

***'Should the Family Courts  
Promote Contact?'***

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# Outline

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- i. Is there a duty to promote contact?
- ii. PD12J strategies and new case law.
- iii. Reform – is there a pro-contact culture?
- iv. Vulnerability.
- v. s91(14).
- vi. Other Significant Cases in 2020.
- vii. Lockdown – Where are we now?
- viii. Committal and Enforcement.

## 2. Is there a duty to promote contact?

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- *Re C (A Child) (Suspension of Contact)* [2011] EWCA Civ 521, Munby LJ:
  - a) Contact is “a fundamental element of family life and is almost always in the interests of the child.”
  - b) Only to be terminated in “exceptional circumstances” where “it will be detrimental to the child’s welfare”.
  - c) Positive obligation on Judge to “maintain or restore contact”.
  - d) Don’t apply “excessive weight...to short-term or transient problems”.
  - e) Key question: Has the Judge taken “all necessary steps to facilitate contact as can be reasonably demanded” in the case?
  - f) Reiterates the precedence of s1(1) over all other considerations.

### 3. Contact not at all costs

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- *Re H-W (a child)* [2017] EWCA Civ 154, [50]:

*“the task of the Judge is to **weigh up the pros and cons of what might be possible ways forward**, looking to see what chances they have of working, what benefits they might bring and what harm might be occasioned in the attempt. **This exercise might lead to the abandonment of some options** that might have looked worth pursuing.”*

## 4. Practice Direction 12J – The Basics

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- An explicit change in the court's approach to the presumption of contact.
- Sets out the required practice in any child welfare case where domestic abuse is either alleged or admitted.
- General Principle: Domestic abuse is harmful to children and/or puts them at risk of harm.
- Requires the court to identify any issue of domestic abuse early, and establish a process of determining the issue.

## 5. Is it necessary to conduct a fact-finding hearing?

- Purpose?

Para 16: “To provide a factual basis for any welfare report; for an accurate assessment of risk; before any final CAO; before ordering DVPP”.

- Considerations – Para 17:

- a) Views of parties and Cafcass
- b) Parties’ admissions
- c) Legal aid
- d) Other evidence
- e) Whether factors (Para 36-27) can be determined without FF hearing
- f) Nature of evidence required to resolve allegations
- g) Relevance
- h) Necessity and proportionality

## 6. A separate hearing? *F v G* [2020] EWHC 2396 (Fam)

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- Appeal allowed:
  - a. The effect of there being a Cafcass recommendation based upon findings that were not formally being sought put the father at a disadvantage.
  - b. Despite making such a significant recommendation the Cafcass officer failed to observe the children with their father.
  - c. When considering whether contact should continue, the Judge did not weigh into the balance the harm that could be caused to the children by the immediate loss of their relationship with their father.
- Fundamentally: It was unfair to proceed to a FF determination without the usual procedural safeguards.
- Dilemmas and tactics.

## 7. PD12J and Interim Contact

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- Para 25: Where DV allegations are undetermined, the court should not make an interim order unless “it is in the interests of the child to do so and the order would not expose the child or the other parent to an **unmanageable risk** of harm”
- Para 26: Court should consider the welfare checklist, in particular ‘the likely effect on the child’, and on the ‘care given to the child by the parent’ who has made the DV allegation.
- Court should consider whether supervised or supported contact is appropriate.
- But note *A v C* (2018)...



## 7. A v C (2018)

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- HHJ Atkinson rejected submissions that para 25 PD12J contained a presumption against interim contact:
  - a) PD12J is a practice direction i.e. guidance on the handling of cases in which domestic abuse is raised.
  - b) PD's do not change the law.
  - c) Child welfare issues are decided by CA 1989.
  - d) The statutory presumption of parental involvement (s1(2A) CA 1989) is neither diminished nor overridden by PD12J.
- How far we have travelled.
- Dilemmas and tactics.

## 8. Practical Steps re Interim Contact

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- Usually considered at (busy) FHDRA.
- Research contact centres and other forms of supervision.
- Can relatives or friends supervise or assist with collection and delivery?  
Prepare statements and offer undertakings.
- Prepare your client for their Cafcass interview.
- Give Judge a history of beneficial contact.

