# PRIVATE LAW UPDATE TALK

# DELIVERED BY FRANCIS CASSIDY

# ON 12 JANUARY 2021

## 1. Introduction and Contents

I will be giving 42 Bedford Row's private children law update for 2020. My name is Francis Cassidy and I have specialising in Children Act for approximately 20 years.

In undertaking my research for this work I was stuck by the tenson between the court's oft stated role in promoting contact and its attempts to implement Practice Direction 12 J of the Family Procedure Rules 2010 and the push for reform designed to make child arrangements orders as safe as possible for families where domestic has occurred. This led me to subtitle this talk

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

In broad terms this talk cover the following topics.

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. **In *Re C (A Child) (Suspension of Contact)* [2011] EWCA Civ 521, [2011] 2 FLR 912 Munby LJ summarised the relevant ECHR case law as follows:**

"a) Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.

b) Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.

c) There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.

d) The court should take a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.

e) The key question, which requires 'stricter scrutiny', is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.

f) All that said, at the end of the day the welfare of the child is paramount; the child's interest must have precedence over any other consideration."

3. **'It is almost always in the interests of a child to have contact with a parent'**
Section B – para 333 of Hershmann and McFarlane referring to Munby LJ's decision in Q v Q [2015] EWCA Civ 991*:*

In Re H-W (a child) [2017] EWCA civ 154 the Court of Appeal made it clear that the Judge does not have to pursue all and every avenue to facilitate direct contact.
"[50] …..If the father was going so far as to submit that the court has an obligation to try every single possibility that might, in theory, achieve direct contact, that does not accord with my understanding of the position. The obligation of the court is to make a decision about contact, with the child's welfare as its paramount consideration

(Section 1(1) Children Act 1989), and having regard in particular to the matters set out in section 1(3) of that Act. Within this framework, 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. In this case, it led the Judge to discard the possibility of seeking general expert advice, over and beyond that offered by the Cafcass officer, even though this had not so far been tried and might have been the only remaining option."

**4. Practice Direction 12J**

Family Law Week's Article that preceded the introduction of PD12J announced
'The presumption of contact can now (explicitly) be displaced;'

There is no doubt it has made huge differences to the court's approach to ordering contact.

The basics.
FPR 2010, PD12J is extensive and sets out in detail the required practice to be followed in any child welfare case where 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.

PD12J proceeds from the general principle that 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 directly from domestic abuse, or indirectly from abuse impairing the capacity of either or both of their parents.

PD12J requires courts to identify any issue of domestic abuse at the earliest opportunity and then establish a process for determining that issue as soon as possible and fairly. The court must ensure that any child arrangements order protects the safety and wellbeing of the child and parent with whom he is living and does not expose them to the risk of further harm.

***I want to argue that PD12J is a tool that sets down a challenge to advocates. For those who can present focussed arguments and present relevant evidence***

***it is in fact a flexible tool that works differently at different stages of the proceedings.***

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

PD12J

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.

19. (b) whether it is necessary for the fact-finding to take place at a separate (and earlier) hearing than the welfare hearing;

6.**F and G 2020 EWHC 2396 Fam.**

At the FHDRA, the mother applied for there to be a fact finding hearing. The judge did express considerable scepticism as to whether a fact finding hearing was necessary, in the face of the mother saying that she was content for the children to go on holiday. After some discussion in court and out, the mother withdrew her application for a fact finding hearing in clear terms.

So at the FHRA a s7 report was ordered and no FFH was ordered.

The Cafcass officer spoke to the children; The Cafcass officer stated he found the mother's account of physical and emotional abuse, and intimidation/threats plausible. The Cafcass officer stated that domestic abuse was likely to have occurred since the end of the relationship, and that the mother was currently experiencing coercive and controlling behaviours.

A fact-finding hearing was not considered at the DRA.

At final hearing, the mother adopted the Cafcass officer's recommendations for indirect contact. The trial judge made findings of fact against the father regarding domestic abuse and coercive behaviour.

The father appealed. Mrs Justice Judd DBE allowed the appeal on the following basis, and remitted the matter for a fresh FHDRA: It is a wide ranging judgment and stated factors for allowing the appeal included.
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 did not observe the children with their father.
c. In his judgment the recorder did not appear to weigh in the balance the harm that could be caused to the children by the immediate loss of their relationship with the father, which had to be set against the risks to the children and the mother of contact continuing.
Underlying the whole appeal is the unfairness of proceeding to a FF determination without procedural safeguards normally included.

**7. PD12J and Interim Contact**
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.

In A v C 7 November 2018 reported on Lawtel HHJ Atkinson rejected a submissions that para 25 of PD12J contained a presumption against interim contact.

‘..when read together with the whole of PD12J, and set against the essential statutory landscape, it clearly does not raise such a presumption. It is neither necessary nor appropriate for me to offer any further ‘guidance’ on PD12J. However, forgive me for making the following rather obvious points:

a. PD12J is a practice direction. It is guidance offered by the President of the Family Division on the handling of cases in which domestic abuse is raised.

b. Like all practice directions it does not change the law.

c. The statutory regime for the determination of welfare issues in relation to children is Children Act 1989.

d. The welfare of the child subject to the application remains paramount and the statutory presumption of parental involvement added to s.11 Children Act 1989 by the Children and Families Act 2014 is neither diminished nor over ridden by PD12J.

**8. Practical Steps re Interim Contact**

a. The decision will usually be considered by a very busy judge at a FHDRA with very little time to consider the issue and even less time to think about the issues. Ask court to consider listing interim contact hearing if pushed for time especially if domestic abuse raised for first time.
b. Research contact centres and other forms of supervision – all are expensive but may be possible for your client.
c. Consider whether there are relatives or friends who can supervise or do collection and delivery and if there are get them to prepare statements and offer undertakings.
d. Prepare your client for CAFCASS interview.
e. Give judge a history of beneficial contact.

9. ***M v F*** **[2020] EWHC 576 (Fam)**[1] concerned an appeal before Mrs Justice Judd DBE in respect of a child arrangements order that had been made and approved by HHJ Tolson QC at a FHDRA.

Mother alleged domestic abuse and at the FHDRA, she argued that in accordance with PD 12J, the matter should be set down for fact finding hearing and in the meantime contact should continue to be supervised.

HHJ Tolson QC considered that the mother's case would have to be investigated and that there should be a fact finding hearing. He directed himself to PD 12J. He said had said: "*In my judgment, it should never be that simply making an allegation of domestic abuse produces automatically a cautious approach to child arrangements. There are grave dangers in that, because the imposition of restricted arrangements upon a child can itself be damaging to the child's welfare and can make a difficult situation even more complicated and harder to resolve in future*". He could not conclude that there was any danger in the daughter spending generous amounts of time with her father based on supervised contact having been tried.

