be contact, but there can be variation in what judges view as 'serious' domestic abuse and in their 'capacity to believe or reject evidence' as a result of the 'human' element involved in decision-making. R03 suggested judges need flexibility to be able to decide cases on a case by case basis but saw judicial variation as a problem, explaining:

Your client will be like "I am going to win this" and you'll be like "well, it depends which judge we get; we won't know until the date. Then it's "Oh, we are getting that judge; we are screwed" or "Oh, it's that judge – anything could happen; he's a wild card". Or, you know ... so, yes, there is a real issue of that. They have all got their own agendas. Everybody who works in this knows their agendas. Everybody knows that there are male-

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<sup>167</sup> N = 16: B02, B03, B05, B07, B08, C06, C07, C08, J08-DJ, R01, R02, R03, S01, S02, S06 and S07. B02 added the qualification that there is greater judicial consistency now than in the past.

friendly judges, female-friendly judges. Ones with certain bugbears.

Some interviewees saw judicial variation in approaches and outcomes as unproblematic since ‘that’s the judicial discretion’.<sup>168</sup> J08-DJ said:

Some people will be very over-protective, I’m sure, and say absolutely nothing can happen and others will be very gung-ho about it and say “Oh no, we just need to move on with this”, so I suppose I would perhaps would probably take the middle line more.

B08 also saw this inconsistency as being an engrained element of a legal system based on judicial discretion, which although not perfect remains the ‘least worst way’ of resolving cases. B05 and C08 similarly were unconcerned by differences in judicial approaches, provided the correct outcome is eventually reached (B05) and risk is properly assessed (C08).

Others, and predominantly the domestic abuse organisations, voiced concern about judicial inconsistency.<sup>169</sup> R02, for example, said that outcomes ‘shouldn’t depend on who the judge is’. Existing studies have also pointed to inconsistency in judicial approaches and have raised this as an issue. For example, while Coy et al found that, overall, the courts’ approach was characterised by the downplaying of domestic abuse, they also concluded that awareness of domestic abuse and perceptions of its relevance to contact varied from judge to judge.<sup>170</sup>

That there is judicial inconsistency was not, however, a universally-held view. Some interviewees suggested that the courts are consistent, albeit with some ‘curve-balls’ according to S10.<sup>171</sup> Where interviewees were more united was in sharing concerns about the handling of cases by magistrates.

#### 4.2.4.1 Are there problems with magistrates’ handling of cases?

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<sup>168</sup> J08-DJ. A view shared by: B05, B08, C06 and C08.

<sup>169</sup> N = 4: R01, R02, R03 and S06.

<sup>170</sup> Coy, Perks, Scott and Tweedale (note 21 supra) p.54.

<sup>171</sup> B01, C03, S03, S04 and S10.

Particular concern was raised by several non-judicial interviewees about magistrates' handling of cases. Several said that magistrates are hearing more contact disputes in which domestic abuse is an issue.<sup>172</sup> With the exception of C09, the picture painted of magistrates' practice by the interviewees who discussed this issue was negative. Even C09, who saw magistrates' hearing of these cases as a positive development, said magistrates can reach the wrong conclusions.

One of the principal problems identified with magistrates' handling of cases was delay, which interviewees said was explained by a number of, in some cases overlapping, factors: their failure to cope with the demands caused by litigants in person;<sup>173</sup> their failure to take a pragmatic approach and being unnecessarily 'by the book';<sup>174</sup> being too slow in their handling of cases;<sup>175</sup> taking too long to make a decision since they are not legally trained;<sup>176</sup> and the tendency to have cases listed and then send them up to be heard by a more senior judge at the last minute.<sup>177</sup>

Furthermore, some interviewees raised the concern that magistrates do not have the knowledge or experience to hear contact disputes in which domestic abuse is alleged. Specific concerns related to magistrates lacking the confidence and experience of the more senior judges and being less robust in their decision making and case management as a result.<sup>178</sup> Some made the related point that as a result of lacking the knowledge necessary to handle the cases in front of them, magistrates will delegate to Cafcass or rely on advocates,<sup>179</sup> or defer to the clerk.<sup>180</sup> S04 qualified this by stating that some magistrates are good and are getting better at hearing cases.

Interviewees raised a range of other concerns, including: magistrates being more likely to be manipulated by litigants or advocates;<sup>181</sup> magistrates being unable to appreciate legal nuances, such as applying the presumption of parental involvement

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<sup>172</sup> N = 10: B01, B02, B03, B06, C04, C09, S02, S04, S08 and S09. B05, R03 and S10 did not make this specific point but, nevertheless, identified problems with magistrates' handling of cases.

<sup>173</sup> S02.

<sup>174</sup> S09.

<sup>175</sup> B01, B02, B03, B05 and C04.

<sup>176</sup> S09 and S10.

<sup>177</sup> R03.

<sup>178</sup> N = 7: B02, B05, B06, C04, S04, S08 and S09.

<sup>179</sup> B06 and S04.

<sup>180</sup> B03.

<sup>181</sup> N = 3: B03, S02 and S04.

without acknowledging that this should not apply in cases where there is a risk of harm;<sup>182</sup> magistrates being out of touch with ‘modern’ understandings of domestic abuse, with the majority being of retirement age;<sup>183</sup> and parents feeling let down when their cases are heard by magistrates, having less respect for them and being less likely to comply with orders as a result.<sup>184</sup> The more practical issue of it being difficult to achieve judicial continuity when a case is heard by magistrates was also identified as a problem.<sup>185</sup> Understanding the long-term impact of magistrates’ handling of cases is, however, rendered difficult by the lack of monitoring on what happens to cases once they leave court.

### **4.3 WHAT HAPPENS WHEN CASES LEAVE COURT?**

As this Chapter has discussed, a consistent finding from this doctoral research, both in relation to interviewees’ practice experiences and the vignettes, and the existing literature, is that the courts adopt a pro-contact stance. While interviewees within this doctoral research were not in agreement about whether this pro-contact stance marginalises concerns about the risks posed by contact in practice, an important finding both within this research and the existing literature is that few applications for contact by domestically abusive parents are refused, and direct contact is a common outcome. And the findings also suggest that when unsupervised contact is not ordered at the outset, the aim, wherever possible, is to progress contact to unsupervised contact.

What then needs to be established is what impact these court-ordered arrangements have on children, and whether the courts are reaching the ‘right’ outcomes in individual cases. There is, however, currently no clear consensus on what ‘right’ outcomes are in relation to contact with a parent who has perpetrated domestic abuse, beyond the general indicators of safe contact set out in Chapter 2.<sup>186</sup> This assessment of ‘right’ outcomes is rendered complex by the restricted scope to bring

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<sup>182</sup> S09.

<sup>183</sup> S02 and R03.

<sup>184</sup> B05.

<sup>185</sup> B02.

<sup>186</sup> More broadly, for a discussion of conceptualisations of ‘just outcomes’, see: A. Barlow, R. Hunter, J. Smithson and J. Ewing, *Mapping Paths to Family Justice: Resolving Disputes in Neoliberal Times* (Palgrave 2018) pp.174-204.



cases back to court for review, the lack of feedback on judicial decision-making<sup>187</sup> and the need for more longitudinal data on the outcomes for children who maintain contact with domestically abusive parents.<sup>188</sup> It is beyond the scope of this doctoral project to seek to answer the question of whether the courts reach the 'right' outcomes in individual cases, but it is within its scope to comment on one of the factors which makes this assessment difficult: the restricted scope to bring cases back to court for review.

#### **4.3.1 Are cases being brought back to court for review?**

One route towards establishing if the 'right' decisions are being taken in individual cases is to bring cases back to court for review, in which the workings of the contact arrangements can be assessed, and decisions taken on whether contact ought to be progressed. PD12J directs that in cases in which the court orders direct contact, it ought also to decide whether a review of the operation of the order is necessary to promote the child's best interests.<sup>189</sup> However, the Child Arrangements Programme steers the courts away from reviews. It makes clear that, beyond interim orders, cases should not be scheduled for review 'unless such a hearing is necessary and for a clear purpose that is consistent with the timetable for the child and in the child's best interests'.<sup>190</sup>

The prevalence of reviews was not discussed by all interviewees but the majority of those who commented said reviews are now avoided, apart from in limited circumstances where the court deems it absolutely necessary.<sup>191</sup> Examples given of when a review would be considered necessary included if the perpetrator is

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<sup>187</sup> For an exploration of the availability and use of feedback by judges, see: J. Masson, *Developing Judgment: The Role of Feedback for Judges in Family Court* (University of Bristol 2015).

<sup>188</sup> For existing research, see: J. Fortin, J. Hunt and L. Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults who Experienced Parental Separation in their Youth* (Sussex Law School 2012).

<sup>189</sup> PD12J (note 43 supra) para 38(d). This features in both the 2014 and 2017 iterations of PD12J.

<sup>190</sup> Practice Direction 12B – Child Arrangements Programme para 15.3. For concern about the emphasis on 'swift resolution' within the Child Arrangements Programme, see for example: Harding and Newnham (note 21 supra) 129. The Child Arrangements Programme applies to disputes between separated parents on arrangements concerning children.

<sup>191</sup> N = 14: B04, B06, B08, C07, C10, J03-M, J04-DJ, J05-CJ, J07-CJ, J08-DJ, J09-DJ, J10-DJ, R03 and S07. S07 made this point less directly than the other interviewees. B04 said some judges are more willing to conduct reviews than others. J04-DJ identified the avoidance of reviews as the guidance from higher authorities. S09's experience was that the courts have never reviewed the orders made, with the expectation instead being that the parties will bring the case back to court if there is a problem.

completing a course,<sup>192</sup> or if contact is re-starting after a lengthy period of no contact.<sup>193</sup> R03's experience was that reviews are now avoided because the courts:

... don't have enough court time now and no-one can afford it, and they don't want them back in court, they just get these cases out off their desk, they just make a plan that they think will probably work and then it's up to those people to return to court to vary, so it's putting the onus on them to change something ... .

That the lack of Cafcass' resources was driving the rarity of reviews, despite reviews being helpful, was also emphasised by C07, who said:

Because they [the courts] want final orders, and the message we are giving as Cafcass officers is "We don't want any more addendum reports" because it used to be, certain judges, certain courts had a reputation of saying "Bring this back in three or four months and do an addendum report". But, from us as an institution, what we are saying is "We can't keep doing that because the demand is so high; we just haven't got the resources. We haven't got the time to be doing an addendum report".

Some interviewees commented on the impact of this practice of avoiding reviews, and echoed R03's point that the onus is now falling on the parents to bring the case back to court. B04, B08, C07, J05-CJ, J08-DJ and S07 said that reviews have been replaced by staggered orders, with the court making an order for contact which stipulates how contact should progress in the future at pre-set intervals. The expectation is then that parents can bring the case back to court if deemed necessary. This approach of putting the onus on the parents to assess the progress of contact is consistent with the broader neoliberal emphasis in family law on personal responsibility.<sup>194</sup>

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<sup>192</sup> N = 4: B08, C09, J04-DJ and J09-DJ.

<sup>193</sup> N = 2: J04-DJ and J10-DJ.

<sup>194</sup> For discussion of the 'neoliberal transformation' of the family justice system, see: Barlow, Hunter, Smithson and Ewing (note 186 *supra*).

Five interviewees thought the limited scope to review was a positive development.<sup>195</sup> The neoliberal emphasis on parents taking responsibility for the contact arrangements was evident in some of these interviewees' responses. J09-DJ, for example, suggested the push away from reviews was positive because court monitoring 'disenfranchis[es] the parents from making their decisions'. J08-DJ made a similar point:

I think the judicial discretion is there and I think parents should manage their own children's lives. My colleague will say to them "We are not here to micromanage arrangements for your child" and why do you think you can keep coming back to us to do it?". And, actually, we've got more important things to deal with so like fact-finding in care, you know. Can't have all our time taken up dealing with squabbles between people who should know better.

Other interviewees voiced their opposition to reviews on the basis of the importance of 'finality' to children's welfare. J03-M, for example, said parents and children need to be removed from the court process 'as quickly as possible', with reviews 'exacerb[at]ing the whole process'. J07-CJ agreed:

Because there was always a temptation – "Oh let's put off making a decision until we've got more information and more information" and, you know, it changes like the tide coming in and out. So, I think from a child's point of view they deserve finality, so you ought to try and make a prediction inaccurate as it may be as to how the future may unfold and work on the premise "This will be the format unless ..." rather than "Well, we won't decide what the format is unless ...".

C10 framed her opposition to reviews in similar terms, and again emphasised the importance of parents taking responsibility for contact arrangements:

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<sup>195</sup> N = 5: C10, J03-M, J07-CJ, J08-DJ and J09-DJ.

... it's not in children's best interests to be involved periodically, constantly in court proceedings, and conflict and you get parents who are quite litigious, who will put in every application they can if you allow them, so I think if a final order ... if a risk assessment is robust ... I mean things change, new information changes, but that needs to be addressed by those people with parental responsibility and not the court.

An equal number of interviewees, however, called for greater scope for review.<sup>196</sup> These interviewees' concerns about the limited scope to review tended to centre on the safety of contact arrangements. Some of these interviewees raised concerns about the extent to which the courts can assess risk robustly without reviews.<sup>197</sup> B08, for example, was concerned that, in the absence of reviews, the courts have to make a 'wild guess' in deciding the outcome of a case. R03 made a similar point that as a result of the unpredictability of perpetrators of abuse, the current judicial approach of creating a 'six-month map', setting out how contact will progress and making a 'presumption that someone is going to become safe', is ill-advised. R03 advocated the re-instatement of reviews, since reviews provides an opportunity to monitor contact before it is progressed:

... at the end of these relationships, it's really hard to know how they are going to carry on and I think that with all of these things, you kind of have to take it stage by stage because you don't know whether he is going to be that crazy guy who is going to ruin her life for the next 15 years, or whether he is going to move on to someone else, in which case she is probably alright or ... you know, you don't know how bad he is going to be because you don't know what the dynamic is going to be at the end.

Some interviewees did not specifically call for greater scope to review orders but, nevertheless, raised concerns about the risks involved in leaving the monitoring of contact to parents.<sup>198</sup> S02's view was that the courts' promotion of contact 'left, right

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<sup>196</sup> N = 5: B06, B08, C07, J05-DJ and R03.

<sup>197</sup> N = 3: B08, C07 and R03. B08 was also concerned by the delays caused by parents having to bring their cases back to court.

<sup>198</sup> N = 3: C10, S02 and S09.

and centre' was putting the burden on the abused parent to test out contact and report incidents to the police. She doubted whether any court-ordered safeguard could protect abused parents and children in practice, referencing cases in which perpetrators have killed their partners and children following relationship breakdown. S09's concern was that the withdrawal of legal aid has made it far harder for parents to bring cases back to court. And C10 warned against supervised contact forming part of final orders because if concerns are raised during the supervised sessions, then the case is no longer live within the court system.

Interviewees were not, therefore, united on whether the courts ought to be given greater scope to review orders. Whilst it may be undesirable for children to be involved in protracted court proceedings,<sup>199</sup> there is also a question to be asked about whether greater harm is caused to children by involvement in untested contact arrangements, particularly in the light of the risks involved in placing responsibility on parents to bring cases back to court if problems arise.

#### **4.4 CONCLUSION**

This Chapter responds to a gap in the evidence base by providing current data on how the courts are resolving applications for contact in which domestic abuse is found or proven. The findings are clear across the practitioner groups that the courts promote contact wherever possible, even in cases of found or proven abuse, confirming the findings from previous studies. Interviewees did not, however, agree on whether this pro-contact stance serves in practice to undermine safety and welfare concerns. The judges themselves were clear that the promotion of contact only extends as far as it is possible for contact to take place safely, and the barristers tended to support judicial approaches. But several interviewees, and in particular the solicitors and domestic abuse organisations, shared concerns about the limited circumstances in which domestic abuse impacts the courts' decision on contact.

One of the issues is the courts' use of the filter of 'relevant' domestic abuse. Whilst this filter exists within PD12J, some interviewees' responses point to risks with its

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<sup>199</sup> This was also emphasised by Sturge and Glaser: C. Sturge and D. Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) 30(Sep) *Family Law* 615, 619.

implementation, with domestic abuse not always regarded as relevant to the final decision when the child has not been directly abused, the abuse is deemed insufficiently serious, the abuse is seen as ‘historic’ or is categorised as ‘one-off’ or ‘situational’. As Chapter 3 argued, domestic abuse does not sit comfortably within neat categories, particularly since seemingly innocuous acts, or ‘historic’ violence, can form part of a dangerous pattern of behaviour when the abuse is viewed in the round. This complexity creates significant challenges for the courts in assessing the risks posed by contact and this thesis calls for investment in research to support the production of more comprehensive guidance on the relevance of abuse to decisions on contact.<sup>200</sup> The findings in this Chapter also underline the importance of raising awareness of coercive control, since this awareness challenges risk-laden assumptions such as that contact can take place safely if the mother has allowed contact post-separation before the case reaches court.

Whilst interviewees were not in agreement about whether the courts’ pro-contact stance minimises safety concerns, and several pointed to judicial inconsistency in approaches, interviewees were agreed that no contact outcomes are rare in contact disputes in which domestic abuse is found or proven, as are outcomes of no direct contact. On the basis of these findings, which are consistent with previous studies, the warning in *Re LVMH* of the ‘pendulum swinging too far against contact where domestic violence has been proved’<sup>201</sup> has not manifested itself in practice. Indeed, even in cases in which no direct contact is deemed appropriate, interviewees’ responses suggest that the approach pursued is to build up to less restrictive forms of contact over time, again underlining the commitment to making contact happen.

Some interviewees opposed the reinstatement of reviews, but concerns raised by other interviewees about staggered orders for contact were that it is now more difficult to manage the long-term risks posed by the perpetrator, with the onus falling on the parent to police the contact. The lack of reviews also makes assessments of whether the courts are reaching the ‘right’ outcomes difficult, with further research

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<sup>200</sup> The importance of this guidance was emphasised by Hunter and Barnett in their influential research (note 12 supra) p.72. This need for guidance was also highlighted by J06-DJ and R03. R03 said: ‘I think there needs to be like a ... a proper discussion about what is and isn’t relevant when it comes to allegations of domestic violence and contact’.

<sup>201</sup> [2001] Fam 260, 273 (Butler-Sloss).

needed to monitor the long-term outcomes for children of contact in order to understand more robustly what represents 'safe' and 'beneficial' outcomes. This thesis now turns to the impact of the statutory presumption of parental involvement and the extent to which it has changed the courts' approach to the resolution of contact disputes in which domestic abuse is found or proven.

# CHAPTER 5

## PRESUMPTIONS – ‘FOR’ OR ‘AGAINST’ CONTACT?

Family law has an uneasy relationship with presumptions, not least because they go against the grain of the well-established knowledge that each child is different, and each case needs to be determined on its own merits. Presumptions arguably have particular limitations in contested family law proceedings, in which the experiences and needs of the children involved are likely to be more complex than those of children within the population more broadly.<sup>1</sup> This, in part, explained the resistance to the introduction of the statutory presumption of parental involvement into the Children Act 1989 through the Children and Families Act 2014. Despite facing significant opposition, both within academia and legal practice, this presumption entered the statute book on 22 October 2014. This doctoral study is the first empirical study to explore its impact on the courts’ and practitioners’ approaches in contact disputes in which domestic abuse is alleged.<sup>2</sup>

This Chapter explores interviewees’ perspectives on both the statutory presumption of parental involvement and the desirability, and workability, of a presumption against contact. Predictions were made prior to the introduction of the statutory presumption that it could push the courts towards ordering contact more readily in cases of proven or found domestic abuse.<sup>3</sup> Interviewees’ experiences indicate this concern has not come to fruition in practice, with the impact of the presumption

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<sup>1</sup> See for example: J. Herring, ‘The Rise and Fall of Presumptions Surrounding the Welfare Principle’ (2013) 43(May) *Family Law* 553, 558.

<sup>2</sup> For comment of the lack of empirical research on the operation of the new presumption, see: A. Barnett, “‘Greater Than the Mere Sum of its Parts’: Coercive Control and the Question of Proof’ (2017) 29(4) *Child and Family Law Quarterly* 379, 399; L. Caffrey, ‘The Importance of Perceived Organisational Goals: A Systems Thinking Approach to Understanding Child Safeguarding in the Context of Domestic Abuse’ (2017) 26 *Child Abuse Review* 339, 348.

<sup>3</sup> See for example: F. Kaganas, ‘A Presumption that “Involvement” of both Parents is Best: Deciphering the Law’s Messages’ (2013) 25(3) *Child and Family Law Quarterly* 270, 293; A. Barnett, ‘Contact At All Costs? Domestic Violence and Children’s Welfare’ (2014) 26(4) *Child and Family Law Quarterly* 439, 455; All-Party Parliamentary Group on Domestic Violence, *Parliamentary Briefing: Domestic Abuse, Child Contact and the Family Courts* (All-Party Parliamentary Group on Domestic Violence and Women’s Aid 2016) pp.6-7. See also: J. Fortin, J. Hunt and L. Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults who Experienced Parental Separation in their Youth* (Sussex Law School 2012) p.11. ‘Proven or found’ is used in this Chapter to encompass admissions of abusive behaviour, along with externally evidenced abuse and findings made through fact-finding.



confined instead to putting existing practice on the statute book. In contrast to calls for reform from within the academic community, however, there was little support among interviewees for reversing this presumption to put in place a presumption against contact.

## **5.1 PRESUMING THE STATUS QUO? THE STATUTORY PRESUMPTION OF PARENTAL INVOLVEMENT**

This section provides a summary of the path to the introduction of the statutory presumption of parental involvement, introduced by the Children and Families Act 2014.<sup>4</sup> It goes on to consider the applicability of this presumption to contact disputes in which domestic abuse is found or proven. The impact of this presumption on the resolution of cases is then assessed through the lens of interviewees' experiences and the reported case law. This is followed by a consideration of its impact on the courts' decision-making process and an assessment of the extent to which its introduction was justified by the existing evidence base.

### **5.1.1 The path to reform**

Debates on 'shared parenting' have taken place over many years, and reform to bring it about has been rejected numerous times, both before the enactment of the Children Act 1989 and after, and most recently by the Family Justice Review in 2011.<sup>5</sup> The Family Law Act 1996 sought to introduce a 'general principle' that, in the 'absence of evidence to the contrary', children's welfare is 'best served' by 'having regular contact' and the 'maintenance of as good a continuing relationship with his parents as is possible', but this was never brought into force.<sup>6</sup> 'Shared parenting' is often used interchangeably with 'shared care', 'shared residence' and 'shared parenting time',

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<sup>4</sup> Children and Families Act 2014, s 11.

<sup>5</sup> Family Justice Review, *Family Justice Review: Final Report* (Ministry of Justice 2011) p.4. For earlier rejections of the prospect of legislation promoting shared parenting, see: Law Commission, *Family Law: Review of Child Law: Custody* (Working Paper No 96, 1986) paras 4.31-4.46; Law Commission, *Family Law: Review of Child Law: Custody* (Law Com No 172, 1988) para 4.10; HM Government, *Parental Separation: Children's Needs and Parents' Responsibilities* (Cm 6273, 2004) para 42; The Advisory Board on Family Law: Children Act Sub-Committee, *Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-residential Parents and the Enforcement of Court Orders for Contact* (LCD 2002) para 1.5.

<sup>6</sup> Family Law Act 1996, s 11(4)(c), repealed by Children and Families Act 2014, s 18. This 'general principle', had it been enacted, would only have applied to cases of divorce or judicial separation. For discussion, see for example: R. Bailey-Harris, J. Barron & J. Pearce, 'From Utility to Rights? The Presumption of Contact in Practice' (1999) 13 *International Journal of Law, Policy and the Family* 111, 112.

but it lacks a uniform definition.<sup>7</sup> The principal argument of proponents of shared parenting has been that the designation of one parent, usually the mother, as the primary carer minimises the involvement of the other, usually the father, in the child's life.<sup>8</sup> Demands for reform have ranged from the introduction of a presumption of equal division of the child's time to a more pared-down presumption of a meaningful ongoing relationship.<sup>9</sup> Debates on shared parenting have become intensely politically-charged, not least as a result of the noise made by the fathers' rights movement.<sup>10</sup>

The Coalition Government picked up the call for shared parenting in 2012, launching its consultation on 'co-operative parenting' in June,<sup>11</sup> hot on the heels of the publication of its response to the Family Justice Review's final report in February.<sup>12</sup> The Family Justice Review had rejected the suggestion of introducing any statutory presumption on parental involvement,<sup>13</sup> having previously advocated a legislative statement to reinforce the 'child's right to a meaningful relationship with both parents' in its Interim Report.<sup>14</sup> Despite the Family Justice Review's opposition to reform, the Coalition Government proceeded with its consultation on how to amend the Children Act 1989 to 'reinforce the principle that both parents should continue to play a role in their child's care post-separation', where it is 'safe and appropriate' to do so.<sup>15</sup>

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<sup>7</sup> Family Justice Review, *Family Justice Review: Interim Report* (Ministry of Justice 2011) p.219; University of Oxford, *Family Briefing Paper 8: Caring for Children After Parents Separate: How Will the Children and Families Act 2014 Approach to Parental Involvement Work in Practice?* (University of Oxford 2014) p.1.

<sup>8</sup> See for example, the discussion in: A. Baker and P. Townsend, 'Post-Divorce Parenting – Rethinking Shared Residence' (1996) 8(3) *Child and Family Law Quarterly* 217, 218-219; *Family Justice Review* (note 7 supra) p.218; L. Trinder, 'Climate Change? The Multiple Trajectories of Shared Care, Policy and Social Practices' (2014) 26(1) *Child and Family Law Quarterly* 30, 31; A. Bainham and S. Gilmore, 'The English Children and Families Act 2014' (2015) 46 *Victoria University of Wellington Law Review* 627, 628.

<sup>9</sup> For discussion, see: Bainham and Gilmore (note 8 supra) 628.

<sup>10</sup> See: H. Rhoades, 'The Rise and Rise of Shared Parenting Laws: A Critical Reflection' (2002) 19 *Canadian Journal of Family Law* 75, 79-82; H. Rhoades and S. B. Boyd, 'Reforming Custody Laws: A Comparative Study' (2004) 18(2) *International Journal of Law, Policy and the Family* 119, 119; R. Collier and S. Sheldon, *Fathers' Rights: Activism and Law Reform in Comparative Perspective* (Hart 2006) p.60; Trinder (note 8 supra) 37-40; Bainham and Gilmore (note 8 supra) 629.

<sup>11</sup> Department for Education and Ministry of Justice, *Consultation: Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life* (Department for Education and Ministry of Justice 2012).

<sup>12</sup> Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A System with Children and Families at its Heart* (Ministry of Justice and Department for Education 2012).

<sup>13</sup> Family Justice Review (note 5 supra).

<sup>14</sup> Family Justice Review (note 7 supra) p.220.

<sup>15</sup> Department for Education and Ministry of Justice (note 11 supra) para 1.5.