## 9. *M v F* [2020] EWHC 576 (Fam), Judd J:

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- PD12J requires Judges at FHDRA, when considering whether to make an interim order:

*“scrutinise the proposed order to ensure it is in the **child's best interests** and does not expose her or her mother to an **unmanageable risk of harm**, bearing in mind the impact which domestic abuse can have upon the **emotional well-being of the child**, the **safety of the mother** and the **need to protect against domestic abuse** which includes controlling or coercive behaviour. ”*

## **10. Evidence to be obtained for the Fact-Finding Hearing – Para 19 PD12J**

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- Key considerations for directions:

a) What are the key facts in dispute?

c) Is a Scott Schedule suitable?

d) What evidence is required to determine allegations?

f) Third party disclosure?

g) Is oral evidence required?

j) Support required for alleged victim to give evidence?

l) Support required for perpetrator to challenge the evidence?

m) Pre-hearing review?

## ***11. R v P (Children: Similar Fact Evidence)*** **[2020] EWCA Civ 1088**

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- Appeal from a case management decision to exclude evidence of similar coercive and controlling behaviour by F towards another woman.
- Appeal allowed – the evidence was relevant and may be capable of establishing propensity which may be probative to the core allegations.

*“the court must be satisfied on the **basis of proven facts that propensity** has been proven...The proven facts must form a sufficient basis to sustain a finding of propensity but each **individual item of evidence does not have to be proved.**”*

## 12. Fact-Finding Hearings - PD12J

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- Para 28: The hearing can be inquisitorial, with each party identifying what questions they wish to ask, and their version of disputed events. Judge should be prepared, if appropriate, to conduct the questioning to focus on the key issues.
- Para 29: Court should make fact findings as to the nature and degree of any domestic abuse and its effect on the child, the child's parents etc.
- Para 30: Must consider whether a further s7 report would be in the child's best interests.
- Para 31: Continuity of Judge at following hearing.

## ***13. JH v MF [2020] EWHC 86 (Fam)***

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- High Court allowed an appeal from a fact-finding hearing heard before HHJ Tolson QC.
- Deeply troubling case containing procedural and substantive failings of law.

e.g. The Judge 'took the inexplicable step' of ordering M to give evidence from counsel's row rather than from the witness box. Also a fundamental failing in applying the law of consent - HHJ found that as M had not been sexually penetrated without consent because she had not physically resisted or reported the matter to police.

- High Court noted that HHJ had placed undue weight on the demeanour of the parties.

Further, he appeared troubled that if he found an allegation 51% proven he had to treat it as correct. The court reiterated that the balance of probabilities test applies irrespective of the seriousness of the case.

## ***14. Re A (A Child) [2020] EWCA Civ 1230***

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- Court of Appeal dealt number of authorities in respect of the fallibility of oral evidence such as *Gestmin v Martin* [2019] EWCA Civ 1645.
- Court of Appeal held the court must be mindful of the fallibility of memory and the pressures of giving evidence. The court must assess all the evidence in a manner suited to the case and that it must not inappropriately elevate one kind of evidence over another.
- The Trial Judge was in error for inappropriately placing reliance on an aspect of M's oral evidence as opposed to contemporaneous written evidence.



## 15. Demeanour – only one factor

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- *Re A*: “41. The court must be mindful of the **fallibility of memory** and the **pressures** of giving evidence. The **relative significance** of oral and contemporaneous evidence will vary from case to case. What is important...is that the **court assesses all the evidence in a manner suited** to the case before it and does not inappropriately elevate one kind of evidence over another.
- *Liven J in A Local Authority v A Mother* [2020] EWHC 1086:  
*“Demeanour will often not be a good guide to truthfulness....Certainly, in court the demeanour of a witness, or anyone else in court, will often be more obvious to the judge, but that does not mean it will be more illuminating”.*
- Assessing demeanour in remote hearings – my experience.

## **16. PD12J - In all cases where DV has occurred**

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- Para 32: Court should take steps to obtain information about facilities available locally to assist any party of child in cases where domestic abuse has occurred,
- Para 33: Court must, in considering any form of contact, consider whether it would be assisted by any social work, or other assessment of any party or child or whether any party should seek advice, treatment or other intervention as a pre-condition to contact.
- Para 34: Activity direction may also be appropriate, with any intervention being one commissioned and approved by Cafcass.