The judge was wrong in being exercised by the fact that the mother had originally been willing to agree unsupervised contact and then subsequently took a restricted stance at the FHDRA:

Judd J summarised the task for the judge in these terms.

‘PD12J requires me to 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. Here I am satisfied that the arrangements are in A's best interests and do not pose a risk for her or her mother which cannot be managed. The father has moved out of the family home and there have been no reported incidents of any sort since October. Safeguarding checks have been completed.’

It would have been better to consider a more gradual introduction to test it out, to see how A felt about it.

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

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;
(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.

11. **R v P (Children: Similar Fact Evidence) [2020] EWCA Civ 1088 18 August 2020**

This was an appeal from a case management decision to exclude evidence in family proceedings. F's application for contact with children aged 5 and 2. The mother opposed contact on the basis that F had subjected her to extreme coercive and controlling behaviour and to sexual abuse, including rape. M wanted to rely on evidence of what she argues is strikingly similar coercive and controlling behaviour by F towards another woman, with whom he began a relationship shortly after her relationship with him ended. It was that evidence that was excluded.

Appeal was allowed.
a. Firstly, the necessary analysis concerning whether the disputed evidence should be admitted was simply not carried out. Moreover, the judge was mistaken about the stance that had been taken by the court previously. The court considered case law as to similar fact evidence from civil, criminal and family jurisdictions.

b. The judge had no doubt the evidence of similar behaviour was relevant and therefore admissible. Additionally, there was no doubt that the evidence should be admitted in the interests of justice.
c. The evidence may be capable of establishing propensity that may be of probative value in relation to the core allegations in this case. Whether propensity is established and whether it will be of probative value will be matters for the trial judge.
'In summary, the court must be satisfied on the basis of proven facts that propensity has been proven, in each case to the civil standard. 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 para 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.

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

The appeal arises from a private law fact-finding hearing dealing with allegations by M of domestic abuse by F, including allegations of the most serious sexual assault. At first instance F was in person.

HHJ Tolson QC (the DFJ for the CFC) stepped in to cross-examine M on F's behalf. At trial M was plainly a vulnerable witness and applied to give evidence using screens.

The judge "took the inexplicable step" of ordering M to give evidence from counsel's row behind a screen rather than the witness box. This decision alone was described as sufficient for the appeal to succeed.

The judge ordered F to give his evidence from counsel's row too, making reference to the "feng shui" of the court room and "balance" between the parties.

The judge did not allow M's counsel to make all the submissions that she wanted to for reasons of time and repeatedly interrupted her.

The judge did not call on F to make closing submissions at all, giving the impression of having prejudged the case.

The appeal court [Russell J] accepted all seven grounds of appeal raised by M and raised additional complaints about the judge.

The judge placed undue weight on the demeanour of the parties; at one point describing M as “neurotic” without medical evidence of the same, and he did not consider the potential impact of abuse on her presentation.
The judge made two findings against M that were not put to her in evidence.

The judge found that M had not been sexually penetrated without consent because she had not physically resisted or attempted to escape and she did not report the matter to the police, albeit she had asked F to stop at the time. The appeal court commented that “this is a senior judge… expressing a view that, in his judgment, it is not only permissible but also acceptable for penetration to continue after the complainant has said no… also that a complainant must and should physically resist penetration.”

The court analysed the criminal law in respect of consent and noted the distinction between freely given consent and unwilling submission to another’s demand.
Finally the appeal court noted that HHJ Tolson QC 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 22 September 2020**
The father appealed an order made on 6 January 2020 in relation to a fact-finding hearing.

The Court of Appeal dealt with a number of authorities in respect of the fallibility of oral evidence such as Gestmin

Kogan v Martin and Others [2019] EWCA Civ 1645, which considered both Gestmin and Blue emphasised the need for a balanced approach to the significance of oral evidence. The Court of Appeal stated that the court must be mindful of the fallibility of memory and the pressures of giving evidence. The Court of Appeal stated that 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 Court of Appeal held the judge had inappropriately placed reliance on an aspect of the mother’s oral evidence as opposed to the contemporaneous written evidence, which had not been referenced.

The Court of Appeal also found that the judge was in error in reaching a conclusion in respect of the father’s alleged motive, which had not been put in cross-

examination. It was held that without careful forensic scrutiny, such a finding amounted to speculation.

The appeal was allowed and the matter remitted for a retrial before a High Court Judge.

**15. Demeanour – Re A continued**

40. I do not seek in any way to undermine the importance of oral evidence in family cases, or the long-held view that judges at first instance have a significant advantage over the judges on appeal in having seen and heard the witnesses give evidence and be subjected to cross-examination (Piglowska v Piglowski [1999] WL 477307, [1999] 2 FLR 763 at 784). As Baker J said in in Gloucestershire CC v RH and others at [42], it is essential that the judge forms a view as to the credibility of each of the witnesses, to which end oral evidence will be of great importance in enabling the court to discover what occurred, and in assessing the reliability of the witness.

41. The court must, however, 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, as was highlighted in Kogan, 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.

42. In the present case, the mother was giving evidence about an incident which had lasted only a few seconds seven years before, in circumstances where her recollection was taking place in the aftermath of unimaginably traumatic events. Those features alone would highlight the need for this critical evidence to be assessed in its proper place, alongside contemporaneous documentary evidence, and any evidence upon which undoubted, or probable, reliance could be placed.

Lieven J in A Local Authority v A Mother [2020] EWHC 1086
‘I agree with Leggatt LJ that demeanour will often not be a good guide to truthfulness. Some people are much better at lying than others and that will be no different whether they do so remotely or in court. 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."

The simple answer is that demeanour is one of a raft of factors that needs to be taken into account and contextualised.

16**. PD12J - In All cases where domestic violence or abuse has occurred.**

32. The court should take steps to obtain (or direct the parties or an Officer of Cafcass or a Welsh family proceedings officer to obtain) information about the facilities available locally (to 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.

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

PD12J para 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

**18. 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 supervised 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.

**19. Forthcoming Court of Appeal Decisions PD12J**

On 19 January 2020 the Court of appeal is going to hear 3 or 4 conjoined appeals arising out of PD12J.

As I understand it one of the matters to be raised is whether PD12J is fit for purpose in cases involving allegations of rape.

I know there are several other appeals that have been lodged in relation to interim contact.

We will produce a bulletin as soon as the judgment is available.