Driving the reforms were three principal objectives. One objective was to remedy a public perception of bias towards mothers or fathers (but in practice, fathers)<sup>16</sup> within the family justice system, with the courts seen to be failing to give sufficient weight to the importance of both parents being involved in their children's lives post-separation.<sup>17</sup> Another was to re-emphasise at a 'societal level' that both parents should bear joint responsibility for the upbringing of their children.<sup>18</sup> And it was hoped that these two objectives would, in turn, fulfil the third objective of encouraging parents to reach agreements between themselves over the arrangements for their children post-separation, without recourse to the court.<sup>19</sup> The Government emphasised from the outset of the reform process that it was not intending to legislate to introduce any presumption that a child would spend equal time with both parents post-separation.<sup>20</sup>

This was never, therefore, a reform designed to engineer any radical change in the courts' approach,<sup>21</sup> and was likely, as a result, to disappoint those arguing for a harder-line version of shared parenting. Indeed, it was acknowledged by the Government that the courts were already working on the basis that both parents should be involved in the child's life post-separation, save where this would not be safe or in line with the child's welfare.<sup>22</sup> Instead, sitting unashamedly at the heart of this reform was the symbolic use of the law to send 'messages'.<sup>23</sup>

The Government gave four options for reforming section 1 of the Children Act 1989 to reinforce the importance of parental involvement.<sup>24</sup> On the basis of having secured

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<sup>16</sup> Family Law Week, 'Children's Minister Clarifies Nature of Proposals for Shared Parenting After Divorce' (no date) <<http://www.familylawweek.co.uk/site.aspx?i=ed98501>> accessed 26 October 2018.

<sup>17</sup> Department for Education and Ministry of Justice (note 11 supra) para 3.1.

<sup>18</sup> Ibid para 3.2.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid para 4.4.

<sup>21</sup> Secretary of State for Education, *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny* (Cm 8540, 2013) paras 62-63.

<sup>22</sup> Ibid para 63.

<sup>23</sup> Kaganas (note 3 supra) 280.

<sup>24</sup> These were: 'Option 1 requires the court to work on the presumption that a child's welfare is likely to be furthered through safe involvement with both parents – unless the evidence shows this not to be safe or in the child's best interests'; 'Option 2 would require the courts to have regard to a principle that a child's welfare is likely to be furthered through involvement with both parents'; 'Option 3 has the effect of a presumption by providing that the court's starting point in making decisions about children's care is that a child's welfare is likely to be furthered through involvement with both parents'; 'Option 4 inserts a new subsection immediately after the welfare checklist, setting out an additional factor which the court would need to consider': Department for Education and Ministry of Justice (note 11 supra) paras 9.1 and 10.2 (emphasis added).

majority support from consultees, albeit on arguably shaky foundations,<sup>25</sup> the Government proceeded with the introduction of a statutory presumption of parental involvement<sup>26</sup> but committed itself to amending the wording of the presumption to 'include stronger wording around safety' in order to take account of the concerns raised during the consultation process.<sup>27</sup> Having dropped the 'shared parenting' label in favour of 'parental involvement', and despite facing significant opposition during the legislative process, on 22 October 2014 section 11 of the Children and Families Act 2014 amended section 1 of the Children Act 1989 to introduce a statutory presumption of parental involvement.

### **5.1.2 The statutory presumption and its applicability to cases in which domestic abuse is found or proven**

Following the enactment of section 11 of the Children and Families Act 2014, section 1(2A) of the Children Act 1989 now reads:

A court ... is ... to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

Section 1(2B) clarifies that 'involvement' does not mandate any particular division of a child's time and can be direct or indirect. The effect of this presumption is, therefore, that the court is now specifically directed to presume the benefits of some sort of contact to the child, unless the contrary is shown. The other welfare factors within section 1(3) continue to apply, the welfare of the child remains the courts' paramount consideration,<sup>28</sup> and if the court decides on the facts of the case that the involvement of the parent in the child's life will not further the child's welfare, then the presumption is rebutted. Alternatively, when there is some evidence before the court

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<sup>25</sup> See, for example, the criticisms of the Government's prestaton of the consultation responses voiced by: Bainham and Gilmore (note 8 *supra*) 636.

<sup>26</sup> Option 1: Department for Education and Ministry of Justice (note 11 *supra*) paras 9.1 and 10.2.

<sup>27</sup> Department for Education, *Cooperative Parenting Following Family Separation: Proposed Legislation on the Involvement of Parents in A Child's Life: Summary of Consultation Responses and the Government Response* (Department for Education 2012) p.16.

<sup>28</sup> *Ibid* s 1(1).

that the involvement of the applicant parent in the child's life will expose the child to a risk of suffering harm, the presumption will not apply at all.<sup>29</sup>

It is not automatically the case that the presumption is inapplicable to cases in which domestic abuse has been found or proven. The presumption's applicability is dependent on the assessment made by the court in each individual case, as in the cases in which domestic abuse is not an issue. Given that 'involvement' can be direct or indirect, there will arguably be few cases in which the presumption will be deemed not to apply, since even if direct contact is considered to expose the child to a risk of suffering harm, indirect contact is unlikely to be regarded as exposing the child to this risk, provided this is appropriately managed.<sup>30</sup> The applicability of the statutory presumption to cases in which domestic abuse is found or proven was confirmed by interviewees within this doctoral research. J07-CJ, for example, said:

I don't think it [the presumption] is ousted by the mere finding and in fact ... Sir Justice Wall [said] exactly that: there can be no automatic assumption that there should be no contact because there's been a finding. And the ... Sturge and Glaser thinking perhaps tilted matters the opposite way and that's why the court felt the need to say we don't start from that premise because Sturge and Glaser almost did, frankly.

The version of Practice Direction 12J (henceforth 'PD12J') in force at the time of the interviews conducted for this doctoral research simply re-phrased the statutory presumption.<sup>31</sup> Interviewees' responses suggest that the statutory presumption is being formally applied haphazardly in practice, with some judges and legal practitioners explicitly referencing the presumption and others not. While some interviewees' experiences were of the statutory presumption always or frequently

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<sup>29</sup> Ibid s 1(6).

<sup>30</sup> If not appropriately managed, however, indirect contact can still be used as an instrument of abuse. See for example: M. Coy, K. Perks, E. Scott and R. Tweedale, *Picking Up the Pieces: Domestic Violence and Child Contact* (Rights of Women and CWASU 2012) p.62.

<sup>31</sup> The changes made in the 2017 revisions to PD12J in relation to the statutory presumption of parental involvement are discussed in the Conclusion to this Chapter.

being directly referenced within proceedings,<sup>32</sup> the experience of others was that it might or might not be formally referenced.<sup>33</sup> As one Circuit Judge said:

Well, we mention it now and again and it quite often gets raised by, you know, counsel for the father. One of the things he puts in their skeleton argument, and rightly so. And, you know, who knows for those who are appointed occasionally to hear family work who are deputies and recorders and people who perhaps haven't done very much in practice, it's a good reminder. But it would, I would suggest, be in the warp and weft of any family practitioner's thinking, in any event.<sup>34</sup>

The experience of several other interviewees was that the statutory presumption is not being explicitly referenced at all, or only very exceptionally.<sup>35</sup> This is consistent with Barnett's review of the reported case law from the end of 2013 until October 2016, which found that the presumption was not referenced in any of the eight cases reviewed.<sup>36</sup> Regardless of whether or not the statutory presumption is being directly referenced, however, the experience of the vast majority of interviewees within this doctoral research was that the courts and practitioners adhered to one consistent approach long before its introduction into the statute book – a de facto presumption in favour of contact.

### **5.1.3 What impact has the statutory presumption of parental involvement had on the resolution of contact disputes in which domestic abuse is found or proven?**

The most concerning of all the criticisms of the statutory presumption was that it would lead to an increase in contact arrangements being made in cases in which children's welfare would not be promoted or children would be exposed to a risk of harm. It was argued in particular that the presumption would encourage the courts to order contact more readily, and to focus on the quantity rather than quality of

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<sup>32</sup> N = 9: B01, C02, C06, C08, C10, J06-DJ, S03, S09 and S10.

<sup>33</sup> N = 7: B06, J07-CJ, B02, B03, B07, S05 and S06.

<sup>34</sup> J07-CJ.

<sup>35</sup> N = 13: B05, B08, C03, C04, C07, J01-M, J03-M, J05-CJ, J08-DJ, R01, S01, S04 and S07.

<sup>36</sup> Barnett (note 2 supra) 390.

contact.<sup>37</sup> Bainham and Gilmore voiced their concern, for example, that the statutory presumption could relegate the welfare of the child below the satisfaction of parents' interests in making contact happen.<sup>38</sup> They endorsed the caution issued by Thorpe LJ that there:<sup>39</sup>

... is a danger that the identification of a presumption will inhibit or distort the rigorous search for the welfare solution. There is also the danger that a presumption may be used as an aid to determination when the individual advocate or judge feels either undecided or overwhelmed.<sup>40</sup>

Much of the concern that the statutory presumption would increase the likelihood of contact being ordered in inappropriate cases stemmed from a fear that the presumption would replicate the unintended consequences which followed two attempts in Australia to use legislative reform to promote the role of the non-resident parent in the post-separation family.<sup>41</sup> It was found in response to both waves of reform that, in practice, the perceived need to promote contact dwarfed concerns about family violence.<sup>42</sup> As Professor Helen Rhoades argued in her response to the Family Justice Review consultation:

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<sup>37</sup> See for example: M. O'Grady, 'Shared Parenting: Keeping Welfare Paramount by Learning from Mistakes' (2013) 43(Apr) *Family Law* 448 (accessed online; no page numbers).

<sup>38</sup> Bainham and Gilmore (note 8 supra) 633.

<sup>39</sup> Ibid.

<sup>40</sup> *Re L (A Child) (Contact: Domestic Violence)*; *Re V (A Child) (Contact: Domestic Violence)*; *Re M (A Child) (Contact: Domestic Violence)*; *Re H (Children) (Contact: Domestic Violence)* [2001] Fam 260, 295 (henceforth in footnotes 'Re LVMH').

<sup>41</sup> The Family Law Reform Act 1995 introduced 'objects and principles' into the courts' determination of disputes over contact, which included both the child's right to contact with both parents and an explicit requirement to take into account family violence. The Family Law Amendment (Shared Parental Responsibility) Act 2006 in Australia brought in more radical reforms, which included the introduction of two 'primary considerations' for the court in determining what represents children's best interests: the benefit to the children of having a 'meaningful relationship' with both parents; and the need to protect children from physical or psychological harm which could arise from being exposed or subjected to family violence, abuse or neglect (see s 60CC(2)). And for discussion, see: B. Fehlberg, 'Legislating for Shared Parenting: How the Family Justice Review Got It Right' (2012) 42(Jun) *Family Law* 709, 710-711; R. Hunter, 'Domestic Violence: A UK Perspective' in J. Eekelaar and R. George, *Routledge Handbook of Family Law and Policy* (Routledge 2014) p.322.

<sup>42</sup> See, for example, in relation to the Family Law Reform Act 1995: H. Rhoades, R. Graycar and M. Harrison, 'The Family Law Reform Act 1995: The First Three Years' (2000) 15(1) *Australian Family Lawyer* 1, 4-5 and 6-7. In relation to the Family Law Amendment (Shared Parental Responsibility) Act 2006, see for example: R. Kaspiw, M. Gray, R. Weston, L. Moloney, K. Hand, L. Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies 2009) pp.233 and 235; Hunter (note 41 supra) p.322. And see further the discussion in: Fehlberg (note 41 supra) 710-711.

In practice, Australian trial judges have tended to measure the notion of a meaningful relationship in temporal terms, creating a de facto assumption or at least a yardstick of shared care.<sup>43</sup>

Such was the level of concern in Australia about the impact of reform that the Family Law Act 1975<sup>44</sup> was amended to make clear that child safety should be given more weight in the courts' deliberations than the benefits to the child of having a 'meaningful relationship' with both parents.<sup>45</sup> Concern that the Australian experience could be replicated in this jurisdiction led the Family Justice Review to withdraw its recommendation to introduce a statutory presumption of parental involvement.<sup>46</sup> Its Final Report endorsed the comment of the Family Justice Council that:

Rather than introducing a provision that creates problems and then adding a fix for those problems, it would be far more sensible not to introduce the problem-creating provision in the first place.<sup>47</sup>

The question, therefore, is whether the statutory presumption introduced in this jurisdiction by the Children and Families Act 2014 has changed the courts' practice, increasing the likelihood of contact being ordered inappropriately in cases in which domestic abuse has been established. Following the implementation of the presumption, there have been a number of suggestions that the presumption has strengthened the courts' resolve to promote contact wherever possible. Barnett reported the anecdotal evidence which points to the 'contact at all costs approach' having been reinforced by the introduction of the presumption.<sup>48</sup> Women's Aid set out that in the light of the introduction of the statutory presumption:

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<sup>43</sup> Family Justice Review (note 5 supra) p.140. See also: Kaspiew, Gray, Weston, Moloney, Hand, Qu and the Family Law Evaluation Team (note 42 supra) p.233-236; B. Fehlberg (note 41 supra) 711; Family Justice Review (note 5 supra) p.141. And see the discussion in: L. Trinder, 'What Might Children Mean by a Meaningful Relationship?' (2009) 15 *Journal of Family Studies* 20.

<sup>44</sup> Family Law Act 1975 s 60CC(2) and (2A).

<sup>45</sup> Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 s 17.

<sup>46</sup> Family Justice Review (note 5 supra) pp.141-142.

<sup>47</sup> Ibid p.141.

<sup>48</sup> Barnett (note 2 supra) 399.



... there are growing concerns amongst some practitioners and academics that the courts are prioritising contact with an abusive parent over the safety of the child and non-abusive parent'.<sup>49</sup>

And the All-Party Parliamentary Group on Domestic Violence argued that the statutory presumption has:

... led to an increased emphasis in the family courts on the importance of children having contact with both parents.<sup>50</sup>

On the basis of the interviews conducted for this doctoral research, the empirical foundation for these statements is unclear. The vast majority of interviewees were united in their experience that the presumption has made no difference to the way in which contact disputes involving domestic abuse are being resolved by the courts because it has simply put on the statute book the strongly pro-contact stance which was already well-established in practice. Interviewees' perspectives are explored first below, before moving onto a discussion of the reported case law.

#### 5.1.3.1 Interviewees' perspectives – is the statutory presumption of parental involvement changing the courts' resolution of contact disputes in which domestic abuse is found or proven?

Every judge interviewed said that the statutory presumption was having no impact on their approach to, or resolution of, cases. This was corroborated by the barristers, who were similarly definite about the lack of impact of the statutory presumption on the courts' resolution of cases. Both within and between these professional groups, there were different understandings of why the presumption was having no effect. The Cafcass, solicitor and domestic abuse organisation interviewees had more mixed views on the significance of the statutory presumption and whether it was changing

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<sup>49</sup> Women's Aid, *Nineteen Child Homicides: What Must Change So Children Are Put First in Child Contact Arrangements and the Family Courts* (Women's Aid 2016) p.13.

<sup>50</sup> All-Party Parliamentary Group on Domestic Violence (note 3 supra) pp.6-7. See also: The Hon. Mr Justice Cobb, *Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm – Report to the President of the Family Division* (January 2017) para 12(a).

the courts' practice, but the majority still confirmed that it was simply maintaining the status quo.

Even among the judges who said the statutory presumption is regularly quoted within proceedings, its lack of impact on the courts' approach was emphasised. J06-DJ, for example, said:

Either way whatever order I am making I will read it [the statutory presumption] out because if I am ordering no contact I've got to demonstrate that I am aware of that and if I am about to order contact I might be saying to the mum "Look, this is the strong presumption that I have to work under. The Court of Appeal have said to me, and the Act says, so this is how it's going to be". So, yes, I would quote it, so you might see it in cases quite often and you might often say "Well, look how often judges are quoting it; it must be important". But I think if it wasn't there it wouldn't make any difference.

And J01-M again confirmed that the statutory presumption is having little impact on the resolution of cases, even when raised by lawyers:

... if you've got a private case that's coming in and they've brought in a lawyer as opposed to be self-representing, then they will come in and then they are the ones who start quoting this and that and then the parents might be thinking "Oh that sounds really good" but it doesn't necessarily change any decision that we might make.

J04-DJ thought the presumption might have had an impact on litigants but said it was having no impact on lawyers:

It might have made a difference to people reading the Act or parents, for example, but for the lawyers, no.

The most common reason given by the judges and barristers for the lack of impact of the presumption was that the courts were already working on the basis that children should have contact wherever possible prior to the reform. These interviewees, however, expressed this view in slightly different ways. Some barristers, and one judge, said a specific presumption in favour of contact was embedded into practice long before the introduction of the statutory presumption.<sup>51</sup> J05-CJ, for example, said that the statutory presumption has not ‘changed anything because we had that presumption anyhow’. B02 described it as a ‘watered-down presumption’ which has ‘added absolutely nothing’ because ‘there’s always been that presumption’. B04 again made the same point:

... that’s always been a presumption. Kids should know their parents, and have a relationship with them, unless it is not in their best interests.

As did B05:

I suppose as practitioners, we all for some time now ... I mean that’s now been incorporated into statute. But, quite frankly, that’s the presumption we were all operating on anyway, so it almost didn’t need saying.

And B08:

... it’s not a new presumption. It’s newly written down but it’s absolutely the presumption we have always worked on that a child should have a relationship with both of its parents if it is safe to do so. ... we always say, “It is in a child’s interests to have a relationship with both parents if it is safe and appropriate to do so”. And we have always said that, and we will always say it.

Other judges and barristers also attributed its lack of impact to it already being firmly-established within judicial thinking that it is better for children to have contact than

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<sup>51</sup> N = 5: B02, B04, B05, B08 and J05-CJ.

not but these interviewees did not specifically label this as a pre-existing presumption.<sup>52</sup> B01 said the statutory presumption 'hasn't made the slightest bit of difference' for this reason, describing it as 'stupid nothingness'. J10-DJ said that the 'starting point' prior to the introduction of the statutory presumption was that 'a child has two parents'. J04-DJ said that the statutory presumption was having 'no impact whatsoever' on the courts' resolution of cases because:

I think every ... me and all of my colleagues who have done children work for years have always had that view that it's better to have contact then nothing at all so that, in the Act, has made no difference.

J02-M again made the same point, again emphasising the benefits to the child of contact:

I would say that's always been our approach that bar there being reasons not to have it [contact], that is always the way that you want to go. It's the best for the child. The most healthy so ... .

As did B07:

Most of the judges here have been pretty pro-contact in the vast majority of cases that I can think of over the last 10 or 15 years. A lot of them are people that I have been in practice with in the past and they are pretty pro-contact for the reasons that I've spoken of already about the make-up of a child's psychological well-being. ... So, I have no personal experience of the presumption having made a difference.

And J08-DJ suggested judges automatically equate making contact happen with the promotion of the welfare of the child:

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<sup>52</sup> N = 7: B01, B06, B07, J02-M, J04-DJ, J08-DJ and J10-DJ.

I don't mention it [the statutory presumption] ever. I don't think I need to because, you know, I mean the welfare of the child is my paramount consideration and, in my view, that dictates having a relationship with both parents unless there is reason why not, so I think that's implicit. All it does is put it in there as the majority of people who come in front of you don't know about the Children Act anyway, you know. Doesn't make any difference to them.

B06 also suggested contact is synonymous with children's best interests in judicial decision-making:

... [the judge] might articulate it [the presumption] in their judgment but actually I don't think it makes practical difference in their decision-making; they've just decided what's in the best interests of the child and that's where they are coming from.

One judge and one barrister also made this same point that the statutory presumption has not made any difference to practice, but these interviewees did so using the language of 'rights'.<sup>53</sup> J03-M said:

I personally don't think it's made a lot of difference because I've always approached it from that point of view that the child has the right to have both parents in their lives unless it's not safe to do so so, you know, in that sense, I think it's reinforcing what we probably already felt was the right thing anyway. So I don't think it's made a huge difference, no.

And B03 said:

I can't say that it weighs heavily on anybody. We all know that wherever possible a child has a right and should know the absent parent, and their families.

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<sup>53</sup> N = 2: B03 and J03-M.

Other judges attributed the lack of impact of the presumption to its purpose being a politically-motivated one of placating those who perceived the courts to give insufficient weight to the importance of both parents in children's lives post-separation.<sup>54</sup> J06-DJ described the statutory presumption as 'parliamentary window dressing'. J07-CJ similarly identified the political motivation for reform:

I think it was a statement of what ought to have been the obvious, which was put in for political reasons because there was a lobby which said there is, you know, not enough emphasis in underlining a child's right to a relationship with both parents in statutory form. But I think it was there in terms of common law long before it was there in terms of primary legislation.

One judge and one barrister made a similar point about the symbolic message-sending intention behind the reform but made the different point that the reform was aimed at litigants in person.<sup>55</sup> J09-DJ said:

It's [the statutory presumption] for the punters isn't it. It's to remind, you know, like many things are now put into the rules, it's because, of course, there are more litigants in person I suppose so that helps them but no, it's had no ... I would like to think I was aware of that, the case law. I don't need anybody to take me to that provision. It's there. ... But, no, it's made no difference to the way I deal with cases. I would be surprised if many experienced judges thought it had to them.

And B05 said:

Perhaps it was for people outside of the legal community ... perhaps it's for the litigants in person ... just to reiterate to the public that this is the presumption; this is what we are operating on the basis of.

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<sup>54</sup> N = 2: J06-DJ and J07-CJ.

<sup>55</sup> N = 2: B05 and J09-DJ.

The solicitors and Cafcass practitioners had more mixed views on the impact of the presumption, but the majority still shared the view of the judges and barristers that the statutory presumption has not changed practice.<sup>56</sup> In common with some of the barristers and judges, one solicitor and one Cafcass practitioner among this majority again said the statutory presumption had not changed practice because a specific presumption in favour of contact was already firmly established before its entry on the statute book.<sup>57</sup> C09 said the presumption was not changing court practice because the presumption had 'always been there'. And S02 said:

I haven't really seen any impact in practice. I think that the view, for a long time, has been that there should be contact, regardless. So, unless you are talking about care proceedings, and where there has clearly been neglect, sexual abuse, something like that, the presumption is, children should see both parents.

Others said the statutory presumption was not changing practice but made a number of different points.<sup>58</sup> C07's experience was that the statutory presumption is never specifically referenced and simply represented the approach adopted prior to the reform, in which contact was promoted wherever safe. S07's experience was also that the statutory presumption is never referenced, and is having no impact as a result, but S07 did not specifically identify the promotion of contact as the courts' approach prior to the reform. C08 had a different experience, reporting the statutory presumption regularly being referenced in proceedings, but agreed that the presumption was not making it more likely that contact would be ordered in cases of domestic abuse. S01's view was that the presumption was not changing practice because the courts' focus has remained on the welfare of the child:

I've not noticed specifically any changes since that's come into place, a different way of thinking, because I think it's always been one of the factors that has been considered anyway because the court consider, you

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<sup>56</sup> S04 could not comment on the impact of the statutory presumption, having not heard of it before. S06 did not comment on the impact of the statutory presumption but confirmed the existence of a pro-contact approach. C02 did not comment on its impact.

<sup>57</sup> N = 2: C09 and S02.

<sup>58</sup> N = 5: C07, C08, S01, S03 and S07.

know, not really what the parents want, they totally look at what's in the child's best interests so I don't think that, irrespective of the presumption being that because "that's my child, I should be able to see that child" and I think, literally, the courts still focus on the welfare checklist of what is in the child's best interests. And that, in my view, is right.

And in line with some of the comments made by the judges and barristers, S03 identified the use of the statutory presumption to send messages, stating:

I guess when you get things like that introduced into law it's because the legislators are worried that we've forgotten something that we should be doing in the first place. And that's how I see it!

Whilst not commenting on whether the statutory presumption had changed the courts' practice, two Cafcass practitioners suggested it had impacted on their own practice in how they explained the law to parents.<sup>59</sup> Since Cafcass practitioners will be the only non-judicial professionals litigants in person encounter, this may influence the messages being sent to parents. The change in Cafcass' practice was not, however, reported by either interviewee to be particularly significant. C01 said:

Maybe in the way that we talk to parents in terms of their role in promoting contact with an absent parent. There might be a bit more of a focus on that and that they've got a responsibility ... I don't think it has changed particularly how I work with families and parents.

C04 similarly felt the statutory presumption could change how Cafcass practitioners frame their discussions with parents but again suggested that this change is not significant:

I always say it to the parents, though. But not ... I don't reference it. I don't say "This Act says this". I say to parents, you know, that from the

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<sup>59</sup> N = 2: C01 and C04.



courts' point of view their starting point is that children should have contact with ... should have a relationship with both parents unless it is not safe to do so. So, I always say that to parents, but I don't actually hear it referenced. ... I would hope that people would always go with that from the outset, but I don't know. It's made me think that maybe I should reference that more in my reports as a ... just to ... as further evidence I guess. It's not just me saying "I think children should have a relationship with both parents" but, actually, this is ... in a new Act and this is where we should be starting from. Yes ... but I've not heard it in "This is the new way we are approaching things".

S08 pointed to a potentially more significant shift in Cafcass' practice, stating that the statutory presumption could be 'creat[ing] a culture' in which contact is promoted, but even this was tentatively expressed:

I suppose these sorts of changes are, again, sort of create a culture, don't they, and as people are being trained and that's the only law they know and then they come through and approach it from that particular angle, and they haven't had experience of how things might have been before, so it probably has a kind of snowballing effect as things move forward maybe. I don't know. I don't know.

Other interviewees did not think the statutory presumption was changing Cafcass' practice.<sup>60</sup> One solicitor, for example, said:

I think for years, Cafcass have always said in their reports, you know, children should be afforded the opportunity to have a relationship with their father. And also, not just with their father but with their extended family as well, which is really important.<sup>61</sup>

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<sup>60</sup> N = 2: C03 and S05.

<sup>61</sup> S05.

C03 agreed that the statutory presumption was not changing Cafcass' practice because it embodied the approach already adopted by practitioners prior to the reform. In common with some of the judges and barristers, C03 also spoke of a child's 'right' to contact:

I don't think so because well, certainly from a Family Court Adviser's perspective, that's where we always start from, you know, that the child ... that both parents needs to exercise their parental responsibility and a child has a right to have both parents in their lives, so I don't think that it's something that brought any major change. It's something that we do, we've always done. Yes. We've always done, obviously looking at the safeguarding and the risk issues. Yes. So. Yes. I don't think that it's ... perhaps made us more aware but it's not something that ... because we've always done it.

The two domestic abuse organisations which commented on the impact on the statutory presumption were split in their experiences. R03 did not think the statutory presumption was changing the courts' practice, again reiterating the point that the courts were already working on the basis of there being a presumption in favour of contact prior to the reform:

I don't really find that presumption or Practice Direction 12J, I don't think that's made any difference to the way the courts operate. I think the presumption was already there and, as usually happens, statute follows the case law and so something ... case law goes in a certain direction and every so often statute gets updated and they just reflect what is already happening in the court. So, yes, I don't think there is ... I mean it might be enforced ... or it might give judges something to quote when they are making the decision that they would already have made because, in their mind, they are always making decisions which are in the best interests of the child.

The minority of interviewees sharing the experience that the presumption was changing practice consisted of solicitors, Cafcass practitioners and one of the domestic abuse organisations.<sup>62</sup> R02 was among the most definite that the statutory presumption had made it more likely that contact would be ordered in cases of domestic abuse:

I think definitely and in terms of really forcing contact through without a clear understanding of what that might mean for the family ... It's like, "well, you know, they should be able to have a relationship with their father", despite the fact that he is a known, violent criminal.

Two solicitors agreed that the statutory presumption was having this effect, one expressing this perspective with less certainty than the other.<sup>63</sup> S09's experience was that the statutory presumption had changed practice 'slightly', making it more likely that contact would be ordered in cases involving domestic abuse, particularly in cases heard by magistrates:

You can't just do a carte blanche saying there is a presumption for contact because people like justices run with that and they won't go against that. ... [it is stated] in the 2014 Act 'unless the risks outweigh' but no-one hears that little bit.