## **17. PD12J - Factors to consider when determining whether to make CAO where domestic abuse has occurred**

- Para 35: Contact order must be in the child's best interests and not expose the child to unmanageable risk of harm.
- Para 36: The court should only make an order for contact if the physical and emotional safety of the child and the parent with whom the child is living can, be secured; and the parent with whom the child is living will not be subjected to further domestic abuse.
- Para 37: Court should consider how domestic abuse may affect where the child is living; the child's relationship with their parents; potential motivations in pursuing a CAO as a form of continued abuse; likely behaviour during contact; and the parties understanding of the effect of past domestic abuse and the potential for future domestic abuse.

## 18. PD12J - Directions for contact

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- Para 38: Being satisfied that direct contact is safe and beneficial, the court should what directions are required to enable the order to be carried into effect e.g. whether supervision is required; limiting duration; future review of the order.
- Para 39: Where direct contact is not appropriate, the court must consider whether it is safe and beneficial to order indirect contact.
- Para 40: In judgment, the Court should make clear how its findings on DV have influenced its decision on the issue of a CAO. Where contact is ordered, it must explain why its order will not expose the child to risk of harm and will be beneficial.

## **19. Court of Appeal – 4 decisions**

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- Upcoming 42BR bulletin.

## 20. Reform

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- Assessing Risk of Harm in Private Law Children Disputes (June 2020):
  - a) 4 barriers to family court's ability to respond to domestic abuse: the pro-contact culture; the adversarial system; limited resources; lack of coordination with other courts and organisations dealing with domestic abuse.
  - b) Suggests the basic design principles for private law children proceedings.
  - c) A uniform Statement of Practice.
  - d) A review of s1(2A).
  - e) Child Arrangements Programme pilot, that is safety-focussed, trauma aware and takes a problem solving approach. Including a procedure for identifying abusive applications and managing them; and increasing the advocacy of children in proceedings.

## 21. Executive Summary to the Harm Report

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- *“Submissions highlighted a feeling that abuse is systematically minimised, ranging from children’s voices not being heard, allegations being ignored, dismissed or disbelieved, to inadequate assessment of risk, traumatic court processes, perceived unsafe child arrangements, and abusers exercising continued control through repeat litigation and the threat of repeat litigation”*
- Lorraine Cavanagh QC identifies measures practitioners can adopt now to improve practice:
  - a) Vulnerable witness measures
  - b) Using specialist domestic abuse resources
  - c) Scott Schedules

## 22. Vulnerability – A reminder

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- Part 3A FPR 2010 and PD3AA
  - a) Sets out the court's duties and powers in relation to assisting parties whose ability to participate in family proceedings may be diminished by reason of their vulnerability, and
  - b) Sets out ways to assist parties and witnesses where the quality of their evidence is likely to be diminished by their vulnerability.
- Where a vulnerable party or witness is to give evidence, there must be a 'ground rules hearing' prior in order to make any necessary participation directions



## 23. Special Measures in Remote & Hybrid Hearings

- President's guidance on matters to be considered before arranging remote hearings, specifically when domestic abuse is in issue:
  - The victim's environment to appear & give their best evidence.
  - What will be visible to all the participants?
  - What environment is needed to ensure physical and emotional safety for the victim and any children involved?
  - What kind of environment is necessary for the court to deal justly with the case, having regard to any welfare issues involved?

## 24. Section 91(14)

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- (14) On disposing of any application for an order under this Act, the court may ... order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court.
- *Re N (Children)* [2019] EWCA Civ 903. Guidance in making a s91(14) Order, following *Re T*:
  - 1) "Are parties fully aware that the court is seised of an application, and is considering making such an order.
  - 2) Do the parties understand the meaning and effect of such an order.
  - 3) Have full knowledge of the evidential basis on which such an order is sought.
  - 4) Have a proper opportunity to make representations in relation to the making of such an order

These fundamental requirements obtain whether the parties are legally represented or not. It is, we suggest, even more critical that these requirements are observed when the party affected is unrepresented."

## 25. Section 91(14) continued...

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- Considering an application to apply for a barred order, while a s91(14) order is in effect (*Re S (Permission to Seek Relief)* [2006] EWCA Civ 1190):
  - Court may or may not require the other parent to be served with the application for permission to apply.
  - May direct that any application for permission shall be served, but should be considered on the papers. If arguable, the matter should be listed for an inter partes hearing.
- Test to be applied on an application for permission (*Re P & N (s91(14): Application for permission to apply: appeal)* [2019] EWHC 421 (Fam)):
  - The 'welfare test' does not apply to a permission application, although it is a 'relevant' factor
  - Court should have regard to the overriding objective (Rule 1 FPR)
  - Application should first be considered without notice or on papers
  - Applicant should not be denied an oral hearing
  - If an application is without merit, it can be dismissed at that stage
  - If the application is arguable, the court should list it for an 'on notice' hearing.