It will be very interesting to the extent to which the Court of Appeal takes into account the views set out within the paper ‘Assessing Risk of Harm in Private Law Children Disputes June 2020’.

**20. Reform.**

**Assessing Risk of Harm in Private Law Children Disputes June 2020**

a. 4 barriers to the family court's ability to respond consistently and effectively to domestic abuse and other serious offences:

- The court's pro-contact culture
- The adversarial system
- Resource limitations affecting all aspects of private law proceedings
- The way the family court works in silo, lacking coordination with other courts and organisations dealing with domestic abuse.

**b.** The basic design principles for private law children's proceedings should be:

- A culture of safety and protection from harm
- An approach which is investigative and problem solving
- Resources which are sufficient and used more productively
- With a more coordinated approach between different parts of the system.

c. A Statement of Practice is proposed to ensure a consistent and ethical approach to cases raising issues of domestic violence and other serious offences

d. A review of the presumption of parental involvement in s.1(2A) of the Children Act 1989 is needed urgently in order to address its detrimental effects.

**e.** Family courts should pilot and deliver a reformed Child Arrangements Programme in private law children cases, that is safety-focussed, trauma aware and takes a problem- solving approach.

f. The Child Arrangements Programme should incorporate a procedure for identifying abusive applications and managing them swiftly to a summary conclusion.

g. The range of options for hearing from children, together with advocacy, representation and support for children be explored more fully as part of the work of elaborating and piloting the reformed Child Arrangements Programme

h. Safety and security at court

i. Communication and coordination

j. Resourcing

k. Review of Domestic Abuse Perpetrator Programmes

l. Training

m. Social Worker Accreditation

n. Monitoring and Oversight

o. Further research

21.' 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.' Executive Summary to the Harm Report.

At a Recent Family Justice Council Talk on the report Lorraine Cavanagh QC one of the panel members set out her views. spoke of the uncomfortable journey for individual Family Justice System professionals from defensiveness to re-education requiring an acceptance that some prior practice may have not been good enough. She spoke openly about tensions at times within the Harm Report panel, not so much on the substance of the report findings but on some of the language and other decisions.

She spoke too of having had to question her own historical practice: Had she really always adequately challenged outdated values of how typical victims behave or present?

She also identified some concrete measures practitioners can adopt now to improve practice on the ground without waiting for the outcome of longer term reform steps.

a. ***Vulnerable witness measures*** – Ground rules hearings for vulnerable witnesses are mandatory (Practice Direction 3AA). We under-use those provisions of the vulnerable witness scheme for domestic abuse victims. We as advocates and judges can address that. There is no need wait. We can and should ensure they apply to victims of alleged domestic abuse and sexual crimes too.

***b. Using publicly available specialist domestic abuse and sexual offences resources*** – We can start making proper use of existing publicly available resources on domestic abuse, trauma and sexual offences alongside Practice Direction 12J. Such as those on consent to sexual relations. Cavanagh referenced Ms Justice Russell in Re H v F [2020] EWHC 86 (Fam) [*Legal Discussion: serious sexual assault in family proceedings para 46 onwards.] [See also The Transparency Project here and here]*. Cavanagh also referenced Blackstones criminal practice and sentencing guidelines. We can start referring judges to Blackstones and the rape section on the CPS public website she suggested – or not take cases where rape is alleged.

c. ***Scott Schedules*** – Reducing the incidence of abusive events means, in truth, a reductive approach to a complex narrative said Cavanagh. Where someone has given all that time to tell the story, to reduce that to a forensically useful tool just isn't serving to get to the truth. Not one professional at the round table thought scott schedules were a productive tool to get to the truth of the matter. See also R v P (Children: Similar Fact Evidence) [2020] EWCA Civ 1088 (18 August 2020) (See Para 22).

22. **Vulnerability – A Reminder.**

Rarely addressed in private law proceedings.

Part 3A of the Family Procedure Rules 2010 and Practice Direction 3AA.

a. Set 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. Set out ways to assist parties and witnesses in family proceedings where the quality of their evidence is likely to be diminished by reason of their vulnerability.

The Practice Direction makes it plain that it is the duty of the court and all parties to the proceedings to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings.

Rules 3A.4 and 3A.5 place a duty on the court to consider whether a party's participation in the proceedings or the quality of their evidence is likely to be diminished by reason of vulnerability and, if so whether it is necessary to make one or more participation directions.

Before making a participation direction, the court must consider any views expressed by the party or the witness about giving evidence.

Rule 3A.7 sets out what factors the court must have regard to when deciding whether to make one or more participation directions.

Further guidance on vulnerability is given at paragraph 3.1 of the Practice Direction. The court should also consider the ability of the party or witness to: (a) understand the proceedings and their role in them, (b) put their views to the court, (c) instruct their representative before, during and after the hearing, and (d) to attend the hearing without significant distress.

Paragraph 2.1 of the Practice Direction gives helpful guidance in respect of concerns arising in relation to 'abuse', and these are to include any of the following:

- domestic abuse (within the meaning given in Practice Direction 12J)
- sexual abuse
- physical and emotional abuse
- racial and/or cultural abuse or discrimination
- forced marriage or so called 'honour based violence'
- female genital or other physical mutilation

- abuse or  discrimination based on gender or sexual orientation
- human trafficking

Once a court decides that a vulnerable party, vulnerable witness or protected party should give evidence then there must be a ‘ground rules hearing’ prior to any hearing at which evidence is to be heard. This need not be a separate hearing to any other hearing in the case but at the ground rules hearing the court will make any necessary participation directions.

Pertinent matters to which the court must consider at such a hearing are fully set out at paragraph 5 of the Practice Direction.

23. **Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings 2020**

This is guidance introduced by the President in 2020 which gives a checklist of matters to be considered before arranging remote or hybrid hearings.
The guidance contains a useful round up of the matters to be considered when planning hearings and contains a checklist of factors to be considered when domestic abuse is an issue.
• In what environment will the victim be appearing?
• In what environment will the victim be preparing themselves for and dealing with the aftermath of the hearing?
• What will be visible to the court and any other participant in the proceedings? What will be visible to the victim?
• What kind of environment and level of visibility is necessary in order to ensure physical and emotional safety for the victim and any children involved?
• What kind of environment and level of visibility is necessary to enable the victim to give their best evidence?
• What kind of environment is necessary to enable the victim to prepare themselves mentally and emotionally for the hearing and to cope after the hearing?
• 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**
One of the recommendations of The Assessing Risk of Harm Report is that victims of domestic abuse are ill-served by the current application of section 91.14.