S10 was more definite that the presumption was changing practice, describing the presumption as turning the 'tide' towards greater contact and highlighting the use of the presumption by lawyers:

... a tide is turning almost isn't it because there is a presumption so it's not "This will/won't have contact", it's "This child will have contact unless there are very good reasons why not". So, already, if you are acting for a person who is applying for contact, they are one step ahead. Before, I think it was "Well, let's look at everything" but you are starting off and

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<sup>62</sup> N = 6: C05, C06, C10, R02, S09 and S10. R01 had not come across the presumption and did not comment on its impact as a result.

<sup>63</sup> S09 and S10.

that's the first point I make whenever I do a hearing: "the presumption is contact will take place so let's get contact moving", if I am acting for the person that wants contact.

... And if you are not, if you are representing for a mum who is opposing it, you have to say to them "It is an uphill struggle because the presumption is ... and even if, even if findings are made, it's still very rare that contact is stopped.

Three Cafcass practitioners said that the statutory presumption had increased the likelihood of contact being ordered in cases of domestic abuse.<sup>64</sup> C10 said the presumption had increased the pressure on the resident parent to prove why contact should not go ahead:

I think it's made it more likely that contact will be ordered if I were to be honest. ... it puts the burden on the resident parent to kind of prove their case that you are not safe as opposed to the other way around because, you know, the applicant will come in and say "I haven't had contact with my children because she has been obstructive" and then it's now down the respondent to say "Well, actually, this is why it's not happening and this is my case" whereas I think ... the onus should be on the perpetrator to evidence what changes they have made right from the get go.

Whilst some interviewees, therefore, thought the statutory presumption was having an impact on outcomes, the majority reported it having made no difference to the way in which the courts resolve contact disputes in which domestic abuse is found or proven. And uniting the majority of interviewees who shared this view on the lack of impact of the presumption was the experience that its lack of impact was explained by the courts already recognising the importance of promoting parental involvement long before the reform, although this was expressed in different ways. As explored

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<sup>64</sup> C05, C06 and C10. C05 and C06 did not elaborate further.

below, the reported case law further points to this conclusion that the statutory presumption does not represent any radical new approach.

5.1.3.2 The reported case law – is the statutory presumption of parental involvement changing the courts’ resolution of contact disputes in which domestic abuse is found or proven?

Reliance on the reported case law as a measure of judicial practice has its limitations.<sup>65</sup> As Barnett has emphasised, these cases are only those which go to appeal, which is the minority and not representative as a result.<sup>66</sup> And the number of cases being appealed has reduced significantly since the Legal Aid, Sentencing and Punishment of Offenders Act 2012.<sup>67</sup> These cases may further be unrepresentative because the reported cases tend to be those in which the trial judge has refused to order direct contact, which, as discussed in Chapter 4, is ‘extremely rare’.<sup>68</sup> Provided these limitations are acknowledged, the reported case law can still help to build the picture on the impact of the statutory presumption, particularly when combined with the empirical data from this doctoral research on the way in which trial judges are resolving cases.

The reported case law corroborates the majority of interviewees’ responses that the statutory presumption has made little difference in practice. As noted above, Barnett found in her review of the reported case law from the end of 2013 to October 2016 that the presumption was not referenced in any of the eight cases reviewed.<sup>69</sup> The sample of cases reviewed for this thesis, all of which were reported since Barnett’s review, do not articulate the impact of the presumption in uniform terms, but none suggest it has radically changed the courts’ approach.<sup>70</sup>

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<sup>65</sup> Barnett (note 2 supra) 388.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Barnett (note 2 supra) 390.

<sup>70</sup> The case law sample was drawn from a Westlaw search with the following key terms: ‘contact’ and ‘child arrangements orders; domestic violence and abuse’. Whilst not providing a full review of the reported case law, since Westlaw does not hold all reported cases, this approach, nevertheless, enabled insights to be made into judicial perspectives and the use of the statutory presumption. All the reported cases in which the statutory presumption was referenced are discussed in this section.

In the recent case of *Re J (Children)*, Lord Justice McFarlane said the statutory presumption ‘enacts a basic tenet of child law’.<sup>71</sup> In *Re CB (International Relocation: Domestic Abuse: Child Arrangements)*, Mr Justice Cobb again identified the weight put on the importance of contact prior to the reform but described the impact of the statutory presumption in stronger terms, stating it has ‘buttressed’ the case law on Article 8 of the European Convention on Human Rights on parent-child contact and the principles in European case law.<sup>72</sup> Mr Justice Cobb, however, balanced this comment by making clear the importance of adhering to PD12J.<sup>73</sup>

References to the statutory presumption in other cases simply restate the terms of the presumption. These cases do not, therefore, emphasise the promotion of contact without the accompanying assessment of whether the parent poses a risk of harm to the child or parent. In *Re LG (A Child) (Fact-Finding Decision: Application to Re-Open)*, for example, Mr Justice Baker said:

The fundamental principles, of course, are set out in s.1 of the Children Act. The child's welfare is the paramount consideration: s. 1(1). When considering an application for a child arrangements order, the court must presume, unless the contrary is shown, that the involvement of each parent in the life of the child concerned will further the child's welfare: s. 1(2A). In determining such an application, the court must also have regard in particular to the matters identified in the so-called welfare checklist in s. 1(3), including any harm which the child has suffered or is at risk of suffering, the child's needs, including her emotional needs, and how capable each of her parents is of meeting her needs.<sup>74</sup>

The only case in the sample that might suggest a different approach is being taken is *JAL v LSW*, in which Mr Justice Williams said:

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<sup>71</sup> [2018] EWCA Civ 115, [2018] 2 FLR 998 [48].

<sup>72</sup> [2017] EWFC 39, [2017] 3 FCR 273 [38].

<sup>73</sup> *Ibid.*

<sup>74</sup> [2017] EWHC 2626 (Fam), [2017] 4 WLR 194 [20]. See also: *Re S (Children)* [2017] EWFC 23, [2017] 3 FCR 417 [92] (Russell J); *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121, [2018] 2 FLR 608 [73] (Jackson LJ); *Re A (A Child)* [2018] EWHC 2771 (Fam), [2018] 9 WLUK 163 [38] (Baker J).

The implementation of section 1(2A) Children Act 1989 makes clear the heightened scrutiny required of proposals which interfere with the relationship between child and parent.<sup>75</sup>

Even this is ambiguous as ‘makes clear’ could refer either to a change or an elucidation of the existing approach. On balance, therefore, the case law reviewed does not suggest that the presumption is having an impact on practice.

#### 5.1.3.3 Summary

It is not claimed that the sample of professionals interviewed for this doctoral research is representative, and the comments from interviewees who felt the statutory presumption was changing practice should not, therefore, be downplayed. That said, the clear picture reported by the majority of interviewees is that the statutory presumption has not changed practice, a finding corroborated by the reported case law. The majority of interviewees’ responses suggest that the statutory presumption has not increased the likelihood of contact being ordered in cases in which domestic abuse is found or proven because the courts already worked on the basis that contact should be promoted wherever it was safe to do so.

Yet, even if the statutory presumption is not changing outcomes, two key criticisms of its introduction remain. The first is that it risks changing the courts’ decision-making process. The second is that the presumption still legitimises a pro-contact stance which has little foundation in the evidence base and reinforces the dominant norm that children should have contact. These concerns are explored below, and it is argued on the basis of the findings from this doctoral research that the latter carries more weight than the former.

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<sup>75</sup> [2017] EWHC 3699 (Fam) [12].

#### **5.1.4 Has the statutory presumption of parental involvement changed the courts' decision-making process in contact disputes in which domestic abuse is an issue?**

A concern raised prior to the introduction of the statutory presumption was that it would undermine the standard burden of proof within family proceedings,<sup>76</sup> which could, in turn, unjustifiably deny children a relationship with their non-resident parent.<sup>77</sup> The statutory presumption does not apply when there is 'some evidence' before the court that the involvement of the applicant parent in the child's life will expose the child to a risk of suffering harm.<sup>78</sup> The test is not, therefore, whether it can be proved on the balance of probabilities that the parent's involvement will expose the child to that risk. It was argued that this lower 'diluted' standard could force the courts to conclude that the applicant parent cannot be involved in the child's life when, in practice, that parent does not pose a risk of harm to the child.<sup>79</sup>

On the basis of the interviews conducted for this doctoral research, this concern has not manifested itself in practice. Overall, interviewees reported the presumption being applied haphazardly, rather than it being referenced in every case with its applicability mapped to the letter of the statute.<sup>80</sup> There was also no indication in any of the interviews conducted that the presumption is making it more likely that the courts will deny contact on the basis of the lower threshold of 'some evidence' rather than the balance of probabilities. On the contrary, the minority of interviewees whose experience suggested that the statutory presumption was changing practice felt the presumption was making it more, not less, likely that contact would be ordered in cases where it previously would not have been. The majority of interviewees did not think the statutory presumption was making any difference to outcomes reached.

A related concern raised prior to the introduction of the statutory presumption was that the focus on harm within the presumption would undermine the judicial decision-making process by encouraging the resident parent to attempt to rebut the

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<sup>76</sup> For discussion of the applicability of the balance of probabilities, see for example: *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11 [2] and [31] (Lord Hoffman).

<sup>77</sup> O'Grady (note 37 supra).

<sup>78</sup> Children Act 1989, s 1(6).

<sup>79</sup> O'Grady (note 37 supra).

<sup>80</sup> See above at 5.1.2.



presumption by raising allegations of harm and the non-resident parent to focus his arguments on why he does not pose any such risk.<sup>81</sup> It was argued that this could lead to 'prejudicial delay' within proceedings and that this concern was particularly acute in the light of the increase in the number of self-represented litigants.<sup>82</sup>

While several interviewees identified false allegations as an issue,<sup>83</sup> none of these interviewees linked the making of false allegations to the statutory presumption of parental involvement. It does not appear, therefore, that there is an empirical foundation for this concern that the presumption would lead to allegations of harm being raised unnecessarily, in turn giving rise to a focus on rebuttals of allegations. Again, the more pressing concern, identified by the minority of interviewees who thought the statutory presumption was changing practice, is that the presumption is making it harder for parents who have experienced domestic abuse to put forward their allegations. The criticism of the introduction of the presumption which still holds weight is that it lacks an evidential foundation.

#### **5.1.5 Was the introduction of the statutory presumption supported by the empirical evidence base?**

An important criticism levelled at the introduction of the statutory presumption was that it was unsupported by the evidence base. It was argued that there was little evidential foundation for the Coalition Government's claim that legislation would remedy a public perception of bias and encourage private settlement, and the lack of empirical evidence for there being any bias against fathers was also emphasised.<sup>84</sup> And, crucially, it was also argued that the pro-contact stance embodied in the presumption was inconsistent with the research evidence on the relationship between contact and welfare.<sup>85</sup>

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<sup>81</sup> O'Grady (note 37 supra).

<sup>82</sup> Ibid.

<sup>83</sup> See Chapter 3 at 3.3.1.

<sup>84</sup> Kaganas (note 3 supra) 283-284. See also: J. Hunt and A. Macloed, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice 2008) pp.250, 253 and 246; M. Harding and A. Newnham, *How Do County Courts Share the Care of Children Between Parents?* (Nuffield Foundation 2015) p.130.

<sup>85</sup> See for example: Kaganas (note 3 supra) 275-278; Barnett (note 3 supra) 455.

Taking the first of these two criticisms, while the Government asserted that a presumption would remedy perceptions of bias, and encourage private settlement, there was no evidence to support this.<sup>86</sup> The reforms in Australia<sup>87</sup> did not appease fathers, and even increased their dissatisfaction with the law, since reform was erroneously interpreted as giving rise to a right to equal time.<sup>88</sup> Kaganas has argued that fathers within this jurisdiction may similarly be disappointed to learn that the statutory presumption does not entitle them to any specific proportion of the child's time, and certainly no entitlement to equal division, even now it is no longer labelled 'shared parenting'.<sup>89</sup> The Justice Committee agreed that the statutory presumption would be unlikely to be successful in remedying perceptions of bias, particularly in the light of public dissatisfaction with the proposed reform among those who understood its scope.<sup>90</sup>

Indeed, it was argued that rather than remedying a perception of bias and encouraging private settlement, the statutory presumption risked increasing parental conflict by raising expectations that the law had been changed to increase the role of the non-resident parent in the post-separation family, when this is not the case.<sup>91</sup> One of the problems, as Harris-Short points out in the context of shared residence orders, is that parents see through vacuous labels.<sup>92</sup> Using shared residence orders for 'psychological or "symbolic"' purposes, she argues, is 'patently obvious' to parents and is more likely, as a result, to intensify ill-feeling, rather than remedy it.<sup>93</sup> If, however, parents do not accurately understand the extent of the statutory presumption, then a risk arises that non-resident parents might pressure resident parents into agreeing to generous contact arrangements, which are neither safe nor

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<sup>86</sup> Kaganas (note 3 supra) 283.

<sup>87</sup> See above at 5.1.3.

<sup>88</sup> Kaganas (note 3 supra) 284.

<sup>89</sup> Ibid.

<sup>90</sup> Justice Committee, *Fourth Report: Pre-Legislative Scrutiny of the Children and Families Bill* (HC 739, 2012) paras 186-187.

<sup>91</sup> Law Society, 'Co-operative Parenting Consultation Response' (6 September 2012) <<http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/co-operative-parenting-consultation-response/>> (accessed 6 March 2018) pp.8-9; O'Grady (note 37 supra); Kaganas (note 3 supra) 285. For comment on the Australian experience, see for example: B. Fehlberg, B. Smyth, M. Maclean and C. Roberts, 'Legislating for Shared Time: Parenting After Separation: A Research Review' (2011) 25(3) *International Journal of Law, Policy and the Family* 318, 319; Fehlberg (note 41 supra) 710.

<sup>92</sup> S. Harris-Short, 'Resisting the March Towards 50/50 Shared Residence: Rights, Welfare and Equality in Post-Separation Families' (2010) 32(3) *Journal of Social Welfare and Family Law* 257, 262.

<sup>93</sup> Ibid.

in children's best interests.<sup>94</sup> This doctoral research was not intended to provide empirical insight into parents' perceptions in this jurisdiction, but the weight of evidence prior to the reform points to the conclusion that the statutory presumption is unlikely to enjoy success in remedying perceptions of bias or encouraging parents to reach amicable settlements in appropriate cases.

Turning to the second criticism of the lack of an evidential foundation for the introduction of the statutory presumption, Chapter 2 argued that the evidence base on the relationship between contact and child well-being does not provide any hard and fast rules to dictate the result of an application for contact in relation to any individual child. It was also argued that it does not justify an outright pro-contact stance. Instead, the risks and benefits of contact need to be carefully balanced in each case,<sup>95</sup> and presumptions do not find a natural home within this approach.<sup>96</sup> Bainham and Gilmore went as far as to argue that the statutory presumption was 'impossible to reconcile' with this approach.<sup>97</sup> The inappropriateness of presumptions to determinations of children's welfare is further underlined by the evidence on the risks to children of contact with domestically abusive parents,<sup>98</sup> and the consistent finding from research that it is the 'nature and quality of contact' which matter to children's adjustment, and not its mere existence.<sup>99</sup>

In the light of the warnings within the existing evidence base on the dangers of presumptions, it is hard to see that the statutory presumption was driven by anything other than ideology, which is a well-supported argument within existing commentary.<sup>100</sup> Kaganas argued that the presumption formed 'part of a symbolic crusade to endorse the traditional importance of the father and to restore confidence in the family justice system'.<sup>101</sup> The Law Society echoed this argument in its response

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<sup>94</sup> See for example: O'Grady (note 37 supra).

<sup>95</sup> See for example: O'Grady (note 37 supra) (accessed online, no page numbers); Bainham and Gilmore (note 8 supra) 633.

<sup>96</sup> See, for example, the comments of Sir James Munby in a different but nevertheless relevant context: *F (A Child)* [2012] EWCA Civ 1364, [2013] 1 FLR [37]. See also: S. Sturge and D. Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) 30(Sep) *Family Law* 615, 623.

<sup>97</sup> Bainham and Gilmore (note 8 supra) 633.

<sup>98</sup> See Chapter 2.

<sup>99</sup> S. Gilmore, 'Contact/Shared Residence and Child Well-being: Research Evidence and its Implications for Legal Decision-Making' (2006) 20(3) *International Journal of Law, Policy and the Family* 344, 358. See also: Fortin, Hunt and Scanlan (note 3 supra).

<sup>100</sup> See for example: Bainham and Gilmore (note 8 supra) 633 and 635; Kaganas (note 3 supra) 293.

<sup>101</sup> Kaganas (note 3 supra) 271.

to the Government's consultation, identifying the reform as stemming from a ministerial 'wish to be seen to be responding to the concerns expressed by fathers' and other groups'.<sup>102</sup>

Interviewees in this doctoral research made clear the courts worked with a strong pro-contact stance even before the reform.<sup>103</sup> This stance was already incompatible with the research evidence on the risks posed to children and parents by contact in cases of domestic abuse. The reinforcement of the role of the non-resident parent in the post-separation family through the introduction of the statutory presumption is arguably unhelpful, if not dangerous, in cases in which domestic abuse is found or proven. Just how strongly entrenched the pro-contact stance is can be further evidenced by interviewees' reactions to the question of whether there should be a presumption against contact in cases of domestic abuse.

## 5.2 A PRESUMPTION AGAINST CONTACT

The question of whether there ought to be a presumption against contact in cases in which it is established there is, or has been, domestic abuse has laid largely dormant for a number of years. It has not, however, lost its relevance. The consistent message from existing studies on the courts' resolution of contact disputes in which domestic abuse is an issue is that the courts should adopt a more cautious approach towards contact with domestically abusive parents. While the specific approach the court ought to adopt is rarely spelt out explicitly, there have been calls from within the academic community for a presumption against contact.<sup>104</sup> This final section will consider first whether there should be a presumption against interim contact before allegations of domestic abuse have been tested, and then whether there should be such a presumption once it has been established that the parent has perpetrated domestic abuse. It should, however, be acknowledged that there was virtually no support for either presumption among the practitioners interviewed for this doctoral

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<sup>102</sup> Law Society (note 91 supra) p.4.

<sup>103</sup> See Chapter 4 at 4.1.1.

<sup>104</sup> M. Hester and L. Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (Policy Press 1996) p.3; C. Piper, 'Commentary on *Re L (A Child) (Contact: Domestic Violence)*' in R. Hunter, C. McGlynn and E. Rackley, *Feminist Judgments: From Theory to Practice* (2010 Hart) p.118. See also: Victims' Commissioner, 'VC Makes 14 Recommendations to Government in her Response to Domestic Abuse Consultation' (1 June 2018) <<https://victimscommissioner.org.uk/vc-makes-14-recommendations-to-government-in-her-response-to-domestic-abuse-consultation/>> accessed 26 October 2018.

research, suggesting that calls for these presumptions are unlikely to gain traction in practice.

### **5.2.1 Should there be a presumption against contact at the allegations stage?**

While interim contact was not the focus of this research, a number of interviewees discussed the desirability and workability of a presumption against contact in response to allegations of abuse. On the basis of their responses, a presumption against contact at the allegations stage is unlikely to find favour in practice.<sup>105</sup> Interviewees' opposition to such a presumption stemmed from a concern about false allegations. C09 said it is harder to disprove allegations of abuse than it is to prove them, and a presumption could lead to an increase in false allegations as a result. C02 also said she would oppose any presumption against contact at the allegations stage since, in her experience, there are 'many cases' in which false allegations are made. C03 shared this concern, as did S07:

If it's only an allegation then no, I wouldn't support it because an allegation ... if you do it that way, it's almost you say, "there's no smoke without fire" because it could be a spurious allegation.

B08 did not oppose the presumption out of concern about false allegations but was opposed to it because:

... you can't prove that you didn't do something. It would be completely to reverse the entire principle of English justice so that would be a bad thing! A very bad thing!

Two interviewees expressed some support for the introduction of a presumption against contact at the allegations stage but heavily qualified these responses.<sup>106</sup> S08 said calls for such a presumption were understandable, but suggested, in common with the other interviewees, that it could lead to an increase in false allegations:

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<sup>105</sup> Some interviewees (C02, C03, C05 and S03) did not comment on whether there should be a presumption against contact in cases of proven domestic abuse.

<sup>106</sup> S05 and S08.

It's difficult to say, isn't it. It's like with anything – you might think it's a good idea and it's well-intentioned but is the foreseeable outcome what you expect it to be? ... Because, you know, you do see cases where it's flipped round and obviously it's absolutely devastating for people's lives if false allegations are made against them. And not only are they dealing with the fact they are dealing with false allegations but, also, they are not seeing their children, they are also potentially losing their work, you know, their job at work or ... so, you know, it is a difficult question. ... I don't know the answer to that [whether there should be a presumption against contact], but I can see why people might be thinking about it. I think things need to change if we are going to deal with domestic abuse and it's how you do it.

S05's view was that the presumption should be that it is the 'child's right to have a relationship with the parent' but that cases involving allegations of domestic abuse have to be looked at 'in isolation'. She did, however, express some support for a presumption against contact at the allegations stage, depending on the severity of the allegations:

And I guess, at the outset, you would look at how serious that was so obviously if you've got a case where, you know, mother has turned up at the police station and she is covered in bruises and she has applied for a non-molestation order and got it then probably you would say that the presumption should be no contact until ... well, until it's ascertained as to what has happened, what effect this is going to have on the children, was it a one-off incident – I'm not saying that's right but obviously it's different to when there is a pattern of behaviour ... and maybe you need, you know, look at every case differently.

However, she again shared the view of other interviewees about the risk of false or exaggerated allegations being made and the consequences of these allegations:

... there are, unfortunately, a lot of cases where people either make up allegations or exaggerate that something has happened when actually there has been argie-bargie between the two of them ... doesn't make it right but to say "oh well, you know, he has hit me or his has done this or we've had this incident at handover today" and the presumption is it just stops ... by the time the court application ... number one the father has got to be able to afford to take it to court. He's not going to get legal aid. Two, that takes time. You can have a child who has actually had quite a good relationship with his dad or parents which is going to break down and have to start again: "where's my dad gone? I've been left by my dad". The feelings of ... yes, so I don't think I'm wrong in saying that.

Only two interviewees, a Cafcass practitioner and domestic abuse organisation, said a presumption against contact at the allegations stage would be appropriate.<sup>107</sup> C04's view was that such a presumption could encourage parents to do more at an early stage to prove their case about why contact should be taking place. R01 agreed, dismissing claims that there is a problem with false allegations:

I just think yes, we definitely should be putting the onus onto perpetrators and if a woman is saying that she's been abused then, in my time that I have been working with women who are victims of domestic abuse, I am not yet to meet one who is telling me a complete pack of lies and making it up. I don't believe that I've met one who has told me a pack of lies, you know, I just can't believe it.

Overall, however, interviewees opposed reform, with concern about false allegations the driving force behind this opposition. The particular risk identified was that contact could be stopped in cases in which the parent has not perpetrated any abuse. The problem described was that once contact has stopped, it can be difficult for it to be re-started, particularly in the light of the significant delays that exist in getting cases to hearing. The counter argument is that in the cases of genuine allegations, children

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<sup>107</sup> C04 and R01.

and their mothers could be put at risk at the interim stage if the domestically abusive parent is permitted interim contact. The most recent iteration of PD12J offers this guidance on the ordering of interim contact:

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 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).<sup>108</sup>

At first sight this guidance suggests there is a de facto presumption against contact. The phrasing ‘unmanageable risk of harm’ within this guidance, however, again underlines the pro-contact stance adopted in practice, suggesting as it does that exposing a child to a risk of harm at the interim stage is acceptable, provided this risk is ‘manageable’. As discussed in Chapter 4, the problem with permitting any contact at the interim stage is that it can be difficult for a victim to argue successfully that it should later cease.<sup>109</sup> These tensions reinforce the importance of supporting the court to distinguish genuine from false allegations in order to ensure the protection afforded to victims, and their children, is not weakened by concerns about false allegations.<sup>110</sup>

### **5.2.2 Should there be a presumption against contact once it has been established that the parent has perpetrated domestic abuse?**

Arguments for a presumption against contact in cases of proven or found domestic abuse centre on the perceived need to put the onus on the domestically abusive parent to demonstrate why contact is safe and beneficial: the parent proven or found

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<sup>108</sup> Practice Direction 12J – Child Arrangements & Contact Orders: Domestic Abuse and Harm (October 2017) para 25 (henceforth in footnotes ‘PD12J’). See also paras: [26] and [27].

<sup>109</sup> See Chapter 4 at 4.2.3.2.1.

<sup>110</sup> See also Chapter 3 at 3.3.1.



to have been abusive should make the case for contact going ahead, rather than the onus falling on the resident parent to show why contact should not take place.<sup>111</sup> For example, Sturge and Glaser's advice to the court in *Re L (A Child) (Contact: Domestic Violence)*; *Re V (A Child) (Contact: Domestic Violence)*; *Re M (A Child) (Contact: Domestic Violence)*; *Re H (Children) (Contact: Domestic Violence)* (henceforth '*Re LVMH*')<sup>112</sup> was that the domestically abusive parent should demonstrate:

... why he can offer something of such benefit not only to the child but to the child's situation (ie act in a way that is supportive to the child's situation with his or her resident parent and able to be sensitive to and respond appropriately to the child's needs) ...<sup>113</sup>

And this, they said, might involve the parent setting out 'how he proposes to help the child heal and recover from the damage done'.<sup>114</sup> Sturge and Glaser's view was shared by the small minority of interviewees who supported the introduction of a presumption against contact. This minority consisted solely of interviewees from the domestic abuse organisations and Cafcass.<sup>115</sup> Whilst this research cannot speak to why these professional groups were more likely than the legal practitioners to hold this view, it is possible that this is explained by variations in the cases seen in practice, or the professional identities of these groups. As a result of this issue raising questions of policy, it was not discussed with the judges interviewed.

Only two interviewees, both of whom were Cafcass practitioners, supported an outright presumption against contact.<sup>116</sup> In common with the arguments advanced by Sturge and Glaser, and within academic commentary,<sup>117</sup> both C07 and C10's support for a presumption against contact stemmed from their view that the domestically abusive parent must take responsibility for the abuse perpetrated:

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<sup>111</sup> Hester and Radford (note 104 supra); Piper (note 104 supra).

<sup>112</sup> *Re LVMH* (note 40 supra).

<sup>113</sup> Sturge and Glaser (note 96 supra) 623.

<sup>114</sup> *Ibid* 623-624.

<sup>115</sup> N = 3: C07, C10 and R02. Although it could be assumed that the interviewees who thought there should be a presumption against contact at the allegations stage would support a presumption against contact once domestic abuse is found or proven. The total number of interviewees supporting a presumption against contact at either stage still represented a minority.

<sup>116</sup> C07 and C10.

<sup>117</sup> Hester and Radford (note 104 supra); Piper (note 104 supra).

I like that approach [a presumption against contact]. I ... yes, that's really interesting. ... I am a believer in ... there has to be some acceptance, there has to be some responsibility and there has to be acknowledgement with the child depending on the age. So, I am a great believer in, and I always say I will help a parent put something in writing or have a meeting with the child to basically say "I am sorry". [C07]

I think that [a presumption against contact] would be a really positive step, really, because I think even in child protection the onus, or the scrutiny, is on the victim. The victim needs to protect her children and actually nothing happens to the perpetrator. No-one even tries to even speak to the perpetrator so absolutely I think a lot of perpetrators that I have come across are very keen to just sort of brush things under the carpet and say 'Whatever has happened, happened. I need to see my children' or blame shift. ... I think courts should absolutely take allegations of domestic violence seriously, particularly where there is evidence of, you know, convictions or fact-finding hearings or ... I think it should come as standard that if you have got a conviction for a violent offence, you need to, you know, you need to satisfy the court that you are safe. It's not for the other party to prove that you are unsafe. [C10]

The only other interviewee to express support for a presumption against contact was R02, but this interviewee felt such a presumption would not gain support in practice and should not be argued for as a result, despite it representing 'the safest way for children'. That a presumption against contact would not secure support in practice was confirmed by the vast majority of interviewees.

