

## **SUBSTITUTED PRACTICE DIRECTION**

The substituted Practice Direction 12J supplementing the Family Procedure Rules 2010 is made by the President of the Family Division under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and is approved by Dominic Raab MP, Minister of State, Ministry of Justice.

The substituted Practice Direction 12J comes into force on: 2 October 2017.

Signed:

\_\_\_\_\_ Date:

Sir James Munby

The President of the Family Division

Signed:

\_\_\_\_\_ Date:

Dominic Raab MP

Minister of State, Ministry of Justice

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

(1) For Practice Direction 12J substitute the new Practice Direction 12J as follows:

#### **“PRACTICE DIRECTION 12J – CHILD ARRANGEMENTS AND CONTACT ORDERS: DOMESTIC ABUSE AND HARM**

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

## Summary

1. This Practice Direction applies to any family proceedings in the Family Court or the High Court under the relevant parts of the Children Act 1989 or the relevant parts of the Adoption and Children Act 2002 in which an application is made for a child arrangements order, or in which any question arises about where a child should live, or about contact between a child and a parent or other family member, where the court considers that an order should be made.

2. The purpose of this Practice Direction is to set out what the Family Court or the High Court is required to do in any case in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse.

3. For the purpose of this Practice Direction –

“domestic abuse” includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment;

“abandonment” refers to the practice whereby a husband, in England and Wales, deliberately abandons or “strands” his foreign national wife abroad, usually without financial resources, in order to prevent her from asserting matrimonial and/or residence rights in England and Wales. It may involve children who are either abandoned with, or separated from, their mother;

“coercive behaviour” means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;

“controlling behaviour” means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour;

“development” means physical, intellectual, emotional, social or behavioural development;

“harm” means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another, by domestic abuse or otherwise;

“health” means physical or mental health;

“ill-treatment” includes sexual abuse and forms of ill-treatment which are not physical; and

“judge” includes salaried and fee-paid judges and lay justices sitting in the Family Court and, where the context permits, can include a justices’ clerk or assistant to a justices’ clerk in the Family Court.

## General principles

4. Domestic abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to domestic abuse, or witness one of their parents being violent or

abusive to the other parent, or live in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents.

5. The court must, at all stages of the proceedings, and specifically at the First Hearing Dispute Resolution Appointment ('FHDRA'), consider whether domestic abuse is raised as an issue, either by the parties or by Cafcass or CAFCASS Cymru or otherwise, and if so must –

- identify at the earliest opportunity (usually at the FHDRA) the factual and welfare issues involved;
- consider the nature of any allegation, admission or evidence of domestic abuse, and the extent to which it would be likely to be relevant in deciding whether to make a child arrangements order and, if so, in what terms;
- give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly;
- ensure that where domestic abuse is admitted or proven, any child arrangements order in place protects the safety and wellbeing of the child and the parent with whom the child is living, and does not expose either of them to the risk of further harm; and
- ensure that any interim child arrangements order (i.e. considered by the court before determination of the facts, and in the absence of admission) is only made having followed the guidance in paragraphs 25–27 below.

In particular, the court must be satisfied that any contact ordered with a parent who has perpetrated domestic abuse does not expose the child and/or other parent to the risk of harm and is in the best interests of the child.

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

7. In proceedings relating to a child arrangements order, the court presumes that the involvement of a parent in a child's life will further the child's welfare, unless there is evidence to the contrary. The court must in every case consider carefully whether the statutory presumption applies, having particular regard to any allegation or admission of harm by domestic abuse to the child or parent or any evidence indicating such harm or risk of harm.

8. In considering, on an application for a child arrangements order by consent, whether there is any risk of harm to the child, the court must consider all the evidence and information available. The court may direct a report under Section 7 of the Children Act 1989 to be provided either orally or in writing, before it makes its decision; in such a case, the court must ask for information about any advice given by the officer preparing the report to

the parties and whether they, or the child, have been referred to any other agency, including local authority children's services. If the report is not in writing, the court must make a note of its substance on the court file and a summary of the same shall be set out in a Schedule to the relevant order.

### **Before the FHDRA**

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

10. If at any stage the court is advised by any party (in the application form, or otherwise), by Cafcass or CAFCASS Cymru or otherwise that there is a need for special arrangements to protect the party or child attending any hearing, the court must ensure so far as practicable that appropriate arrangements are made for the hearing (including the waiting arrangements at court prior to the hearing, and arrangements for entering and exiting the court building) and for all subsequent hearings in the case, unless it is advised and considers that these are no longer necessary. Where practicable, the court should enquire of the alleged victim of domestic abuse how best she/he wishes to participate.

### **First hearing / FHDRA**

11. At the FHDRA, if the parties have not been provided with the safeguarding letter/report by Cafcass/CAFCASS Cymru, the court must inform the parties of the content of any safeguarding letter or report or other information which has been provided by Cafcass or CAFCASS Cymru, unless it considers that to do so would create a risk of harm to a party or the child.