## ***26. Re B (A Child) (Unnecessary Private Law Applications) [2020] EWFC B44***

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- Concerned an appeal relating to disclosure of mother's medical records.
- HHJ Wildblood QC said this amounted to an inappropriate use of limited court resources and stated "this type of litigation should only come before a court where it is genuinely necessary."
- The judge warned that if unnecessary e.g. 'micro-management' cases are brought to court, there will be criticisms and possible sanctions.

## ***27. FF v BM [2020] EWFC B6***

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- Appeal in relation to the decision to order indirect contact with youngest child.
- Appeal allowed due to procedural irregularities and a lack of engagement with the welfare checklist in judgment.

*“The task facing the Justices was not to pass an examination or to prepare a detailed legal or factual analysis of all the evidence and submissions heard. Essentially, their task was twofold: to **enable the parties to understand** why the decision was reached and to **provide sufficient detail** and analysis to **enable an appellate court** to decide whether or not the judgment is **sustainable.**”*

## ***28. Re S (Parental Alienation: Cult: Transfer of Primary Care) [2020] EWHC 1940 (Fam)***

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- Transfer of residence of a 9 year old to father's care after mother failed to adequately disengage from the cult of Universal Medicine.
- The judge's analysis of how to approach an application for transfer of residence gives a succinct analysis of the guidance from the Court of Appeal:

*"Such an order will be appropriate where assessment of the paramount welfare of the child justifies such an order. In a case such as this the **evaluation of paramount welfare and the necessity or proportionality** of the **appropriate order** to give effect to that evaluation of paramount welfare are inextricably linked; and indeed, in a case such as this, the conclusions as to paramount welfare make the resulting order necessary and proportionate."*

## ***29. Re A (Children) (Parental Alienation)*** **[2019] EWFC B56**

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- HHJ Wildblood QC – Practice points for parental alienation (PA) cases:
  - a) Identify alienation as a key issue early
  - b) Avoid delay
  - c) Early full hearing to identify allegations of fact
  - d) Indirect contact in PA case has limitations
  - e) Vast numbers of professionals can cause problems
  - f) Ensure professionals work collaboratively
  - g) Early intervention for psychotherapeutic support
  - h) Responding simply on the basis of what children say here is 'manifestly superficial and naïve'
  - i) Joinder of children should not be delayed where necessary.

## **30. *M v H (Private Law: Vaccination)* [2020] EWFC 93**

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- Litigation related to the giving of an MMR vaccine, with the issue of a COVID-19 vaccine also considered.
- Court made a specific issue order for vaccination.
- Obiter: *“it very difficult now to foresee a case in which a vaccination approved for use in children, **including vaccinations against the coronavirus that causes COVID-19**, would not be endorsed by the court as being in a child’s best interests, **absent a credible development** in medical science or peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of the vaccine or a well evidenced medical contraindication specific to the subject child.”*



## ***31. Father v Mother* [2020] EWHC 1929 (Fam)**

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- Could F take the children to Dubai, given it is not a signatory to the Hague Convention?
- Applying the tests in *Re A*, Judge's view was that there is a risk, albeit a relatively small one, that the F would seek to retain the girls in Dubai. Judge deemed it necessary to put safeguards in place to ensure that if F does seek to retain the children in Dubai they will be returned to England with relatively little difficulty.
- Judge held that an agreement between the parents, lodged with the appropriate court in Dubai, setting out their acceptance that the children are habitually resident in England and that the children should be returned, would be a sufficient safeguard in this case.

## 32. Relocation – the ‘*F, K, C, Payne Composite*’

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- Williams J in *Re K (A Child)* [2020] EWHC 488:
  - i. Child’s wishes & feelings.
  - ii. Physical, emotional and educational needs.
  - iii. Likely effect of any change in circumstances of moving abroad. Consider the positives and negatives of their new environment.
  - iv. Child’s age, sex, background and other relevant characteristics.
  - v. Any harm he has suffered or is at risk of suffering e.g. effect of diminished contact with non-resident parent
  - vi. Capability of the parents in meeting the child’s needs
  - vii. The range of powers available to the court – is reciprocal enforcement possible?