The resounding answer within interviewees' responses to the question of whether a presumption against contact would be desirable in cases of established domestic abuse was 'no'. None of the barristers supported this. None of the solicitors supported it either, although some expressed greater openness towards it. A small majority of the Cafcass practitioners also opposed such a presumption. One of the three domestic

abuse organisations firmly opposed such a presumption. Interviewees' opposition clustered around four principal issues: a concern that the presumption would invite false allegations; an argument that each case needs to be determined on its own merits; a belief that children should not be prevented from having contact, even when the parent has perpetrated domestic abuse; and a concern about the logistics of the presumption.

#### 5.2.2.1 False allegations

Driving many interviewees' opposition to a presumption against contact in cases of proven or found domestic abuse was a concern that it could lead to an increase in false allegations. B01 was the only barrister to take a positive stance towards a presumption against contact, but even this was heavily caveated. Her view was that it might be a positive development but only if it could be guaranteed that it would only apply in cases of 'true' domestic abuse. She therefore opposed such a presumption on the basis of there being 'so many' false allegations within current practice. B04 also said a presumption would 'lead to even more exploitation', encouraging parents to make false allegations to 'get back at the other parent'. B05 shared this view and described a presumption as 'disastrous for the child' as a result. B06 was also worried that a presumption against contact would encourage allegations to be made, since parties would be put on an 'antagonistic footing'. S02 echoed these concerns, arguing that a presumption would be 'open to abuse':

And I think it would stop good fathers having contact because it is a really easy stone to throw.

As did S10:

I think the risk there is that it [a presumption against contact] opens the door to more false allegations being made because if a mother then does say "there has been this", he is on the back foot where I don't think that is right.

And S09:

... you would have loads of people winding up their other halves,  
disappearing off into the sunset with their new boyfriend.

While these concerns should not be discounted, whether they lead logically to the conclusion that there should not be a presumption against contact in cases of *proven or found* domestic abuse is open to question. Concerns over false allegations could be better addressed through examining the way in which allegations of domestic abuse are tested, rather than allowing them to block the adoption of a presumption against contact altogether in cases in which it has been established that there has been domestic abuse.<sup>118</sup>

#### 5.2.2.2 Each case needs to be determined on its own merits

Some interviewees opposed a presumption against contact on the basis that each case needs to be determined on its own merits, with presumptions identified as sitting uneasily with this approach.<sup>119</sup> B02, for example, described a presumption against contact as ‘utterly over-simplistic’ and a ‘typical academic point of view’ because:

... I don’t think presumptions are good anyhow. It’s meaningless to have  
a presumption. Every case is determined on its own back.

A related argument was that domestic abuse is variable, and a parent who has perpetrated domestic abuse does not necessarily pose a risk to the child. C01, for example, highlighted the capacity of domestically abusive fathers to change:

Well I think every case needs to be looked at on an individual basis ... it  
may be that there have been incidents but the father has changed, he has  
taken on board, he has done a programme, he is remorseful, he regrets  
his behaviour, he can see the impact it’s had on the children and he is in

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<sup>118</sup> See Chapter 3 at 3.2.

<sup>119</sup> N = 5: B02, C01, C08, S01 and S09.

a position to be able to offer them something now and repair that relationship now and be a part of their lives in some way so ... yes I think we would need to be careful about presuming there shouldn't be any because currently it is carefully assessed whether there should be some anyway.

And S01 emphasised that not all forms of domestic abuse are the same:

Sometimes domestic abuse is just a volatile relationship and isn't directed specifically towards the child, so you can have a positive relationship with the child because obviously abuse isn't always violent, and you could have a positive relationship with the child, but not necessarily with that particular person. I think, as with anything, it should be judged on the merits of the individual case and judged that way, which is how the judiciary really deal with it ... .

The argument that presumptions are inappropriate because each case needs to be determined on its own merits finds support in the existing evidence base.<sup>120</sup> Of course, this argument must logically apply as much to the statutory presumption of parental involvement as it does the prospect of a presumption against contact.<sup>121</sup> Evident in some interviewees' responses, however, was that it is acceptable to promote contact, and these interviewees opposed a presumption against contact on this basis.

#### 5.2.2.3 Domestic abuse should not be a barrier to contact

A further reason for interviewees' opposition to a presumption against contact was a perception that domestic abuse ought not to be a barrier to contact. Interviewees raised a number of different arguments. One was that a presumption would interfere with the child's 'right' to contact. B05 described it as a child's 'fundamental human right' to have contact and opposed the presumption on the basis that it would prevent

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<sup>120</sup> See for example: Sturge and Glaser (note 96 supra) 623; O'Grady (note 37 supra) (accessed online, no page numbers); Bainham and Gilmore (note 8 supra) 633.

<sup>121</sup> See further: S. Gilmore, 'The Assumption that Contact is Beneficial: Challenging the "Secure Foundation"' (2008) 38(Dec) *Family Law* 1226, 1228.

contact taking place. S04 also positioned her opposition to a presumption within rights-based discourse:

... as I say, unless there is definitive evidence that this behaviour has affected the children involved then surely it has to be the children's right to have a relationship with both their parents but by elevating the presumption to one against contact, you are really sort of putting the facts of the relationship before the children.

Another argument advanced was rooted in the perception that contact is central to children's well-being. B07 said:

I'd see it [a presumption against contact] as a negative development because it is very important for a child's psychological well-being growing up to have a positive image ... as positive an image as possible of each of its parents because children realise that they are part mum and part dad and for them to have a positive impact of their whole selves, they need to have a positive image of each parent as well. And I can't see how that could be achieved in a presumption against contact in a domestically abusive situation.

And C06 said that whilst each case needs to be determined on its own facts, it remains in children's interests for the presumption to be in favour of contact:

... I think the presumption that ... the presumption that contact or time spent is the right presumption from a child's point of view unless there is serious reason, you know, as to why that child wouldn't want to see their parent.

A further argument raised was that the adoption of a presumption would go against well-established practice. B06 said a presumption would be 'against the grain' of the legislation and case law, which makes clear that the 'starting point for a court in dealing with children is that they should have a relationship with both parents'. His

view was that the courts may already be reversing the presumption in favour of contact in cases of 'serious' domestic abuse, but this is just not articulated.

And, finally, while it might have been assumed that all the domestic abuse organisations would support a presumption against contact, in the light of their work in supporting victims of domestic abuse, R03 similarly opposed a presumption against contact on the basis that domestic abuse should not be an automatic barrier to contact:

... I don't have any reason to believe why a child shouldn't have contact with an abusive father. What I think is that mothers need to be protected throughout the process. They need to be protected from being dragged to court, they need to be protected at handovers ... .

These interviewees' responses are consistent with a long tradition in the reported case law which makes clear that domestic abuse ought not to be a barrier to contact.<sup>122</sup> Lord Justice Waller, for example, set out in *Re LVMH* that domestic abuse should not be 'elevated to some special category' since it is 'one highly material factor amongst many which may offset the assumption in favour of contact'.<sup>123</sup> In the light of the risks posed to parents and children by contact, however, there is an argument that there is sufficient justification for 'elevat[ing]' domestic abuse into this 'special category', and that domestic abuse should act as more of a barrier to contact than is the case within current practice. As the Law Society argued:

It is ... imperative that the protection of children from risk of physical and emotional abuse should take precedence over anything else in considering what is in the best interest of the child.<sup>124</sup>

Interviewees, however, also raised concern about the logistical problems which might arise in practice if a presumption against contact was introduced.

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<sup>122</sup> See for example: *Re LVMH* (40 supra) 273 (Butler-Sloss, P).

<sup>123</sup> *Ibid* 301.

<sup>124</sup> Law Society (note 91 supra) p.7.

#### 5.2.2.4 Logistical problems with the implementation of a presumption against contact

The logistics of making a presumption against contact work also deterred some of the barristers and solicitors from supporting such a presumption. Distinguishing between ‘out of character’ abuse, which is confined to a relationship, and ongoing domestic abuse, which involves long-term risks, were identified as particular challenges.<sup>125</sup> B01, for example, said:

You’ve also got to look at the difference between people who are abusive all the time or occasionally have lapses. When relationships break down, emotions get tense, people become heightened. People say and do things which are completely out of the ordinary which don’t reflect their normal pattern of behaviour and you have to be able distinguish between the person who is genuinely abusive day in, day out and an abusive person who behaved badly due to complex emotional relationship breakdown and all the fears that go with that, who maybe slapped his wife, or maybe have kicked the dog ... and I’m not condoning either. But if you look at that as being out of character, I don’t see that as presenting a risk factor going forward. But if you could say, “well, he slapped his wife, therefore domestic abuse therefore the presumption is against contact”. It wouldn’t be right in my view.

B02’s opposition was also based on a perception that there are different grades of severity of domestic abuse:

And what do you mean by domestic abuse? You know, sort of the parent having hammer and tongs the night they separate or long-sustained ... you know, where somewhere in that continuum you would draw the line ... you know, if there’s bruising, no contact? It’s just nonsense. No, I would heartedly resist anyone who argued that.

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<sup>125</sup> N = 4: B01, B02, B03 and S06. These debates are explored in greater detail in Chapter 3.



S06 also questioned the feasibility of a presumption in the light of having to determine 'some sort of scale of measurement as to the abuse'. However, she argued that all arguments against contact currently have to rebut the presumption of contact and expressed greater support for a presumption against contact than the other interviewees:

... I completely see where people are coming from because, especially in the more grave situations, you know, I would be inclined to agree sometimes – actually, you know, “no unless you tell us why yes” ... .

### **5.3 CONCLUSION**

The introduction of the statutory presumption of parental involvement into the Children Act 1989 faced significant opposition, both within academia and practice. One of the major concerns was that it would increase the likelihood of contact being ordered in unsafe cases in which domestic abuse is an issue. A clear finding from the experiences reported within this doctoral research, however, is that the presumption is not having an impact on either the outcomes reached, or process followed, in these cases. This, the majority of interviewees emphasised, is because a pro-contact stance was already firmly established prior to the reform, with the statutory presumption simply putting on the statute book the approach already embedded in practice. Nonetheless, it has symbolically reinforced the dominant norm that children 'need' contact.

In the light of the risks posed by contact with a domestically abusive parent, there is an argument that this symbolic reinforcement is inappropriate, and there ought to be a presumption against contact in cases of proven or found domestic abuse. The vast majority of interviewees within this doctoral research, however, opposed the prospect of a presumption against contact. Many opposed it due to concerns about false allegations, and some on the grounds of logistics. The opposition of other interviewees was rooted in a concern about the importance of deciding cases on their own merits, an argument which must logically apply as much to presumptions in favour of contact as those against. Some interviewees, however, opposed the

presumption against contact on the basis that domestic abuse should not be a barrier to contact at all.

In theory, neither a presumption for or against contact is compatible with the approach which finds most support within the empirical evidence base, which is that each case should be determined on its own merits. It has recently been argued that one route to re-focus the courts' assessment in this way, and dilute the pro-contact stance, is to introduce into PD12J wording akin to Mr Justice Cobb's recommendation of setting out explicitly that the statutory presumption is inapplicable to cases in which there is a risk of harm from domestic abuse to either the child or parent.<sup>126</sup> Birchall and Choudhry, for example, have recently argued that it ought to be made clear that the statutory presumption of parental involvement does not apply to cases in which there is evidence of domestic abuse.<sup>127</sup>

The most recent iteration of PD12J, in force since October 2017, does not do this, simply directing the court instead to 'consider carefully whether the statutory presumption applies', and in doing so to pay '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'.<sup>128</sup> However, the weight of opposition in this research to the prospect of a presumption against contact suggests that any further amendment to PD12J would be controversial. Moreover, given the very clear evidence from interviewees that a pro-contact stance operated even before the introduction of the statutory presumption of parental involvement, displacing that presumption might have little impact in practice.

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<sup>126</sup> The Hon. Mr Justice Cobb, *Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm – Report to the President of the Family Division* (January 2017) p.12. See also the argument of Hunter, Barnett and Kaganas that the failure to implement Cobb's changes represented 'a missed opportunity to mitigate the strong pro-contact culture': R. Hunter, A. Barnett and F. Kaganas, 'Introduction: Contact and Domestic Abuse' (2018) (40)(4) *Journal of Social Welfare and Family Law* 401, 408.

<sup>127</sup> J. Birchall and S. Choudhry, "What About My Right Not to be Abused?" Domestic Abuse, Human Rights and the Family Court' (Women's Aid 2018) pp.7 and 53.

<sup>128</sup> PD12J (note 108 supra) para 7. The reference to the 'child or parent' is different to the statutory presumption, which is phrased as risk of harm to the child. The 2014 iteration of PD12J also had this broader focus.

# CHAPTER 6

## FINANCIAL TENSIONS

The way in which domestic abuse affects the courts' decisions on contact cannot be properly understood if divorced from an exploration of the intense financial challenges which continue to affect the family court system. Legal aid cuts have fundamentally altered the legal landscape, with more parents having to navigate the legal system without representation. Self-representation, along with changes to court processes, have added strain to the resolution of cases, with mounting caseloads and restrictive access to expert input. Broader strains on external support services, including pressures on Cafcass and the under-resourcing of contact centres, are intensifying further the challenges for the courts in resolving applications for contact. These financial tensions matter to contact disputes in which domestic abuse is alleged: they have a bearing on the ability of the court to resolve cases satisfactorily, and criticisms of the courts' approach should be mindful of these challenges; and, crucially, these tensions also give rise to a significant risk that the environment in which the courts are making decisions is not one conducive to securing outcomes in which the safety of both children and parents can be assured.

This doctoral study is the first to have consulted the key professional actors on their perceptions of the impact of financial tensions on the courts' resolution of contact disputes involving domestic abuse allegations in the post-Legal Aid, Sentencing and Punishment of Offenders Act 2012 era (henceforth 'LASPO'). While interviewees had different perspectives on many of the issues discussed in this thesis, what united the majority was a shared, and grave, concern about the impact of these financial tensions on family justice. Interviewees' concerns are consistent with broader academic criticisms of the reforms to legal aid.<sup>1</sup> They are also consistent with academic concern

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<sup>1</sup> See for example: R. Hunter, 'Doing Violence To Family Law' (2011) 33(4) *Journal of Social Welfare and Family Law* 343; M. Maclean, 'Family Law in Hard Times' (2011) 33(4) *Journal of Social Welfare and Family Law* 309; J. Eekelaar, '"Not Of the Highest Importance": Family Justice Under Threat' (2011) 33(4) *Journal of Social Welfare and Family Law* 311; M. Maclean and J. Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart 2016); A. Barnett, 'Family Law Without Lawyers – A Systems Theory Perspective' (2017) 39(2) *Journal of Social Welfare and Family Law* 223; A. Barlow, R. Hunter, J. Smithson and J. Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Socio-Legal Studies 2017).

about the quality of, and lack of funding for, contact centres,<sup>2</sup> and concerns about the under-resourcing of Cafcass.<sup>3</sup> This Chapter explores interviewees' perspectives on the impact of financial tensions on contact disputes in which domestic abuse is alleged, structured around three themes: the impact of the cuts to legal aid; the reforms to, and pressures on, the court process; and the under-resourcing of external support services, focusing on Cafcass and contact centres.

## **6.1 LEGAL AID REFORM AND ITS IMPACT ON CONTACT DISPUTES IN WHICH DOMESTIC ABUSE IS ALLEGED – SELF-REPRESENTATION AND CROSS-EXAMINATION**

Concern about the impact of legal aid reform on family justice united interviewees across all practitioner groups. Interviewees' concerns were numerous. Interviewees reported parents having to represent themselves in court if ineligible for legal aid, with many litigants in person (henceforth 'LIPs') being unable to present their cases effectively, giving rise to the risk that judges are being expected to make decisions without access to all the salient facts. Interviewees also reported parents alleging domestic abuse having to face cross-examination from the alleged abuser. And, in cases where one party has representation and the other does not, interviewees reported problems with power inequalities.

To provide the background to interviewees' concerns, a brief synopsis of the reforms to legal aid and subsequent amendments is provided below. The interviews took place against a backdrop of particularly stringent evidence requirements, preceding the amendments made in 2018. The concerns voiced by interviewees illustrate the importance of these amendments but, as explored below, the changes are unlikely to remedy the broader problems caused by the cuts to legal aid.

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<sup>2</sup> See for example: M. Hester and L. Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (Policy Press 1996); C. Sturge and D. Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) 30(9) *Family Law* 583, 626; R. Aris, C. Harrison and C. Humphreys, *Safety and Child Contact: An Analysis of the Role of Child Contact Centres in the Context of Domestic Violence and Child Welfare Concerns* (Lord Chancellor's Department 2002) pp. ii and 122; C. Humphreys and C. Harrison, 'Squaring the Circle – Contact and Domestic Violence' (2003) 33(Jun) *Family Law* 419, 421-422; R. K. Thiara and A. Gill, *Domestic Violence, Child Contact and Post Separation Violence: Issues for South Asian and African-Caribbean Women and Children: A Report on Findings* (NSPCC 2012) pp.126-127; J. Birchall and S. Choudhry, "'What About My Right Not to be Abused?'" Domestic Abuse, Human Rights and the Family Court' (Women's Aid 2018) pp.7, 39 and 54.

<sup>3</sup> See for example: Thiara and Gill (note 2 supra) p.102; R. Thiara and C. Harrison, *Safe Not Sorry: Supporting the Campaign for Safer Child Contact* (University of Warwick 2016) pp.19-20.

### 6.1.1 Legal aid reform – a synopsis

LASPO, in force from 1 April 2013, introduced radical reform to the family law legal aid system, sweeping away legal aid for the majority of child arrangements orders disputes but maintaining provision for cases in which a parent has been, or is at risk of being, a victim of domestic abuse.<sup>4</sup> Section 12 enabled regulations to be enacted to stipulate the evidence requirements, and Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012 stipulated these requirements in relation to domestic abuse. These attracted substantial criticism and have been successively amended as a result. Following monitoring and reports by Rights of Women and Women's Aid,<sup>5</sup> changes were made on 22 April 2014 to include additional and amended forms of evidence, such as evidence of police bail.<sup>6</sup> A successful legal challenge in the Court of Appeal in 2016<sup>7</sup> led to the Government announcing it would extend the time limit for evidence from two to five years, and also introducing a provision for the assessment of evidence of financial abuse, with both coming into effect on 25 April 2016.<sup>8</sup> On 8 January 2018, the time limit was removed completely and additional forms of admissible evidence introduced.<sup>9</sup>

The interviews with members of the judiciary for this doctoral research took place after the Court of Appeal's judgment, and the changes which followed in April 2016, but before the reforms which came in force from January 2018. While the judges interviewed were not asked to comment on legal aid policy directly, they were asked to share their experience of hearing cases involving LIPs. Concerns about the impact

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<sup>4</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, Part 1, para 12.

<sup>5</sup> Rights of Women and Women's Aid, *Evidencing Domestic Violence: A Barrier to Family Law Legal Aid* (Rights of Women 2013); Rights of Women and Women's Aid, *Evidencing Domestic Violence: A Year On* (Rights of Women 2014).

<sup>6</sup> The Civil Legal Aid (Procedure) (Amendment) Regulations 2014. For monitoring of these amendments see: Rights of Women and Women's Aid, *Evidencing Domestic Violence: Reviewing the Amended Regulations* (Rights of Women 2014); Rights of Women and Women's Aid, *Evidencing Domestic Violence: Nearly 3 Years on* (Rights of Women 2015). And see also: Justice Committee, *Eighth Report – Impact of Changes to Civil Legal Aid Under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (2015) HC 311; Ministry of Justice, *Research Investigating The Domestic Violence Evidence Requirements For Legal Aid In Private Family Disputes* (Ministry of Justice 2017) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/719408/domestic-violence-legal-aid-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719408/domestic-violence-legal-aid-research-report.pdf)> accessed 23 October 2018.

<sup>7</sup> *The Queen (on the Application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91, [2017] 1 FLR 615. On appeal from the High Court: [2015] EWHC 35 (Admin), [2015] 2 FLR 823.

<sup>8</sup> See: Civil Legal Aid: Written Statement – HCWS690 (21 April 2016); Civil Legal Aid (Procedure) (Amendment) Regulations 2016/516.

<sup>9</sup> Civil Legal Aid (Procedure) (Amendment) (No. 2) Regulations 2017/1237.

of the legal aid reforms united the judges interviewed, and many of these concerns were shared by the barristers, solicitors, Cafcass practitioners and domestic abuse organisations. These non-judicial interviews commenced on 10 February 2016, just before the Court of Appeal gave its judgment. In the light of the level of concern expressed about the lack of access to legal aid for domestic abuse victims, the relaxation in the time limit and evidence requirements is to be welcomed. It is unlikely, however, that the changes will make significant inroads into remedying the broader problems caused by the cuts to legal aid, and the other financial tensions discussed in this Chapter, to date, remain unaddressed.

### **6.1.2 How has legal aid reform affected the number of parents self-representing in contact disputes in which domestic abuse is alleged?**

Explored below are the experiences and range of concerns interviewees raised about the impact of legal aid reform on private contact disputes in which domestic abuse is alleged. Harder to measure is what is happening to parents who are ineligible for legal aid and who subsequently do not come into contact with the court system. This doctoral research was not designed to address this issue, since the practitioners interviewed would, by definition, only have experience of cases which reach court, but a couple of interviewees, nevertheless, raised this as a concern.<sup>10</sup> It has also been identified as an issue within existing research.<sup>11</sup> This issue is flagged here as being in need of further research, along with continuing to monitor the impact of legal aid reform on the cases which reach court.

The Ministry of Justice has tracked the increase in the number of LIPs following the reforms to legal aid. Between April to June 2018, the most recent period for which figures are available, in 38% of private law disposals neither the applicant nor respondent had legal representation, a 21% increase since April to June 2013.<sup>12</sup> In only

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<sup>10</sup> J04-DJ was unconvinced that in these ‘invisible’ cases parties would be amicably reaching their own agreements, predicting instead that contact is being stopped but the other party is unable to challenge this at court. R01 also pointed to the possibility that parents ineligible for legal aid are not taking cases to court but was concerned about the impact of this on victims of abuse. See further: R. Hunter, ‘Exploring the “LASPO Gap”’ (2014) 44(May) *Family Law* 660.

<sup>11</sup> See for example: Women’s Aid and Rights of Women, *Evidencing Domestic Violence: A Barrier to Family Law Legal Aid* (August 2013) pp.2 and 4.

<sup>12</sup> Ministry of Justice, *Family Court Statistics Quarterly, England and Wales, April to June 2018* (27 September 2018) pp.6-7. The picture was almost identical for the January to March 2018 period: Ministry of Justice, *Family Court Statistics Quarterly, England and Wales, January to March 2018* (28 June 2018) p.6.

19% of cases were both parties represented, a drop of 16% since 2013.<sup>13</sup> The latest legal aid statistics for April to June 2018 show a 10% increase in the number of applications granted for family civil representation supported by evidence of domestic or child abuse,<sup>14</sup> slightly down on the 14% increase reported for January to March 2018.<sup>15</sup> The increase in January to March was attributed to the evidence requirements changes made in January 2018, suggesting that more parents alleging domestic abuse are now able to access legal aid.<sup>16</sup> Neither set of statistics, however, reveals precisely how many parents alleging domestic abuse within contact proceedings are able to access legal aid, and research is needed to monitor the impact of the January 2018 reforms. Anecdotal evidence points to parents alleging domestic abuse still being unable to access legal representation in disputes over contact.<sup>17</sup> It should also not be forgotten that many victims of domestic abuse do not report the abuse they experience, and are thus ineligible for legal aid, despite the 2018 amendments.<sup>18</sup>

All of the judges interviewed within this research who discussed LIPs agreed that, following the reforms to legal aid, these litigants have become a major feature of contact proceedings, even in cases in which domestic abuse is alleged.<sup>19</sup> In the magistrates' courts, J03-M's experience was that neither party being represented has become the norm, particularly at the first hearing, if not beyond. At the District Judge level, the usual scenario was again reported to be that neither party is represented, with some cases having one party with representation as a result of being eligible for legal aid.<sup>20</sup> One District Judge said, 'I would fall off my chair if both parties were represented these days'.<sup>21</sup> Another said it was 'very rare' that there would be any legal representation, reporting that 'probably one case in 50 you'll get a lawyer involved somewhere along the line'.<sup>22</sup> Only one District Judge gave a lower estimate of the number of cases involving two unrepresented litigants (20%), stating that one

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<sup>13</sup> Ibid.

<sup>14</sup> Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics Quarterly, England and Wales, April to June 2018* (27 September 2018) p.9.

<sup>15</sup> Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics Quarterly, England and Wales, January to March 2018* (28 June 2018) p.8.

<sup>16</sup> Ibid p.11.

<sup>17</sup> See for example the comments of Jess Phillips MP: HC Deb 18 July 2018, vol 645, col 133WH.

<sup>18</sup> Birchall and Choudhry (note 2 supra) p.8.

<sup>19</sup> N = 8: J01-M, J03-M, J04-DJ, J05-CJ, J07-CJ, J08-DJ, J09-DJ and J10-DJ.

<sup>20</sup> N = 3: J04-DJ, J08-DJ and J10-DJ.

<sup>21</sup> J04-DJ.

<sup>22</sup> J08-DJ.

party tends to be represented where there are domestic abuse allegations if there have been Family Law Act 1996 proceedings.<sup>23</sup> This is a lower estimate but still acknowledges that there will be cases in which there are concerns about domestic abuse, but the parties are unrepresented. High levels of self-representation were also reported by the Circuit Judges. J07-CJ said that in ‘almost all’ contact cases involving allegations of domestic abuse neither party is represented or only one party is represented.

Many of the Cafcass, barrister and solicitor interviewees also emphasised the prevalence of self-representation.<sup>24</sup> C02 attributed this prevalence to parents alleging domestic abuse being unable to produce the evidence required to access legal aid, again underlining the problems with the evidence requirements discussed above. The barristers and solicitors predictably provided a different perspective, since their involvement in proceedings by definition means at least one party has representation, but many of these interviewees still emphasised the increase in the number of LIPs. B08, for example, stated that she would come up against an unrepresented party in ‘a lot’ of cases, and expressed concern that even in cases of ‘massive merit’, parents are still ineligible for legal aid. B06 said he faces LIPs in around a quarter of cases but added that his experience was ‘distorted’ since ‘statistically there’s lots and lots of litigants in person’.

Interviewees’ responses underline the importance of the 2018 amendments. B02, for example, had been involved in a case prior to the amendments in which the victim had been raped and assaulted repeatedly but was ineligible for legal aid because the evidence was more than two years old. The removal of the evidence time limits is, thus, to be welcomed, but caution should be exercised before over-emphasising its impact. The representatives from the domestic abuse organisations were particularly concerned about the problems victims of domestic abuse face in meeting the financial threshold for legal aid eligibility, even beyond the evidence time limits.<sup>25</sup> R03 described the means test as ‘completely unreasonable’ and argued:

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<sup>23</sup> J09-DJ.

<sup>24</sup> N = 5 (Cafcass): C01, C02, C03, C07 and C08; N = 6 (barristers): B02, B04, B05, B06, B07 and B08; N = 6 (solicitors): S01, S02, S03, S04, S05 and S07.

<sup>25</sup> N = 3: R01, R02 and R03.



... you shouldn't go to court without legal advice; you can't get out of these situations without legal advice and legal representation. And even if it's really basic stuff, like someone explaining the options to you or telling you how to fill out a form, it's completely unreasonable to expect people to work this out for themselves through Googling.