12. Where the results of Cafcass or CAFCASS Cymru safeguarding checks are not available at the FHDRA, and no other reliable safeguarding information is available, the court must adjourn the FHDRA until the results of safeguarding checks are available. The court must not generally make an interim child arrangements order, or orders for contact, in the absence of safeguarding information, unless it is to protect the safety of the child, and/or safeguard the child from harm (see further paragraphs 25-27 below).

13. There is a continuing duty on the Cafcass Officer/Welsh FPO which requires them to provide a risk assessment for the court under section 16A Children Act 1989 if they are given cause to suspect that the child concerned is at risk of harm. Specific provision about service of a risk assessment under section 16A of the 1989 Act is made by rule 12.34 of the FPR 2010.

14. The court must ascertain at the earliest opportunity, and record on the face of its order, whether domestic abuse is raised as an issue which is likely to be relevant to any decision of the court relating to the welfare of the child, and specifically whether the child and/or parent would be at risk of harm in the making of any child arrangements order.

### **Admissions**

15. Where at any hearing an admission of domestic abuse toward another person or the child is made by a party, the admission must be recorded in writing by the judge and set out as a Schedule to the relevant order. The court office must arrange for a copy of any order containing a record of admissions to be made available as soon as possible to any Cafcass

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

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

16. The court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic abuse –

- (a) in order to provide a factual basis for any welfare report or for assessment of the factors set out in paragraphs 36 and 37 below;
- (b) in order to provide a basis for an accurate assessment of risk;
- (c) before it can consider any final welfare-based order(s) in relation to child arrangements; or
- (d) before it considers the need for a domestic abuse-related Activity (such as a Domestic Violence Perpetrator Programme (DVPP)).

17. In determining whether it is necessary to conduct a fact-finding hearing, the court should consider –

- (a) the views of the parties and of Cafcass or CAFCASS Cymru;
- (b) whether there are admissions by a party which provide a sufficient factual basis on which to proceed;
- (c) if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;
- (d) whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;
- (e) whether the factors set out in paragraphs 36 and 37 below can be determined without a fact-finding hearing;
- (f) the nature of the evidence required to resolve disputed allegations;
- (g) whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and
- (h) whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.

18. Where the court determines that a finding of fact hearing is not necessary, the order must record the reasons for that decision.

19. Where the court considers that a fact-finding hearing is necessary, it must give directions as to how the proceedings are to be conducted to ensure that the matters in issue are determined as soon as possible, fairly and proportionately, and within the capabilities of the parties. In particular it should consider –

- (a) what are the key facts in dispute;
- (b) whether it is necessary for the fact-finding to take place at a separate (and earlier) hearing than the welfare hearing;

(c) whether the key facts in dispute can be contained in a schedule or a table (known as a Scott Schedule) which sets out what the applicant complains of or alleges, what the respondent says in relation to each individual allegation or complaint; the allegations in the schedule should be focused on the factual issues to be tried; and if so, whether it is practicable for this schedule to be completed at the first hearing, with the assistance of the judge;

(d) what evidence is required in order to determine the existence of coercive, controlling or threatening behaviour, or of any other form of domestic abuse;

(e) directing the parties to file written statements giving details of such behaviour and of any response;

(f) whether documents are required from third parties such as the police, health services or domestic abuse support services and giving directions for those documents to be obtained;

(g) whether oral evidence may be required from third parties and if so, giving directions for the filing of written statements from such third parties;

(h) where (for example in cases of abandonment) third parties from whom documents are to be obtained are abroad, how to obtain those documents in good time for the hearing, and who should be responsible for the costs of obtaining those documents;

(i) whether any other evidence is required to enable the court to decide the key issues and giving directions for that evidence to be provided;

(j) what evidence the alleged victim of domestic abuse is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence;

(k) in cases where the alleged victim of domestic abuse is unable for reasons beyond their control to be present at the hearing (for example, abandonment cases where the abandoned spouse remains abroad), what measures should be taken to ensure that that person's best evidence can be put before the court. Where video-link is not available, the court should consider alternative technological or other methods which may be utilised to allow that person to participate in the proceedings;

(l) what support the alleged perpetrator may need in order to have a reasonable opportunity to challenge the evidence; and

(m) whether a pre-hearing review would be useful prior to the fact-finding hearing to ensure directions have been complied with and all the required evidence is available.

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

### **Reports under Section 7**

21. In any case where a risk of harm to a child resulting from domestic abuse is raised as an issue, the court should consider directing that a report on the question of contact, or any other matters relating to the welfare of the child, be prepared under section 7 of the Children

Act 1989 by an Officer of Cafcass or a Welsh family proceedings officer (or local authority officer if appropriate), unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests.

22. If the court directs that there shall be a fact-finding hearing on the issue of domestic abuse, the court will not usually request a section 7 report until after that hearing. In that event, the court should direct that any judgment is provided to Cafcass/CAFCASS Cymru; if there is no transcribed judgment, an agreed list of findings should be provided, as set out at paragraph 29.

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

### **Representation of the child**

24. Subject to the seriousness of the allegations made and the difficulty of the case, the court must consider whether it is appropriate for the child who is the subject of the application to be made a party to the proceedings and be separately represented. If the court considers that the child should be so represented, it must review the allocation decision so that it is satisfied that the case proceeds before the correct level of judge in the Family Court or High Court.