The plain wording of the subsection seems to envisage a flexible tool that could be utilized by a trial judge at the conclusion of a hearing.
(14)On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) 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 is a reminder as to what are now considered the fundamental requirements on making a section 91(14) Children Act order.
The parties were involved in protracted proceedings regarding their two children which had been ongoing for five years. A directions hearing took place and the father did not attend, but did file a position statement. The Judge heard evidence from the Guardian and the mother and indicated after hearing the evidence that he was minded to make a s. 91(14) order against both parents and proceeded to make such an order for two years.
The father applied to vary the order but the application was dismissed. On father's appeal the Court of Appeal emphasised the very clear guidance in Re P [1999] EWCA Civ 1323 and comments of Tomlinson LJ in Re T (A child)(Suspension of contact) [2015] EWCA Civ 719 as follows:
(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; this may of course mean adjourning the application for it to be made in writing and on notice. 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 part 2**
The correct procedure for considering an application for permission to apply for a barred order while a section 91(14) order is in effect was set out by the Court of Appeal in Re S (Permission to Seek Relief) [2006] EWCA Civ 1190:
• the court has a degree of flexibility on the question of whether or not the other parent needs to be served with an application for permission to apply. In the first instance, and where the circumstances are sensitive (such as where the stress of the previous litigation had destabilised the family), the court should not serve the other party until it has decided whether or not this is necessary

• a judge, when making a section 91(14) order, may direct that any application for permission to apply during its currency shall not, in the first instance, be served on the respondent but should be considered on the papers
• if a judge refuses such permission on the papers the applicant should then be afforded an oral hearing if he/she is dissatisfied with a paper refusal
• if a judge hearing an application on paper considers that there is an arguable case, the matter should be listed for an inter partes hearing.

The test to be applied on an application for permission was considered by Cobb J in Re P & N (s 91(14): application for permission to apply: appeal) [2019] EWHC 421 (Fam). After lengthy proceedings concerning the father's contact with two children, and adverse findings against the father, a section 91(14) order was made preventing the father from making further section 8 applications for three years. The father applied for permission to apply for a 'spend time with' order.
HHJ Plunkett heard the father's application without notice to the mother or the children's solicitor and granted it.
The mother appealed against the grant of permission. Cobb J allowed the mother's appeal and determined the correct procedure for permission applications:
• the 'welfare test' does not apply to a permission application, though the welfare of the child is a 'relevant consideration'
• the court should have regard to the overriding objective in Rule 1 FPR 2010, particularly 'to deal with applications "justly", "fairly", "ensuring that the parties are on an equal footing" and "saving expense"'
• the application should be considered 'in the first instance' on the papers or at an oral hearing without notice to the respondent, particularly if there are concerns about the effect on a respondent of learning of a fresh application
• an applicant should not be denied an oral hearing
• if the application is without merit, it can be dismissed at that stage
• if the application demonstrates an arguable case, the court should list the application for an 'on notice' hearing to allow the respondent to make representations.

**26. Re B (A Child) (Unnecessary Private Law Applications) [2020] EWFC B44 25 September 2020.** The judge had dealt with an appeal relating to disclosure of mother's medical records.
This judgment was released by HHJ Wildblood QC to highlight the issue of court listings being filled by interim private law hearings that should not require court involvement.

HHJ Wildblood QC said this amounted to an inappropriate use of limited court resources, pursuant to Rule 1.2 (e) of The Family Procedure Rules 2010 HHJ Wildblood QC felt confident that they had the backing of all local judges and magistrates in providing the following message; “this type of litigation should only come before a court where it is genuinely necessary.

The judge stressed that judges have an unprecedented amount of work to deal with and cited examples of “micro-management” that had appeared before them such as; the junction of the M4 for handovers; which parent should hold the children’s passports in a case where there was no suggestion of detaining the children outside the jurisdiction; and how contact should be arranged on a Sunday.
The judge reiterated that private law litigation should not be brought to court unless genuinely necessary. The judge warned that if unnecessary cases are brought to court, there will be criticisms and possible sanctions.

**27. <u>FF v BM [2020] EWFC) B6</u>**
At the final hearing F sought a Child Arrangements Order to define his contact with his children. The Lay Justices determined that the youngest Child (C) and his older siblings should have indirect contact with F, the frequency of which was not specified.

F appealed late. Judge analysed late appeal with reference to Denton principles on relief from sanctions in civil cases and FPR 4.6 but allowed late appeal mainly on grounds of merits of the appeal.

F did not appeal in respect of the older two children, having regard to their expressed wishes and feelings. Accordingly, F’s appeal related only to C.

HHJ Middleton- Roy said a “… decision of this kind calls for the evaluation and balancing up of factors relevant to the child's welfare….only where…[the Lay Justices]… conclusion is shown to be wrong because evidence has been ignored or misunderstood, or evaluated and weighed up so inadequately that the conclusion is perverse, will this Court interfere.”

The appeal was allowed.
a. Justices had misunderstood F’s immigration status and the Justices' conclusions that the child, if permitted to have direct contact with a father who was then deported would suffer, "abandonment and emotional distress which could trigger mental

health issues if the contact suddenly ceased," is not a finding that was open to the Justices to make on the evidence then before the Court.
b. Whilst the Justices reasons set out each of the factors required in the statutory checklist provided by section 1(3) Children Act 1989, scant consideration was given to each of those factors.
c. The decision of the Justices not to allow oral evidence from the parties, hearing only the oral evidence from Cafcass, was procedurally irregular and compounded the problem.
d. Like any judgment, the reasons provided by the Justices must be read as a whole and having regard to their context and structure. 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)**

Transfer of residence of a 9 year old to father's care after mother failed to adequately disengage from the cult of Universal Medicine.

Father appealed first instance decision made by circuit judge.by which he refused to order a transfer of the care of the child to the applicant father. The Court of Appeal allowed the appeal and remitted the case to High Court.

Universal Medicine Universal Medicine is a belief wherein adherents are said to lose the capacity to question or scrutinise what they are taught; anyone who leaves is warned of curses they will suffer and told they will lose all access to healing and salvation.

The mother represented herself during the hearing, her direct access barrister (Ms Baker) was unwell, and the judge refused an adjournment applied for by the mother. The judge allowed further time for the mother during the hearing and Ms Baker submitted written submissions which supplemented the oral closing submissions the mother had made.

The child was not separately represented as an ISW, Helena Ware, had been appointed and therefore the Court of Appeal considered a 16.4 Guardian was not necessary.

The judge found that the mother had disassociated from individuals involved in UM, but not the beliefs or practices and did not accept the criticism of the organization.

The judge found the mother's motivation to leave UM was the potential loss of her child, rather than any realization of the harmful consequences of UM. Her disassociation was superficial and this caused concern over what may happen once proceedings were concluded.