In the light of the comments of judges below about the risks involved in resolving cases involving LIPs,<sup>26</sup> interviewees' reports of the high levels of self-representation in disputes over contact in which domestic abuse is alleged are concerning. There are grounds for remaining cautious before concluding that the 2018 amendments will resolve the problems with the inaccessibility of legal aid for parents alleging domestic abuse, suggesting that the concerns voiced by interviewees about the impact of legal aid reform remain highly pertinent. And these concerns matter because they point to the decision-making environment in which contact disputes are resolved not being one which is conducive to reaching outcomes which promote the safety and well-being of children.

### **6.1.3 What is the impact of the increase in self-representation on the resolution of contact disputes in which domestic abuse is alleged?**

Maclean and Eekelaar have argued that the reforms to legal aid did not mean 'the law has disappeared from family relationships', but rather that the:

... government does not consider it sufficiently important that it should be accessible to all. ... After LASPO, those with the means to do so can of course use the services of the legal profession. Those without such means ... must use other means. This could involve gathering such information as they can from the internet, or from advice centres ... or finding themselves in court from choice as applicants or involuntarily as respondents without advice or representation, or simply giving up.<sup>27</sup>

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<sup>26</sup> See below at 6.1.3.1.

<sup>27</sup> Maclean and Eekelaar (note 1 supra) pp. 13-14.

The experiences of interviewees within this doctoral research point firmly to the conclusion that it is imperative that parents involved in contact disputes in which domestic abuse is alleged have access to legal representation, since these parents are not equipped to use effectively the 'other means'<sup>28</sup> described by Maclean and Eekelaar to fill the gap left by the withdrawal of legal representation. Concern about the challenges involved in resolving contact disputes involving LIPs in which domestic abuse is alleged united many of the judges interviewed,<sup>29</sup> and were echoed by some of the non-judicial interviewees. J03-M, for example, said:

... the absence of legal representation is a hindrance to the whole process in terms of time and everything else.

As explored below, interviewees reported a number of problems with the inability of parents to present their cases effectively without legal representation, the consequences of which are particularly serious in cases in which domestic abuse is an issue.

#### 6.1.3.1 Concern that the courts are unable to access the 'justice of the case' without legal representation

Most fundamentally, some judges expressed significant concern that they are now unable to access information essential to the case in hand when domestic abuse is alleged if the parties self-represent. This concern has parallels with those articulated in Trinder et al's major study into LIPs.<sup>30</sup> And this finding is significant because if judges are not being supported to access all of the information pertinent to the case, there is a risk that decisions on contact will be taken without the full picture of the risks posed by the domestically abusive parent being known. J05-CJ, for example, said:

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<sup>28</sup> Ibid.

<sup>29</sup> N = 8: J01-M, J03-M, J04-DJ, J05-CJ, J06-DJ, J08-DJ, J09-DJ and J10-DJ.

<sup>30</sup> L. Trinder, R. Hunter, E. Hitchings, J. Miles, R. Moorhead, L. Smith, M. Sefton, V. Hinchly, K. Bader and J. Pearce, *Litigants in Person in Private Law Family Cases* (Ministry of Justice 2014) pp.71 to 72. This study was conducted prior to the legal aid reforms and was designed to 'inform policy and practice responses to LIPs following the legal aid changes' (p.1). This study had three elements: Intensive Cases Study (analysis of 151 cases, including hearing observations and interviews with the parties and judges, lawyers and Cafcass professionals); Local Contextual Study (focus groups with judges, lawyers, Cafcass and court staff, along with interviews and observations with local LIP support organisations and observations of public areas, such as waiting rooms); and Secondary Analysis Study (secondary analysis of two large national datasets from studies led by members of the research team): see further Appendix A of the report.

The main challenge is the lack of representation of sometimes both parties. And that is challenging in every possible way. I think most judges and magistrates dealing with the cases are concerned that they are not getting at the justice of the case and they are not being enabled to get at it ... .

Judges made a number of different points about the consequences of the lack of representation for their ability to 'ge[t] at the justice of the case'. The core of this concern was that parents who have experienced domestic abuse are unable to communicate their experiences to the court without legal representation. J05-CJ, for example, warned that LIPs cannot fill the shoes of advocates:

We rely on good advocacy to extract the information so ... and I think we all feel ... we don't know what it is we don't know. ... most of these people are unable to tell a good point from a bad point so they may tell you a load of complete nonsense but in there, there's a nugget of information which would transform the case, but they don't bother to mention it. And how are we going to know that? We can't ask the question to extract that because we don't know.

J06-DJ made a similar point:

I suppose litigants in person typically, and more particularly I suppose the victims, which typically are women, struggle to marshal the facts and the allegations in a manner that is acceptable for the court. You get a stream of generalities, typified in one I saw last week where the lady just wrote a stream of consciousness, underlinings, marginal notes, just completely chaotic and hopeless. And picking this up, this lady probably has been a victim of fairly serious abuse, I think, but she is completely unable to express it in a manner that is coherent and helps the court.

J09-DJ agreed that unrepresented parties will present generalised allegations of abuse, rather than the precise and focused allegations the court requires, and again identified this as a challenge. J10-DJ also said LIPs alleging domestic abuse struggle to articulate the abuse they have experienced and put allegations forward with clarity, attributing this to the litigant having to make allegations ‘with the perpetrator sitting pretty much next to them’.<sup>31</sup> J06-DJ also expressed concern about the vulnerability of unrepresented parents alleging abuse and the risk that they can be overpowered by the alleged perpetrators. These findings suggest that parents alleging domestic abuse without legal representation are struggling to communicate to the court the abuse experienced, and judges are unable to compensate for this by extracting the information because they ‘don’t know what it is [they] don’t know’.<sup>32</sup> The risk that decisions are being taken in the dark, without the full extent of the abuse being known is, thus, a real one.

There is also an argument that parents alleging domestic abuse being unable to articulate their experiences poses risks to access to justice for parents alleged to have been abusive. J06-DJ said that parents should not have to face a ‘stream of consciousness’ and should understand precisely what has been alleged. This again underlines the importance of parents alleging abuse being able to articulate their allegations, and the challenges facing the court when this does not happen.

Fundamentally, some judges were also concerned that the absence of legal representation makes it harder for them to assess the ‘truth’ and arrive at the ‘right’ outcome. J09-DJ, for example, expressed concern about it being difficult for judges to ‘check and balance’ themselves without advocate input. This judge said that when making major calls, such as whether to hold a fact-finding:

You need somebody, a well-qualified lawyer in front of you to say, ‘Hang on a minute, judge, I think you are falling into error or capable of it’ and to tell you so you can just reflect. It’s quite hard to check and balance yourself. ... It’s much easier when you’ve got someone to just say ‘Well,

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<sup>31</sup> The problem of generalised allegations is explored in greater detail in Chapter 3 at 3.2.1.

<sup>32</sup> J05-CJ.

what about this?’ and that’s a problem not having parties represented in front of you.

And J08-DJ reported that getting to the ‘truth’ is harder without legal representation, stating that there is ‘often a nugget of truth’ but the challenge is ‘actually getting to it’. This judge warned of the limits to how far judges can push to access that ‘truth’:

There will be occasions where somebody doesn’t tell you something which you ought to have known, or doesn’t ask the right question, and that’s one of the problems with this system because we are not inquisitorial. And you have to be very careful about the extent to which you ask questions ... .

Another judge (J06-DJ) was emphatic that the lack of legal representation is changing outcomes because lawyers play a significant role in unearthing the ‘truth’. This judge gave an example of a case in which a father accepted responsibility for his abusive behaviour. The mother’s barrister, however, did not accept that the father was being genuine and, following the barristers’ questioning of the father, it became clear that the father was indeed not accepting responsibility. While accepting that some barristers take parents’ admissions at face value, J06-DJ warned:

If that lady had been unrepresented, that would not have happened. ...  
And I think with the coming of unrepresented people, that sort of thing [the forensic need to explore] gets completely lost.

What this example illustrates, therefore, is the difference legal representation can make to outcomes: had the mother not been represented, the father’s false admission would have been taken at face value. Not all judges said that the lack of representation was changing outcomes,<sup>33</sup> but it is questionable how far there can be confidence that the ‘right’ outcomes are being reached if the lack of representation means that the salient facts are not being made clear to the court.

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<sup>33</sup> Despite the concerns raised above, J08-DJ, for example, said that judges still reach appropriate outcomes, albeit with cases taking longer due to the involvement of litigants in person.

#### 6.1.3.2 Concern about the impact of litigants in person on the court process

Several interviewees, from different practitioner groups, raised concerns about LIPs being unable to cope with the court process, and the impact this has on both the resolution of cases and the functioning of the courts more broadly.<sup>34</sup> These concerns again echo some of those raised in Trinder et al's major study.<sup>35</sup> Interviewees made a number of different, but related, points. B07 said that whilst some LIPs do a better job than some advocates, many require a lot of guidance from the judiciary. This barrister also said that statements prepared by LIPs either contain too much information or leave out essential information. S01 attributed the rarity of fact-findings to the increase in self-representation, since LIPs lack the knowledge required to engage in fact-finding.<sup>36</sup> S10 thought opportunities for interventions can be missed, because LIPs will not have heard of domestic abuse intervention programmes, or expert assessments, and thus will not identify the need for them. C04 made a similar point that one of the problems is that that LIPs cannot identify the information the court will require. And even when directed, B04 said that LIPs:

... don't do what they have been directed to do. They don't provide statements, or they keep providing statements one after another. You know, "here's a statement from my mate Fred down the road, and here's this and here's that". They come to court sometimes with a carrier bag full of papers and it's difficult for the judges.

B02 said that in addition to LIPs being unable to cope with court processes and procedures, they are less likely to be truthful:

... the instinctive reaction of anybody is to think about the family court as being like any other court, like the criminal court, where you have to deny

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<sup>34</sup> N = 20: B02, B04, B05, B06, B07, B08, C01, C04, C07, C08, J01-M, J03-M, J04-DJ, J05-CJ, J06-DJ, J08-DJ, S01, S02, S07 and S10.

<sup>35</sup> Trinder, Hunter, Hitchings, Miles, Moorhead, Smith, Sefton, Hinchly, Bader and Pearce (note 30 supra) pp.65-66.

<sup>36</sup> This supports the prediction made by Hunter that litigants in person would be unable to cope with the 'forensic demands' of fact-finding hearings: R. Hunter, 'Domestic Violence: A UK Perspective' in J. Eekelaar and R. George, *Routledge Handbook of Family Law and Policy* (Routledge 2014) p.322.

everything. And if they've got good advice, which is "well, if you've done something, for heaven's sake say so and do something about it rather than just deny it all". You know, that's so much more productive. And you can get all of that with representation, whereas now you don't. So, you have two people arguing, not knowing the relevance of what they are arguing, unwilling to make any concessions before a judge who hasn't got enough time to hear this and is struggling to find the issues so, yes, it's just funding. Nightmare!

One of the consequences of LIPs being unable to cope with these processes and procedures is delay. Several interviewees raised delay, and associated court costs, caused by the increase in LIPs as a concern.<sup>37</sup> J05-CJ's experience was that cases often now have to be adjourned as a result of LIPs either not appearing at court or coming to court unprepared, adding pressure to an already pressured court timetable. J05-CJ described the situation as a 'nightmare'. J04-DJ said that when the parties both used to be represented, most cases would settle at the first or second appointment, whereas now that parties are not represented, cases are having to go all the way through to final hearing, sometimes with Guardians appointed in response to parents being unable to cope with litigation. J04-DJ described the legal aid reforms, giving a personal rather than judicial opinion, as a 'false economy'. In this judge's experience, one of two outcomes now follow a dispute over contact in domestic abuse cases, neither of which was seen as positive:

But, now, you've either got them walking off and these kids don't ever see their dad again or they try and fight everything and it takes forever. And it's a waste of time.

Implicit in J04-DJ's comment is that it is better for parties to settle their cases at the earliest opportunity, and to avoid confrontational proceedings, with the increase in LIPs identified as a barrier to this goal. This was also raised as an issue by other interviewees. Some judges, and some barristers, reported that litigants are less likely

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<sup>37</sup> N = 10: B02, B05, B06, B08, J04-DJ, J05-CJ, J08-DJ, S01, S02 and S07.

to be willing to negotiate when they appear in person than when they are represented, and identified this as a problem.<sup>38</sup> J07-CJ attributed this to neither party wanting to 'giv[e] in to the other side'. That LIPs are unable, or unwilling, to reach negotiated agreements compared to their represented counterparts has been found in other studies.<sup>39</sup> J02-M was the only judge to say something positive about the increase in self-representation and, unlike the other interviewees, this judge suggested that hearings involving LIPs can be advantageous because these litigants can be encouraged to communicate with each other:

I think litigants in person ... sometimes it works because if they are more receptive we can turn round to them and say, 'Well, look. We are going to impose this upon you if you don't talk to each other' and a few are receptive to that but sometimes, depending on the stages they are at, they are very emotional.

While some interviewees saw the inability or unwillingness of LIPs to negotiate as a problem, there is a compelling argument that negotiated agreements are not desirable in cases in which domestic abuse is an issue, given what is known about the risks to parents who have been victims of domestic abuse being pressured into unsafe agreements by the domestically abusive parent. Indeed, Barnett has criticised the focus on litigants' failures to negotiate for this reason.<sup>40</sup> Some of the solicitor interviewees were also particularly concerned by these risks, echoing the concerns raised in previous studies.<sup>41</sup> S02 said LIPs are more likely to agree to any contact if they feel threatened, which is particularly likely in the light of the inadequacy of court facilities.<sup>42</sup> She described the lack of representation in this context as 'dangerous,

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<sup>38</sup> N = 4: B04, B06, J04-DJ and J07-CJ.

<sup>39</sup> See for example the discussion in Barnett (note 1 supra) 232 and the following: R. Moorhead and M. Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department for Constitutional Affairs 2005) pp.51-52; D. Emmerson and J. Platt, 'Legal Aid, Sentencing and Punishment of Offenders Act 2012: LASPO Reviewed' (2014) 44(Apr) *Family Law* 515, 520; Trinder, Hunter, Hitchings, Miles, Moorhead, Smith, Sefton, Hinchly, Bader and Pearce (note 30 supra) pp.35 and 48-49. See also: M. Maclean and J. Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Hart Publishing 2009) p.121.

<sup>40</sup> Barnett (note 1 supra) 231-232.

<sup>41</sup> See for example: M. Coy, K. Perks, E. Scott and R. Tweedale, *Picking Up the Pieces: Domestic Violence and Child Contact* (Rights of Women and CWASU 2012) p.40. B06 also had experience of litigants in person agreeing to 'everything' when the other party is represented as a result of a lack of understanding of the process.

<sup>42</sup> The adequacy of court facilities fell outside the scope of this thesis, but this concern is consistent with those raised by others, such as: Coy, Perks, Scott and Tweedale (note 41 supra) pp.43-44; Birchall and Choudhry (note 2 supra) p.8.



really dangerous'. S10 also thought LIPs are more likely to give in to the pressure to allow contact, pressure which she identified as exerted by the courts and Cafcass. She said LIPs would be:

... put under pressure, initially, by the court and Cafcass at court to say "Contact. Contact. Contact". "Contact. Contact. Contact". But you have to look at it ... that's what my job is. I look at cases like that. So immediately I look at that and think this is what I would do. A litigant in person who can't get legal aid? ... She will just be going – "What? I've just got to allow contact?" whereas you've got to look at ... it's the whole picture. ... Because when you ... it's like an onion, you peel it back, another layer, another layer, another layer and it's only when you've done the job a long time and you are in court all the time that you think "Let's try this. Let's try that".

That legal representation 'saves' parents affected by domestic abuse from being pushed into unsafe contact arrangements is not, however, uncontentious. Barnett has argued that 'almost overnight' since LASPO, family lawyers have come to be seen by 'legal and moral observers' as the 'champions' of victims of domestic abuse.<sup>43</sup> This transformation, she argues, could be attributed to lawyers being seen as the solution to the problems of LIPs being unable to negotiate agreements, and their broader negative impact on the functioning of the family justice system, in increasing the number of contested hearings and complicating the decision-making process.<sup>44</sup> She sees this as problematic, since whilst unrepresented parents may be coerced into unsafe arrangements, positioning lawyers as the 'champions' of victims 'ignores the role that family lawyers themselves may play in pressurising clients into agreeing to contact'.<sup>45</sup> Family lawyers have, she argues, pressured mothers who have experienced domestic abuse into agreeing to unsafe contact arrangements, to avoid the outcome

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<sup>43</sup> Barnett (note 1 supra) 224 and 231.

<sup>44</sup> Ibid 231.

<sup>45</sup> Ibid.

of being perceived by the courts as 'hostile' or 'unreasonable',<sup>46</sup> an argument supported by a sizeable body of evidence.<sup>47</sup>

The extent to which family lawyers merit the title of 'champions'<sup>48</sup> of victims is not, therefore, straightforward. Overall, the findings from this research support the statement of B08 that family lawyers are now seen as 'some great saviour' within proceedings and that, crucially, and in contrast to the argument of Barnett, this title is justified. As outlined above, interviewees, and in particular the judicial interviewees, were emphatic about the importance of legal representation to the investigation and resolution of contact cases in which domestic abuse is alleged, and the deleterious consequences of its absence: that without legal representation judges cannot feel confident they have access to all the information crucial to the case in hand; that each case cannot be explored in the level of depth required; that parents affected by domestic abuse cannot articulate the abuse they have suffered to the court; that judges feel they cannot 'check and balance' themselves; and that there are major problems with delay. On the basis of these findings, it is difficult to overstate the importance of legal representation to contact disputes in which domestic abuse is alleged. One of the other major problems caused by the legal aid reforms is litigant-to-litigant cross-examination.

#### 6.1.3.3 What is the impact of self-representation in relation to cross-examination on contact disputes in which domestic abuse is alleged?

One of the major problems with the lack of legal representation for parents alleged to have been abusive is that the parents raising allegations of abuse may have to face cross-examination from the alleged abuser. While this is prohibited within criminal

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<sup>46</sup> Ibid 229.

<sup>47</sup> Hester and Radford (note 2 supra); L. Radford, S. Sayer and AMICA, *Unreasonable Fears? Child Contact in the Context of Domestic Violence: A Survey of Mother's Perceptions of Harm* (Women's Aid 1999); F. Kaganas and C. Piper, 'Divorce and Domestic Violence' in S. Day Sclater and C. Piper (eds), *Undercurrents of Divorce* (Ashgate 1999); B. Neale and C. Smart, 'In Whose Best Interests? Theorising Family Life Following Parental Separation or Divorce' in Day Sclater and C. Piper (eds), *Undercurrents of Divorce* (Ashgate 1999); A. Barnett, 'Contact and Domestic Violence: The Ideological Divide' in J. Bridgeman and D. Monk (eds), *Feminist Perspectives on Family Law* (Cavendish 2000); J. Hunt and A. Macleod, *Outcomes of Applications to Court for Contact Orders After Parental Separation or Divorce* (Ministry of Justice 2008) pp.94-95. See also: B. Neal and C. Smart, "'Good" and "Bad" Lawyers: Struggling in the Shadow of the New Law' (1997) 19(4) *Journal of Social Welfare and Family Law* 377, 396.

<sup>48</sup> Barnett (note 1 supra) 224 and 231.

proceedings, no such prohibition exists in family law cases.<sup>49</sup> Judicial criticism, across different levels of judiciary seniority, of the lack of action taken to address this problem is considerable. In its *Nineteen Child Homicides* report, Women's Aid said:

Allowing a perpetrator of domestic abuse who is controlling, bullying and intimidating to question their victim when in the family court regarding child arrangements orders is a clear disregard for the impact of domestic abuse, and offers perpetrators of abuse another opportunity to wield power and control.<sup>50</sup>

In response to this argument, the then President, Sir James Munby, replied, 'who could possibly disagree?'.<sup>51</sup> Hayden J has been similarly vocal in his criticism, recently describing litigant in person cross-examination in domestic abuse cases as a 'stain on the reputation of our Family Justice system':

... [T]he process is inherently and profoundly unfair. I would go further it is, in itself, abusive. For my part, I am simply not prepared to hear a case in this way again. I cannot regard it as consistent with my judicial oath and my responsibility to ensure fairness between the parties.<sup>52</sup>

That the lack of representation for cross-examination is changing outcomes has also been emphasised. In *JY v RY*, for example, District Judge Read recently said:

I therefore think there is a very strong likelihood that the outcome of the fact finding would have been different, and most probably a truer reflection of what really happened, had the parents been represented. It would surely have concluded sooner, more fairly, and at far less expense

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<sup>49</sup> For the rules within criminal law proceedings, see: Youth Justice and Criminal Evidence Act 1999, ss 29, 34, 35, 36 and 38 and Part 23 of the Criminal Procedure Rules 2015.

<sup>50</sup> Women's Aid, *Nineteen Child Homicides* (Women's Aid 2016) p.27.

<sup>51</sup> Sir James Munby, '16<sup>th</sup> View from the President's Chambers: Children and Vulnerable Witnesses: Where Are We?' (2017) 47(Feb) *Family Law* 151, 154. See also the concern raised in by the Hon. Mr Justice Cobb in *Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm – Report to the President of the Family Division* (January 2017) paras 13-18.

<sup>52</sup> *Re A (A Minor: Fact Finding; Unrepresented Party)* [2017] EWHC 1195 (Fam); [2017] 3 FCR 494 [60]. See also: *H v LR* [2006] EWHC 3099 (Fam), [2007] 2 FLR 162 [25] (Wood J); *A Chief Constable v YK* [2010] EWHC 2438 (Fam), [2012] Fam 102 [112] (Sir Nicholas Wall P); *Q v Q* [2014] EWFC 31, [2015] 1 WLR 2040 [92] (Sir James Munby); *PS v BP* [2018] EWHC 1987 (Fam), [2018] 4 WLR 119.

to the public purse than ultimately was the case, with two wasted days at Court. It may also have been less painful for the participants.<sup>53</sup>

There have been attempts to overcome this problem. One option considered was to award McKenzie Friends rights of audience to conduct cross-examination, but this was met with judicial caution.<sup>54</sup> Most promisingly, in February 2017, the Government introduced the Prisons and Courts Bill, which made provision for an advocate to be appointed to carry out the cross-examination.<sup>55</sup> The Bill, however, fell with the 2017 General Election and, despite a commitment in the Queen's Speech which followed to legislate to prevent cross-examination,<sup>56</sup> legislation remains, at the time of writing, unIntroduced.<sup>57</sup> As a result, the options facing a judge charged with hearing a case requiring cross-examination of LIPs remain, to borrow McFarlane LJ's phrasing, 'stark':<sup>58</sup>

Either the alleged abuser conducts the cross examination himself (possibly with the assistance of a McKenzie Friend) or questions are put on his behalf to the witness by the Judge.<sup>59</sup>

Whilst widely accepted as a problem in pressing need of a remedy,<sup>60</sup> there is no systematic monitoring of the prevalence of litigant in person cross-examination in

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<sup>53</sup> [2018] EWFC B16 [35].

<sup>54</sup> See for example: *Re J (Children) (Contact Orders; Procedure)* [2018] EWCA Civ 115, [2018] 2 FCR 527 [73] (McFarlane LJ); *PS v BP* (note 52 supra) [9] (Hayden J). An attempt to allow the Family Court to direct the Court Service to fund representation for cross-examination has also been rejected, see: *Re K (Children) (Unrepresented Father: Cross-Examination of Child)* [2015] EWCA Civ 543, [2015] 1 WLR 3801.

<sup>55</sup> Prisons and Courts Bill 2016-17.

<sup>56</sup> Prime Minister's Office, Queen's Speech and Associated Background Briefing, on the Occasion of the Opening of Parliament on Wednesday 21 June 2017, p.40 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/620838/Queens\\_speech\\_2017\\_background\\_notes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620838/Queens_speech_2017_background_notes.pdf)> accessed 5 November 2018.

<sup>57</sup> There is, however, hope that provision will be made to remedy this problem in the Domestic Abuse Bill: HC Deb 6 March 2018, vol 637, col 148. On 27 November 2017, Part 3A was introduced into the Family Procedure Rules 2010, which 'makes provision in relation to vulnerable persons (parties and witnesses), including protected parties, in family proceedings'. Alongside this, Practice Direction 3AA was introduced to provide guidance on vulnerable persons' participation in proceedings and evidence provision. Neither Part 3A nor Practice Direction 3AA, however, remedies the problems with current practice in relation to cross-examination. Hayden J set out in *PS v BP* (note 52 supra) a list of 'observations' on how child arrangements disputes involving cross-examination, domestic abuse and litigants in person should be handled, which were intended to act as a 'forensic life belt until a rescue craft arrives' in the form of Parliamentary intervention (at [34]).

<sup>58</sup> *Re J (Children) (Contact Orders; Procedure)* [2018] EWCA Civ 115, [2018] 2 FCR 527 [68].

<sup>59</sup> Ibid.

<sup>60</sup> Most recently at the time of writing, see the call from the Home Affairs Committee for prohibition on cross-examination in the family courts to be included within the Domestic Abuse Bill: Home Affairs Committee, *Domestic Abuse* (22 October 2018) <<https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1015/101502.htm>> accessed 23 October 2018. See also: Birchall and Choudhry (note 2 supra) p.54; Women's Aid, 'Resolution, The Law

contact disputes in which domestic abuse is alleged. The recent research by Birchall and Choudhry found that 24% of the 63 women surveyed had been cross-examined by alleged perpetrators.<sup>61</sup> Judicial dissatisfaction with the lack of protection for parents facing cross-examination from their alleged abusers was emphasised in the major Ministry of Justice study, published in 2015, which was based on 21 semi-structured interviews with members of the family law judiciary.<sup>62</sup> This doctoral study is the first post-LASPO to have consulted the judiciary on this issue with a specific focus on contact disputes in which domestic abuse is an issue, which again highlights its importance in advancing the evidence base. The studies conducted to date, including the findings from this research, point to the conclusion that the options currently available to the judiciary outlined by McFarlane LJ above are entirely unsatisfactory, with reform desperately needed.

Concern about litigant in person cross-examination united the interviewees who discussed this issue within this doctoral research, and these interviewees made a number of different points. R02's experience of working with parents alleging domestic abuse within contact proceedings was that victims of domestic abuse are 'almost routinely' being cross-examined by perpetrators, and that this cross-examination removes the possibility of the victim being able to articulate her experiences of abuse:

... you can't expect someone who has been abused for 10 years to sit in a courtroom with someone else who is then cross-examining them, and making comments to them, and doing things which – this happens quite a lot – we hear about perpetrators who will make hand gestures or certain movements. In one case a woman that we work with ... when the judge couldn't see, I don't know what formation they were sitting in, but

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Society And Women's Aid Issue Joint Call To Government To Urgently Ban Cross-Examination Of Victims By Their Abusers In The Family Courts' (18 July 2018) <<https://www.womensaid.org.uk/resolution-the-law-society-and-womens-aid-issue-joint-call-to-government-to-urgently-ban-cross-examination-of-victims-by-their-abusers-in-the-family-courts/>> accessed 23 October 2018.

<sup>61</sup> Birchall and Choudhry (note 2 supra) p.27. See also: Coy, Perks, Scott and Tweedale (note 41 supra) pp.40, 43 and 80; Justice Committee (note 6 supra) pp.40-42; All-Party Parliamentary Group on Domestic Violence, *Parliamentary Briefing: Domestic Abuse, Child Contact and the Family Courts* (All-Party Parliamentary Group on Domestic Violence and Women's Aid 2016) pp.4, 14 and 26.

