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'Like Gold Dust These Days': Domestic Violence Fact-Finding Hearings in Child Contact Cases

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Abstract Fact-finding hearings may be held to determine disputed allegations of domestic violence in child contact cases in England and Wales, and can play a vital role for mothers seeking protection and autonomy from violent fathers. Drawing on the author's empirical study, this article examines the implications for the holding of fact-finding hearings of judges' and professionals' understandings of domestic violence and the extent to which they perceive it to be relevant to contact. While more judges and professionals are developing their understanding of domestic violence, the ambit of when and how it is considered relevant to contact has grown increasingly narrow, which suggests that many disputed allegations of domestic violence are disregarded and women and children continue to be put at risk from violent fathers. This bifurcated approach is likely to have significant implications for recent developments in this area of family law which are considered in this article.

Keywords Child contact · Domestic violence · Fact-finding hearings · Practice Direction 12J · Presumption of parental involvement

Introduction

Preliminary fact-finding hearings provide the means for courts to adjudicate on disputed allegations of domestic violence in Children Act proceedings, when courts are tasked with determining a child's residence or their contact with the non-

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resident parent, and domestic violence is raised as an issue.[1] The procedure to be followed by courts and professionals in these circumstances is governed by Practice Direction 12J ('the Practice Direction') (Potter 2008), which was first issued by the President of the Family Division in May 2008 following concerns that domestic violence was being ignored in the drive to promote contact, including by courts failing to hold fact-finding hearings.

Fact-finding hearings can play a vital role for mothers seeking protection and autonomy from violent fathers, by ensuring that the abuse remains visible and is factored into decisions on whether and how contact should take place. Research and case law prior to the Practice Direction being implemented revealed that, when courts did not adjudicate on disputed allegations of domestic violence, the abuse would be disregarded, and professionals and judicial officers would focus on progressing contact. The minimisation of domestic violence, together with the perceived importance of contact between children and non-resident fathers, exacerbated the erasure of domestic violence in private law Children Act proceedings, leading to unsafe agreements or orders for contact.

This article considers how judicial and professional understandings of domestic violence and children's welfare inform judges' and professionals' perceptions of the relevance of domestic violence to contact since the Practice Direction was implemented, and what the implications of these perceptions are for two recent developments in this area of family law. On 22 April 2014, the Practice Direction was reissued in amended form. Its original, narrow, incident-based description of domestic violence has been replaced by the broader governmental definition which highlights the coercively controlling nature of domestic violence and abuse. Additionally, the serious consequences of domestic violence for children and resident parents are emphasised, and courts have to consider at all stages whether contact will benefit the child, not simply whether it can be safe. At the same time, the Children and Families Act 2014, which also came into effect on 22 April 2014, introduced a presumption that involvement of a parent in a child's life will further the child's welfare.[2] The way in which judges and professionals perceive domestic violence to be relevant to contact, and the existing tensions between the focus on assessing risk and the drive to promote contact, are likely to have significant consequences for the application of these new provisions in relation to the holding of fact-finding hearings and consequently, for the safety and protection of women and children involved in private law Children Act proceedings. As will be discussed in this article, these developments are being played out in the context of a surge in the numbers of litigants in person (LIPs) since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was implemented in April 2013.

This article examines the willingness of professionals to request fact-finding hearings and the extent to which courts are prepared to hold them. It also considers professionals' views on fact-finding hearings, the reasons that courts may refuse to

[1] The Children Act 1989 has been amended by Section 12 of the Children and Families Act 2014 which came into effect on 22nd April 2014 and replaces 'residence' and 'contact' orders with 'child arrangements orders'.

[2] Section 11 of the Children and Families Act 2014, which came into effect in October 2014, incorporates the presumption in the new Sections 2A and 2B of the Children Act 1989.

list these hearings, what happens to disputed allegations of domestic violence if fact-finding hearings are not held, and orders made following findings of fact being made. In order to explore these issues, this article draws on in-depth interviews with professionals and a review of relevant reported cases undertaken for the author's small-scale study of the perceptions and practices of judicial officers and professionals in contact cases where domestic violence is an issue.[3] Although it is not possible to generalise from the small sample size, the findings, particularly when read with prior research and with three other recent studies (Coy et al. 2012; Thiara and Gill 2012; Hunter and Barnett 2013), reveal strongly indicative trends in judicial and professional practices and perceptions relating to fact-finding hearings and the relevance of domestic violence to contact.

The Significance of Domestic Violence for Child Contact Arrangements

Domestic violence is highly prevalent in the general population, irrespective of race and class (Mooney 1994; Mirrlees-Black 1999; Walby and Allen 2004; Home Office 2010; White et al. 2010). It is even higher, however, in families with children (Radford et al. 1999; Walby and Allen 2004; Mullender 2004; Bossy and Coleman 2000; Home Office 2010). While it is recognised that domestic violence is not perpetrated exclusively by male partners, official statistics and research by feminist scholars attest to the gendered prevalence, frequency and severity of domestic violence (Walby and Allen 2004; Smart et al. 2005; Cowan and Hodgson 2007; Hester 2009; Crown Prosecution Service 2012; Office for National Statistics 2013). Women tend to be subjected to more repeat incidents of violence than men (Westmarland and Hester 2006), are more likely to sustain more serious injuries than men, and demonstrate higher levels of fear (Humphreys 2006; Douglas and Walsh 2010). Women are also far more likely than men to end relationships because of domestic violence, and to raise domestic violence as a contact-related problem (Trinder et al. 2005).

It is apparent that while legal and political discourses portray domestic violence as a feature of 'the past' relationship and therefore irrelevant to the future arrangements for children, numerous research studies and statistics demonstrate that the risks of domestic violence are particularly high on or after relationship breakdown, when it may escalate by intensifying and increasing in severity (see for example: Kelly 1999; Fleury et al. 2000; Buchanan et al. 2001; Humphreys and Thiara 2002; Wilson and Daly 2002; Bryan 2005; Cowan and Hodgson 2007; Humphreys 2006, 2007; Harrison 2008). As Douglas and Walsh (2010, 498) point out, "one of the most dangerous times for an abused woman is in the months after separation". It is also clear that most applications for contact are made by fathers (Humphreys and Harrison 2003; Trinder et al. 2005; Aris and Harrison 2007; Hunt and Macleod 2008; Macdonald 2014).

These data strongly suggest that a large proportion of child contact arrangements take place within a context of domestic violence, and that women and children may

[3] A total of 29 barristers, solicitors and Family Court Advisers (FCAs), drawn from 5 of Her Majesty's Courts and Tribunals Service (HMCTS) areas, were interviewed. Broader information on this project, including the study sample and methods, can be obtained from the author's PhD thesis (Barnett 2014).

be even more at risk from violent men than they were during the subsistence of the parents' relationship. As Cathy Humphreys (2010, 511) highlights, "the most recent study of police domestic violence incidents in the UK indicated 50 % were post-separation and most occurred around arrangements for child contact."[4] Perry and Rainey (2007, 30) found that "[a]llegations of violence or other abuse featured in more than half the cases in the sample". Children and Family Court Advisory and Support Service (Cafcass) practitioners estimated that the proportion of their caseload featuring domestic violence is up to 70 % or more (HMICA 2005; NAPO 2002). Thiara and Gill (2012, 15) found that post-separation violence was a "significant issue for 78%" of the South Asian and African-Caribbean women they interviewed. The way in which child contact with a domestic violence perpetrator can expose women and children to further abuse has been highlighted by numerous other studies (see for example: Hester and Radford 1996; Radford et al. 1999; Kaye et al. 2003; Walby and Allen 2004; Harrison 2008; Macdonald 2014).

The harmful effects on children of exposure to domestic violence are well documented in research and clinical studies (see for example Mullender and Morley 1994; Stark and Flitcraft 1985; Jaffe et al. 1990; Edleson 1999; Kitzman et al. 2003). Domestic violence can have a significant effect on the mother's ability to care for the children by, for example, undermining the relationship between mother and child (Humphreys 2006), and continuing post-separation violence can impact on the mother's recovery (Humphreys and Harrison 2003; Radford and Hester 2006). Outcomes for children are "poorest when post-separation contact forms the site for continuing violence" (Harrison 2008, 400; see also Humphreys 2006). Children from minority ethnic families may experience particular difficulties when their mothers leave abusive relationships because of isolation and ostracism from their communities (Worrall et al. 2008).

Despite the prevalence of domestic violence and its effects on women and children, progressive changes that occurred from the late 1960s as a consequence of the emerging recognition of gendered violence as a significant social problem occurred entirely separately from policy on the family, and male violence towards women was seen as entirely separate from children's welfare (Eriksson and Hester 2001; Featherstone and Peckover 2007, 182). However, as a result of ground-breaking research by Marianne Hester and Lorraine Radford (1996) and Hester et al. (1997), as well as pressure from women's groups, "domestic violence and its impact on women and children have been recognized as a major source of harm imposing high individual and societal costs" (Harrison 2008, 381). Hester and Radford revealed that domestic violence was being systematically effaced from political, legal and professional discourses informing the issue of post-separation parenting, so that the connection between the welfare of children and domestic violence on the part of fathers was almost totally absent from family law dealing with the aftermath of parental separation. Numerous other studies also attest to the dangers associated with contact where there has been domestic violence.[5] The perceived importance for

[4] Humphreys refers to a study by Stanley et al. (2009).