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

25. Where the court gives directions for a fact-finding hearing, or where disputed allegations of domestic abuse are otherwise undetermined, the court should not make an interim child arrangements order unless it is satisfied that it is in the interests of the child to do so and that the order would not expose the child or the other parent to an unmanageable risk of harm (bearing in mind the impact which domestic abuse against a parent can have on the emotional well-being of the child, the safety of the other parent and the need to protect against domestic abuse including controlling or coercive behaviour).

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

(a) take into account the matters set out in section 1(3) of the Children Act 1989 or section 1(4) of the Adoption and Children Act 2002 ('the welfare check-list'), as appropriate; and

(b) give particular consideration to the likely effect on the child, and on the care given to the child by the parent who has made the allegation of domestic abuse, of any contact and any risk of harm, whether physical, emotional or psychological, which the child and that parent is likely to suffer as a consequence of making or declining to make an order.

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

(a) the arrangements required to ensure, as far as possible, that any risk of harm to the child and the parent who is at any time caring for the child is minimised and that the safety of the child and the parties is secured; and in particular:

(i) whether the contact should be supervised or supported, and if so, where and by whom; and

(ii) the availability of appropriate facilities for that purpose;

(b) if direct contact is not appropriate, whether it is in the best interests of the child to make an order for indirect contact; and

(c) whether contact will be beneficial for the child.

### **The fact-finding hearing or other hearing of the facts where domestic abuse is alleged**

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

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

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

30. At the conclusion of any fact-finding hearing, the court must consider, notwithstanding any earlier direction for a section 7 report, whether it is in the best interests of the child for the court to give further directions about the preparation or scope of any report under section 7; where necessary, it may adjourn the proceedings for a brief period to enable the officer to make representations about the preparation or scope of any further enquiries. Any section 7 report should address the factors set out in paragraphs 36 and 37 below, unless the court directs otherwise.

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

### **In all cases where domestic abuse has occurred**

32. The court should take steps to obtain (or direct the parties or an Officer of Cafcass or a Welsh family proceedings officer to obtain) information about the facilities available locally (to include local domestic abuse support services) to assist any party or the child in cases where domestic abuse has occurred.

33. Following any determination of the nature and extent of domestic abuse, whether or not following a fact-finding hearing, the court must, if considering any form of contact or involvement of the parent in the child's life, consider-

(a) whether it would be assisted by any social work, psychiatric, psychological or other assessment (including an expert safety and risk assessment) of any party or the child and if so (subject to any necessary consent) make directions for such assessment to be undertaken and for the filing of any consequent report. Any such

report should address the factors set out in paragraphs 36 and 37 below, unless the court directs otherwise;

(b) whether any party should seek advice, treatment or other intervention as a precondition to any child arrangements order being made, and may (with the consent of that party) give directions for such attendance.

34. Further or as an alternative to the advice, treatment or other intervention referred to in paragraph 33(b) above, the court may make an Activity Direction under section 11A and 11B Children Act 1989. Any intervention directed pursuant to this provision should be one commissioned and approved by Cafcass. It is acknowledged that acceptance on a DVPP is subject to a suitability assessment by the service provider, and that completion of a DVPP will take time in order to achieve the aim of risk-reduction for the long-term benefit of the child and the parent with whom the child is living.

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

35. When deciding the issue of child arrangements the court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.

36. In the light of any findings of fact or admissions or where domestic abuse is otherwise established, the court should apply the individual matters in the welfare checklist with reference to the domestic abuse which has occurred and any expert risk assessment obtained. In particular, the court should in every case consider any harm which the child and the parent with whom the child is living has suffered as a consequence of that domestic abuse, and any harm which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made. The court should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before during and after contact, and that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.

37. In every case where a finding or admission of domestic abuse is made, or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other and towards the child and the impact of the same. In particular, the court should consider –

(a) the effect of the domestic abuse on the child and on the arrangements for where the child is living;

(b) the effect of the domestic abuse on the child and its effect on the child's relationship with the parents;

(c) whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent;

(d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and

(e) the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse.

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

38. Where any domestic abuse has occurred but the court, having considered any expert risk assessment and having applied the welfare checklist, nonetheless considers that direct contact is safe and beneficial for the child, the court should consider what, if any, directions or conditions are required to enable the order to be carried into effect and in particular should consider –

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

Where a risk assessment has concluded that a parent poses a risk to a child or to the other parent, contact via a supported contact centre, or contact supported by a parent or relative, is not appropriate.

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

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

40. In its judgment or reasons the court should always make clear how its findings on the issue of domestic abuse have influenced its decision on the issue of arrangements for the child. In particular, where the court has found domestic abuse proved but nonetheless makes an order which results in the child having future contact with the perpetrator of domestic abuse, the court must always explain, whether by way of reference to the welfare check-list, the factors in paragraphs 36 and 37 or otherwise, why it takes the view that the order which it has made will not expose the child to the risk of harm and is beneficial for the child.”.

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