The judge concluded that 'I am therefore satisfied that the distress that the child will feel as a result of the separation from her mother and from a period of no contact will be short-term and will not have medium to long-term consequences of a magnitude which in any way approaches the magnitude of the consequences of leaving her in the current position.'

The judge stated he would write the child a short letter to be delivered by the father, which he may be able to fall back on in the event of difficulties with the child and her acceptance of the situation.

<u>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.</u>
'The welfare of the child is the paramount consideration. I bear in mind the welfare checklist, the presumption of parental involvement contained in section 1(2A), that an order which transfers the primary care of a child and restricts their relationship, and thus which significantly interferes with the relationship between the child and a parent, should only be made where it is necessary and proportionate. Whilst a significant order, as the Court of Appeal emphasised, a transfer of primary care is not limited to cases of last resort. 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 HHJ Wildbllod QC set out practice points for parental alienations cases.**

a. It is essential to identify alienation as a key issue early in proceedings.
b. Avoiding delay should be a priority.
c. A full hearing on evidence to determine underlying and important allegations of fact should be undertaken early.
d. The use of indirect contact in a case where there is parental alienation has obvious limitations in some cases.
e. A vast number of professionals can cause problems for the family, and especially children.
f. If there are multiple professionals in a case, ensure they are working collaboratively at all times.
g. Early intervention is essential for effective psychotherapeutic support to be put in place, or other intervention.
h. Responding simply on the basis of what children say in this type of situation is often "*manifestly superficial and naïve.*"
i. Joinder of children should not be delayed where it is necessary.

**30. M v H (Private Law: Vaccination) [2020] EWFC 93 (15 December 2020)**

This was litigation about whether children should have the MMR vaccination where the issue of covid vaccination was rather tagged on.

The father supported vaccination and the mother opposed. Mother's '6 years of research' that she referred to in her statements 'comprised a newspaper article, a document that purported to be the factsheet from an MMR vaccine, a flyer entitled "The Babies Aborted for Vaccines", a list of papers which, and doctors who maintain that there is a link between the MMR vaccine and autism, a list entitled "Historical Data on Vaccines and Outbreaks" and, as I have mentioned, material from an American paediatrician called Larry Palevsky, who the mother described as "world renowned" but who also appears, from the information contained in the mother's evidence and the online material she invited me to consider, to be a very vocal advocate against vaccination engaged in advancing a very specific anti-vaccine agenda.'

The court made a specific issue order for vaccination of the children.
'It is now clearly established on the basis of credible, peer reviewed scientific evidence that it is generally in the best interests of otherwise healthy children to be vaccinated with those vaccines recommended for children by Public Health England and set out in the routine immunisation schedule which is found in the Green Book

published in 2013 and updated as necessary since. It is equally well established that the benefit in vaccinating a child in accordance with Public Health England guidance can be taken to outweigh the long-recognised and identified side effects. The mother has placed no evidence before the court to gainsay these conclusions in respect of P and T, either by way of a medical contra-indication specific to either child or new, credible evidence regarding the safety and efficacy of the vaccines set out in the NHS schedule of vaccinations. I am satisfied on the evidence before the court that there are no other welfare considerations that are contra-indicative to P and T to receiving those vaccinations having regard to s. 1(3) of the Children Act 1989.'

The judge referenced the Court of Appeal guidance commenting.
'Finally, whilst the Court of Appeal did not reach a definitive conclusion on the question of whether, in private law proceedings, the question of vaccination should or should not continue to require court adjudication where there is a dispute between holders of parental responsibility, the observations of the Court of Appeal in in Re H (A Child: Parental Responsibility: Vaccination) summarised at paragraph [40] of this judgment, whilst strictly obiter, make 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.'

<u>The judge reserved any decisions as to Covid 19 vaccination giving a heavy hint.</u>
'I wish to make abundantly clear to anyone reading this judgment that my decision to defer reaching a conclusion regarding the administration to the children of the vaccine against the coronavirus that causes COVID-19 does not signal any doubt on the part of this court regarding the probity or efficacy of that vaccine. Rather, it reflects the fact that, given the very early stage reached with respect to the COVID-19 vaccination programme, it remains unclear at present whether and when children will receive the vaccination, which vaccine or vaccines they will receive in circumstances where a number of vaccines are likely to be approved and what the official guidance will be regarding the administration of the COVID-19 vaccine to children. <u>As I make clear at the conclusion of this judgment, having regard to the principles that I reiterate below it is very difficult to foresee a situation in which a vaccination against COVID-19 approved for use in children would not be endorsed by the court as being in a child's best interests</u>, absent peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one or more of the COVID-19 vaccines or a well evidenced contraindication specific to that

subject child. However, given a degree of uncertainty that remains as to the precise position of children with respect to one or more of the COVID-19 vaccines consequent upon the dispute in this case having arisen at a point very early in the COVID-19 vaccination programme, I am satisfied it would be premature to determine the dispute that has arisen in this case regarding that vaccine.'

**31. Travel Abroad**

**Father v Mother [2020] EWHC 1929 (Fam) 03 July 2020**

This was an application by the father (F) under the inherent jurisdiction for the summary return of two girls A (aged 14) and D (aged 11) to Dubai.

In March 2020, M and the girls went on an agreed holiday to Switzerland. However, in the light of Covid-19, M decided to go to England instead. She emailed F on 19 March saying that they were coming to England. M then sold her car and told her employer she was not returning to Dubai on 19 March. On 21 March, M emailed F saying that she and the girls had decided to stay in England and bring forward their places at K College (a school) with immediate effect. F was furious and initiated proceedings in the High Court in England for the return of A and D.

After correspondence between the parties, at lunchtime of the first day of the hearing, F changed his position and was no longer pursuing summary return.

Issue was whether F could take the children to Dubai given it is not a signatory to Hague Convention.

Held – The Judge (J) had no doubt that it is in the girls' best interests for them to remain in England and to have a close relationship with F, including being able to see F in as natural and unforced a situation as possible. This meant the girls should be able to see F in Europe and possibly, in the future, Dubai and South Africa.

Applying the tests in Re A, J's view was that there is a risk, albeit a relatively small one, that the F would seek to retain the girls in Dubai. J 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.

J said 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 to England, would be a sufficient safeguard in this case. J accepted that there is a 70% chance of such an agreement

being upheld by the Dubai courts but concluded that there were no factors which might lead the Dubai court to not uphold the agreement in this case. Thus, in J's judgement, the agreement would sufficiently mitigate the risk that F may seek to retain the children in Dubai.