[5] Anderson (1997), Women's Aid (1997), Bailey-Harris et al. (1999), Kaganas and Piper (1999), Radford et al. (1999), Barnett (2000), Piper (2000), Aris et al. (2002) and Humphreys and Thiara (2002).

children of maintaining contact with non-resident parents reinforced the invisibility of domestic violence in private law children proceedings, and courts increasingly refused to recognise domestic violence as a valid reason for opposing or restricting contact.[6] Women's accounts of violence by fathers and concerns over children's safety were at best minimised, or even treated as evidence of the mother's 'hostility', so it was risky for women to resist contact on the basis of such violence (Hester and Pearson 1997; Kaye 1996). Professionals were unwilling to support the mother in stopping contact unless there was clear 'professional' evidence that the child had been abused because of the strong perception that courts did not consider violence towards the mother as constituting grounds for the cessation of contact (Hester and Radford 1996; Anderson 1997). Courts also failed to understand how violent and controlling men could use the court process itself to continue to harass mothers (Rhoades 2002).

The ideological divide between domestic violence and parenting is informed and reinforced by the separate and distinct ways in which men and masculinities are constructed in different legal contexts, and sometimes even in the same context, which can "serve to obscure men's multiple identities" (Featherstone and Peckover 2007, 185; see also Collier 1995). In the area of post-separation parenting, fatherhood has been rendered safe by 'dangerous masculinity' being relegated to territory "outside the realm of fathering" (Scourfield and Drakeford 2002, 625) and it is images of 'safe family men' that dominate political, legal and popular discourses and family policy, because of the strong political imperative to reconstitute 'the family' across households (Humphreys 1999; Eriksson and Hester 2001).

It was the research discussed above that compelled policy-makers and the Court of Appeal to confront the issue of domestic violence in cases concerning child contact, and led to guidelines intended to change the way in which courts and professionals responded to domestic violence in such cases.

The Origins of Fact-Finding Hearings and of the Practice Direction

Preliminary fact-finding hearings in Children Act cases in England and Wales have their origins in care proceedings, where they were introduced to facilitate the process of determining whether the 'threshold criteria' under Section 31(2) of the Children Act 1989 are met. Courts were encouraged to consider "whether or not there were questions of fact within a case which needed to be determined at an early stage" (Wall 2010, para 11). Bracewell J in *Re S (Care Proceedings: Split Hearing)* explained that cases suitable for such 'split hearings' "would be likely to be cases in which there is a clear and stark issue, such as sexual abuse or physical abuse".[7] From its inception, therefore, the notion of the 'split hearing' has been underpinned by a legalistic, incident-based approach to domestic violence which, as will be

[6] See, eg, *Re M (A Minor) (Contact: Conditions)* [1994] 1 FLR 272; *Re F (Minors) (Contact: Mother's Anxiety)* [1993] 2 FLR 830; *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124; *Re P (Contact: Supervision)* [1996] 2 FLR 314. See also Hester and Pearson (1997) and Kaganas (1999).

[7] *Re S (Care Proceedings: Split Hearing)* [1996] 2 FLR 773, 775 per Bracewell J.

discussed in this article, has dominated private law Children Act proceedings until very recently.

'Split hearings' were introduced into contact and residence proceedings by the Court of Appeal in the landmark conjoined appeals of *Re L, V, M, H*[8] because of the concerns that emerged from the research evidence discussed above that allegations of domestic violence were being filtered out of proceedings by the lower courts minimising or ignoring them. The Court of Appeal in *Re L* and the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law (CASC 2000, 2001) set out guidelines for courts when determining contact cases where allegations of domestic violence are made. A particularly important guideline was the requirement for courts to consider holding fact-finding hearings on disputed allegations at the earliest opportunity where they may have an effect on outcomes.

In the context of the strength of dominant familial discourses that sought to reinforce the position of the father in the post-separation family (Harrison 2008, 382), feminist campaigners and researchers achieved remarkable success in putting domestic violence on the agenda in private law Children Act proceedings, and in compelling policy makers and the judiciary to take domestic violence more seriously. This can be seen in the clear message sent by the Court of Appeal in *Re L* to the lower courts to recognise the importance of domestic violence in terms of harm to children and risk to both children and primary carers. However, these developments were simultaneously undercut by the Court of Appeal's endorsing of the 'presumption of contact' in *Re L*, and by the way in which those powerful familial discourses continued to resonate with large sectors of the judiciary and family law professionals. As will be discussed below, this meant that even after *Re L* the guidelines failed to have a significant impact, and many judges and professionals disregarded them because they continued to prioritise contact over women's and children's safety and well-being.

Following *Re L*, the Court of Appeal dealt with a number of appeals in which it was critical of the lower courts' failure to follow the *Re L* and CASC guidelines, in particular by not conducting fact-finding hearings.[9] Research undertaken prior to the implementation of the Practice Direction encountered similar concerns to those found in the pre-*Re L* research and revealed the very low numbers of fact-finding hearings held in private law Children Act proceedings, despite the high prevalence of domestic violence in such cases (Humphreys and Harrison 2003; Perry and Rainey 2007; Hunt and Macleod 2008; Harrison 2008). Monitoring of the guidelines by the Lord Chancellor's Department found that the guidelines were frequently ignored, that fact-finding hearings were not always held where appropriate, and that issues of safety were frequently not addressed (DCA and DfES 2004). Research undertaken by HMICA (2005) and for the Family Justice Council (FJC) (Masson 2006), found that fact-finding hearings were inconsistently and rarely held because domestic violence was considered irrelevant to contact, and fact-finding hearings

[8] *Re L, V, M, H (Contact: Domestic Violence)* [2000] 4 ALL ER 609, [2000] 2 FLR 334, CA.

[9] See e.g. *Re M and B (Children: Domestic Violence)* [2001] 1 FCR 116; *K and S (Children) (Contact: Domestic Violence)* [2006] 1 FCR 316; *Re C (Children Proceedings: Powers of Transfer)* [2008] EWCA Civ 502, [2008] 2 FLR 815.

were seen as an unwelcome intrusion into the conciliatory, forward-looking ethos of family proceedings. Domestic violence continued to be minimised or 'equalised' by courts and professionals which meant that it continued to be disregarded, screened out of Cafcass reports, and considered irrelevant to contact (HMICA 2005; Harrison 2008; Macdonald 2014).

Images of 'safe family men' and 'implacably hostile mothers' continued to influence the perceptions of professionals, who often misunderstood the behaviour of violent men, so that perpetrators of domestic violence could be perceived as reasonable, plausible and charming (HMICA 2005; Harrison 2008). As a consequence, fathers' motivation was rarely questioned, and the parenting capacity of violent men was over-estimated (Harrison 2008). Women who raised allegations of domestic violence continued to be viewed with suspicion, disbelieved and treated as obstructive (HMICA 2005), or their fears could be trivialised and not taken seriously (Perry and Rainey 2007).

Furthermore, even if domestic violence was found to have occurred, the strong presumption that children invariably benefit from contact meant that applications for direct contact were very rarely refused, and women continued to be pressurised into agreeing to unsafe contact arrangements (Saunders and Barron 2003; Humphreys and Harrison 2003; Aris and Harrison 2007; Trinder et al. 2005; Macdonald 2014). Because risk was not sufficiently assessed, orders for supervised contact were rare; the most common final outcomes were for direct, unsupervised contact (Trinder et al. 2004; HMICA 2005; Perry and Rainey 2007; Hunt and Macleod 2008). Practitioners' practices were no different, whether or not domestic violence was alleged, because "virtually any involvement by fathers with their children constitutes good-enough fathering" (Eriksson and Hester 2001, 791). These difficulties may be compounded for women and children from BME communities, as the violence they sustain may be attributed to 'oppressive' cultural backgrounds because of stereotyping by professionals (Worrall et al. 2008; Thiara and Breslin 2006), and because of language and immigration difficulties (Harrison 2008).

Following the publication by Women's Aid of a report about 29 children who were killed between 1994 and 2004 as a result of contact arrangements in England and Wales (Saunders 2004), Wall LJ requested the FJC to advise on the approach the courts should adopt to proposed consent orders. The subsequent report produced by the FJC found that, in general, the guidelines in *Re L* were more honoured in the breach than in the observance.[10] The assumption that contact is in a child's best interests and that it will inevitably be ordered by the court could result in pressure being put on victims of domestic violence to agree to orders for contact resulting, frequently, in unsafe agreements for contact.