<sup>62</sup> The research was conducted between August and October of that year: Ministry of Justice, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses* (Ministry of Justice Analytical Series 2017).

he made like that gesture [sign of being hurt] to her and obviously to her that meant he “I am going to get you” so then she was completely petrified throughout the court case and couldn’t string a sentence together.

C07’s experience was that the risk of parents having to cross-examine one another without representation was a significant factor which contributed to fact-findings not being regularly held. J04-DJ also expressed concern about litigant in person cross-examination, describing the current situation as ‘very, very unsatisfactory’, and J03-M lamented the failings of the family court in lagging behind the criminal court in providing measures to respond to this problem, describing the family court as ‘way behind the times’.<sup>63</sup>

Some of the judicial interviewees explained how the problem of litigant in person cross-examination is managed when neither party is represented. J03-M said:

Whenever that’s happened in my case, I’ve always tried to make sure that the victim is not cross-examined directly by the perpetrator and I always try and insist that the perpetrator asks any questions to me, and I will then re-phrase them if necessary or even say that I don’t think that’s an appropriate question.

However, J03-M did not think this re-phrasing was a sufficient response, calling instead for alleged perpetrators to have access to legal representation to conduct the cross-examination of the alleged victim on his behalf. Without this, J03-M said, it is difficult for judges to feel they are acting impartially:

... it is quite a pressure on the Chair to have to try and be the balancing party in these sort of situations. If you are just the solicitor who’s doing it, you’ve only got one job to do but chairing a Bench where you’ve got

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<sup>63</sup> Within criminal proceedings, the Youth Justice and Criminal Evidence Act 1999 provides protections for vulnerable and intimidated witnesses.

other considerations, it's quite difficult to get a balance right and be fair to everybody.

This echoes the concerns of the judiciary raised in the major Ministry of Justice study.<sup>64</sup> These judges also expressed concern about the inadequacies of current options available to manage cross-examination, which included posing questions on behalf of the litigant in person, since these techniques can undermine the impartiality of the judiciary.<sup>65</sup> Concern about the way in which judges are filtering and re-phrasing questions posed by LIPs during cross-examination has also been articulated in the reported case law, lending further weight to the argument that judges should not be expected to perform this role.<sup>66</sup> Even putting these concerns aside, the immense pressure put on the judicial role by having to conduct cross-examination has been emphasised:

These hearings were also extremely demanding on the judge as one professional was required to take on three roles of judge and lawyer for both parties, whilst also ensuring a fair, just and efficient process.<sup>67</sup>

The appointment of a legal representative for the alleged perpetrator for the purposes of cross-examination, which was advocated by J03-M, was a suggestion made by the judges interviewed, and external organisations consulted, as part of the Ministry of Justice study.<sup>68</sup> As outlined above, the Prisons and Courts Bill, which made provision for this to be implemented,<sup>69</sup> fell with the 2017 General Election. It is questionable, however, whether the Bill would have gone far enough. J05-CJ, for example, argued:

I suppose the next choice would be what is being mentioned that you can get somebody to cross-examine but I think that's ... from what I gather it's going to be quite hard to get that and then they are going to be limited

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<sup>64</sup> Ministry of Justice (note 62 supra) pp.2 and 16-18.

<sup>65</sup> Ibid. See also the concerns raised by practitioners outlined in: Justice Committee (note 6 supra) p.40.

<sup>66</sup> See, for example: *PS v BP* (note 52 supra) [18] (Hayden J). See also: *JY v RY* (note 53 supra) [10]-[14] (District Judge Read).

<sup>67</sup> Trinder, Hunter, Hitchings, Miles, Moorhead, Smith, Sefton, Hinchly, Bader and Pearce (note 30 supra) p.58.

<sup>68</sup> Ministry of Justice (note 62 supra) p.3. See also: House of Commons Justice Committee, *Operation of the Family Courts* (Sixth Report of Session 2010-12) (HC518-I) (14 July 2011) para 244.

<sup>69</sup> Prisons and Courts Bill 2016-17, s 47.

just to doing the cross-examination, not allowed to make submissions or anything, which is very limited I think and I think maybe losing an opportunity to get a bit more.

There is also an argument that the appointment of a legal representative to conduct the cross-examination of the parent alleging domestic abuse in cases in which that parent also lacks representation offers the alleged perpetrator an advantage. Inequality of bargaining power was raised as a further consequence of the reforms to legal aid within this doctoral study and was an issue which again concerned interviewees.

#### 6.1.3.4 What impact has the increase in self-representation had on the court process and the resolution of cases in which domestic abuse is alleged when one party is represented but not the other?

While neither party being represented poses significant problems for the court, one party being represented and the other not has its own challenges. Eekelaar has criticised the lack of funding for representation of parents alleged to have been abusive, since these allegations ‘could have serious personal and social consequences’ but these parents have to face the allegations unrepresented since they are not deemed ‘vulnerable’.<sup>70</sup> Some of the interviewees within this doctoral study also raised this as a problem,<sup>71</sup> suggesting that Eekelaar’s concerns have an empirical foundation. J04-DJ pointed to the inequality between parents who have to face allegations of domestic abuse without representation within contact proceedings and alleged perpetrators facing police prosecution in a criminal court, who would be entitled to duty solicitor representation. J05-CJ voiced a similar concern, stating that there are cases where the parent alleging the abuse is represented but the other parent is not, and ‘your guts are telling you that it’s actually maybe not how it is, or it’s exaggerated’ but the parent is ‘completely unable to defend himself’. J05-CJ described this as a ‘real problem’. S09 said legal aid reform had ‘annihilated the fairness or balance for private law proceedings’, in part because fathers cannot defend themselves against specious allegations.

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<sup>70</sup> Eekelaar (note 1 supra) 312.

<sup>71</sup> N = 3: J04-DJ, J05-CJ and S09.



Other interviewees were concerned by the risks involved in the alleged perpetrator being represented and the alleged victim being unrepresented. C02, for example, said this was common and described it as a 'horrible scenario':

And the dad will rock up, already a very aggressive man, more powerful because he has a solicitor by his side and the mother is just slowly disappearing because they feel so disempowered.

C10 echoed this concern:

You know, it's about how well they put their case forward. Courts are led by evidence and your ability to argue your case so often you find quite unsafe people who have extremely good solicitors who get what they want.

J08-DJ made a different point about the risks which arise when there is an imbalance in representation, warning that there are limits on how far judges can step in to compensate for this imbalance:

And you have to be very careful about the extent to which you ask questions and you particularly have to be careful, I think, when you have one person that's represented and another person who is not because the person who is represented then feels very aggrieved that you are actually doing the other side's case for them.

This judge added that the cases with two LIPs are 'a lot easier to deal with' than the cases where one is represented, and the other is not, because there is 'more of a balance'. B06 warned that some LIPs will agree to arrangements they are not happy with when the other party is represented because they are 'so overwhelmed' by the court process. J03-M was more positive, stating that while there are risks with inequality of bargaining power when one party is represented, and the other is not, the risk of disadvantage can be overcome through case management, rendering one

party being represented still preferable to neither having representation. The unsatisfactory state of affairs of one party being represented and the other appearing in person is, nevertheless, clear. The challenges this poses for the court in overcoming this imbalance are significant, and there are important questions to be asked about the extent to which these challenges are changing the roles played by the key actors in the resolution of disputes to an unacceptable degree.

#### 6.1.3.5 Have the reforms to legal aid changed the roles played by the key actors in the resolution of cases?

The findings from this doctoral research suggest that the reforms to legal aid, and the consequent increase in self-representation, have changed fundamentally the courtroom dynamic, with parents without representation struggling to present their cases, being unable to navigate the court system and having to face cross-examination, or allegations of abuse, without representation. There are limits to how far the judiciary, and legal and Cafcass practitioners, can be expected to step in compensate for these challenges, and there are important questions to be asked about how far the roles of these key actors are being reshaped to an unacceptable degree.

Some of the judges interviewed spoke of the way in which their role within the courtroom has changed in the light of the increase in the number of LIPs, and in particular in response to the way in which litigants struggle to cope with the court process. J01-M, for example, described the role of a judge when hearing cases involving LIPs as having become akin to a ‘head teacher or grandma’, with it being necessary to ‘bang [the litigants’] heads together’. J04-DJ described the judicial role differently, stating that it had become similar to that of a mediator. Two judges reported that they saw their role as having to impose structure when cases involve LIPs.<sup>72</sup> J10-DJ for example, said that the onus now falls on the judge to proactively ‘tease out what the allegations are’, and then to ‘hone in’ on the problems and ‘look at solutions’.

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<sup>72</sup> J07-CJ and J10-DJ.

The majority of the judges who discussed their changing roles did not express opinions on these roles. J08-DJ, however, emphasised that there is a limit to what judges can achieve within an adversarial system:

... there is a limit ... as I said, you are the judge. You are not a mediator. You are not an advocate. You are not in an inquisitorial position, so you have to be careful as to the approach you take and what you can actually achieve.

Some of the barristers and solicitors also raised tensions on the judicial role, along with pressures on their own roles, as concerns. They spoke in particular of the delicate balance which has to be struck in cases in which one party is represented and the other is not. B06, for example, described how judges have had to take on a more 'proactive' role, and how he, as a barrister, found himself having to hold back in his role as his client's representative when the other party is unrepresented:

... sometimes you get a situation where actually you don't push as much as you otherwise would because the person isn't represented and you don't think it's fair.

In common with Barnett's argument outlined above, B08 said that barristers are now seen as 'some great saviour' within proceedings, who are expected to take the lead in drafting orders and opening channels of communication with the other party. Some solicitors voiced similar concerns about the way in which their role within proceedings has changed in the light of the increase in self-representation. S01 said solicitors have to walk the delicate line in cases in which one parent has representation, but not the other, between explaining the law to the unrepresented party and avoiding the provision of advice. S07 went further in saying that the responsibility to run the case falls on the represented party, with that party's costs being higher as a result of their lawyers' workloads being greater, and cases taking longer to resolve, in cases involving LIPs.

Several of the Cafcass interviewees also reported additional pressures on their roles. These said Cafcass is being expected by the courts, and litigants in person, to fill the gaps left by the lack of legal representation, which is putting a ‘huge demand’<sup>73</sup> on practitioners’ workloads.<sup>74</sup> C08, for example, said that unrepresented parents now rely on Cafcass because they are the only professionals involved in the case:

I mean, because they are not represented, they will come directly to us. They can ring us three, four times a day. If they had a problem over the weekend, they will ring us. So, for us, if they had a solicitor representing them, it would have gone through the solicitor because, at the end of the day, we are the only professional involved in the case and that’s the other person they could see but if there was a person, a solicitor there, it would make our job a lot easier.

C03 said Cafcass practitioners are now expected to attend court more regularly and take on a greater mediatory role between the parties in proceedings. C07 agreed, adding that practitioners are facing more complaints from litigants, since lawyers previously played a role in managing clients’ emotions and expectations. C10 warned that the ability of Cafcass practitioners to perform their roles effectively is being put under pressure by these tensions. Interviewees from the other practitioner groups also identified Cafcass as an overstretched resource, along with other resource-related tensions which undermine the courts’ ability to resolve cases robustly.

## **6.2 THE RESOURCE-STRETCHED DECISION-MAKING ENVIRONMENT – PRESSURES ON, AND CHANGES TO, THE COURT PROCESS**

Several interviewees raised concerns about the family justice system buckling under considerable strain, in particular with there being intense pressures on court time. Several interviewees also reported problems caused by the opportunities to instruct

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<sup>73</sup> Phrasing used by C03.

<sup>74</sup> N = 5: C01, C03, C07, C08 and C10. S04 also made this point, as did J05-CJ, who said that pressure on Cafcass has increased in the light of the circumstances in which experts can be instructed being restricted. C06 shared a different view, explaining that the increase in self-representation has not ‘massively increased’ Cafcass practitioners’ workloads because there are limits to how far they can compensate for the lack of representation, since practitioners cannot offer legal advice, despite this often being sought by litigants in person who have no other professional support within proceedings.

experts being limited. Interviewees' concerns give further reason to question whether the decision-making environment in which the courts, and practitioners, must work is one conducive to making decisions which ensure the best interests and safety of children are promoted.

### **6.2.1 Pressures on court time**

A key concern voiced by interviewees was the impact of the pressures on court time on the courts' ability to resolve cases robustly. Some interviewees attributed the lack of court time to the impact of legal aid reform, with cases involving LIPs taking far longer to resolve than those involving lawyers. Others did not comment on the cause. J05-CJ was among the most concerned, stating that s/he no longer feels judges can be confident that they have always reached the right outcomes as a result of these pressures:

At the moment we are all completely overloaded anyhow, particularly care, but private law has picked up again. So, lists are over-full. Resources, well, you know, there are just not enough resources generally and particularly of lawyers. So ... we do our best, but I don't think we can necessarily feel confident that we are always getting to the ... the right outcome because we are not being equipped to do so anymore.

S02 raised a similar concern, sharing her experience that when cases reach court, they are no longer receiving the time they require. J03-M agreed that judges '... are all under time pressure the whole time'. J09-DJ suggested that the pressures put on the judiciary by the increase in self-representation are made worse as a result of judges having to hear cases at 'such a breakneck speed'. J06-DJ felt judges have sufficient control over their caseloads to ensure that each case is still be properly heard but was, nevertheless, concerned by the way in which directions and case management hearings are squeezed in, without sufficient time being allocated to judges to take on these cases:

So once I start the two-day case I would have done the job properly once I did get going but those other three [directions and case management hearings], even now if I had the resources ... it's not felt like a good experience doing that because I was sort of printing stuff off, pulling it together, I've not got the right time. I think I stayed relaxed but, you know, there's a lot of judges out there that might find that quite stressful, quite pressured. And they do – the word in the corridor all the time is "Look, I've got a day case. I've got these other cases in front of it. This is outrageous!".

J07-CJ shared this concern about the scheduling of directions hearings on days set aside for full hearings, but said it was the only way to cope with demand.

A related concern was the impact on parents of delay in listing cases for hearing. J07-CJ felt that justice is being denied to parents as a result of the under-resourcing of the system:

You can very often find in a remedy which is supposed to be summary, there is not enough time to hear a contested hearing for another two, three months, and obviously justice delayed is justice denied when you need relief. But that's the phenomenon of us not having enough judges and enough courtrooms. And we look at magistrates, District Judges, Circuit Judges, recorders, deputy District Judges and every court in the region and they are all full up.

Other interviewees echoed this concern.<sup>75</sup> As a result of these delays, interviewees described the court system as 'broken',<sup>76</sup> and 'completely overrun'.<sup>77</sup> Only S05 reported that the court process had been 'speeded up a bit'. As Chapter 4 explored, some interviewees were also critical of the courts' reluctance to hold reviews, and attributed this reluctance to the pressures on court time:

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<sup>75</sup> N = 6: B02, B05, S02, S06, S09 and S10.

<sup>76</sup> S02.

<sup>77</sup> S06.

But because they don't have enough court time now and no-one can afford it, and they don't want them back in court, they just to get these cases out off their desk, they just make a plan that they think will probably work and then it's up to those people to return to court to vary ...<sup>78</sup>

These concerns about the pressures on court time make for concerning reading, both in relation to the courts' ability to resolve contact disputes robustly in which domestic abuse is alleged, and in relation to the impact on parents of the wait to have their cases heard. They also underline again how criticisms of the courts should be mindful of the challenging environment in which judges, and practitioners, must work, and that there is a significant risk that this environment is not one conducive to securing outcomes in which the safety and well-being of children and parents can be assured. A further factor adding pressure to the judicial role reported by interviewees was the lack of funding for expert assessment.

### **6.2.2 Limited access to expert assessment**

The rules on when an expert can be instructed in private law children proceedings have been tightened, the aim being to limit the use of these assessments.<sup>79</sup> The most common forms of expert assessment within contact disputes in which domestic abuse is an issue are psychiatric or psychological reports, which provide specialist assessment of the level of risk posed by the perpetrator. One of the problems is that, with the exception of the minority of publicly funded cases, the onus falls on the parties to fund the assessment, an option unavailable to many; and even in publicly funded cases, there is no guarantee of funding.<sup>80</sup> Whilst not a question on the original interview schedule, several interviewees, and in particular judges, voiced concern about the lack of funding for expert assessment.<sup>81</sup>

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<sup>78</sup> R03. The extent to which the courts review, and should review, orders once made is discussed in Chapter 4 at 4.3.1.

<sup>79</sup> The Child Arrangements Programme stipulates compliance with section 13 of the Children and Families Act 2014 and Part 25 of the Family Procedure Rules: Practice Direction 12B: Child Arrangements Programme, para 14.13. See further: *Re C (A Child) (Procedural Requirements of a Part 25 Application)* [2015] EWCA Civ 539, [2015] Fam Law 889.

<sup>80</sup> Points made by interviewees later in this section.

<sup>81</sup> N = 9: B01, B04, J04-DJ, J05-CJ, J06-DJ, J07-CJ, J10-DJ, S03 and S10.

B01 described expert psychological assessments as 'extremely rare' and S03 reported that it can be extremely difficult to secure expert assessment, even when it is 'really, really necessary'. J04-DJ described the problem with the lack of access to expert assessment as follows:

A court can't fund it. The parties can't afford it and even if one party has got legal aid, Legal Aid Services are not going to fund it, so you are, potentially, putting children at risk ... .

Other interviewees also emphasised the importance of expert assessment to the courts' assessment of risk posed by the perpetrator, and the gaps left by the lack of funding. S03, for example, described psychological assessments as 'unbelievably useful in identifying the risks', particularly in cases of psychological abuse, and that these assessments have particular value in assisting the court in understanding the impact of abuse on children. S10 similarly placed value on psychological assessments since these assessments 'look at the whole picture'. J05-CJ said access to psychiatric, and to a lesser degree psychological, evidence could make a 'big difference' to cases heard because there are limits to how far Cafcass can be expected to compensate for the lack of access to expert evidence:

... psychiatric evidence, sometimes psychological evidence ... it could make a big difference. We turn to Cafcass as experts in a way, a lot, much more than I think we would have to otherwise but to get some advice, some ... and the Guardian is an expert, really, to get her expertise in but it's very hard to deal with this without those things [expert reports] so, yes, we would very much want to use that [expert reports] if we could.

The importance of expert assessment to understanding not only the level of risk posed by the perpetrator, but also the impact of the abuse on the parent subjected to it, was also emphasised. J06-DJ was concerned that the psychological impact of contact on parents who have experienced domestic abuse is often not identified within current practice, arguing that the system is 'ill-equipped to recognise that and diagnose it'.



This judge's view was that this problem could only be remedied through greater access to psychological assessment.

That judges are having to step in to compensate for the lack of access to expert assessment was reported by some interviewees. J04-DJ said that, in the absence of expert assessment, a judge has to act as a:

... sort of ... a mini psychologist when you're seeing people and you sort of have to gauge are they really a threat? ... You know, are they that sinister? Are they going to try and manipulate these children? And if they are going to try and manipulate these children, what effect is that going to have on them? Is that effect worse than not seeing dad at all?

The risks involved in relying on judges to assume the role of the expert were also raised by some interviewees. B01, for example, pointed to the impact of the quality of representation in cross-examination on the courts' ability to perform this role:

I think possibly what it [lack of access to expert assessment] does is take away the ability to help the court because if you've got a diagnosis that someone has a severe personality disorder and because of that it makes ... because the assessor will go on and give a view about whether the parent can successfully parent a child. So that gives the judge his or her reasons because they've had an expert who has assessed this person as not being safe. So, they have to pretty much do that assessment themselves from the witness box. So, it comes back to the quality of the representation because if the person doing ... cross-examination is vital in those cases ... is able to paint the picture for the court by asking the right questions then the court can get there, then the court can get there but if you don't ask the right questions the court can never get there.

That some judges feel equipped to perform this role and are reluctant, as a result, to permit expert assessment, even when funding is available, was, however, raised as an issue by S10.

One route described by some judges to overcome the problem of lack of access to expert assessment was the appointment of a Guardian, which can open the door to funding for this assessment. These interviewees, however, emphasised that, even then, funding is by no means guaranteed.<sup>82</sup> J10-DJ added that even when there is funding, there is a lengthy waiting period for a psychological assessment.

These findings, when coupled with those on the pressures on court time, illustrate starkly again the enormity of the task facing judges charged with resolving disputes over contact in which domestic abuse is alleged: not only is the time afforded to judges to resolve cases being squeezed, but their capacity to assess risk is being undermined through lack of access to expert assessment. As explored below, the under-resourcing of Cafcass and contact centres as external support services intensify the challenges for the courts and raise further questions about the extent to which the decision-making environment is one conducive to securing outcomes which promote the safety and well-being of children.

### **6.3 LACK OF FUNDING FOR EXTERNAL SUPPORT SERVICES – CAFCASS AND CONTACT CENTRES**

Interviewees raised concerns about the delays caused to court processes by the under-resourcing of Cafcass and questioned the quality of the support Cafcass can provide to the court within the current financial environment. The lack of funding for supervised contact was also identified as a concern, limiting as it does the courts' ability to locate opportunities for 'safe' contact.

#### **6.3.1 Pressures on Cafcass**

Several interviewees were concerned about the level of service provided by Cafcass. Criticisms tended, however, to be tempered by sympathy for the demands on Cafcass' time and its under-resourcing. Some interviewees commended Cafcass for continuing to provide a high-quality service, despite being 'very over-stretched'.<sup>83</sup> J10-DJ called

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<sup>82</sup> N = 4: J05-CJ, J06-DJ, J07-CJ and J10-DJ.

<sup>83</sup> J05-CJ and J08-DJ (J08-DJ quoted).

for greater Cafcass input into cases but said this was impossible currently as Cafcass is 'very thinly spread'. Some of the judges interviewed were particularly concerned about the impact of Cafcass being over-stretched in causing delay. J04-DJ and J06-DJ raised as a problem the norm now being to have to wait two or three months for a section 7 report. J04-DJ's concern was that this, when combined with having to wait a long time for a hearing, means that families are within the court system for lengthy periods. This judge emphasised the judicial reliance on Cafcass, since these practitioners are the only ones who can undertake enquiries, such as visiting the child's school. J06-DJ's concern with delay was that it can be difficult to re-start contact once it has ceased, and there might not be contact at the interim stage. S06 also said that Cafcass practitioners are taking 'longer and longer' to complete their reports as a result of being under-resourced, a point made also by S02 and S10.

A further problem raised was variable standards within Cafcass, but interviewees were again sympathetic to resourcing pressures. This was a particular concern of some barristers.<sup>84</sup> B05 reported that the quality of Cafcass' service varied 'enormously'. B01 said practitioners are now less expert and she recommends, as a result, her clients instruct private social workers, where they have the means to do so. B08 said some practitioners are 'out of their depth'. Several solicitors also emphasised the need for investment in funding to support Cafcass to provide the required service.<sup>85</sup> S03, for example, said that Cafcass' domestic abuse training was 'very good', but practitioners need 'to be given some more tools in their box to be looking at these issues'. C06 shared this concern about the impact of resourcing pressures on the standard of Cafcass' service, stating that she has seen the service drop from:

... being like gold, gold standard to probably round about silver right now. I don't think it will go to bronze but, you know, we used to have a lot more of everything in terms of time, staff, resources and I know that is austerity measures that have come to bite on everybody.

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<sup>84</sup> N = 4: B01, B04, B05 and B08. B02 said that Cafcass practitioners are now less experienced than they were in the past but did not raise this as a specific concern.

<sup>85</sup> N = 5: S03, S05, S06, S07 and S10. S02 suggested Cafcass practitioners needed to be more experienced but did not link this specifically to funding.

C10 also warned against reliance on Cafcass as the sole source of risk identification and management:

... just because Cafcass are involved doesn't mean you get a practitioner who will have the time or the skills to be able to actually bring out all the risk factors or may not have the information at that time.

In the light of the critical role played by Cafcass in supporting the court in contact disputes in which domestic abuse is alleged, investment in its resourcing should be a priority. As outlined below, some interviewees also reported the lack of funding for supervised contact centres as increasing the pressure on Cafcass, with Cafcass practitioners expected to supervise contact to fill the gap left by the lack of contact centre funding.

### **6.3.2 The limited availability of supervised contact centres**

Supported contact centres offer a neutral space for contact to take place in low-risk cases, with volunteers and staff receiving some training but not being trained in risk assessment or management.<sup>86</sup> Practice Direction 12J now makes clear that these centres should not be used in cases where 'risk assessment has concluded that a parent poses a risk to a child or to the other parent'.<sup>87</sup> Supervised contact centres are designed for high risk cases, where contact needs to be monitored by a professional.<sup>88</sup> The problem, as outlined in the existing literature, is that contact centres have been under financial strain for a number of years.<sup>89</sup> There is a lack of supervised centres,<sup>90</sup> and concerns have been raised about inadequate supervision at the supervised

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<sup>86</sup> E. Coe, *Child Contact Centres Protocol* (2017) 47(11) *Family Law* 1163, 1163.

<sup>87</sup> Practice Direction 12J para 38(d). See also: Coe (note 86 supra) 1163; National Association of Child Contact Centres, 'Revised Protocol for Referrals of Families to Child Contact Centres by Judges and Magistrates' (October 2017) <<https://naccc.org.uk/what-we-do/protocols/judicial-protocol>> accessed 23 October 2018.

<sup>88</sup> Coe (note 86 supra) 1163.

<sup>89</sup> See for example: Hester and Radford (note 2 supra); Sturge and Glaser (note 2 supra) 626; Aris, Harrison and Humphreys (note 2 supra) pp. ii and 122; Thiara and Gill (note 2 supra) pp.126-127; Birchall and Choudhry, (note 2 supra) pp.7, 39 and 54.

<sup>90</sup> See for example: Thiara and Gill (note 2 supra) pp.125 and 132; Thiara and Harrison (note 3 supra) pp.23-24; Coy, Perks, Scott and Tweedale (note 41 supra) pp.6 and 81; L. Caffrey, 'The Importance of Perceived Organisational Goals: A Systems Thinking Approach to Understanding Child Safeguarding in the Context of Domestic Abuse' (2015) 26 *Child Abuse Review* 339, 348; All-Party Parliamentary Group on Domestic Violence (note 61 supra) p.20.

centres which exist.<sup>91</sup> Restrictions in supervised contact centre availability can mean the courts have to look elsewhere for supervision, with relatives potentially seen as the 'solution', when relative supervision may not represent 'safe' contact.<sup>92</sup> Supported centres being relied upon to supervise contact between children and parents who have been domestically abusive, when these centres are not equipped to do so, has also been identified as a problem.<sup>93</sup>

Several interviewees within this doctoral research echoed existing concerns about the lack of resourcing for supervised contact. Interviewees' comments clustered around three main findings: first, the centres are hugely under-resourced; second, the challenges this under-resourcing poses for the courts in having to identify alternative solutions; and third, concern about the quality of monitoring at supervised centres, even when places can be found. The extent to which supervised contact centres can be relied upon as a 'safe' space in which contact with a parent who has perpetrated domestic abuse can take place is, thus, in doubt, which is of concern in the light of the problems associated with the alternatives.

That supervised contact centres are under-resourced was emphasised by nearly three-quarters of all interviewees.<sup>94</sup> Interviewees reported lengthy waiting lists,<sup>95</sup> parents having to travel long distances to access them<sup>96</sup> and restrictive opening times, which are not suitable for parents working non-standard hours.<sup>97</sup> J02-M, for example, said:

... the problems with the contact centres are they are booked to the raft. They are closing left right and centre because there's no funding for them. And there's some waiting lists in some areas of the county there is like a three-month waiting list, which is very hard for a parent ... .

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<sup>91</sup> See for example: Thiara and Gill (note 2 supra) p.126; Birchall and Choudhry (note 2 supra) pp.39-40.

<sup>92</sup> See for example: All-Party Parliamentary Group on Domestic Violence (note 61 supra) p.21.