The court is being besieged by travel abroad applications each school holiday period.

32. **Relocation.**

Williams J has been leading the way in providing a welfare based test in Re C (a Child) [2019] EWHC 131 Fam. Even he accepts the Payne criteria are not dead and in ***Re K (A Child)*** **[2020] EWHC 488 (Fam)**, he has set out what he refers to as the 'F, K, C, Payne composite'.

i. *The ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding.*
ii. *Physical, emotional and educational needs.*
iii. *The likely effect on the child of any change in their circumstances. Within this some specific questions might be what changes to housing, schooling and relationships are likely if they remain in England? How realistic is the plan in the sense of how likely is it to be implemented as conceived? Will there be positive effects in respect of the removing parent's ability to provide care for them if they move abroad? What are the other positives and negatives about country X in terms of environment, education, links with family? What will be the impact on the child of moving permanently to another country in respect of their relationship with the left behind parent and other extended family? To what extent may that be offset by on-going contact and extension to other relationships in the new country?*
iv. *The child's age, sex, background and any characteristics of his which the court considers relevant.*
v. *Any harm which he has suffered or is at risk of suffering. There is obviously a significant overlap here with the effects of change and so within this, what may be the impact on the child of the change of their relationship with the left behind parent? How secure is that relationship now and how likely is it to endure and thrive if the child moves? How realistic are the proposals for maintaining contact? What will be the impact on the removing party of having to remain in England, contrary to their wishes?*

*What will be the consequent impact on the child? What will be the impact on the left behind parent of the child moving? Will the ability of either parent to provide care for the child be adversely affected by the refusal or grant of the application and if so to what extent? To what extent will loss of contact with the left behind family be made up for by extension of contact with the family in the new country.*

vi. *The capability of the parents, how capable each of them are and any other person in relation to whom the court considers the question to be relevant is of meeting the child's needs. How are the parents currently meeting their needs? Are there any aspects of their ability which may be particularly important in the context of a relocation, for instance their capability of meeting the emotional need of the child for a relationship with the left behind parent? Is the application to relocate wholly or in part motivated by a desire to exclude or limit the left behind parent's role? Is the left behind parent's opposition to the move genuine, or is it motivated by some desire to control, or some other malign motive? Will the parent be better able to care for the child in the new country than in England? What role can the left behind parent play in the future?*

vii. *The range of powers available to the court under this Act. Can conditions of contact be imposed in terms of provision of funds, or frequency of visits? Can court orders be made in the other country, either mirror orders or orders which will allow reciprocal enforcement?*

33. **Lockdown Issues – Remote Hearings**

The summary of the factors to be applied is in Lancashire County Council v M (Covid-19 Adjournment Application) 2020 EWFC 43 is worth keeping to hand. McDonald J consolidated the guidance and relevant caselaw and set out the following factors to be applied when consider whether a remote hearing can be held fairly. It is a long list and the cynic in me thinks the factors could be applied to support whichever decision a judge wanted to arrive at.

i) The welfare of the subject child or children;

ii) The statutory duty to have regard to the general principle that delay in determining the question is likely to prejudice the welfare of the child;

iii) The requirement to deal with cases justly, having regard to the welfare issues involved;

iv) The extent to which a remote or hybrid hearing will provide the judge with a proper basis upon which to make a full judgment;

v) The steps that can be taken to reduce the potential for unfairness by enabling the cases to proceed fairly when previously it may have been adjourned, having regard in particular to the need to make every effort to accommodate and enhance the ability of lay parties to engage fully in the remote or hybrid process, including the extent to which it is possible to arrange for a lay party to engage with that process from a location other than their home where they can be supported by at least one member of their legal team and, where appropriate, any interpreter or intermediary;

vi) The impact of the COVID-19 pandemic on the likely timescales for a fully face to face hearing in preference to a remote or hybrid hearing and the need to evaluate any potential unfairness against that timescale;

vii) The statutory requirement that all public law children cases are to be completed within 26 weeks and that any extension to the 26 week timetable must be necessary to enable the court to resolve the proceedings justly;

viii) The requirement, so far as is practicable, to allot to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases, evaluated in the context of the limitations placed by the COVID-19 pandemic on the resources currently available to give effect to fully face to face hearings; and

ix) The individual circumstances of the particular case and the parties, including but not limited to:

a) Whether the parties consent to or oppose a remote or hybrid hearing;

b) The importance and nature of the issue to be determined bearing in mind that parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be limited to that which it is necessary for the court to hear;

c) Whether there is a special need for urgency, or whether the decision

could await a later hearing without causing significant disadvantage to the child or the other parties;

d) Whether the parties are legally represented;

e) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully, including access to and familiarity with the necessary technology, funding, intelligence/personality issues, language, ability to instruct their lawyers (both before and during the hearing) and other matters;

f) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;

g) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;

h) The scope and scale of the proposed hearing;

i) The available technology. A telephone hearing is likely to be a less effective medium than using video;

j) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;

k) Any 'Covid-safe' alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge;

l) Any other factors idiosyncratic to the particular case.

Whilst acknowledging that decisions will be fact specific and will fall to be determined having regard to these, and possibly other factors, MacDonald J notes that it is clear the 'signposts' set out in The Road Ahead that adjourning cases indefinitely or for a period of many months will not be a viable option and that adjourning the case to await a fully face-to-face hearing is unlikely to be a proper course when an effective and fair

remote or hybrid hearing can be held with steps taken to maximise the fairness of that remote or hybrid process.

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

A District Judge (DJ Wylie) had conducted a finding of fact hearing (the mother had made allegations of violent behaviour against the father, the Court heard the evidence and made 2 findings and the other two allegations were not made out.

The father, however, made an application for a re-hearing. DJ Wylie recused herself from the hearing and it went before His Honour Judge Duggan

All that the mother and father knew of DJ Wylie's situation was that she had recused herself for personal family reasons.
HHJ Duggan decided that there was no suggestion of actual bias, but that an independent observer would consider that if a Judge couldn't hear part 2 of a case for some personal conflict, then what they had done at part 1 might also be under doubt, and that thus the finding of fact hearing should be re-heard before another Judge.
The mother appealed, and the case went before Jackson LJ.
In the meantime, the mother's lawyers wrote to the Court asking

1. What was the 'family connection'?
2. At the finding of fact hearing in February 2020, had the Judge been aware of it?
3. If so, why wasn't it raised with the parties?

The Court replied, though very late in the day.

1. The Judge's son, and the mother, are members of the same hockey club. On social media, the Judge's son and the mother follow one another.
2. The Judge had not realised this until June 2020, well after the finding of fact hearing
3. if the Judge had realised, she would have raised it with the parties.