As a consequence, the FJC called for a "cultural change… with a move away from 'contact is always the appropriate way forward' to 'contact that is safe and positive for the child is always the appropriate way forward'" (Craig 2007, 27). The FJC recommended that a Practice Direction should be issued embodying the CASC and *Re L* guidelines and the recommendations of the FJC. The result of that recommendation was Practice Direction 12 J which, it was hoped, would provide

[10] A summary of the FJC findings and recommendations is provided by Jane Craig (2007); see also Masson (2006).

the vehicle for effecting that cultural transformation. Practice Direction 12 J establishes the framework for best practice to be followed by courts and professionals in terms of scrutinising proposed consent orders, proving domestic violence, assessing risk, ensuring the safety of the children and resident parents both prior to and after domestic violence has been proved or admitted, and determining whether contact may benefit the child.

The Findings

The Frequency of Fact-Finding Hearings Following the Practice Direction

In light of the rarity of fact-finding hearings prior to the Practice Direction being issued, it was considered important to establish whether the Practice Direction led to any increase in the numbers of such hearings. The majority of solicitors and barristers interviewed across all regions said that they had noticed an increase in the numbers of fact-finding hearings after the Practice Direction was implemented in May 2008.[11]

Despite this reported increase, the tensions between taking domestic violence more seriously and the promotion of contact that could be discerned in the post-*Re L* case law persisted. In a number of appeals heard after the Practice Direction was issued, the Court of Appeal was highly critical of trial judges for failing to conduct fact-finding hearings, for abandoning them when they had been listed, or for accepting compromises when the full history of domestic violence should have been investigated.[12] At the same time, the message emerged from the higher courts that the numbers of fact-finding hearings had increased to such a point that the court system was unable to cope and, by implication, that unnecessary fact-finding hearings were being held.[13] The *President's Guidance in Relation to Split Hearings* ('the Guidance on Split Hearings') was issued as a direct consequence of this perception that fact-finding hearings were "taking place when they need not do so; and…[were] taking up a disproportionate amount of the court's time and resources" (Wall 2010, para 1). The clear intention of the Guidance on Split Hearings was to limit the numbers of separate fact-finding hearings, which Wall LJ emphasised should rarely be considered necessary (Wall 2010, paras 6 and 7).

Participants in this study were asked whether they had observed any change in the numbers of fact-finding hearings following the Guidance on Split Hearings being issued in May 2010. The majority of those who responded to this question reported a decrease,[14] which appears to be directly attributable to a narrowing of

[11] N = 16 (including all the 5 family lawyers interviewed in 2010), comprising: Solicitors = 11; Barristers = 5.

[12] See e.g. *Re R (Family Proceedings: No Case to Answer)* [2009] EWCA Civ 1619, [2009] 2 FLR 82; *Re Z (Unsupervised Contact: Allegations of Domestic Violence)* [2009] EWCA Civ 430, [2009] 2 FLR 877.

[13] See *SS v KS* [2009] EWHC 1575 (Fam), *S v S (Interim Contact)* [2009] 2 FLR 1586; *Re C (Domestic Violence: Fact-finding Hearing)* [2009] EWCA Civ 994, [2010] 1 FLR 1728.

[14] N = 12 of 22 useable responses, comprising equal numbers of solicitors, barristers and FCAs.

views on the relevance of domestic violence to contact. The majority of participants were of the view that the Guidance on Split Hearings had a major effect on the way in which courts consider domestic violence to be relevant to contact, primarily by judges being more robust or proactive in 'weeding out' cases where domestic violence is considered to be irrelevant, being firmer in what they perceive to be 'relevant' domestic violence, and as a consequence being much less willing to order fact-finding hearings.

Some family lawyers, particularly barristers, considered that the decrease in the numbers of fact-finding hearings held was a positive development.

> In my own practice I'm actually finding less of them…I think there was once a statement, somebody raised domestic violence and people just assumed that that meant you were on the road to a fact-finding whereas now I think there is this early stage analysis when you look at it and say: do we need fact-finding? Is that going to be helpful? Is that actually going to change the ultimate [outcome]? [Ms T, Barrister, NW][15]

Other participants, particularly Cafcass officers, expressed concern about the reduction in the incidence of fact-finding hearings because of the tendency of courts to disregard disputed allegations of domestic violence altogether if these are not determined, so that the potential risk to the child and resident parent remains an unknown quantity. Similar concern was expressed by some of the respondents to Hunter and Barnett's survey.

Others thought that unless the result would be the total cessation of direct contact, fact-finding hearings are a 'waste of time'. However, the literature on contact arrangements where domestic violence has occurred suggests a scale of different contact arrangements, depending on the level and type of ongoing risk, ranging from no direct contact with a very high risk parent, to supervised handover arrangements where parents should not come into contact with each other (Newman 2010; Kelly and Johnson 2008; Parsons 2014; Macdonald 2014). As Helen Rhoades (2012, 72) points out: "the kinds of protective arrangements required, will depend on the nature of the violence established and the level of risk to the child".

Not only did the numbers of fact-finding hearings reduce following the Guidance on Split Hearings; a few respondents reported that the length of the hearings also decreased because of the courts limiting the number of allegations to be tried to a few 'sample' incidents. Ms P expressed concern about this practice because it can result in a partial picture of the abuse:

> My experience from today is that the judge was obviously trying to restrict the evidence to something that was manageable for the court system rather than something that was actually going to get to the bottom of the case. You know, when you read judgments about people having schedules of facts, you know, 40 odd facts, and I've got the judge today saying six each, like well, it doesn't really do the job, does it, when there's more than six. [Ms P, Barrister, SW]

[15] For similar views expressed by judicial officers, see Hunter and Barnett (2013, 23).

Even if fact-finding hearings *are* listed, they may not end up being held. All but one of the solicitors and barristers interviewed reported that they had encountered cases where fact-finding hearings were listed, but on the day of the hearing they did not take place or were cut short. The most common reason for this was the case being 'carved up' by the perpetrator making 'sufficient' admissions of domestic violence, resulting in an agreed schedule of findings.[16] However, Ms T [Barrister, NW] considered that this is "always a bit of a fudge" and Ms Y [FCA, London] described these agreements as "watered down compromises."

It would appear, therefore, that fact-finding hearings continue to be a rare occurrence, which is supported by Coy et al's (2012) research. Hunter and Barnett (2013) found that fact-finding hearings are still the exception rather than the rule. Most respondents to their survey reported that fact-finding hearings are held in 0–25 % of cases in which domestic violence is raised as an issue, with the largest group (42 %) saying that such hearings are held in less than ten per cent of cases.

Underlying the continued rarity of fact-finding hearings, it is suggested, are judicial and professional understandings of domestic violence and its relevance to contact, underpinned by the firm belief of most courts and professionals in the benefits for children of contact with non-resident fathers.

Understanding Domestic Violence

The way in which the term, 'domestic violence', is defined and understood has varied over time and in different contexts (Sokoloff and Dupont 2005, 42). Feminist scholars have pointed out that domestic violence is rarely one-dimensional, and that women are frequently subjected to "multiple forms of violence: physical, sexual, emotional, economic, and social" (Harrison 2008, 389; see also Kaye et al. 2003, 95; Watson and Ancis 2013; Macdonald 2014, 23). The coercively controlling nature of much gendered intimate partner violence has particular significance for post-separation contact (Shipway 2004; Humphreys 2006; Watson and Ancis 2013), as it can be seen as "an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship" (Mahoney 1991, 65–66). A history of coercive and controlling behaviour has been found to be a key predictor of post-separation abuse (Ornstein and Rickne 2013).

We also need to recognise the way in which "gender inequality itself is modified by its intersection with other systems of power and oppression" (Sokoloff and Dupont 2005, 43) such as race and class. The consequences and effects of this were highlighted in the first (and only) UK study on child contact and post-separation violence with respect to South Asian and African-Caribbean women and children by Ravi Thiara and Aisha Gill (2012), conducted between June 2008 and April 2010. They found that notions of family honour and shame "were central to contact battles in the context of domestic violence across all South Asian groups [and that for] African-Caribbean women, too, the sense of shame and stigma was powerful in shaping their responses", which worked to silence women through, for example, pressure not to go to court (Thiara and Gill 2012, 4).

[16] N = 13, comprising: Barristers = 4; Solicitors = 7; FCAs = 2.

The definition of domestic violence that has been incorporated into the revised Practice Direction gives expression to contemporary understandings of domestic violence as a pattern of coercive, controlling behaviour, of which physical violence may form a part. The coercively controlling nature of domestic violence was not reflected in the description of domestic violence in the Practice Direction prior to the recent amendments, but focused instead on "physical violence, threatening or intimidating behaviour and any other form of abuse."[17] Professionals' views on this description provide a good insight into the way in which they understand domestic violence.

The Professionals

As discussed above, research undertaken prior to the implementation of the Practice Direction revealed that professionals tended to downplay and minimise the significance of domestic violence to contact (Perry and Rainey 2007, 39; Harrison 2008, 389), which in itself may be perceived by mothers "as facilitating the power and control dynamics perpetrated by abusers" (Watson and Ancis 2013, 181). Macdonald (2014, 21) in her pre-Practice Direction research, also found that there was a tendency in Cafcass reports to present domestic violence 'neutrally' as a mutual problem, thereby absolving the perpetrator of responsibility for it, even though research has found that mutual, ungendered domestic violence is rare (Bancroft and Silverman 2002). Professionals may also fail to understand the way in which "the legal system may quickly become another avenue and arena through which her abuser may perpetrate abuse" (Watson and Ancis 2013, 167; see also Kaye et al. 2003). Thiara and Gill (2012, 16) found that the way in which men may use contact to control and intimidate women may be worse for African-Caribbean and South Asian women "who were threatened not to involve the police, leaving them with little prospect of protection against their on-going abuse."

