PUMP COURT

CHAMBERS

PRIVATE LAW UPDATE

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DOMESTIC ABUSE – STARTING POINT

FPR 2010 - PRACTICE DIRECTION 12J – 'Child arrangements & Contact Orders: Domestic Abuse and Harm'

- Must be applied in any case where DA features. Clear from authorities that failure to do is likely to ground a successful appeal.
- Provides important guidance, essential to be familiar with its terms
- Applies to any family proceedings, 'in which an application is made for a child arrangements order, or in which any question arises about where a child should live, or about contact between a child and a parent or other family member, where the court considers that an order should be made.' [para 1]
- Purpose of PD is to set out what the court, '…is required to do in any 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 risk of such abuse' [para 2]

FPR 2010 - PRACTICE DIRECTION 12J – 'Child arrangements & Contact Orders: Domestic Abuse and Harm' [ctd]

- 'Domestic abuse is harmful to children, and/or puts children at risk of harm, including where they are victims of domestic abuse for example by witnessing one of their parents being violent or abusive to the other parent, or living in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with and being victims of domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents. [para 4]
- In its judgment or reasons the court should **always make clear how its findings on the issue of domestic abuse have influenced its decision on the issue of arrangements for the child**. In particular, where the court has found domestic abuse proved but nonetheless makes an order which results in the child having future contact with the perpetrator of domestic abuse, **the court must always explain, whether by way of reference to the welfare check-list, the factors in paragraphs 36 and 37 or otherwise, why it takes the view that the order which it has made will not expose the child to the risk of harm and is beneficial for the child**. [Para 40]

Statutory Definition of Domestic Abuse

- Domestic Abuse Act 2021 introduced a statutory definition of domestic abuse which came into force on 1st October 2021. **PD 12J has been updated to include the new definition**
- 'S1(2) Behaviour of a person ("A") towards another person ("B") is "domestic abuse" if—

  (a)A and B are each aged 16 or over and are personally connected to each other, and

  (b)the behaviour is abusive.

  (3)Behaviour is "abusive" if it consists of any of the following—

  (a)**physical or sexual abuse**;

  (b)**violent or threatening behaviour**;

  (c)**controlling or coercive behaviour**;

  (d)**economic abuse** (see subsection (4));

  (e)**psychological, emotional or other abuse**;

  and it does not matter whether the behaviour consists of a single incident or a course of conduct.

Statutory Definition of Domestic Abuse ctd

- ‘(4)“**Economic abuse**” means any behaviour that has a **substantial adverse effect on B’s ability to**—

  (a)acquire, use or maintain money or other property, or

  (b)obtain goods or services.

  (5)For the purposes of this Act A’s behaviour may be behaviour “towards” B despite the fact that it consists of conduct directed at another person (for example, B’s child).’

- ‘“domestic abuse” includes, but is not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment.’

Domestic Abuse – ‘personally connected’

Section 2 of the Domestic Abuse Act 2021 defines ‘personally connected’ as people who:

- are, or have been, **married or in a civil partnership** [s2(1)(a)-(b)]
- have **agreed to marry or enter a civil partnership**, whether or not that agreement has been terminated. [s2(1)(c)-(d)]
- are, or have been, ‘in **an intimate personal relationship with each other**’ [s2(1)(e)]
- ‘have, or there has been a time when they each have had**, a parental relationship [either through being a parent or having parental responsibility]** in relation to the same child [being a person under 18] [s2(1)(f), s2(2), and s2(3)]
- Are **relatives** (as defined under Family Law Act 1996 s63(1)) [s2(1)(g)]

Domestic Abuse – Child as a victim

Section 3(1) of the Domestic Abuse Act 2021 provides that where behaviour of a person ("A") towards another person ("B") is domestic abuse:

'(2)Any reference in this Act to a **victim of domestic abuse includes a reference to a child** who—

(a)**sees or hears, or experiences the effects of, the abuse**, and

(b)**is related to A or B**.

(3)A child is related to a person for the purposes of subsection (2) if—

(a)the person is a parent of, or has parental responsibility for, the child, or

(b)the child and the person are relatives.'

PD 12J – supplementary definitions

Relevant supplementary definitions in PD 12J include the following:

- '…"domestic abuse" includes, but is not limited to, **forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment**.' [para 2B]
- "**coercive behaviour**" means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;
- "**controlling behaviour**" means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour;
- "**development**" means physical, intellectual, emotional, social or behavioural development; "harm" means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another, by domestic abuse or otherwise;
- "**harm**" means ill-treatment or the impairment of health or development including, for example, impairment suffered from being a victim of domestic abuse or from seeing or hearing the ill-treatment of another, by domestic abuse or otherwise [all at para 3]

Domestic Abuse – Case Law

- In June 2020 the Ministry of Justice issued its final report on 'Assessing Risk of Harm to Children in Private Law Children Cases'. Since then the higher courts have addressed anew the proper approach to issues of domestic abuse.
- ***F v M [2021] EWFC 4*** – Hayden J suggested at para [113] that a Scott Schedule is of limited utility in a case concerning allegations of a pattern of coercive and controlling behaviour.