<sup>93</sup> See for example: Thiara and Gill (note 2 supra) pp.105, 126 and 128; Caffrey (note 90 supra) 348; All-Party Parliamentary Group on Domestic Violence (note 61 supra) p.21.

<sup>94</sup> N = 30 (73%): B01, B02, B03, B04, B05, B06, B07, B08, C02, C03, C07, C08, C09, C10, J01-M, J02-M, J04-DJ, J06-DJ, J07-CJ, J08-DJ, J10-DJ, R02, R03, S01, S02, S03, S05, S06, S07 and S10.

<sup>95</sup> N = 13: C02, C08, C09, J01-M, J02-M, J10-DJ, S01, S02, S03, S05, S06, S07 and S10.

<sup>96</sup> N = 9: C08, C09, J02-M, J08-DJ, S02, S03, S05, S07 and S10. Only S09 did not think the location and waiting lists for spaces at centres were problematic. However, as outlined below, S09 was concerned about the quality of supervision at supervised centres.

<sup>97</sup> N = 2: B06 and B08.

A further concern for several interviewees was that even when supervised contact centres are available, supervised contact might still not be a viable option because parents have to self-fund the sessions, which most parents cannot afford.<sup>98</sup> As a result, B08 said that supervised contact is 'just not in the reach of most people'.

The relevance of this under-resourcing of supervised contact centres is that it poses the challenge of what should happen in the absence of supervised contact centre places. The most common alternative reported by interviewees was reliance on relatives, or other third parties, to supervise the contact sessions.<sup>99</sup> Some interviewees saw this as a positive option, provided the relative or third party was sufficiently neutral.<sup>100</sup> Relative or third-party supervision was not, however, an unproblematic option for other interviewees. S10, for example, said that relatives' supervision of contact can rest on the mother being involved, which cannot happen in abuse cases. S02 said that parents who have experienced domestic abuse can be pressured into relative or third-party supervision as a result of the lack of supervised contact centre places. And R02 described the problem as follows:

And that is something that has come up a lot with regards to survivors, where someone in the perpetrator's family is meant to supervise contact and where, actually, they feel that that is really unsafe and they don't feel they can trust that person who is in the supervisor role to actually ensure that contact is happening in a safe way ... . And I think the level of anxiety that that gives to women, feeling that the supervision is really inadequate ... .

C02 said it is difficult to find a family member who can supervise contact since these family members can lack the insight required to protect the child, or the resident parent may oppose the supervision as a result of family members being complicit with

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<sup>98</sup> N = 19: B01, B03, B04, B06, B08, C02, C03, C07, C08, J01-M, J04-DJ, J06-DJ, J07-CJ, J08-DJ, J10-DJ, R03, S01, S02 and S03.

<sup>99</sup> N = 17: B02, B05, B08, C02, C03, C07, C09, J01-M, J06-DJ, J07-CJ, J08-DJ, J10-DJ, R02, S01, S02, S03 and S10. S03 added that the usual approach would be to explore the possibility of relative supervision before pursuing contact centre supervision.

<sup>100</sup> N = 3: B02, B05 and C07.

the perpetrator. C10 agreed that finding a suitable family member takes time, with there being few family members who have sufficient neutrality. B01 also reported that many relatives are blind to the abuse perpetrated.

An alternative response to the lack of supervised contact centre places reported by some Cafcass practitioners was that Cafcass is expected to supervise contact sessions. These practitioners spoke of the added burdens this exerts on their roles.<sup>101</sup> C02 reported, for example, that Cafcass is having to refuse to supervise sessions, with parents then having to wait months for a contact centre place, a scenario she described as a 'complete nightmare'. Another option reported by some interviewees was parents self-funding independent social workers to accompany them during contact.<sup>102</sup> In the light of the cost of contact centre places being prohibitive,<sup>103</sup> it is unlikely private supervision would be an option open to many.

In the absence of family member, Cafcass or private social worker supervision, some interviewees reported that parents have no choice but to wait for a contact centre place.<sup>104</sup> This concerned B05, who said, 'time is something we don't have with children', with delay being the 'death nail ... if it is too long'. Others said contact will not take place unless a safe forum can be found.<sup>105</sup> J10-DJ, for example, said that even if a relative is willing to supervise contact in response to the absence of a contact centre place, if the relative is not equipped to do so in a way which will ensure the child's safety, then there is no option other than for no contact to take place.

In contrast, some interviewees reported the courts taking greater risks with the safety of children as a result of the inaccessibility of supervised contact. S02, for example, said the courts:

... do take more risks than they used to. Because they have to weigh out 'should this child have a relationship with its father?' over him not being

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<sup>101</sup> N = 2: C02 and C10.

<sup>102</sup> N = 4: C02, J07-CJ, J10-DJ and S10. C02 said independent social workers are employed 'fairly frequently'.

<sup>103</sup> A point made by interviewees earlier in this section.

<sup>104</sup> N = 2: C03 and B05.

<sup>105</sup> N = 3: B08, J06-DJ and J10-DJ.

in a position to afford to move forward because no-one else is going to pay for that supervised contact.

B06 also reported the courts taking greater risks, explaining that in cases where supervised contact is not an option, the ‘typical solution’ would be to move forward with supported contact, a response also described by S02. Given what is known about the risks of supported contact in cases involving parents who have been domestically abusive,<sup>106</sup> it should be of concern if this practice is widespread.

These findings underline the major resourcing problems with supervised contact centres, along with the problems associated with the alternatives. Interviewees’ responses suggest, however, that there is no guarantee that contact will be ‘safe’, even when it takes place at a contact centre. And this matters for the courts’ assessments of whether contact should take place because it raises questions about the extent to which the risks posed by the domestically abusive parent can be managed. C08, for example, said that supervised centres are not always ‘as safe as people think’. B03 reported that supervised contact centres are now, in practice, only providing supported contact, a concern also voiced by S09:

The quality of that contact – well, the contact centre is limited. The quality of supervision is nil. You have one volunteer, very kindly, trying to watch God knows how many parents. There’s no feedback from the contact centre if something goes wrong, which quite often it does.

R02’s concern was that contact which ought to be taking place at supervised centres is going ahead at supported centres because volunteers do not feel able to refuse referrals:

... so, in the supported centres where they are just staffed by volunteers, they quite often get referrals for contact through the family courts and they don’t feel able to push back on unsafe referrals because they are

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<sup>106</sup> See: Practice Direction 12J para 38(d); Coe (note 86 supra) 1163; National Association of Child Contact Centres (note 87 supra).



volunteers and they are pushing back to the judiciary. That's really full-on so often they feel like they have to take all the referrals, even when they are like "Is this safe? Probably not. But we can't push back because that's a family court judge. I am a volunteer".

Overall, these responses suggest that there are two principal risks to children's safety posed by the under-resourcing of supervised contact centres: first, that alternatives to supervised contact may be relied upon which do not cater sufficiently for the risks posed by the domestically abusive parent; and, second, that there is a risk that supervised contact, even when it is available, does not provide the level of supervision required to ensure the safety of children. If contact is to take place in cases of proven or found domestic abuse, then investment in options for professionally-monitored contact is essential.

## **6.4 CONCLUSION**

Whilst interviewees did not agree on every issue discussed within this doctoral research, concern about the impact of financial tensions on the family justice system united their responses. The LASPO reforms were unprecedented in their removal of public funding for the majority of private family disputes, with an increase in self-representation following as a consequence. Whilst the legal aid evidence requirements have been relaxed, interviewees emphasised enduring problems with litigant-to-litigant cross-examination and power inequalities. Whilst it is not uncontentious that lawyers are the 'saviours' of victims of domestic abuse,<sup>107</sup> interviewees emphasised the importance of legal representation not only to the functioning of the court system but also to the justice of the outcomes reached. Without it, there is a real risk that decisions are being taken in the dark, without access to the salient facts, that cases cannot be explored in the level of depth required, and that judges feel they cannot 'check and balance' themselves.

The increase in self-representation is also significant because interviewees reported it has caused major delays within an already overstretched system, with LIPs unable

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<sup>107</sup> Phrasing used by B08.

to fill the shoes of lawyers. The lack of funding for expert assessment was also identified as increasing the pressures on the judicial role, and it is questionable whether the risks posed by domestically abusive parents can be robustly assessed without expert input. Pressures on Cafcass and contact centres as external support services were further reported as problems, with concerns raised about the delays to the court process caused by Cafcass being over-stretched and the extent to which Cafcass can function to the standard required under this level of strain. And, as reported by interviewees, the lack of funding for supervised contact centres is squeezing opportunities for 'safe' contact, and the extent to which supervised contact is 'safe', even when it takes place, is also in doubt.

Taken as a whole, these problems point to the conclusion that the environment in which decisions on contact are being taken is not conducive to securing outcomes which ensure the safety and well-being of children. One solicitor described the risks posed by the current financial climate starkly:

... I think everything is being done on a shoe string, and I think that there will be cases where children or mothers will die. Will that change things?  
No. And that's terrifying.

Criticisms of the courts, and practitioners, should be mindful of this intensely challenging environment in which judges and practitioners must work. There are limits to how far the judiciary, lawyers and Cafcass can be expected to compensate for these financial tensions, both in relation to their own capacity and the risk that their roles are being re-shaped to an unacceptable degree. With the financial climate remaining one of limited resources, it is more challenging than ever, but at the same time more important than ever, to find ways to better support both the court and litigants.

# CHAPTER 7

## CONCLUSION

Existing research and commentary paint a bleak picture of the courts' handling of contact disputes in which domestic abuse is alleged, found or proven. The courts' failures to protect children and mothers have been repeatedly emphasised, and current concerns echo many of those levelled at the courts prior to the seminal case of *Re LVMH*<sup>1</sup> and the introduction of Practice Direction 12J (henceforth 'PD12J'). The law and practice have, as a result, been described as a 'cycle of failure'.<sup>2</sup> The concerns repeated over many years have been that the courts place too much emphasis on the importance of children maintaining contact with their fathers post-separation and too readily accept that fathers can perpetrate domestic abuse but, nevertheless, be 'good' or 'good enough' parents, and that this undermines the safety and well-being of children and their mothers.

This doctoral research has shed light on both the problems with current practice and the challenges faced by those charged with working on these cases. It has provided insights into the way in which cases are being resolved, which is significant because much existing research pre-dates major developments, including the introduction of the statutory presumption of parental involvement, the 2014 amendments to PD12J and legal aid reform. Few previous studies have also gained access to the judiciary, and their perspective has provided important insights. By consulting the range of key actors involved in contact disputes, it has been possible to build a rich picture of perspectives on current practice and its challenges.

This concluding chapter summarises the key findings from the thesis, exploring their interrelationship and significance. Having outlined the relationship between the chapters and the messages from the evidence base on the benefits and risks of

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<sup>1</sup> *Re L (A Child) (Contact: Domestic Violence)*; *Re V (A Child) (Contact: Domestic Violence)*; *Re M (A Child) (Contact: Domestic Violence)*; *Re H (Children) (Contact: Domestic Violence)* [2001] Fam 260.

<sup>2</sup> R. Hunter, A. Barnett and F. Kaganas, 'Introduction: Contact and Domestic Abuse' (2018) (40)(4) *Journal of Social Welfare and Family Law* 401, 401.

contact, it explores the three core tensions affecting the law and practice: ideological, structural and financial. It then considers the changes made to PD12J in October 2017 and highlights areas in need of further research. The overall conclusion to this thesis – that while there is evidence of improved understanding of domestic abuse, ideological, structural and financial tensions undermine practice – suggests that the need for further research is urgent, as is the need to find creative solutions to problems to fit the resource-stretched environment in which decisions on contact are being taken.

## **7.1 THE INTERRELATIONSHIP OF THE THESIS CHAPTERS**

Chapter 2 explored the evidence base on the impact of domestic abuse on children, and the benefits and risks of contact. Although the courts' decisions must be tailored to the needs and experiences of each child, it is also important that these decisions are informed by this evidence base, since it provides a guidance framework on when contact should take place, albeit not a definitive one. Chapter 3 went on to discuss interviewees' perspectives on the way in which domestic abuse is defined and evidenced in current practice, which is significant because unless allegations are recognised as domestic abuse, and either evidenced or established through fact-finding, they cannot, in theory, impact on the contact decision. Taken collectively, Chapters 2 and 3 contain a number of important messages for the courts on how domestic abuse should be understood in the context of contact.<sup>3</sup>

Chapter 4 built on Chapters 2 and 3 by moving on to assess interviewees' perceptions of the impact that proven or found domestic abuse has on the contact decision. Chapter 5 then explored interviewees' views on the extent to which the introduction of the statutory presumption of parental involvement has changed practice, providing the first empirical insight within the existing evidence base into the impact of the presumption. Chapter 6 closed the substantive chapters with an exploration of interviewees' perceptions of the intense financial challenges which are impacting on all aspects of the courts' resolution of disputes, an understanding of which is essential if workable solutions are to be found to current problems. Having summarised below what is known from the evidence base on the benefits and risks of contact, this

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<sup>3</sup> See below at 7.2.

concluding chapter explores the key findings from the thesis as a whole, structured around the ideological, structural and financial tensions which undermine current practice.

## **7.2 SUMMARY – WHAT IS KNOWN FROM THE EXISTING EVIDENCE BASE ON THE BENEFITS AND RISKS OF CONTACT WITH A PARENT WHO HAS PERPETRATED DOMESTIC ABUSE?**

As Chapter 2 explored, the evidence base on the benefits and risks of contact with a parent who has perpetrated domestic abuse does not provide a definitive answer to the question of whether, and if so in what circumstances, children should have contact with parents who have perpetrated domestic abuse. This is, in part, a product of each decision taken on contact needing to be tailored to the individual needs of each child, particularly because children's responses to domestic abuse are not uniform, but it also results from the lack of longitudinal data on the outcomes for children of court-ordered contact with a domestically abusive parent.<sup>4</sup> That said, the evidence base, combined with the developments explored in Chapter 3 on the way in which domestic abuse should be conceptualised, contains a number of clear messages for the courts' resolution of contact disputes.

Whilst contact with a parent who has perpetrated domestic abuse can provide benefits to children, there is no empirical foundation for assuming these benefits. The risks posed by contact to children can be high, and whilst the unpredictability of domestically abusive behaviour renders risk assessment difficult, it is well-established that abuse can escalate on separation. The recognition of domestic abuse as coercive control also has consequences for the courts' assessment of risk. It mandates that the parties' whole relationship is understood, rather than focusing on specific incidents. It challenges assumptions that safeguards such as handovers will protect children and mothers from harm post-separation. And it warns against assessments of risk founded on whether the abuse is physical or non-physical, and against dismissing abuse as 'historic'. As now explored below, some but not all of these messages are permeating

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<sup>4</sup> Although see the findings relevant to court-adjudication in: J. Fortin, J. Hunt and L. Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults who Experienced Parental Separation in their Youth* (Sussex Law School 2012).

practice, with the ideological commitment to the importance of contact to children remaining a barrier to absorption.

### **7.3 IDEOLOGICAL TENSIONS**

The findings from this thesis suggest that some of the messages above from the evidence base are permeating practice, with some evidence of significant progression in the courts' theoretical understanding of domestic abuse and the risks it poses. As Chapter 3 explored, all the judges were clear that non-physical abuse is recognised and taken seriously as domestic abuse, with some sharing the view that non-physical abuse poses greater risks to children and parents than physical abuse. The judges were also emphatic that the promotion of contact only extends as far as it is possible for contact to take place safely. Several of the practitioners, and in particular the barristers, supported this assessment of judicial practice. These findings suggest that there have been developments in judicial understanding of, and weight given to, domestic abuse, compared to findings from previous studies, which have tended to conclude that the courts only take domestic abuse seriously when there are incidents of 'high-end' physical abuse.

However, there remain several areas of tension, some of which relate to definitions of domestic abuse and others to the weight given to domestic abuse in deciding if contact should go ahead. Several interviewees, and in particular the solicitors and domestic abuse organisations, raised significant concerns about current practice. First, as Chapter 3 explored, whilst several practitioner interviewees were positive about judicial understanding of domestic abuse, several others did not think the courts recognise both physical and non-physical forms of abuse, or that they take both seriously. Second, as Chapter 4 explored, the solicitor and domestic abuse organisation interviewees in particular raised concerns about the limited circumstances in which domestic abuse impacts the courts' decisions on contact, with the promotion of contact marginalising concerns about the safety and well-being of children. Indeed, some interviewees' responses across all practitioner groups suggest there are risks with the employment of a filter of 'relevant' domestic abuse, with abuse not always being regarded as relevant when the child has not been a direct victim or when the abuse is deemed insufficiently serious, 'historic' or a 'one-off'. As

Chapters 2 and 3 argued, the perpetration of domestic abuse does not sit easily within clearly-defined categories such as these.

Regardless of the stance taken on whether the courts' theoretical understanding of domestic abuse has improved, a clear finding from across all the practitioner groups was that the courts' commitment to the promotion of contact manifests itself in no contact, or no direct contact, being extremely rare outcomes for fathers who have perpetrated domestic abuse. This echoes the findings from previous studies. Interviewees' responses also suggest that when unsupervised contact is not deemed appropriate, the aim is still to progress contact over time, again underlining the importance attributed to children building or maintaining a relationship with their fathers, even in cases of domestic abuse. As some interviewees emphasised, the problem with this approach concerns the extent to which risk can be managed in both the short-term and long-term with the progression of contact, particularly within the current financial climate. Concern was raised prior to the introduction of the statutory presumption of parental involvement that it would further entrench the courts' commitment to the promotion of contact, even in cases of domestic abuse. Interviewees' responses do not, however, suggest that the presumption is changing the courts' approach or outcomes, principally because the courts' pro-contact stance was firmly established prior to the reform. But arguably what the statutory presumption, nevertheless, does at an ideological level is reinforce the commitment to the promotion of contact, and this is at best unhelpful, and at worst dangerous, in cases involving domestic abuse.

The evidence base on the benefits and risks of contact does not support a pro-contact stance in cases of proven or found domestic abuse. As Sturge and Glaser argued, if any assumption is being made, an assumption against contact finds more evidential support than one in favour.<sup>5</sup> On the basis of interviewees' responses, however, a presumption against contact will not secure support in practice, with the vast majority of interviewees strongly opposed to its introduction. Assumptions or presumptions in either direction do not sit comfortably in any event with the well-established

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<sup>5</sup> C. Sturge and D. Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) 30(Sep) *Family Law* 615, 623.

knowledge that children are unique and respond to separation and domestic abuse in different ways. The ideological commitment to making contact happen should thus be challenged in cases in which domestic abuse is found or proven. Achieving a consensus, however, on the outcomes the courts ought to be reaching in these cases is rendered complex both by this need to ensure decisions are tailored to each individual child and the lack of longitudinal data on the outcomes for children of court-ordered contact in these cases. Whilst the 'wrong' outcomes are clear, the 'right' outcomes are arguably harder to articulate precisely.

## **7.4 STRUCTURAL TENSIONS**

Developments in theoretical understandings of domestic abuse are limited unless the structural foundations upon which decisions are being taken are compatible with these developments. Even among the interviewees who shared positive experiences of the courts' understanding of domestic abuse, reporting that both physical and non-physical abuse is taken seriously, several said that the weight given to non-physical abuse in practice can be undermined by the barriers to evidencing this abuse. This speaks to the broader structural tension affecting practice: that the current incident-based model, premised on 'testable' isolated incidents and external evidence, is incompatible with the lived reality of domestic abuse, particularly when domestic abuse is conceptualised with coercive control at its core. On the basis of interviewees' responses, problems with the incident-based model manifest themselves in a number of ways.

A concern raised by the judicial interviewees was that parents alleging domestic abuse often provide generalised allegations, which are not amenable to fact-finding because the 'facts' to be found are unclear. The struggles faced by litigants in person in articulating the abuse experienced were particularly emphasised. Interviewees across the professional groups also reported as problems the lack of external evidence available in practice to substantiate allegations, and a judicial reluctance to hold fact-findings in the absence of this evidence. And, even when fact-findings are held, some interviewees reported a judicial reluctance to conclude that the abuse has taken place on the balance of probabilities, when the only evidence available is one parent's word against the other.



The problem with the current incident-based model is that it works if victims of abuse are able to articulate precisely allegations of abuse and produce external evidence to support these allegations, but the reality is that domestic abuse undermines victims' abilities to report the abuse experienced or communicate it to the court. The findings from this research support the broader calls for the implementation of new models for evidencing domestic abuse, both inside and outside the child contact context, models which provide a better fit with the lived reality of abuse and are built around coercive control. The findings from this research also suggest, however, that concerns over false allegations might present a barrier to the adoption of a new model. Identifying and understanding coercive control is also time-intensive, which might represent a further barrier in the light of the financial tensions raised by interviewees in Chapter 6.

There is a further structural tension, which affects the cases in which the abuse has been capable of being evidenced, either externally or through fact-finding. This is the limited circumstances in which cases can now be brought back to court for review. Interviewees reported that common practice is now for the courts to make staggered contact orders, with the onus falling on the parent to monitor the contact and bring the case back to court if necessary. Whilst some interviewees were opposed to the reinstatement of reviews on the basis that children's welfare is not promoted by protracted court proceedings, others voiced concern about the extent to which the long-term risks posed by contact can be managed without reviews, highlighting problems with reliance on parents to police the safety of contact. The reinstatement of reviews would, however, require resources which, as Chapter 6 explored, are already thinly spread.

## **7.5 FINANCIAL TENSIONS**

It is impossible to discuss the courts' resolution of contact disputes in which domestic abuse is alleged, found or proven without addressing the financial tensions which are affecting the resolution of these cases, and criticisms of the courts' approach ought to be mindful of these challenges. Whilst interviewees were not in agreement about other issues discussed within this thesis, they were united in their concern about the

impact of financial tensions on the resolution of cases and the functioning of the family justice system more broadly. Of particular concern to interviewees across the professional groups was the impact of the unprecedented cuts to legal aid, which have led to high levels of self-representation, including in cases in which domestic abuse is alleged. Interviewees were clear that litigants in person struggle to cope with the court process, with serious concerns raised about the extent to which the courts are able to access information essential to the case in hand without input from lawyers.

Interviewees also reported the rise in self-representation as having increased the pressure on the key professional actors involved in disputes, but in particular the courts, with important questions arising on the extent to which the roles played by these actors are being reshaped to an unacceptable degree. The changes to the legal aid evidence requirements are to be welcomed, but they do not tackle problems caused by the lack of protection against litigant-to-litigant cross-examination and broader power inequalities. Whilst the extent to which lawyers are a positive force in the lives of parents affected by domestic abuse is not uncontentious, the findings from this study suggest that legal representation is essential in these cases, and the consequences of its absence dangerous.

One of the further consequences of the rise in self-representation reported by interviewees was delay. Interviewees reported acute pressures on the court system, with these pressures having consequences both for the courts' ability to resolve cases robustly and for parents subjected to lengthy delays before having their cases heard. Some interviewees also reported that the restrictions in access to expert assessment has undermined the ability of the courts to assess risk, adding further pressure to the judicial role. Problems were also reported with the under-funding of external support services, with Cafcass overstretched and the opportunities for supervised contact limited. Taken as a whole, these problems point to the conclusion that the environment in which decisions on contact are being taken is not conducive to securing outcomes which ensure the safety and well-being of children.

## 7.6 WILL THE MOST RECENT ITERATION OF PRACTICE DIRECTION 12J CHANGE PRACTICE?

This thesis has, therefore, highlighted ideological, structural and financial tensions which are undermining the courts' resolution of contact disputes in which domestic abuse is alleged, found or proven. In response to concerns about the courts' resolution of such disputes, PD12J was amended in October 2017. The changes post-dated the interviews conducted for this doctoral research. This section outlines briefly these changes. Whilst research is needed to assess their impact empirically, it is suggested that they are unlikely to go very far in addressing the problems highlighted by interviewees within this research.

The 2017 amendments made several changes to PD12J, including: the importance of adherence to PD12J has been underlined; the court is now directed to 'consider carefully' if the statutory presumption applies;<sup>6</sup> the court must now satisfy itself that any contact ordered exposes neither the child, nor the other parent, to an 'unmanageable risk of harm';<sup>7</sup> the definition has become one of 'domestic abuse' rather than 'violence';<sup>8</sup> a de facto presumption against interim contact has been introduced;<sup>9</sup> the conclusions the court must record have been clarified;<sup>10</sup> and contact at a supported contact centre, or supervised by a parent or relative, is now deemed inappropriate in cases in which the parent poses a risk of harm to the child or other parent.<sup>11</sup>

The findings from this doctoral research suggest that the extent to which these amendments will allay concerns raised in existing research and commentary is

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<sup>6</sup> Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm (October 2017) para 7.

<sup>7</sup> Ibid para 35.

<sup>8</sup> Ibid para 3. The definition was also expanded to include abandonment.

<sup>9</sup> Ibid para 25.

<sup>10</sup> Ibid, see for example: paras 8, 14, 15, 18, 22 and 29.

<sup>11</sup> Ibid para 38. Whilst many of Mr Justice Cobb's recommendations, issued following his review of PD12J, were implemented, others were diluted or omitted. Examples include: Mr Justice Cobb wanted to introduce safety and risk assessments completed by a 'specialist domestic abuse practitioner working for an appropriately accredited agency' in cases of proven domestic abuse (para 33); he also wanted stronger wording on the inapplicability of the statutory presumption of parental involvement, as Chapter 5 noted (para 4); and he recommended a statement on the importance of the court making sure that the 'court process is not used as a means to perpetuate coercion, control or harassment by an abusive parent' (para 6). See: The Hon. Mr Justice Cobb, *Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm – Report to the President of the Family Division* (January 2017).

doubtful. No judge deliberately promotes unsafe contact. On the basis of this doctoral research, where the problems lie is in the boundaries of current definitions of domestic abuse, along with assessments of ‘relevant’ domestic abuse and ‘safe and beneficial’ contact, being open to varied interpretation, and in the structural and financial tensions outlined above. Even if PD12J was applied to the letter, the amendments do not address these deeper problems. More comprehensive change is needed, and there are several areas in need of further research to achieve this change, in addition to monitoring the impact of these recent amendments to PD12J.

## 7.7 THE NEED FOR FURTHER RESEARCH

The findings from this doctoral research suggest there are four principal areas in need of further research. The first is to monitor the impact of the most recent iteration of PD12J. The second is to invest in research on the long-term outcomes for children who have court-ordered contact with parents who have perpetrated domestic abuse, with a particular focus on coercive control and non-physical forms of abuse.<sup>12</sup> Whilst the existing evidence base contains a number of messages for the courts on the impact of domestic abuse on children, and the risks posed by contact, there is a lack of empirically-founded guidance on the specific outcomes which should be reached to promote children’s welfare. This call for research is not new; the Children Act Sub-Committee made a similar point in its report in 2000.<sup>13</sup> There is, of course, a limit to how far such guidance can be provided, since each decision on contact must be tailored to each child, but longitudinal data on the impact on children of contact with a parent who has perpetrated domestic abuse would, nevertheless, aid the court in its longer-term assessment of risk.

The third area is to conduct research to support the production of more detailed guidance for the judiciary on the status of coercive control, the boundaries of current

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<sup>12</sup> Building on the work of, for example: Fortin, Hunt and Scanlan (note 4 supra).