Against this background, there appears to have been some progress in the views of professionals since the Practice Direction was implemented. The majority of interview participants recognised that domestic violence is not limited to incidents of physical violence and many of them thought that the description of domestic violence in the Practice Direction did not make the varied forms by which abuse may be exercised sufficiently clear.[18] Most respondents described it as encompassing emotional abuse and a few respondents considered that financial control, denigration of the mother and alienation from their children were forms of domestic violence. "You know, it isn't always physical, it's the emotional abuse and the erosion of self-esteem" [Ms G, Barrister, SE].

Nearly half of all respondents (although only two barristers), articulated a theoretical understanding of the power and control dynamics that characterise domestic violence, although more Cafcass officers than legal professionals understood those dynamics. These respondents were able to see that what could have been constructed as one-off or 'historic' incidents formed part of a pattern of

[17] Paragraph 2.

[18] N = 21, comprising Barristers = 7; Solicitors = 6; FCAs = 8.

coercive control. "And we need to be aware that that control doesn't need to be the physical. The emotional, the mental control can be just as effective, but just as corrosive to the victim" [Mr J, FCA, NE].

> His control, well his control is different, if you're constantly pregnant, short of money, he's doing a criminology degree, putting you down, 'look at me, I'm a brainbox'… The thing is, domestic violence, the most worrying ones, are the controlling partners [Ms V, FCA, NW].

Thiara and Gill (2012, 11) also found that "professionals were increasingly becoming familiar with the methods that men used, including contact, to continue abuse after separation."

However, half of all participants still considered that anything 'less than physical' is not serious, important or 'real' violence. These professionals tended to see domestic violence on a scale of severity, minimising or considering less 'relevant' behaviours that do not constitute incidents of 'severe' physical violence.[19]

> They were allegations of pushes or shouting, um, and some low level threats if I can put it that way and, you know, we're not wishing to minimise it in any way, you know, if it was true then it's, you know, it's not very pleasant, but it, you know, there was no allegation of injuries or, you know, a punch or a slap or anything of that sort. [Ms T, Barrister, NW]

Six respondents thought that domestic violence that 'only' occurs on relationship breakdown is less serious and even understandable or excusable, despite the substantial body of research discussed above, which indicates that domestic violence can increase in severity on or after relationship breakdown.

The Judiciary

The more recent reported cases suggest that judges too are starting to recognise the coercively controlling nature of domestic violence, as well as the many ways in which that control can be exercised. In *Re S (A Child)*[20] the trial judge opened up to scrutiny the father's conduct towards the mother to reveal a pattern of domineering and controlling behaviour, and made visible the way in which the father's abuse of the mother was an inseparable aspect of his own parenting of the child. Indeed, the majority of interview respondents thought that their local judges have a good understanding of what constitutes domestic violence and "take it seriously". Three respondents observed that judges' awareness of domestic violence had improved over the past few years. One said: "[I]t's a lot better now. I can remember when I started there was no understanding. You got the odd judge who had been on some training and that was it. But now there is a much better understanding" [Ms X, FCA, London].

Professional approval of judicial understanding of domestic violence was, however, far from unanimous. Mr J [FCA, NE] described the attitude of the

[19] N = 14, comprising Barristers = 5; Solicitors = 4; FCAs = 5.

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

judiciary in the county court of a North East town as "like stepping back five years" and "the wild west". Eight respondents expressed concern that courts tend to focus on incidents of physical violence, and are not alive to, or take seriously, other forms of domestic abuse.

> I'd say that the majority look at physical violence or strongly threatening behaviour as domestic violence, rather than the smaller forms of abuse or intimidation…I'd say more the physical violence is the thing that's focused on more [Ms A3, Barrister, London].

This judicial focus on discrete incidents of physical violence is reinforced by the courts' preference for itemised 'Scott Schedules' of allegations to be tried.[21] These schedules can have the effect of compelling women, from the outset of proceedings, to construct and articulate the abuse they have sustained within the narrow, incident-based approach. At the same time, however, courts are now also required to consider what evidence is needed to determine patterns of coercive, controlling or threatening behaviour, violence or abuse.[22] Underlying the new amendments, therefore, is a tension between these opposing approaches to domestic violence, as well as the tension between safeguarding children and resident parents, and reinforcing the 'presumption of contact', which will now be explored.

The 'Presumption of Contact'

As we have seen, the extent to which courts and professionals subscribe to the dominant welfare discourse has an important role to play in the way in which they respond to domestic violence in contact cases. All but one of the respondents interviewed considered that contact between children and non-resident parents is 'important', 'very important' or 'extremely important'.[23] There were no overt differences in views between family lawyers and Cafcass officers in this respect, although nine respondents (most of whom were solicitors) indicated that post-separation contact is important, but only if it is safe. They said: "On a scale of 1 to 10, I would say 10. With 10 being the [sic] exceptionally important, yes" [Ms H, FCA, SE] and "Oh, I think unless there are really, really good reasons that they shouldn't, then I think it should be taken as read that they should" [Ms O, FCA, SW]. Thiara and Gill (2012, 12) found that the emphasis by professionals on the 'right' of fathers to contact could operate "at the expense of many BME women". The reported cases and contemporaneous research (Coy et al. 2012; Thiara and Gill 2012, 13) indicate that the courts, too, operate on the basis that children invariably benefit from continued direct contact with non-resident fathers. It is not being asserted that children should never have any direct contact with perpetrators of

[21] Scott schedules are itemised tables setting out the dates and brief descriptions of the specific allegations that the victim seeks to prove, together with the alleged perpetrator's response. The revised Practice Direction specifically requires courts, for the first time, to consider directing Scott Schedules—Paragraph 19(c).

[22] Revised Practice Direction paragraph 19.

[23] The term, 'non-resident parents', is used in this context to reflect the fact that it was used in the question on this issue to which participants responded.

domestic violence, nor that the promotion of contact in individual cases where domestic violence has occurred is necessarily 'wrong'. What is being explored is the way in which "[t]he complex problem of child welfare has been reduced to the simple 'solution' of contact, which is being applied across the board regardless of the reality of parental and parent/child relationships" (Smart and Neale 1997, 335).

Not only do most professionals support the presumption of contact. The majority of family lawyers interviewed firmly signed up to the notion that agreements between parents for contact benefit children, rather than decisions by courts.[24] According to Ms F: "If they can consent early it takes the heat and anguish out of litigation which is very stressful indeed" [Barrister, SE]. However, a number of respondents qualified their responses by saying that agreements can be beneficial as long as there are no risks involved and contact can be safely managed.

So on the one hand, the adversarial, litigious nature of fact-finding hearings could be seen to run counter to the forward-looking, conciliatory ethos of agreement-seeking (Masson 2006), while on the other hand the fact-finding exercise may be seen as a necessary part of the safeguarding process. These opposing tendencies are resolved by the determination of whether the domestic violence is 'relevant' to contact. As will now be discussed, the presumption that contact is invariably 'good' for children and that litigated outcomes are 'bad' can have a powerful effect on the way in which professionals and judicial officers understand the relevance of domestic violence to contact.

When Should Fact-Finding Hearings Be Held? The 'Relevance' of Domestic Violence to Contact

The Practice Direction provides that: "The court should determine as soon as possible whether it is *necessary* to conduct a fact-finding hearing in relation to any disputed allegation of domestic violence before it can proceed to consider any final order(s) for residence or contact" (para 13, emphasis added).[25] Whether it will be 'necessary' to hold a fact-finding hearing depends on whether the nature and effect of the disputed allegations of domestic violence mean that they would be 'relevant' to contact.

The post-Practice Direction reported cases and the interviews indicate that most judges and professionals consider domestic violence to be 'relevant' to contact primarily if it involves very 'serious' or 'severe' recent physical violence.[26] The most common reason why courts may consider that domestic violence is not relevant to contact and therefore decline to hold fact-finding hearings is if they do not consider the allegations to be of sufficiently serious physical violence.[27]

[24] N = 12.

[25] Paragraph 16 sets out the amended version of this provision, which still provides for the court to determine whether it is 'necessary' to conduct a fact-finding hearing.

[26] See e.g. *Re E (Contact)* [2009] EWCA Civ 1238, [2010] 1 FLR 1738; *Re C (Domestic Violence: Fact-Finding Hearing)* [2009] EWCA Civ 994, [2010] 1 FLR 1728.

[27] N = 22, comprising almost equal numbers of barristers, solicitors and FCAs.

> In cases of serious and sustained physical violence, a fact-finding hearing is normally ordered – to allow any experts to consider risk appropriately. But in less serious cases, it is less likely to be ordered. [Ms E, Barrister, London]

It was also apparent that most professionals themselves consider that only 'serious' or 'severe' violence would be relevant to outcomes.