'**An intense focus on particular and specified incidents may be a counterproductive exercise. It carries the risk of obscuring the serious nature of harm perpetrated in a pattern of behaviour**. This was the issue highlighted in the final report of the expert panel to the Ministry of Justice: *'Assessing Risk of Harm to Children and Parents in Private Law Children Cases*' (June 2020). It is, I hope, clear from my analysis of the evidence in this case, that **I consider Scott Schedules to have such severe limitations in this particular sphere as to render them both ineffective and frequently unsuitable**. I would go further, and question whether they are a useful tool more generally in factual disputes in Family Law cases. The **subtleties of human behaviour are not easily receptive to the confinement and constraint of a Schedule**. I draw back from going further because Scott Schedules are commonly utilised and have been given much judicial endorsement. I do not discount the possibility that there will be cases when they have real forensic utility. **Whether a Scott Schedule is appropriate will be a matter for the judge and the advocates in each case** unless, of course, the Court of Appeal signals a change of approach.'

Domestic Abuse – Case Law

- Hard on the heels of ***F v M*** came the judgment of the Court of Appeal in ***Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448.*** The case concerned four appeals from circuit judges who did not find allegations of domestic abuse proved. A total of 32 counsel, including 12 QCs, appeared on behalf of the parties and the interested organizations which had been granted permission to intervene. A single judgment was handed down by the President of the Family Division, King LJ and Holroyde LJ:

- **Scott Schedules** - while the court observed that, 'The process before this court has undoubtedly confirmed the need to move away from using Scott Schedules', somewhat frustratingly the court declined to express a view as to what we should move to. Reciting various options suggested by counsel, the judgment said that, 'It will be for others, outside the crucible of an individual case or appeal, to develop these suggestions into new guidance or rule changes [para 49].

Domestic Abuse – Re H-N (ctd)

- **Is a fact-find necessary?** – 'Not every case requires a fact-finding hearing even where domestic abuse is alleged. As we emphasise later, it is of critical importance to identify at an early stage the real issue in the case in particular with regard to the welfare of the child before a court is able to assess if, a fact-finding hearing is necessary and if so, what form it should take.' [Para 8]
- The court emphasized the importance of following the procedure in PD 12J. The court stated at para 37:

> 'The court will carefully consider the totality of PD12J, but to summarise, the proper approach to deciding if a fact-finding hearing is necessary is, we suggest, as follows:

i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).

ii) In deciding whether to have a finding of fact hearing the court should have in mind its **purpose** (PD12J.16) which is, in broad terms, **to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children**.

iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including **whether there is other evidence which provides a sufficient factual basis to proceed** and importantly, the relevance to the issue before the court if the allegations are proved.

iv) Under PD12J.17 (h) the court has to consider **whether a separate fact-finding hearing is** 'necessary and proportionate'. The court and the parties should **have in mind as part of its analysis both the overriding objective** and the President's Guidance as set out in '*The Road Ahead*'. '

Domestic Abuse – Re H-N (ctd)

Coercive and Controlling behaviour –

- 'Where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary in the context of PD12J, paragraph 16, that assertion should be the primary issue for determination at the fact- finding hearing. Any other, more specific, factual allegations should be selected for trial **because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise**, unless any particular factual allegation **is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour** (a likely example being an allegation of rape).' [para 59]

Domestic Abuse – Re H-N (ctd)

- The court identified that, ‘How to meet the need to evaluate the existence, or otherwise, of a pattern of coercive and/or controlling behaviour without significantly increasing the scale and length of private law proceedings is therefore a most important, and not altogether straight- forward, question.’ [Para 57]. The court again thought that the answer would require consideration by others but at para 58 offered the following pointers:
- ‘a) PD12J (as its title demonstrates) is focussed upon ‘domestic violence and harm’ **in the context of ‘child arrangements and contact orders’; it does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court**;

Domestic Abuse – Re H-N (ctd)

- b) PD12J, paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is 'necessary' in order to:
  - i) Provide a **factual basis for any welfare report** or other assessment;
  - ii) Provide a **basis for an accurate assessment of risk**;
  - iii) Consider **any final welfare-based order(s)** in relation to child arrangements; or
  - iv) Consider the **need for a domestic abuse-related activity**.