The Court of Appeal said this:-
In my view, once the District Judge decided to decline to hear the case on the basis of recusal, she should have ensured that the parties were formally notified of her reason for withdrawing from the case.

It is understandable that the Judge was troubled by this odd position and clear that he was acting with the best of intentions. At the same time, it was necessary for him to approach the matter systematically.
Procedural steps could have been taken to achieve this, but the issue was not addressed.
The decision to set aside all of the findings on the basis of apparent bias on the part of the District Judge was both wrong and unfair:
(1) The Judge was not in a position to take a decision about apparent bias: the decision calls for an informed observer, which supposes knowledge of the basic facts. He should have put himself in a position to inform the parties about the District Judge's reasons for wishing to recuse herself so that they were in a position to respond. He instead referred only to the existence of a family connection, which they were in no position to assess. Consequently, they were not only unable to put their case about the District Judge's withdrawal but, more seriously, they had no meaningful way of addressing the new and radical proposal to set aside her findings altogether. This process was not fair to either party.
(2) As to the legal test for apparent bias, the Judge was right to say that one must put oneself in the position of a reasonable observer who is not involved in the case. However, he was mistaken in stating that the test is whether the observer would be concerned that justice had not been seen to be done, when the correct question is whether the observer would conclude that there was a real possibility that the judge was biased, which is a stronger thing
(3) Finally, the Judge's conclusion that the District Judge's findings were infected by apparent bias is not supported by any sound reasoning. 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. In this case the matter was put beyond argument by the fact that the District Judge did not discover that her son and the mother knew each other until months after she had made her decision.
HHJ Duggan's decision was therefore overturned, and the findings made by DJ Wylie restored, father's application to reopen them being refused.

**35. Committal - Andreewitch v Moutreuil [2020] EWCA 382 11 March 2020**
Financial remedies case.

M applied for A's committal for contempt of court. A appeared at the hearing without representation. The judge carefully explained his right to representation and to legal aid. He said he waived his right to representation and that he preferred to continue the hearing rather than adjourn. He swore in as evidence a position statement he

had prepared, on the invitation of M's barrister, and gave evidence for over two hours. The judge made the order requested by M and criticised A's explanations and credibility.

A, acting in person, appealed on seven grounds. The only one pursued at the Court of Appeal was that the judge should have explained to A that in committal proceedings he was not obliged to give evidence at all. He was given no such warning.

The Court of Appeal summarised the law on contempt and the very high level of protection afforded to the respondent, given that they are effectively the defendant in quasi-criminal proceedings.

The Court considered that it had to strike a balance between the "special safeguards that exist for the benefit of the respondent" on the one hand and fairness and "the public interest in the maintenance of the authority of the court" on the other.

In this case Peter Jackson LJ decided that the failure to inform A of his right to silent constituted a procedural defect. A reference to A's right to silence in M's counsel's note was insufficient to remedy the defect. The defect was held to be more than a mere 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 and endorsed the recommendation that the court should consider it before dealing with a committal application. The list is extensive and deals with matters such as the clarity of the contempt alleged, provision of necessary documents, opportunity to access legal advice, the right to remain silent and the right not to self-incriminate, the standard of proof and the wording of any committal order. Importantly the court reminded legal representatives of their duty to bring these safeguards to the court's attention.

**36. Committal or Enforcement**
**The right answer in my opinion is always enforcement.**
**CH v CT [2018] EWHC 1310 (Fam). Baker J. Part one.**
**Applications to enforce.**

17. A child arrangements order under s.8 of the Children Act 1989 can, in certain circumstances, be enforced by an application to commit the defaulting party to prison

for contempt of court. It is generally recognised, however, that committal proceedings are usually inappropriate as a method of enforcing a child arrangements order. For that reason, the Children and Adoption Act 2006 introduced a new procedure for enforcing such orders by making an "enforcement order" requiring the defaulting party to do unpaid work. The relevant provisions, found in s.11J of the Children Act 1989 as amended by the 2006 Act, provide *inter alia* as follows:

> "(1) This section applies if a child arrangements order with respect to a child has been made.
>
> (2) If the court is satisfied beyond reasonable doubt that a person has failed to comply with a provision of the child arrangements order, it may make an order (an "enforcement order") imposing on the person an unpaid work requirement.
>
> (3) But the court may not make an enforcement order if it is satisfied that the person had a reasonable excuse for failing to comply with the provision.
>
> (4) The burden of proof as to the matter mentioned in subsection (3) lies on the person claiming to have had a reasonable excuse, and the standard of proof is the balance of probabilities."

There are further provisions governing the making of enforcement orders in the remaining subsections of s.11J, and also in ss.11K. 11L, 11M and 11N. Importantly, under s.11K, a court may not make an enforcement order unless the person said to be in breach of the child arrangements order had been given a warning notice under s.11I. That latter section provides:

> “Where the court makes (or varies) a child arrangements order, it is to attach to the child arrangements order (or the order varying the child arrangements order) a notice warning of the consequences of failing to comply with the child arrangements order.”

**37. CH v CT part 2 – Committal.**

18. The rules governing applications and proceedings in relation to contempt of court in family proceedings are set out in Part 37 of the Family Procedure Rules 2010, which was introduced into the rules by an amendment in 2014. Rules 37.4(1), 37.9 and 37.10 are particularly relevant to this appeal. They provide as follows:

> "37.4(1) If a person -
>
> (a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or

(b) disobeys a judgment or order not to do an act,

then, subject to the Debtors Acts 1869 and 1878 and to the provisions of these Rules, the judgment or order may be enforced under the court's powers by an order for committal.

….

37.9(1) Subject to paragraph (2), a judgment or order to do or not do an act may not be enforced under rule 37.4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Chapter, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.

(2) The following may be enforced under rule 37.4 notwithstanding that the judgment or order does not contain the warning described in paragraph (1) -

(a) an undertaking to do or not do an act which is contained in a judgment or order; and

(b) an incoming protection measure.

(3) In the case of -

(a) a section 8 order (within the meaning of section 8(2) of the Children Act 1989);

(b) an order under section 14A, 14B(2)(b), 14C(3)(b) or 14D of the Children Act 1989 enforceable by committal order;

(c) an order prohibiting contact with a child under section 51A(2)(b) of the [Adoption and Children Act 2002]

the court may, on the application of the person entitled to enforce the order, direct that the court officer issue a copy of the order, endorsed with or incorporating a notice as to the consequences of disobedience, for service in accordance with this rule, and no copy of the order shall be issued with any such notice endorsed or incorporated save in accordance with such a direction.