> I have in the county court on occasion, but you know, the judge saying, you know: 'this really isn't the sort of thing that the court will be concerned with, whether your client, you know, snatched a cup of tea out of the other person's hand'. Um, so yeah, that has happened, and I normally felt that those were sensible decisions. [Ms E, Barrister, London]

Similarly Thiara and Gill (2012, 13) found that legal professionals focused more on physical violence than manifestations of coercive control, even though they recognised that "the effects of psychological abuse could often be worse for women and children".

Macdonald's research (2014, 10, 21) undertaken prior to the implementation of the Practice Direction found that a substantial minority of Cafcass officers did not consider allegations of domestic violence to be serious if they were 'historic' or 'in the past'. These perceptions appear to persist, since eighteen respondents (comprising equal numbers of barristers, solicitors and FCAs) suggested that courts would not consider domestic violence to be relevant if it was 'old' or 'historic', happened 'some years ago' or 'long ago'. Although some respondents shared this view, a minority of family lawyers and Cafcass officers expressed concern about the tendency of courts to consider 'historical' allegations of domestic violence as irrelevant to contact. Ms L gave an example of a case in which the father attempted to strangle the mother 2 years prior to the relationship breakdown, and the mother provided an account of a more recent history of "sort of intimidating and controlling behaviour" which Ms L found "quite worrying in terms of, you know, what it said about his state of mind."

> He was doing things like filming her at handovers…stuff that rings alarm bells…and the judge said that he felt that the violence that the mother had alleged was historical and even if found as proven would not affect the progression of contact. [Ms L, Solicitor, SW]

Because this judge perceived domestic violence in a legalistic way as comprising discrete 'incidents', the father's controlling behaviours were discounted by him, so that the 'real' violence was, for the judge, indeed historical. Judicial and professional perceptions of the relevance of domestic violence to contact play a major role in the extent to which professionals are willing to request fact-finding hearings and courts to agree to hold them.

Willingness of Family Lawyers to Request Fact-Finding Hearings and of Courts to List Them

In light of the continued rarity of fact-finding hearings indicated by this study and contemporaneous research, it was surprising to find that the majority of family

lawyers said that if their client opposed contact on the basis of domestic violence, which the other parent disputed, they would request a fact-finding hearing. However, whether family lawyers actually *do* request such hearings is another matter. While Ms E [Barrister, London] said that she would certainly request a fact-finding hearing if her client relied on the allegations, she conceded that she had never, in fact, actually asked for one. Ms H [FCA, SE] commented that in her experience family lawyers rarely request fact-finding hearings. Additionally, just over half of the respondents interviewed, comprising equal numbers of barristers, solicitors and FCAs from all regions, indicated that judicial officers *are* usually willing to hold fact-finding hearings if asked to do so, although eleven respondents indicated that this "depends" and "varies", and that there are wide differences amongst judicial officers in this respect.

It is suggested that the primary reason for this apparent willingness of family lawyers to request fact-finding hearings and of courts to hold them lies in the very narrow circumstances in which domestic violence is perceived by judges and family lawyers, particularly barristers, to be 'relevant' to contact. It is likely that the self-reported willingness of barristers to request fact-finding hearings on behalf of the victim/mother may apply primarily to those cases where they think that the allegations are 'relevant' to contact, namely, in the most severe cases of recent physical violence.[28] It is not surprising, therefore, that courts would agree to hold such hearings in those circumstances. Indeed, Ms S indicated that refusals to hold fact-finding hearings are quite common where the requests are made on the spurious instructions of the client who 'misguidedly' thinks that the abuse she has sustained is relevant to contact:

> I mean, for a court to refuse to list it, it would, in my experience, most likely be because it's an unfounded request to list a finding of fact, and somebody may be acting on their client's instructions, um, because the client feels it's appropriate and it's relevant and it's necessary or whatever…But the court wouldn't necessarily conclude that there needed to be a finding of fact. [Ms S, Barrister, NW]

The extent to which courts are likely to accede to requests by FCAs for fact-finding hearings also provides useful insights into the willingness of courts to hold such hearings because an important role of Cafcass is to safeguard the child. The majority of FCAs (n = 8) (although a minority of family lawyers) said that courts would not, or "not always" accede to their recommendations for fact-finding hearings, or would only do so after a great deal of persuasion. One said: "I would say probably 80 per cent of the time, if you insist on a finding of fact hearing, then they will do it, but you do have to fight your corner" [Mr V, FCA, NW]. Most of the FCAs interviewed and three family lawyers indicated that courts are no longer as willing to accede to requests by FCAs for fact-finding hearings as they may have been in the past. Ms K thought that courts and family lawyers deliberately try to bypass Cafcass requests for such hearings altogether:

[28] There may also be an element of response-bias in family lawyers' self-reports.

> I think everyone is aware of the guidance and… a hearing shouldn't be listed because Cafcass say they can't report without it or if one of the parties decide that they want it. So I think the judges are quite keen to get in before there is a Cafcass report and make that decision and then record that on the file so Cafcass is aware that the judge does not think a fact-finding hearing is necessary. [Ms K, Solicitor, NE]

Similarly Hunter and Barnett (2013) found that some judges and family lawyers considered that FCAs insisted unnecessarily on fact-finding hearings, and even imputed selfish motives to Cafcass officers, suggesting that they request fact-finding hearings to avoid preparing reports or making recommendations and are therefore 'passing the buck'.

Four FCAs were emphatic in their views that courts do not generally accede to their requests for fact-finding hearings and are not usually willing to hold them. Ms H [FCA, SE] said that she regularly recommends fact-finding hearings in her safeguarding reports,[29] but since they are so rare, those recommendations are obviously not being followed. Ms N [FCA, SW] and Ms Y [FCA, London] thought that this situation was getting worse. Ms N [FCA, SW] commented that fact-finding hearings "are like gold dust these days" and Ms H observed that most judges are very reluctant to hold such hearings: "I can't remember when a fact-finding hearing was listed recently… I've seen situations where parents are just sort of shouted at and told to get out and sort something out… there's hardly ever a fact-finding hearing agreed." [Ms H, FCA, SE] It was very worrying to hear from Mr J [FCA, NE] that in one county court in which he works FCAs are extremely reluctant even to recommend fact-finding hearings for fear of getting 'trashed' by the judges, who usually refuse to hold them. These views give a strong indication of the antipathy of courts to fact-finding hearings, because Ms H and Ms N were clear that in other respects, the courts invariably follow their recommendations.

A minority of solicitors also felt that courts were generally antithetical to fact-finding hearings.

> I think that's something that does happen here in xxx actually, I think there's such a reluctance to actually bottom the issues from day one and say instead: look, let's just set up some supervised contact, get Cafcass involved and see if we can move matters on. There's a real kind of push for, yeah, rather than dwelling on what's happened in the past, unless, you know, there are very serious allegations and I think, I think actually in my experience that that's the sort of kind of pressure you feel. [Ms C, Solicitor, SE]

Ms C has identified the drive to promote contact as underlying the courts' reluctance to hold fact-finding hearings, which runs counter to the need to safeguard against risk. These opposing tendencies are reflected in professionals' views on the merits and role of fact-finding hearings.

[29] These reports are now termed 'safeguarding letters' and are reports of Cafcass's initial safeguarding checks, comprising information from local authorities and the police, and a telephone interview with each party.

Participants' Views on Fact-Finding Hearings

A wide divergence of views on fact-finding hearings could be discerned between barristers on the one hand and FCAs and solicitors on the other. The majority of respondents, including all ten of the FCAs interviewed, as well as eight solicitors but only two barristers, considered that fact-finding hearings were generally 'helpful' or 'useful', although a further four barristers and two solicitors held mixed views. Seven respondents felt that fact-finding hearings were helpful to "narrow the issues" or "resolve" matters by providing a factual basis for assessing risk and determining outcomes. One said: "But it's, you know, you kind of think: well, what's the value of a risk assessment when you don't have a factual basis with something as serious as that?" [Ms T, Barrister, NW].

A number of respondents felt that if allegations remain unresolved, they can linger and impede 'progress', or resurface months and even years later: "I think pretty much, we sort of take the view that we don't want it hanging around like a bad smell, so it's better to get it out in the open." [Ms P, Barrister, SW] Ms M spoke about a fact-finding hearing that was compromised but the allegations kept resurfacing a year later:

> Yeah, I had a case where the case had been for some time and they had had different lawyers representing them at a fact-finding hearing and they'd both come away with a very wishy-washy statement and the allegations were still being raised as an issue a year later and they should actually have gone through with a fact-finding hearing… For both parents, yeah, irrespective of what the findings are going to be it's better to have it and then deal with it. [Ms M, Barrister, SW]

Although all the respondents expressing these views subscribed to the dominant welfare discourse, they prioritised assessing risk adequately, obtaining the 'right' outcome for the child or achieving a final resolution of the case over the drive to get contact progressing as speedily as possible. Similarly, respondents to Hunter and Barnett's survey reported that fact-finding hearings can be helpful by providing a factual basis on which the case can proceed and resolving issues which may continue to resurface if they are not addressed (2013). The importance of having a factual matrix to assess risk was highlighted by Kelly and Johnson (2008) and is an integral aspect of new tools formulated by Cafcass to assess risk (Parsons 2014).