Domestic Abuse – Re H-N (ctd)

c) Where a fact-finding hearing is 'necessary', **only those allegations which are 'necessary'** to support the above processes **should be listed for determination**;

d) In every case where domestic abuse is alleged, **both parents should be asked to describe in short terms** (either in a written statement or orally at a preliminary hearing) **the overall experience of being in a relationship with each other.**

- At para 139 the judgment sets out its underlying rationale: 'Domestic abuse is often rightly described as pernicious. In recent years, the greatly improved understanding both of the various forms of abuse, and also of the devastating impact it has upon the victims and any children of the family, described in the main section of this judgment, have been most significant and positive developments. The modern approach and understanding is reflected in the 'General principles' section of PD12J(4)…**that does not, however, mean that in every case where there is an allegation of, even very serious, domestic abuse it will be either appropriate or necessary for there to be a finding of fact hearing**, so much is clear from the detailed guidance set out in paragraphs 16–20 of PD12J and, in particular, at paragraph 17:
- **Criminal law concepts –** Judges should not analyse the evidence in domestic abuse cases by reference to criminal law concepts [para 65]. A family judge makes a finding on the balance of probabilities and does not decide whether a criminal offence has been proved to the criminal standard. [para 73]

Domestic Abuse – case law

In ***K v K [2022] EWCA Civ 468***, Vos MR, McFarlane P, and King LJ considered the proper approach to fact finding post ***H-N***. Following an unsuccessful appeal to a circuit judge, the court allowed a litigant in person father's appeal against a fact finding (including a finding of rape) and remitted the matter for further judicial consideration. The court was critical of the trial judge's failure to focus on the welfare issues to which the fact find would go, and the judge's failure to consider non-court dispute resolution.

- ***H-N*** was endorsed
- The court deprecated the failure to engage in a MIAM where: '**Had they done so, the issues between the father and mother that concerned the logistics of the father's contact might have been speedily resolved before the inevitable trauma caused to the family by the fact-finding process**. The mother had agreed to unsupervised contact and did not, at that stage, see the alleged rape or generalised allegations of controlling behaviour, bullying and physical abuse of the children as central to the resolution of the issues between them.' [para 6]

Domestic Abuse – *K v K* (ctd)

- Under FPR 2010 r3.3, a court should consider at every stage of the proceedings whether non-court dispute resolution is appropriate. Under r3.3, where an exemption from a MIAM is claimed the court must consider whether the exemption is validly claimed.
- The essential purpose of a FHDRA is an opportunity for judicially led dispute resolution. Where safeguarding issues arise, FPR PD12B para 14.13, '…provides expressly that the court should consider "[t]he nature and extent of any factual issues" and "whether a fact-finding hearing is needed to determine allegations which are not accepted … whose resolution is likely to affect the decision of the court". We would emphasise those last words.' [para 39]
- The judge considering a fact-finding hearing must first identify the child welfare issue to which the resolution of the dispute will be relevant [para 40]
- 'A decision to hold a fact-finding hearing is a major judicial determination within the course of family proceedings. The process will inevitably introduce delay and postpone anything other than an interim determination of issues relating to the child's welfare, which is contrary to the statutorily identified general principle that any delay in resolving issues is likely to be prejudicial to a child's welfare (section 1(2) of the CA 1989). Further, the litigation of factual issues between parents is likely to be adversarial and, whatever the outcome, to have a negative impact on their ongoing relationship and ability to cooperate with each other as parents. It is therefore important for the court, in every case where fact-finding is being considered, to take time to identify the welfare issues, to understand the nature of the allegations, and then to consider whether the facts alleged are relevant to those issues and whether it is, therefore, necessary for the factual dispute to be determined.' [para 42]

Domestic Abuse – *K v K* (ctd)

- ‘Fact-finding is only needed if the alleged abuse is likely to be relevant to what the court is being asked to decide relating to the children's welfare.’ [para 8]
- ’…the judge ought to have considered all the allegations in the context of the contention that most fundamentally affected the question of future contact, namely whether the father was demonstrating coercive and controlling behaviour affecting the children's welfare after the separation.’ [para 10]
- ‘…the main things that the court should consider in deciding whether to order a fact-finding hearing are: (a) the nature of the allegations and the **extent to which those allegations are likely to be relevant** to the making of the child arrangements order, (b) that the purpose of fact-finding is to allow assessment of the risk to the child and the impact of any abuse on the child, (c) whether fact-finding is necessary or whether other evidence suffices, and (d) whether fact-finding is proportionate.’ [para 66]
- ‘…the duty on the court is limited to determining **only** those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, in what terms.’ [para 67]
- Where coercive control is raised, there, ‘…is not a requirement for the court to determine every single subsidiary factual allegation that may also be raised. The court **only decides individual factual allegations where it is strictly necessary to do so** in addition to determining the wider issue of coercive or controlling behaviour when that itself is necessary.’ [para 70]

Domestic Abuse – Re B-B

In ***Re B-B [2022] EWHC 108*** Cobb J delivered judgment on one the cases which was remitted by the Court of Appeal in ***H-N***. It is notable for the continued focus on what is necessary for the court to dispose of the case. It includes helpful commentary on the practical conduct of fact finds, and a useful distillation of the legal principles applied.