### **33. Lockdown Issues – *Lancashire County Council v M (Covid-19 Adjourment Application)* [2020] EWFC 43**

- McDonald J consolidated guidance and case law and set out extensive factors to be applied to consider whether a remote hearing can be held fairly:
  - i. The welfare of the child
  - ii. Principle that delay is prejudicial to welfare
  - iii. Requirement to deal with cases justly
  - iv. Will a remote hearing provide judge with proper basis to make a full judgment
  - v. Steps that can be taken to mitigate potential unfairness so parties can fully engage with process
  - vi. Impact of Covid-19 on likely timescales for F2F hearings
  - vii. Public law children cases – 26 week time limit
  - viii. Requirement to allot a case an appropriate share of court resources
  - ix. The individual circumstances of the particular case (an even longer list!)

## **34. Recusal – *W (Children: Reopening/Recusal)* [2020] EWCA Civ 1685**

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- Judge recused herself following FF hearing for ‘personal family reasons’. No actual bias, but a personal conflict due to the Judge’s son having a social connection with M.
- Issue on appeal is whether the findings should be set aside and re-heard before new Judge.
- Court of Appeal held the decision by HHJ to set aside all of the findings of DJ on the basis of apparent bias was both wrong and unfair.

*“This was the sort of happenstance community tie that should be **disclosed to parties** by a judge who is aware of it, but would **not ordinarily** lead the **reasonable and informed observer** to conclude that the judge could not try the case fairly.”*

## **35. Committal – *Andreewitch v Moutreuil* [2020] EWCA 3823**

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- Financial remedies case. M applied for A's committal for contempt of court.
- M's application was successful. A appealed. CoA heard one ground of appeal: that the Judge should have explained to A that he was not obliged to give evidence at all.
- Peter Jackson LJ decided that the failure to inform A of his right to silent constituted a procedural defect. More than a technical error because the right to silence is a core element of criminal proceedings.
- Jackson LJ referred to a nine-point "checklist" of procedural safeguards the court should consider before dealing with a committal application.

## 36. Committal or Enforcement?

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- *CH v CT* [2018] EWHC 1310 (Fam) – Part 1, Applications to enforce:
- s11J Children Act 1986 sets out a new procedure for enforcing CAO, rather than through an application to commit.
- Court must be satisfied beyond reasonable doubt, that a person has failed to comply with the CAO, and has no reasonable excuse (on balance of probabilities) for doing so.
- Note s11K: a court may not make an enforcement order unless the person said to be in breach of the CAO had been given a warning notice under s.11I

## ***37. CH v CT, Part 2 - Committal***

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- Applications and proceedings for contempt of court in family proceedings – governed by Part 37 FPRs.
- Part 37 is supplemented by PD37A. Note 1.1: ‘If disobedience is to be dealt with by proceedings for contempt of court, a penal notice must be endorsed’ on the order.
- 13.2: ‘The court may waive any procedural defect...if satisfied that no injustice has been caused to the respondent’

## **38. CH v CT, Part 3 – Warning Notices**

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- *“The notice on the front of the order handed down after the hearing did not state, in terms, that disobedience of the order would be a contempt of court which could be punishable by imprisonment.”*
- In the order, the warning notice under s11I, had been conflated with the penal notice under FPR Part 37.
- *“If a child arrangements order under s.8 of the 1989 Act is to be enforced by committal, it must comply with the provisions of FPR 37.9 and PD 37A as to a penal notice.”*
- Therefore the order was not capable of being enforced through committal.



## 39. Warning Notice for CAO

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- Enforcement warning - Do not assume the court will include this in the order!
- Penal notices – you may wish to add this with a specific heading directed against a specific person.

“To [name of person to whom the penal notice is directed]: If you the within-named [applicant] / [respondent] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or your assets may be seized.”

- If the order cannot be enforced it is almost worthless.

**Next 42BR Lecture:**

***“Vulnerability, fairness and the  
Remote Family Court”***

**26 January 2021, 5pm**

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Siân Smith - Chair of the FLBA's Vulnerable Witnesses Working Group.

With guest Nicola Lewis - Registered Intermediary and Communication Specialist.

Nicola and Siân will discuss the challenges of ensuring fairness for vulnerable individuals in remote hearings. They will share their experiences and give helpful advice to practitioners on achieving the fair participation of vulnerable parties and witnesses in remote and hybrid hearings.