For other respondents, however, fact-finding hearings were seen as impeding the inevitable and, for some of them, the correct outcome, namely, contact between the child and father. Six family lawyers who held mixed views on fact-finding hearings described the 'negative' aspects as increasing 'acrimony' between the parents, being stressful experiences for the parties, and being a 'waste of time' because contact is likely to end up being ordered in any event. Ms E said: "More often than not, even when findings have been made, contact will eventually be ordered, either as supported/supervised, and then eventually unsupported. Thus, in some senses they do waste resources" [Barrister, London].[30] For these respondents, fact-finding

[30] For similar findings see Thiara and Gill (2012, 13).

hearings serve no useful purpose unless they could lead to the complete cessation of contact.

Only two barristers and a solicitor held entirely negative views of fact-finding hearings.[31] They were also among the respondents who thought that fact-finding hearings are held too often.

> A lot of them are useless, a complete waste of time…and the case deteriorates, the relationship could take months to recover, there would always be bitterness. My view is they need to be dealt with very carefully indeed as to whether they happen or not. [Ms F, Barrister, SE]

Ms G (Barrister, SE, who was interviewed together with Ms F) agreed with these comments, and added that she had only experienced one "really worthwhile" fact-finding hearing—an extreme case of "horrific" domestic violence by a father who was a "nutter" and was "kicked out of Fathers4Justice", and the mother and children had to relocate under new names with wide-ranging orders to prevent the father locating them. However, that case was very much the exception.

> Nine times out of ten, even more than that, they are a complete and utter waste of time and energy for the parties, the court, for everyone, they just raise the temperature unnecessarily, because you have a winner and a loser, and that's not what we're meant to be doing in family law. [Ms G, Barrister, SE]

Ms D was vehemently opposed to fact-finding hearings, because of the way she perceived they could be "manipulated" by mothers to delay proceedings:

> I don't find them very helpful. Um, I think that they're open to abuse and that it's clogging up the court system that's already overrun, it's clogging up Cafcass that's already overrun, it's increasing the legal aid budget…it drags it out longer for mum and dad where he should be having some contact, he's not having contact for a significant period of time. [Ms D, Solicitor, SE]

An issue that concerned a number of respondents, and impacted on their perceptions of the merits of fact-finding hearings, was the ability of courts to determine whether domestic violence has occurred where the only evidence is the testimony of the parties, and there is no 'real' or 'independent' evidence, resulting in the contest being seen as 'one person's word against another'. Mr R (Solicitor, NE) saw a particular difficulty in 'quantifying' or 'evidencing' cases of emotional abuse, recognising that the incident-based approach to domestic violence does not lend itself easily to findings being made on a process rather than on 'facts'. It was even more concerning to find that, for some respondents, the lack of 'independent' evidence was itself 'proof' that domestic violence had not happened, on the basis that if it had really taken place, there *would* be 'external' evidence of it. These findings are supported by earlier and contemporaneous research, which reveals that allegations of domestic violence may not be taken seriously by courts and professionals, if there is no 'external' evidence to corroborate the mother's account

[31] These respondents, particularly the barristers, were extremely pro-contact and held very negative views of mothers involved in contact proceedings generally.

(Aris and Harrison 2007; Harrison 2008, 393; Trinder et al. 2005; Macdonald 2014). While many women find it difficult to produce evidence of 'historic' violence, BME women may experience particular problems in this respect because of, for example, under-reporting abuse to the police or other agencies, sometimes as a consequence of threats by the abuser and his family (Thiara and Gill 2012).

We can also see how those discourses that underpin current family proceedings which construct parents involved in contact proceedings, and particularly mothers, as irrational, unreliable or hostile, feed into the way in which the evidence is assessed. Ms S (Barrister, SW) for example, felt that mothers who are 'credible' in their testimony should be able to provide a coherent narrative: "But there are some allegations that it's self-evidently, well, someone's description of the incidents is relatively poor or weak or confused, the court is unlikely to make those findings." So we can see how images of 'real' victims and perpetrators may underpin the way in which courts and professionals respond to parents' evidence.[32]

Respondents' observations on the merits of fact-finding hearings, together with their perceptions of the relevance of domestic violence to contact, underpin their views on whether fact-finding hearings are held where appropriate. As will now be discussed, it was not surprising to find that those respondents who thought that fact-finding hearings were held too often tended to have negative perceptions of such hearings, while those who thought they were not held often enough, or that 'the balance is right' were more likely to emphasise their positive aspects.[33]

Are Fact-Finding Hearings Held Where Appropriate?

The majority of family lawyers across all regions considered that fact-finding hearings *are* held where appropriate and that "the balance is right".[34] Furthermore, while two solicitors and an FCA thought that fact-finding hearings are not held often enough, five barristers and a solicitor thought that they are held too often. This suggests that most family lawyers approve of the very restrictive circumstances in which fact-finding hearings are held, and barristers think they should be limited even further. Ms D [Solicitor, SE], for example, thought that fact-finding hearings were 'definitely' held where they are not necessary, for example, where the allegations are 'minor' or 'historical'. However, it appears that 'minor' allegations giving rise to 'unnecessary' fact-finding hearings may actually be very serious. Ms E described 'mid-level' violence which formed the subject of, in her view, an unnecessary fact-finding hearing as including "punching, kicking, pushing her over, smashing the flat, that sort of thing, nothing where she really needed much help from the hospital other than painkillers. No stabbings, or anything nasty, again I hate to minimise." [Ms E, Barrister, London].

[32] For similar findings see Thiara and Gill (2012, 13) and Watson and Ancis (2013). See also the judgment of Mostyn J in *A v A (Appeal: Fact-finding)* [2010] EWHC 1282 (Fam) and the trial judge's criticism of the mother in *Re R (Family Proceedings: No Case to Answer)* [2009] EWCA Civ 1619, [2009] 2 FLR 82.

[33] Similar findings were made by Hunter and Barnett (2013).

[34] N = 13, comprising: Barristers = 5; Solicitors = 8.

Although this issue was not specifically explored with Cafcass officers, only three FCAs indicated, in response to other questions, that they shared the view that "the balance is right". Additionally, seven FCAs reported that they had encountered cases where a fact-finding hearing was not held where they considered that it should have been. There was not, however, a clear demarcation in views on this issue between family lawyers and FCAs. Two barristers and two solicitors also said that they had acted in cases where they felt that a fact-finding hearing should have been held.

What Happens to Disputed Allegations of Domestic Violence if Separate Fact-Finding Hearings Are Not Held?

The views of participants were sought on what happens to disputed allegations of domestic violence if they are not tried separately. No clear picture emerged on this issue. Ms I [FCA, NE] and Ms E [Barrister, London] thought that there were more composite hearings in recent months, and Mr J [FCA, NE] was aware of one recent composite hearing. Ms T [Barrister NW] indicated that courts 'sometimes' hold composite hearings although this was not necessarily a deliberate listing decision. On the other hand, Ms S [Barrister, NW] and Ms Q [Solicitor, SW] considered that, if courts decide not to hold separate fact-finding hearings, the disputed allegations are sidelined and the focus is on progressing contact.

> I think they're being weeded out so there isn't a determination… I think in some circumstances they are being dealt with very promptly so the court has considered them resolved, or they are weeded out…and not dealt with and the court then makes recommendations about contact. [Ms S, Barrister, NW]

Two family lawyers reported that courts employ a mix of strategies if discrete fact-finding hearings are not held, with composite hearings being held where the allegations are considered 'serious enough', or the allegations are 'weeded out' and ignored. Ms P [Barrister, SW] observed that, while in the past 6 months she had noticed fewer split hearings and more composite ones, this was still fairly uncommon and in some cases domestic violence tends to 'fizzle out' as contact gains momentum.

Ms P (Barrister, SW) was the only respondent to identify an important positive aspect of composite hearings—that they enable allegations of domestic violence to be contextualised within, and seen as part of, the 'welfare' issues of parenting: "I think people really have taken on board what the, what effect will it have on contact and looked at it more of a welfare and capacity to parent issue than a, you know, a fact-finding per se." Indeed, this was one of the reasons why some judges and barristers who responded to Hunter and Barnett's survey expressed a preference for dealing with allegations of domestic violence and welfare issues in one hearing (2013).

There is no indication from the case law, however, that courts are holding 'composite' hearings. Rather, it appears from the reported cases that the approach of the lower courts is to ignore allegations of domestic violence altogether if they consider that they are not serious enough to warrant a separate fact-finding hearing.

The only reported case in which a composite hearing appears to have been held (although this is not stated in the judgment) is *Re S (A Child)*[35] in which findings of abusive and coercively controlling behaviour were made against the father at a final hearing.