<sup>13</sup> The 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* (Lord Chancellor’s Department 12 April 2000) p.53. More recently, the Home Affairs Committee has called for a review into the impact on children of contact arrangements in domestic abuse cases: Home Affairs Committee, *Domestic Abuse* (22 October 2018) para 28 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1015/101502.htm>> accessed 23 October 2018.

definitions of domestic abuse and the relevance of abuse to decisions on contact.<sup>14</sup> This guidance is challenging to produce, since domestic abuse does not lend itself to neat categorisations, but is necessary because, without it, there is a risk that allegations of abuse can be marginalised. And the final area in need of research is the possibility of developing a new evidential model to better support the courts' access to, and use of, evidence of abuse experienced, as well as its access to, and use of, academic research. The first component speaks to interviewees' concerns about the challenges faced by parents in communicating and evidencing the abuse experienced in court. The second component speaks to the problem of the pro-contact stance, which continues to exist in cases in which domestic abuse is an issue. This second component calls for academic-practitioner collaboration and is aligned in its objectives with those of the recently-established Family Justice Observatory.<sup>15</sup> And, above all, research in each of these four areas must be conducted with sensitivity to the intense financial challenges affecting practice if solutions are to be found which are compatible with the current lack of resources.

## 7.8 CONCLUSION

This doctoral research has provided much-needed data on the courts' resolution of contact disputes in which domestic abuse is alleged, found or proven. It has explored current problems and challenges. It has provided insights into major developments affecting the law and practice, which post-dated the majority of existing research, mapping the impact of the statutory presumption of parental involvement and assessing the impact of legal aid reform. And by consulting the key practitioners engaged in working on these cases, including members of the judiciary, it has also enabled the intensely challenging environment in which they must work to be understood, which is crucial if workable solutions are to be found to current problems.

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<sup>14</sup> The need for this guidance was emphasised by some interviewees: C07, J06-DJ and R03. The importance of guidance of this kind was also emphasised by Hunter and Barnett in their influential research: R. Hunter and A. Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council 2013) p.72.

<sup>15</sup> See: The Nuffield Foundation, 'The Nuffield Family Justice Observatory' <<http://www.nuffieldfoundation.org/news/nuffield-family-justice-observatory>> accessed 30 October 2018; J. Fortin, J. Hunt and L. Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults who Experienced Parental Separation in their Youth* (Sussex Law School 2012).

In some respects, the findings from this doctoral research are more positive than those in previous studies, with evidence of judicial understanding of domestic abuse having improved, in particular in relation to the recognition of non-physical forms of domestic abuse. In other respects, however, the findings reinforce the concerns of previous studies, with several interviewees reporting problems with the courts' over-promotion of contact and the rarity of direct contact being refused. The impact of the financial tensions affecting practice are also difficult to overstate. Whilst the question of whether contact with a father should continue in cases of domestic abuse does not permit a simple answer, the need to address the ideological, structural and financial tensions surrounding this question is clear.

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# APPENDIX A

## VIGNETTES

Included in this Appendix are the two vignettes discussed with interviewees. The methodological issues underpinning the use of vignettes in empirical research are explored in Chapter 2 and interviewees' perspectives on the outcomes the court would reach in these cases are explored in Chapter 4. Interviewees were also asked further questions, including how the veracity of the allegations would be assessed, but space prohibits a discussion of these findings in this thesis.

### **VIGNETTE ONE**

A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother opposes all contact. She alleges that the father has been emotionally and psychologically abusive towards her throughout their seven-year relationship. She maintains that the father used to try to make her feel like she was losing her mind by, for example, putting the gas on and claiming the mother had forgotten to turn it off. She also alleges that he grabbed her arm at the end of their relationship, causing it to bruise. The mother also maintains that the children witnessed the abuse. She is currently receiving outreach support from her local refuge and says she is very frightened of the father. She recently received a letter at her friend's house, which she claims was from the father, with the message 'R.I.P'. The father denies all the allegations.

### **VIGNETTE TWO**

A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother claims that the father was physically and emotionally abusive to her for five out of the seven years of their relationship. She alleges, for example, that he raped her on several occasions, and that he would regularly punch her in the stomach and head. She has never reported the abuse before now, save for one occasion at the end of the relationship when she called the police. She has been staying in a refuge (with the children) since the separation. She says she is petrified of the father harming her and the children.

The mother and father separated three months ago. For the first two months following separation, the father had unsupervised contact with the children for three hours a week. The mother, however, ceased contact one month ago, prompting the father's application for a child arrangements order. She says she allowed contact at the outset because she was so afraid of the father. The mother maintains she stopped contact because she was concerned about the impact it was having on the children, who she says were coming home from contact very upset and quiet. The father accepts he has been abusive in the past, although not to the extent alleged by the mother, but claims he is now a changed man and is willing to seek help. The mother initially opposed all contact but then said she would agree to contact if it is always supervised.

# APPENDIX B

## INTERVIEW SCHEDULES

Included below are the interview schedules for:

- Interviews with the judiciary;
- Interviews with barristers and solicitors;
- Interviews with Cafcass; and
- Interviews with the domestic abuse organisations.

\*

### Suggested interview schedule (Judiciary)

PhD research: 'Perceptions of Post-separation Contact and Domestic Abuse' (Jo Harwood, School of Law)

**Please note:** The interview schedule below has been assembled as a general guide only. The aim of the interview is to give you the space to discuss the issues you feel are most important and for the interview to be constructed around your experiences and perceptions. The interview will be conducted with sensitivity to the need for the judiciary to remain independent, and to avoid engagement in areas of political controversy or government policy.

### PART 1: Perceptions of contact and domestic abuse

- Can you tell me about some of the main challenges you face in your role in dealing with private law parental contact disputes which involve domestic abuse allegations? (Prompt: or challenges that you think exist more generally?)
- Without disclosing any confidential details, can you outline the last private law contact dispute you dealt with which involved allegations of domestic abuse? (Prompt: details could include the following):
  - Case facts.
  - What the allegations of domestic abuse were and who made them.
  - Whether the case was typical or atypical.

- Whether there was a fact-finding hearing.
- Whether there was interim contact:
  - If there was interim contact, what form of interim contact?
  - Why was interim contact ordered/why was interim contact not ordered?
- Whether there was a final order for contact:
  - If there was a final order for contact, what form of contact was it?
  - Why was that order made/why was an order not made for contact?
- Whether the presumption of parental involvement introduced by section 11 of the Children and Families Act 2014 applied.
  - If it was applied, why and to what effect?
  - If it was not applied, why was it not applied?

As part of this discussion about the last private law contact dispute you dealt with, or as part of a more general discussion, I would be grateful for the opportunity to explore issues such as:

- How domestic abuse is defined.
- When domestic abuse should be considered relevant to contact.
- In what circumstances contact can be considered 'safe' in cases involving domestic abuse.
- When, if at all, contact should not take place in cases involving domestic abuse.
- What constitutes evidence of domestic abuse.
- The use of fact-finding hearings in cases involving domestic abuse.
- How common interim and final orders for contact are in cases involving domestic abuse and, if they are common, how the outcomes tend to be reached (for example, through court adjudication or parental consent).

## **PART 2: The new presumption of parental involvement**

I would be interested to learn about your perception of the new presumption of parental involvement introduced by section 11 of the Children and Families Act 2014 and, in particular, whether the presumption is being applied in, and/or is having any impact on, contact cases involving domestic abuse.

## **PART 3: Vignettes**

I would be grateful for the opportunity to discuss the following vignettes.



### Vignette One

A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother opposes all contact. She alleges that the father has been emotionally and psychologically abusive towards her throughout their seven-year relationship. She maintains that the father used to try to make her feel like she was losing her mind by, for example, putting the gas on and claiming the mother had forgotten to turn it off. She also alleges that he grabbed her arm at the end of their relationship, causing it to bruise. The mother also maintains that the children witnessed the abuse. She is currently receiving outreach support from her local refuge and says she is very frightened of the father. She recently received a letter at her friend's house, which she claims was from the father, with the message 'R.I.P'. The father denies all the allegations.

Suggested questions on the vignette:


- Would the presumption of parental involvement apply in this case? Why/why not?
- Do you think there would be contact in this case? Why/why not? If so, what form?
- Is this case typical or atypical of the cases you see in practice?

### Vignette Two

A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother claims that the father was physically and emotionally abusive to her for five out of the seven years of their relationship. She alleges, for example, that he raped her on several occasions, and that he would regularly punch her in the stomach and head. She has never reported the abuse before now, save for one occasion at the end of the relationship when she called the police. She has been staying in a refuge (with the children) since the separation. She says she is petrified of the father harming her and the children.

The mother and father separated three months ago. For the first two months following separation, the father had unsupervised contact with the children for three hours a week. The mother, however, ceased contact one month ago, prompting the father's application for a child arrangements order. She says she allowed contact at the outset because she was so afraid of the father. The mother maintains she stopped contact because she was concerned about the impact it was having on the children, who she says were coming home from contact very upset and quiet.

The father accepts he has been abusive in the past, although not to the extent alleged by the mother, but claims he is now a changed man and is willing to seek help. The mother initially opposed all contact but then said she would agree to contact if it is always supervised.



Suggested questions on the vignette:

- Would the presumption of parental involvement apply in this case? Why/why not?
- Do you think there would be contact in this case? Why/why not? If so, what form?
- Is this case typical or atypical of the cases you see in practice?

**PART 4: Dealing with litigants in person in cases involving domestic abuse allegations**

If you feel able to comment on your experiences of cases involving litigants in person, I would be really interested to learn about your experiences.



## **Suggested Interview Schedule (Barristers and solicitors)**

### **Overview**

Thank you so much for very kindly agreeing to be interviewed as part of my PhD research. Your contribution is invaluable and I am really grateful to you for taking part. Please find below some examples of the issues I would be really interested to discuss with you in the interview. Please note, however, that these examples have been assembled as a general guide, rather than a definitive list. I am really keen to ensure that you have the freedom in the interview to explore the issues you feel are most relevant on this topic and I am looking forward to learning from your experiences.

### **PART 1: Perceptions of contact and domestic abuse**

If you feel able to do so, I would be really keen to start the interview by asking you about the last private law contact case you worked on which involved allegations of domestic abuse (without, obviously, disclosing any confidential details). I would be interested to hear about what happened in that case (for example, the type of domestic abuse allegations and whether there was/is likely to be contact), and whether the case is typical or atypical of the types of cases you see in practice.

As part of this, or as a separate discussion, I would be grateful if we could explore issues such as:

- What you feel are some of the main challenges you face in your role, and that you think exist for your clients, in dealing with private law parental contact disputes which involve domestic abuse allegations.
- Your thoughts on the legal definition of domestic abuse.
- When you think domestic abuse should be relevant to contact and whether this accords with when, in your experience, domestic abuse is generally seen as relevant to contact in practice.
- Whether, and in what circumstances, you feel contact can be 'safe' in cases involving domestic abuse, and how this accords with what you think happens more generally in practice.
- When, if at all, you think contact should not take place at all in cases involving domestic abuse, and how this accords with what you think happens more generally in practice.
- What, in your view, constitutes 'evidence' or 'proof' of domestic abuse in practice, and what you think should constitute 'evidence' or 'proof'.
- How common you think fact-finding hearings are in cases involving domestic abuse.



- How common you think interim and final orders for contact are in cases involving domestic abuse and, if they are common, how the outcomes tend to be reached (for example, through court adjudication or parental consent).
- Whether you think there should be a presumption against contact in cases involving domestic abuse.

## **PART 2: The new presumption of parental involvement**

I would be interested to find out about your view on the new presumption of parental involvement (section 11 of the Children and Families Act 2014). It would be really helpful if you could tell me whether you think the presumption is having any impact in practice on contact disputes which involve allegations of domestic abuse. If you have experience of the presumption being applied in contact cases involving allegations of domestic abuse, I would be interested to hear about what kinds of cases these were and why you think the presumption was applied in those cases.

## **PART 3: Vignettes**

I would be grateful if I could ask you to comment on the following fictional vignettes. I have included some suggested questions on the vignettes below but please feel free to make any comments you feel are relevant.

### **Vignette One**

*A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother opposes all contact. She alleges that the father has been emotionally and psychologically abusive towards her throughout their seven-year relationship. She maintains that the father used to try to make her feel like she was losing her mind by, for example, putting the gas on and claiming the mother had forgotten to turn it off. She also alleges that he grabbed her arm at the end of their relationship, causing it to bruise. The mother also maintains that the children witnessed the abuse. She is currently receiving outreach support from her local refuge and says she is very frightened of the father. She recently received a letter at her friend's house, which she claims was from the father, with the message 'R.I.P'. The father denies all the allegations.*

- Do you think there would be contact in this case? Why/why not? If so, what form?
- Do you think there should be contact in this case? Why/why not?
- Would the presumption of parental involvement apply in this case? Why/why not?
- Is this case typical or atypical of the cases you see in practice?





### Vignette Two

*A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother claims that the father was physically and emotionally abusive to her for five out of the seven years of their relationship. She alleges, for example, that he raped her on several occasions, and that he would regularly punch her in the stomach and head. She has never reported the abuse before now, save for one occasion at the end of the relationship when she called the police. She has been staying in a refuge (with the children) since the separation. She says she is petrified of the father harming her and the children.*

*The mother and father separated three months ago. For the first two months following separation, the father had unsupervised contact with the children for three hours a week. The mother, however, ceased contact one month ago, prompting the father's application for a child arrangements order. She says she allowed contact at the outset because she was so afraid of the father. The mother maintains she stopped contact because she was concerned about the impact it was having on the children, who she says were coming home from contact very upset and quiet.*

*The father accepts he has been abusive in the past, although not to the extent alleged by the mother, but claims he is now a changed man and is willing to seek help. The mother initially opposed all contact but then said she would agree to contact if it is always supervised.*

- Do you think there would be contact in this case? Why/why not? If so, what form?
- Do you think there should be contact in this case? Why/why not?
- Would the presumption of parental involvement apply in this case? Why/why not?
- Is this case typical or atypical of the cases you see in practice?

### PART 4: Financial tensions

The challenges facing the family courts, practitioners and parents involved in family law cases following the recent funding restrictions, particularly in relation to legal aid, have been widely documented. It would be very helpful if you could tell me about any experiences you have had of these challenges in relation to contact in cases involving domestic abuse.

### PART 5: Reform

I would be really keen to hear about what recommendations, if any, you would make to improve the law in this area. **Thank you.**



## **PhD Research: Child Arrangements Orders and Domestic Abuse (Contact)**

### **Suggested Interview Schedule (Cafcass)**

Thank you so much for very kindly agreeing to be interviewed as part of my PhD research. Your contribution is invaluable and I am really grateful to you for taking part. Please find below some examples of the issues I would be really interested to discuss with you in the interview. Please note, however, that these examples have been assembled as a general guide, rather than a definitive list. I am really keen to ensure that you have the freedom in the interview to explore the issues you feel are most relevant on this topic and I am looking forward to learning from your experiences.

#### **PART 1: Perceptions of contact and domestic abuse**

If you feel able to do so, I would be really keen to start the interview by asking you about the last private law contact case you worked on which involved allegations of domestic abuse (without, obviously, disclosing any confidential details). I would be interested to hear about what happened in that case (for example, the type of domestic abuse allegations and whether there was/is likely to be contact), and whether the case is typical or atypical of the types of cases you see in practice.

Please note that references to cases involving domestic abuse in this document are primarily intended to refer to cases where domestic abuse has been found to have taken place. I am of course aware that allegations of domestic abuse may prove to be unfounded, and for this reason would be very grateful if we could also explore your experiences of cases where allegations have been made but have either not yet been investigated or have not been proven.

As part of this, or as a separate discussion, I would be grateful if we could explore issues such as:

- What you feel are some of the main challenges you face in your role, and that you think exist for parents, in dealing with private law parental contact disputes which involve domestic abuse allegations.
- Your thoughts on the legal definition of domestic abuse.
- When you think domestic abuse should be relevant to contact and whether this accords with when, in your experience, domestic abuse is generally seen as relevant to contact in practice.

- Whether, and in what circumstances, you feel contact can be 'safe' in cases involving domestic abuse, and how this accords with what you think happens more generally in practice.
- When, if at all, you think contact should not take place at all in cases involving domestic abuse, and how this accords with what you think happens more generally in practice.
- What, in your view, constitutes 'evidence' or 'proof' of domestic abuse in practice, and what you think should constitute 'evidence' or 'proof'.
- How common you think fact-finding hearings are in cases involving domestic abuse (and, when they take place, whether they take place within substantive hearings or as separate hearings).
- How common you think interim and final orders for direct or indirect contact are in cases involving domestic abuse and, if they are common, what form of contact tends to be ordered and how the outcomes tend to be reached (for example, through court adjudication or parental consent).
- How common you think orders for no contact are in cases involving domestic abuse.
- Whether you think there should be a presumption against contact in cases involving domestic abuse.

## **PART 2: The new presumption of parental involvement**

I would be interested to find out about your view on the new presumption of parental involvement (section 11 of the Children and Families Act 2014). It would be really helpful if you could tell me whether you think the presumption is having any impact in practice on contact disputes which involve allegations of domestic abuse. If you have experience of the presumption being applied in contact cases involving allegations of domestic abuse, I would be interested to hear about what kinds of cases these were and why you think the presumption was applied in those cases.

## **PART 3: Vignettes**

I would be grateful if I could ask you to comment on the following fictional vignettes. I have included some suggested questions on the vignettes below but please feel free to make any comments you feel are relevant.



### Vignette One

*A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother opposes all contact. She alleges that the father has been emotionally and psychologically abusive towards her throughout their seven-year relationship. She maintains that the father used to try to make her feel like she was losing her mind by, for example, putting the gas on and claiming the mother had forgotten to turn it off. She also alleges that he grabbed her arm at the end of their relationship, causing it to bruise. The mother also maintains that the children witnessed the abuse. She is currently receiving outreach support from her local refuge and says she is very frightened of the father. She recently received a letter at her friend's house, which she claims was from the father, with the message 'R.I.P'. The father denies all the allegations.*


- Do you think there would be contact in this case? Why/why not? If so, what form?
- Do you think there should be contact in this case? Why/why not?
- Would the presumption of parental involvement apply in this case? Why/why not?
- Is this case typical or atypical of the cases you see in practice?

### Vignette Two

*A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother claims that the father was physically and emotionally abusive to her for five out of the seven years of their relationship. She alleges, for example, that he raped her on several occasions, and that he would regularly punch her in the stomach and head. She has never reported the abuse before now, save for one occasion at the end of the relationship when she called the police. She has been staying in a refuge (with the children) since the separation. She says she is petrified of the father harming her and the children.*

*The mother and father separated three months ago. For the first two months following separation, the father had unsupervised contact with the children for three hours a week. The mother, however, ceased contact one month ago, prompting the father's application for a child arrangements order. She says she allowed contact at the outset because she was so afraid of the father. The mother maintains she stopped contact because she was concerned about the impact it was having on the children, who she says were coming home from contact very upset and quiet.*

*The father accepts he has been abusive in the past, although not to the extent alleged by the mother, but claims he is now a changed man and is willing to seek help. The*



*mother initially opposed all contact but then said she would agree to contact if it is always supervised.*

- Do you think there would be contact in this case? Why/why not? If so, what form?
- Do you think there should be contact in this case? Why/why not?
- Would the presumption of parental involvement apply in this case? Why/why not?
- Is this case typical or atypical of the cases you see in practice?

#### **PART 4: Financial tensions**

The challenges facing the family courts, practitioners and parents involved in family law cases following the recent funding restrictions, particularly in relation to legal aid, have been widely documented. It would be very helpful if you could tell me about any experiences you have had of these challenges in relation to contact in cases involving domestic abuse.

#### **PART 5: Reform**

I would be really keen to hear about what recommendations, if any, you would make to improve the law in this area.

**Thank you.**



## **PhD Research: Child Arrangements Orders and Domestic Abuse (Contact)**

### **Suggested Interview Schedule (Domestic abuse organisations)**

#### **Overview**

Thank you so much for very kindly agreeing to be interviewed as part of my PhD research. Your contribution is invaluable and I am really grateful to you for taking part. Please find below some examples of the issues I would be really interested to discuss with you in the interview. Please note, however, that these examples have been assembled as a general guide, rather than a definitive list. I am really keen to ensure that you have the freedom in the interview to explore the issues you feel are most relevant on this topic and I am looking forward to learning from your experiences.


#### **PART 1: Perceptions of contact and domestic abuse**

I would like to start the interview by asking you whether you have any particular observations you would like to make about the legal system and child contact disputes based on your experiences of working with women who have experienced domestic abuse. If you feel able to do so, I would then be really interested to hear about the last private law contact case you worked on which involved domestic abuse (without, obviously, disclosing any confidential details). I would be keen to hear about what happened in that case (for example, the form of domestic abuse and whether there was/is likely to be contact), and whether the case is typical or atypical of the types of cases you see in practice.

As part of this, or as a separate discussion, I would be grateful if we could explore issues such as:

- What you feel the main challenges are in your role, and for women who have suffered domestic abuse, in dealing with private law parental contact disputes.
- How you define domestic abuse and, if you feel able to comment, whether you think this accords with the 'legal' definition of domestic abuse.
- When domestic abuse should be relevant to contact and, if you feel able to comment, whether you think this accords with when domestic abuse is seen as relevant to contact in a legal context.
- What advice you would give on when, if at all, contact can be 'safe' in cases involving domestic abuse and, if you feel able to comment, how this accords





with what you think happens in practice (in relation to cases involving the legal system).

- When, if at all, you think contact should not take place at all in cases involving domestic abuse and, if you feel able to comment, how this compares to what you think happens in practice (in relation to cases involving the legal system).
- What you think should count as 'evidence' or 'proof' of domestic abuse in relation to contact disputes heard at court and, if you feel able to comment, how this accords with what you think happens in practice (in relation to cases heard at court).
- If you have experience of fact-finding hearings, how common you think these are in cases involving domestic abuse.
- If you feel able to comment, how common you think interim and final orders for contact are in cases involving domestic abuse and, if they are common, how the outcomes tend to be reached (for example, through court adjudication or parental consent).
- Whether you think there should be a presumption against contact in cases involving domestic abuse.

## **PART 2: The new presumption of parental involvement (if applicable)**


If you have experience of the new presumption of parental involvement (section 11 of the Children and Families Act 2014), I would be interested to find out about your experience of it and how you feel it is impacting on cases involving domestic abuse.

## **PART 3: Vignettes**

If you feel able to do so, I would be grateful if I could ask you to comment on the following fictional vignettes. I have included some suggested questions on the vignettes below but please feel free to make any comments you feel are relevant.

### **Vignette One**

*A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother opposes all contact. She alleges that the father has been emotionally and psychologically abusive towards her throughout their seven-year relationship. She maintains that the father used to try to make her feel like she was losing her mind by, for example, putting the gas on and claiming the mother had forgotten to turn it off. She also alleges that he grabbed her arm at the end of their relationship, causing it to bruise. The mother also maintains that the children witnessed the abuse. She is currently receiving outreach support from her local refuge and says she is very frightened of the father. She recently received a*



*letter at her friend's house, which she claims was from the father, with the message 'R.I.P'. The father denies all the allegations.*

- Do you think there would be contact in this case? Why/why not? If so, what form?
- Do you think there should be contact in case this case? Why/why not?
- If you feel able to comment, would the presumption of parental involvement apply in this case? Why/why not?
- Is this case typical or atypical of the cases you see in practice?

### Vignette Two

*A father makes an application for a child arrangements order for unsupervised contact with his two year-old son and six year-old daughter. The mother claims that the father was physically and emotionally abusive to her for five out of the seven years of their relationship. She alleges, for example, that he raped her on several occasions, and that he would regularly punch her in the stomach and head. She has never reported the abuse before now, save for one occasion at the end of the relationship when she called the police. She has been staying in a refuge (with the children) since the separation. She says she is petrified of the father harming her and the children.*

*The mother and father separated three months ago. For the first two months following separation, the father had unsupervised contact with the children for three hours a week. The mother, however, ceased contact one month ago, prompting the father's application for a child arrangements order. She says she allowed contact at the outset because she was so afraid of the father. The mother maintains she stopped contact because she was concerned about the impact it was having on the children, who she says were coming home from contact very upset and quiet.*

*The father accepts he has been abusive in the past, although not to the extent alleged by the mother, but claims he is now a changed man and is willing to seek help. The mother initially opposed all contact but then said she would agree to contact if it is always supervised.*

- Do you think there would be contact in this case? Why/why not? If so, what form?
- Do you think there should be contact in case this case? Why/why not?
- If you feel able to comment, would the presumption of parental involvement apply in this case? Why/why not?
- Is this case typical or atypical of the cases you see in practice?





#### **PART 4: Financial tensions**

The challenges facing the family courts, practitioners and parents involved in family law cases following the recent funding restrictions, particularly in relation to legal aid, have been widely documented. It would be very helpful if you could tell me about any experiences you have had of these challenges in relation to contact in cases involving domestic abuse.

#### **PART 5: Reform**

I would be really keen to hear about what recommendations, if any, you would make to improve the law in this area.

**Thank you.**



# APPENDIX C

## INFORMATION SHEET

27 January 2016

### INFORMATION SHEET


**Research project title:** Perceptions of Post-separation Contact and Domestic Abuse.

**Project outline:** This project aims to understand practitioners' perceptions of child contact in cases involving domestic abuse, focusing on outcomes and the new presumption of parental involvement, and to explore some of the challenges which may arise in these cases.

**Researcher:** Joanna Harwood (PhD student)

#### **Guidance for participants:**

- The participant's participation in this study is voluntary. They are free to withdraw from the research at any time, without giving a reason and with the assurance that this will not affect future treatment or have any negative consequences.
- The participant has been selected to participate for interview based on the location in which they practise and their experience of contact disputes which involve domestic abuse allegations.
- The interview will be audio-recorded on a portable recording device to enable the researcher to transcribe accurately the interviews.
- Neither the participant nor the geographical area in which they practise will be identified within the research project.
- Recordings and all consent forms associated with this research will be stored securely and destroyed after 10 years in accordance with the University of Warwick's data protection policy.
- The participant's engagement in the project is their attendance at the interview.

- 
- Participants shall be given the option to receive a report of the findings from the research once the project has been completed.
  - It is hoped that this research will lead to recommendations being made for improvements in the law.
  - If participants have any concerns about the research project, these should be addressed either to the researcher at [J.C.M.Harwood@warwick.ac.uk](mailto:J.C.M.Harwood@warwick.ac.uk) or the Law School's Research Ethics Adviser, Professor Alan Neal, at [Alan.Neal@warwick.ac.uk](mailto:Alan.Neal@warwick.ac.uk).
  - Should participants have any complaints relating to this study, the complainant should be advised to contact the Deputy Registrar (further details here:  
[http://www2.warwick.ac.uk/services/rss/researchgovernance/complaints\\_procedure/](http://www2.warwick.ac.uk/services/rss/researchgovernance/complaints_procedure/)).

[End]

# APPENDIX D

## CONSENT FORM

**29 March 2016**

### CONSENT FORM

**Participant identification number where applicable:**

**Research project title:** Perceptions of Post-separation Contact and Domestic Abuse.

**Name of Researcher (to be completed by participant):**

**I confirm that I have read and understood the information sheet dated \_\_\_\_\_ for the above project, which I may keep for my records and have had the opportunity to ask any questions I may have.**

**I agree to take part in the above study and am willing to:**

- be interviewed;
- have that interview audio-recorded for the purpose of enabling the researcher to transcribe accurately the interview;
- to have (anonymous) quotes from my interview used within the researcher's PhD thesis and in any publications or conference presentations which may arise from the PhD thesis.

**I understand that my information will be held and processed for the following purposes:**

- to be included as anonymous data for use within the researcher's PhD thesis; and
- to be included as anonymous data for use in any publications or conference presentations which may arise from this PhD thesis.

**I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason, and without being penalised or disadvantaged in any way.**

\_\_\_\_\_  
**Name of Participant**

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Name of person taking  
consent (if different  
from Researcher)**

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Researcher**

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**Signature**