37.10 (1) A committal application is made by an application notice using the Part 18 procedure in the proceedings in which the judgment or order was made or the undertaking was given.

(2) Where the committal application is made against a person who is not an

existing party to the proceedings, it is made against that person by an application notice using the Part 18 procedure.

(3) The application notice must –

(a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and

(b) be supported by one or more affidavits containing all the evidence relied upon.

(4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.

(5) The court may –

(a) dispense with service under paragraph (4) if it considers it just to do so; or

(b) make an order in respect of service by an alternative method or at an alternative place."

19. FPR Part 37 is supplemented by Practice Direction 37A, the following provisions of which are relevant to this case.

20. Paragraph 1 of the Practice Direction provides:

"1.1 A judgement or order which restrains a party from doing an act or requires an act to be done must, if disobedience is to be dealt with by proceedings for contempt of court, have a penal notice endorsed on it as follows (or in words to substantially the same effect) –

"If you the within-named [*insert name*] 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.".

1.2 Where an order referred to in rule 37.9(3)(a) or (b) is to be endorsed with or have incorporated in it a penal notice in accordance with rule 37.9(3), the notice must be in the words set out in paragraph 1.1 of the Practice Direction, or words to substantially the same effect."

21. Paragraph 10.2 provides *inter alia*:

"If … the committal application is commenced by the filing of an application notice … (4) the application notice must contain a prominent notice stating the possible consequences of the court making a committal order and the respondent not attending the hearing. A form of notice which may be used is annexed to this Practice Direction."

The annex to paragraph 10.2(4), headed "Form of penal notice to be included on committal applications", states:

> "IMPORTANT NOTICE
>
> The Court has power to send you to prison, to find you or seize your assets if it finds that any of the allegations made against you are true and amount to a contempt of court. **You must attend court** on the date shown on the front of this form. It is in your own interest to do so. You should bring with you any witnesses and documents which you think will help you put your side of the case. If you consider the allegations are not true you must tell the court why. If it is established that they are true, you must tell the court of any good reason why they do not amount to a contempt of court, or, if they do, why you should not be punished. If you need advice, you should show this document at once to your solicitor or go to a Citizens' Advice Bureau or similar organisation."

22. Paragraph 12.5 provides *inter alia*:

> "The court will also have regard to the need for the respondent to be -
>
> (1) allowed a reasonable time for responding to the committal application including, if necessary, preparing a defence;
>
> (2) made aware of the possible availability of criminal legal aid and how to contact the Legal Aid Agency;
>
> (3) given the opportunity, if unrepresented, to obtain legal advice …."

23. Under paragraph 13.2:

> "The court may waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect."

**38. CH v CT Part 3 - Warning Notices**

30. There is another matter which I raised with the parties in the course of the hearing, namely whether the order of 21 July 2017 was one which was capable of being enforced by committal at all. As set out above, an order can only be enforced by committal if endorsed with a penal notice that complies with FPR rule 37.9(1) and paragraphs 1.1 and 1.2 of Practice Direction 37A. The notice contained in the various iterations of the order of 21 July 2017 did not comply with those provisions. 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. Instead, it stated (in bold typeface) that "if you do not do what the child arrangements order says you may be sent to prison and/or fined,

made to do unpaid work or pay financial compensation". The sealed version of the order subsequently served also included those words on the front of the order on the front of the order but in ordinary font as opposed to bold typeface. The sealed order did contain a notice that.stated "if you do not comply with the provisions of this order you may be held in contempt of court and be committed to prison or fined", but that notice was on the second page of the order, not on the front.

31. Plainly what has happened here is that the warning notice under s.11I of the 1989 Act has been conflated with the penal notice under FPR Part 37.

32. 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. The notice must contain the words as set out in paragraph 1.1 of the Practice Direction or words to substantially the same effect. It must be prominently displayed. It must be on the front of the order.

33. In addition, it is important to note the effect of rule 37.9(3)(a). A penal notice under rule 37.9 must not be endorsed on an order under s.8 of the 1989 Act, including a child arrangements order, unless the court, on the application of the person entitled to enforce the order, has expressly directed that it be endorsed. This contrasts with the warning notice under s.11I of the 1989 Act as amended which must be attached to every child arrangements order. In ***Re A (A Child)*** **[2013] EWCA 1104** at paragraph 13, McFarlane LJ observed that the purpose of s.11I:

> "seems plain; it is to alert the parties to the fact that all contact orders are potentially enforceable against those who may act in breach of them and, secondly, to remove judicial discretion as to whether to attach, or not attached, a penal notice to any particular order."

But, as noted above, Part 37 was inserted into the rules in 2014, after the decision in *Re A.* Its provisions closely follow the equivalent provisions in CPR Part 81. Thus, FPR 37.9(1) and (2) are in virtually identical terms to CPR 81.9(1) and (2). There is, however, no parallel provision in CPR Part 81 to FPR 37.9(3). In my judgement, the provision in FPR 37.9(3)(a) that, in the case of a s.8 order, the court <u>may</u> (my emphasis) direct that the order be endorsed with a penal notice, and that without such a direction no copy of the order shall be so endorsed, is aimed at countering the observation that the purpose and effect of s.11I was to remove judicial discretion as to whether or not a penal notice should be attached.

34. In my judgement, a warning notice under s.11I is different from a penal notice under FPR rule 37.9. All child arrangements orders must contain a warning notice

under s.11I. In addition, however, a child arrangements order may be endorsed with a penal notice, if expressly directed by the court. Any penal notice so directed must comply with the provisions of rule 37.9(1) and PD37A paragraph 1.1.

35. I have drawn the above observations to the attention of the group of judges who have been asked by the President of the Family Division to draft standard form orders in children's cases (Mostyn J, HH Judge Dancey, HH Judge Hess and Mr Edward Devereux QC).

36. So far as this case is concerned, I conclude that the order of 21 July 2017 was not one capable of being enforced by an order for committal under FPR rule 37.4 because it did not contain a penal notice in terms that complied with FPR rule 37.9(1).

**39. Warning Notice for Child Arrangement Orders.**
**1. Enforcement Warning.**

Do not assume the court will include this on the order.

**This order includes a child arrangements order (the part of the order setting out living arrangements for a child and about time to be spent or contact with another person). If you do not do what the child arrangements order says you may be made to do unpaid work or pay financial compensation. You may also be held to be in contempt of court and imprisoned or fined, or your assets may be seized.**

It also contains a penal notice but you may want to on a belt and braces approach add a penal notice 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.

Francis Cassidy
42 Bedford Row
12 January 2020