Orders Made if Domestic Violence is Found Proved

As discussed above, prior to the implementation of the Practice Direction, orders refusing contact were very rare and "did not differ from those made in cases where there had not been a history of domestic violence" (Kaye et al. 2003, 105). Current court statistics reveal that, despite the prevalence of domestic violence in contact proceedings, orders for no contact, or refusals of contact applications, continue to be extremely rare and have even decreased since the Practice Direction was implemented (Ministry of Justice 2012). In none of the cases in which the women interviewed by Coy et al. were involved were orders for 'no contact' made (2012). Similarly most respondents to Hunter and Barnett's survey (2013) agreed that orders for no contact are rarely made, and none of the professionals interviewed by Thiara and Gill (2012, 12) "could provide examples of cases in the last ten years where contact – even if it was indirect – had not been ordered."

These statistics and research findings are supported by the post-Practice Direction case law and the interviews. The reported cases demonstrate that even where findings of domestic violence are made, the lower courts may order direct contact against the wishes of the mother, or a less restrictive form of contact than that proposed or agreed to by the mother.[36] It was not, therefore, surprising to find that many interview respondents indicated that, even where domestic violence is proved, this 'hardly ever' or 'very rarely' results in no direct contact. Ms E said: "More often than not, even when findings have been made, contact will eventually be ordered either as supported/supervised, and then eventually unsupported" [Barrister, London]. The majority of family lawyers (n = 13) considered that only recent, extremely serious physical violence would lead to no contact being ordered. Additionally, the perpetrator's failure to admit the violence or accept the findings was also cited as a factor that may persuade the court not to order any direct contact, since a key 'indicator' of risk for the majority of participants (n = 17) was the extent to which the father was able to admit the violence and accept the findings made against him. Fathers who remain 'in denial' after findings are made are generally seen by courts and professionals as 'high risk'. However, seven respondents indicated that such acceptance is very rare, a view confirmed by Hunter and Barnett's research (2013) as well as by the reported cases.[37] Nevertheless, if the violence is not considered serious enough, this may not, in itself, be seen as a good enough reason to deny contact. Indeed, it seems from

[35] *Re S (A Child) supra* n 18.

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

[37] See e.g. *Re A-T (Children)* [2008] EWCA Civ 652; *Re P (Children)* [2008] EWCA Civ 1431; *Re M (Children)* [2009] EWCA Civ 1216, [2010] 1 FLR 1089; *Re S (A Child)* [2012] EWCA Civ 617; *Re W (Children)* [2012] EWCA Civ 1788.

professionals' responses that unsafe strategies may be used even in 'medium' and 'high risk' cases because of the absence of appropriate resources for safeguarding women and children, and/or because the violence is minimised by courts and professionals.

Discussion

The responses of professionals confirm the view of Ms Y [FCA, London] that courts and professionals have come a long way from the days when she started practice in the early 1980s, when the victim had to suffer 'injuries or blood' before it was recognised that she had sustained domestic violence. The views of the professionals who participated in the study and the recent case law suggest that understandings of domestic violence have started to shift as oppositional voices are beginning to be heard. Many family lawyers and FCAs have a broad and insightful theoretical understanding of domestic violence and some understand its coercive, controlling nature, although fewer barristers understand these dynamics. The more recent reported cases demonstrate that some judges, too, are starting to recognise the power and control dynamics of domestic violence, and to acknowledge that domestic violence constitutes "a significant failure in parenting" (Sturge and Glaser 2000). It is hoped that the new definition of domestic violence in the Practice Direction will lead to a wider recognition of the coercively controlling nature of domestic violence.

Despite this increased awareness, the findings of this study indicate that, after an initial surge in the numbers of fact-finding hearings after the Practice Direction was implemented in May 2008, there appears to have been an increasing 'backlash' against them, exacerbated by the Guidance on Split Hearings. Although the Guidance on Split Hearings discouraged the holding of separate fact-finding hearings, it did not require courts to disregard allegations of domestic violence altogether. However, the case law and interviews do not suggest that the lower courts regularly hold composite hearings; rather, it appears that their approach is to ignore allegations of domestic violence if they do not consider that a separate fact-finding hearing is necessary. This suggests that many disputed allegations of domestic violence continue to be disregarded. Indeed, Coy et al. (2012, 50) found that women experienced the failure to hold fact-finding hearings "as a further silencing."

As discussed above, numerous commentators have highlighted the way in which the de facto 'presumption of contact' has "masked the gendered separation of men into good fathers and violent men" (Eriksson and Hester 2001, 788), as a consequence of the way in which courts and professionals "frequently dissociate men's violence from their parenting" (Thiara and Gill 2012, 18; see also Macdonald 2014, 24-26). Very few family lawyers or judges consider "the role of a domestic violence perpetrator as a parent and have focused on a father's emotional investment in caring about his children while overlooking his ability to care for them" (Bell 2008, 1140; see also Eriksson and Hester 2001, 780; Bancroft and Silverman 2002). Underlying this erasure of domestic violence from paternal care-

giving and from private law Children Act proceedings is the strong support of most judicial officers and professionals for post-separation contact and the acontextual, incident-based approach to domestic violence, which reinforce each other and permeate every aspect of contact proceedings, including decisions whether or not to hold fact-finding hearings. This means that, even where courts and professionals acknowledge the seriousness of domestic violence, anything other than very severe incidents of physical abuse are not considered 'real' violence, and many courts and professionals fail to understand how 'historic' violence can have a continuing controlling effect. As a consequence, the broad, theoretical insights of many professionals into the nature and effects of domestic violence do not necessarily translate into practice. This has had the effect of narrowing the range of behaviours that may be construed as providing 'cogent reasons' to deny children the 'benefits' of contact, which (as discussed below) may well be exacerbated by the recent introduction of a presumption of parental involvement.

So fact-finding hearings in all but the most extreme circumstances of recent, severe physical violence may be viewed as harmful and unnecessary impediments to the goal of achieving post-separation contact. 'Minor' or 'isolated' incidents of abuse, particularly at the end of the relationship, are not perceived by many professionals as 'real' domestic violence and therefore relevant to contact because they fail to contextualise them within the gendered power and control dynamics of domestic abuse. This is extremely concerning in light of the significant body of research evidence which reveals that psychological, emotional and verbal abuse can have even more detrimental effects on women and children than physical violence (see e.g. Dobash and Dobash 1992; Hague and Malos 1993). This means that the broad range of abusive, controlling behaviours described by the women interviewed by Coy et al. (2012), which were experienced by many of them as more frightening and debilitating than the physical violence, would not be seen by these professionals and many judges as 'relevant' to contact, and therefore necessitating a fact-finding hearing.

The attempts by family lawyers to avoid fact-finding hearings by 'carving up' the dispute on the basis of limited admissions by the father (an approach that may be encouraged by the court), and the restriction on the number of allegations to be tried to a few 'sample incidents' mean that the full extent of the risk posed to the mother and child is minimised or even invisible. Furthermore, while courts are now expected to consider the views of Cafcass in deciding on the fact-finding exercise, rather than deliberately ignoring them,[38] the antipathy of courts towards fact-finding hearings means that FCAs may need to continue to 'fight their corner' to overcome the resistance of many judicial officers to such hearings.

The burden on the mother of proving domestic violence is compounded by the presumption of contact, stereotypes of 'typical' victims and perpetrators, and by the inability of many courts and professionals to understand the effects of domestic violence on women, so that the mother's uncorroborated oral testimony may be viewed with suspicion and discounted as not being 'real' evidence. Courts and

[38] Paragraph 17 of the revised Practice Direction.

professionals may even avoid fact-finding hearings altogether if there is no 'independent' evidence.[39]

We have seen how, prior to the implementation of the Practice Direction, courts and professionals tended to downgrade domestic violence because of the importance ascribed to post-separation contact (see e.g. Eriksson and Hester 2001; Saunders and Barron 2003; Harrison 2008). The findings of this study suggest that these perceptions persist. This can be seen in the view of many professionals and courts that fact-finding hearings cause delay and waste resources which arises out of, and reinforces the perception that domestic violence is an unimportant obstacle to the really important business of promoting contact. The repeated judicial attempts to get contact established and progressing, often involving numerous hearings over months and years could be, but are not, constructed as 'wasteful' of resources because the presumption of contact constitutes them as 'necessary'.[40] Similarly, the need to hold fact-finding hearings could have been 'blamed' on the refusal of perpetrators to admit the violence. Yet no participants suggested that such hearings could be avoided if the father admitted the abuse from the outset; rather, it is the mother who is at fault for bringing the 'acrimony' into the 'rational', conciliatory ethos of family proceedings. This reflects a general reluctance by professionals to see fathers in a negative light and a degree of latitude shown towards them, which contrasts with the impatience and even hostility demonstrated by some professionals towards mothers who raise allegations of domestic violence.[41]

Several commentators have written about the way in which mothers' concerns about, or opposition to contact are rendered 'illegitimate' and constructed as evidence of selfishness or irrationality because the dominant construction of children's interests aligns them so closely with those of fathers (Boyd 2004; Elizabeth et al. 2010; Featherstone 2010). This "mother-blaming" (Eriksson and Hester 2001, 789) may lead to women being disbelieved by professionals when they allege domestic violence in contact cases (Harrison 2008, 395; Watson and Ancis 2013, 181). The findings of this study and contemporaneous research (Coy et al. 2012; Hunter and Barnett 2013) suggest that judges and professionals may continue to view women's complaints about domestic violence with suspicion, perceiving them to be a delaying tactic and/or designed to disrupt the other party's relationship with the child. South Asian and African-Caribbean women may also encounter disbelief about the abuse as well as constant scrutiny of their parenting because of stereotyping by professionals by, for example, "normalising male domination within South Asian families" (Thiara and Gill 2012, 10).

Even if domestic violence is proved or otherwise established, the interviews, current statistics and research all demonstrate that some form of direct contact is almost always ordered, even if this is opposed by the mother. This strongly indicates that most judicial officers continue to consider the father's conduct and its

[39] The importance that courts may attach to parents' oral evidence was highlighted by Lady Hale in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 3 WLR 1.

[40] See e.g. *Re P (Children)* [2008] EWCA Civ 1431, [2009] 1 FLR 1056; *Re K (Appeal: Contact)* [2010] EWCA Civ 1365, [2011] 1 FLR 1592; *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494.

[41] These observations arise out of comments made about parents during the interviews by many family lawyers and a few FCAs.

consequences to be less important than the presumed benefits of contact (Perry and Rainey 2007; Hunt and Macleod 2008). The examples of cases cited by participants in which no direct contact was ordered suggest that courts and professionals perceive an 'acceptable' level of domestic violence which mothers and children should tolerate in the interests of promoting contact with fathers, and that this level is extremely high.

The Effects of LASPO

The difficulties experienced by women involved in contact proceedings who have sustained domestic violence and the reluctance of courts to determine disputed allegations of abuse may be compounded when parties to proceedings are litigants in person. Since April 2013, legal aid for parties to private law Children Act proceedings has been almost eliminated by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Current figures indicate that more than 50 % of parties are litigants in person (LIPs), many of whom may be victims of domestic violence because of the stringent 'gateway' requirements for evidence of domestic violence stipulated by regulations (Ministry of Justice 2014; Rights of Women et al. 2013). Existing research suggests that LIPs struggle to present their cases, create more work for judges and generate delay (Moorhead and Sefton 2005; Williams 2011). The key 'legal' tasks that LIPs find most challenging are preparation of bundles and cross-examination, and they may also present with a range of personal vulnerabilities which can compound the difficulties they experience in self-representation (Trinder et al. 2014). These problems have clear implications for the ability of LIPs to cope with fact-finding hearings. Women who experience language barriers and require the assistance of interpreters may encounter particular difficulties in negotiating proceedings and presenting their cases (Thiara and Gill 2012, 14).

Additionally, victims may have to deal directly with, and be cross-examined by, their abusers. Women and legal professionals participating in Coy et al's study "expressed concern that this constituted another route for harassment and intimidation and inhibited women from disclosing details of his violence and their concerns for children's welfare" (2012, 79). Numerous written responses to the recent Commons Select Committee's enquiry into the effect of LASPO (2014) and research by Rights of Women et al. (2013, 2014) highlighted this issue, as well the difficulties many women have in proving domestic violence, particularly patterns of coercively controlling behaviour.

As a consequence of all these problems there may be greater pressure by judges on both litigants in person and those who are represented to reach agreement or attend mediation as the only way in which courts are able to cope with the large numbers of LIPs. Courts may actively circumvent the fact-finding exercise in order to avoid having to confront these difficulties. This concern was raised by respondents to Hunter and Barnett's survey in relation to the anticipated increase in the number of LIPs following the implementation of LASPO (2013). They queried whether domestic violence would always be raised and fact-finding hearings

held where needed. Coy et al. (2012, 40) also point out that where women are not represented, "[p]ressure to reach speedy resolution may mean that women accede to arrangements which are not necessarily in their own or their children's best interests."

Conclusions

Despite the aims of the authors of the Practice Direction and some progress in professional and judicial perceptions of the nature and effects of domestic violence, the gendered relations of power that give rise to, and reinforce, the perceived importance for children of maintaining a relationship with non-resident fathers, continue to work to erase men's violence against women in legal discourse. This means that "in spite of the growing recognition of the gendered features of violence in adult close relationships… fatherhood is still to an overwhelmingly large extent constructed as essentially non-violent" (Eriksson and Hester 2001, 780). The dominant welfare discourse has become increasingly axiomatic and incontestable by marginalising and discrediting oppositional meanings about children's welfare, and by trivialising and rendering irrational women's reasons for opposing contact with non-resident fathers.

As a consequence, while more judges and professionals are developing their understanding of domestic violence and are taking it more seriously, the ambit of when and how it is considered relevant to contact has grown increasingly narrow. This means that, for most courts and family lawyers, and some FCAs, there is an 'acceptable' level of abuse that mothers should be prepared to tolerate for the sake of their children. The narrow, incident-based approach to domestic violence applied by some courts and professionals, particularly barristers, which underpins the origins of fact-finding hearings, may obscure the way in which coercive and controlling behaviours permeate the fabric of the parties' lived experiences, rendering the abuse invisible. The extreme circumstances that appear to warrant the holding of fact-finding hearings suggest that the bar of 'acceptable' abuse is being increasingly raised to the point where the father has to be practically a monster for his conduct to be seen by courts as relevant to contact.

Even where findings of domestic violence are made—including for 'high risk' fathers who do not accept the findings against them—some form of direct contact is invariably ordered by the court (except in 'extreme' cases). The incremental approach described by Hunt and Macleod (2008) appears to be a continuing feature of contact cases since the implementation of the Practice Direction, and courts and professionals find it difficult to envisage circumstances where domestic violence could constitute a bar to contact. This bifurcated approach is likely to have significant implications for, and could be reinforced by, the recent revisions to the Practice Direction and the introduction of the presumption of parental involvement in the Children Act 1989, which reflect the tensions between taking domestic violence more seriously and promoting contact 'at all costs'. These oppositional trends are given expression in the 'General Principles' of the Practice Direction,

which highlight the harmful nature and consequences of domestic violence (paragraph 5) but reiterate the presumption of parental involvement (paragraph 4).

The presumption of parental involvement is based on Section 60CC of the Australian Family Law Act 1975 (which was introduced with other amendments in 2006), which requires the courts to regard two matters as 'primary considerations' when determining arrangements for children (known as the 'twin pillars' approach): the benefit to children of having a meaningful relationship with both parents and the need to protect children from harm. Rhoades (2012) concluded that the Australian experience of these provisions provided a number of arguments against including a 'meaningful relationship' factor in the Children Act 1989, key to which was safety concerns.[42] A key study by Kaspiew et al. (2009) revealed that the 'meaningful relationship' element was being prioritised over the protection of children from harm element, the latter being subject to more extensive requirements of proof. Indeed, Kaspiew et al. found that "parents with safety concerns were no less likely than other parents to end up with a shared care order" (Rhoades 2012, 165).

The findings of this study and contemporaneous research in England and Wales suggest that the new presumption of parental involvement in the Children Act 1989 is likely to have a similar effect to the 'twin pillars' provision in Australia—to over-emphasise the importance of fostering an ongoing relationship with both parents at the expense of safety concerns, and to reduce even further the circumstances in which domestic violence is seen as relevant to contact. This raises questions as to whether the amended definition of domestic violence in the Practice Direction will be sufficient to transform the way in which courts and professionals perceive domestic violence and its relevance to contact, or whether the dominant welfare discourse, reinforced by the recent presumption of parental involvement, will continue to relegate all but the most extreme incidents of recent physical violence as irrelevant and unimportant.

The way in which separate fact-finding hearings currently reinforce the acontextual, incident-based approach to domestic violence, and the difficulties that LIPs are facing, may suggest that allegations would more productively be dealt with in 'composite' hearings, so that the perpetrator's conduct and behaviour could be situated within the broader 'welfare' context and recognised as a 'significant failure in parenting'. Composite hearings may also be less daunting for the increasing numbers of litigants in person to manage. It is suggested, however, that within the discursive and ideological context of current family law, reinforced by the recent presumption of parental involvement, the abuse may continue to be weeded out and disregarded altogether in the drive to promote contact.

Fact-finding hearings, therefore, may serve an important function in keeping domestic violence visible. Accordingly, it is suggested that it is still strategically necessary for preliminary fact-finding hearings to be maintained and their remit extended to include all the varied ways in which the gendered power and control dynamics of domestic violence are exercised. Macdonald concludes that without a shift in the 'contact at all costs' approach, practice directions and guidance "cannot effectively ensure safe practice in child contact cases" (2014, 27). It is hoped that a

[42] See also Trinder (2010), Fehlberg (2012, 711).

focus on the power and control dynamics of gendered intimate partner violence can contribute to this fundamental shift in family law, away from 'contact at all costs' and towards recognition of the moral legitimacy of women's desires for safety, well-being and autonomy from violent men. At the same time, if courts and professionals are able to acknowledge that denial of the violence by perpetrators is itself a hallmark of domestic abuse, and to recognise that it is those denials, not the mother's allegations, that necessitate the holding of fact-finding hearings, the need for such hearings may diminish.

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