Practical advice [para 6]

'This hearing, and the preparation of this judgment, has highlighted the following:

i) The **benefit of considering the evidence relevant to each different form of alleged domestic abuse in 'clusters**': thus, it was useful to 'cluster' the evidence which went to the issue of alleged physical abuse; separately I considered the evidence of the allegations relevant to sexual abuse, separately emotional abuse, separately financial abuse and so on. Inevitably, the evidence relevant to each form of abuse overlapped in places, but **in looking at the evidence by reference to the different forms of alleged abuse, a picture was built up of the nature of the relationship under scrutiny, and it was easier to see whether patterns of behaviour emerged**. This may not have been so apparent had the matters been looked at by reference to individual / free-standing items on a *Scott Schedule*. I accept the Court of Appeal's view that **it is the *cumulative effect* of individual incidents within each of those clusters of abuse-type, and of each type of abuse on the other, which give the clearest indication of the experience of abuse;**

Domestic Abuse – Re B-B (ctd)

ii) The importance of resolving these issues close in time to the events in question; this hearing took place between three and five years after the key events. The **delay in resolving the issues has compromised the quality of the evidence itself**, and the delay has inevitably taken a toll on the litigants who have not been able emotionally to get on with their lives;

iii) The need for **flexible arrangements to ensure that participation directions (rule 3AA FPR 2010) truly meet the needs of the parties and the case**; the increased use of 'hybrid' hearings over the last 18 months (for all types of hearing in the family court) provides a useful template which worked well in this case;

iv) The need for advocates to focus on those issues which it is necessary to determine to dispose of the case, and for oral evidence and/or oral submissions to be cut down only to that which it is necessary for the court to hear;

v) The evidence of the principal parties is always likely to be far more valuable than the evidence of supporting witnesses; at the **case management stage, judges should rigorously test with the parties and/or their advocates (and review for themselves) what (if any) real value is likely to be brought to the enquiry by the evidence of third parties**;

Domestic Abuse – Re B-B (ctd)

vi) The **importance of judicial continuity in domestic abuse cases**; unsurprisingly, I had no prior connection with this case before it was remitted for hearing by the Court of Appeal. But it struck me as I considered the case management of this case prior to the hearing, and indeed as I listened to the evidence itself, that continuity of judicial involvement would have enhanced the efficient and sympathetic management of the process;

vii) That **an abusive relationship is invariably a complex one in which the abused partner often becomes caught up in the whorl of abuse, losing objective sense of what was/is acceptable and unacceptable in a relationship**. Like many abused partners, the mother in this case became immunised to the emotional volatility of the damaging relationship which she saw as normal and acceptable; like many abused partners, she clung to what she knew.'

Domestic Abuse – Re B-B (ctd)

Distillation of Legal Principles [para 26]

i) The burden of proof lies, throughout, with the person making the allegation. In this case, both the mother and the father make allegations (in some respects overlapping) against each other on which they seek adjudications;

ii) In private law cases, the court needs to be **vigilant to the possibility that one or other parent may be seeking to gain an advantage in the battle against the other**. This does not mean that allegations are false, but it does increase the risk of misinterpretation, exaggeration, or fabrication;

iii) It is not for either parent to prove a negative; there is no 'pseudo-burden' on either to establish the probability of explanations for matters which raise suspicion;

Domestic Abuse – Re B-B (ctd)

iv) The standard of proof is the civil standard – the **balance of probabilities**. The law operates a **binary system**, so if a fact is shown to be more likely than not to have happened, then it happened, and if it is shown not to cross that threshold, then it is treated as not having happened; this principle must be applied, it is reasonably said, with 'common sense';

v) Sometimes the burden of proof will come to the judge's rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But, generally speaking, a judge ought to be able to make up his/her mind where the truth lies without needing to rely upon the burden of proof;

vi) The **court can have regard to the inherent probabilities of events or occurrences**; the more serious or improbable the allegation the greater the need for evidential 'cogency';

Domestic Abuse – Re B-B (ctd)

vii) Findings of fact in these cases must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation; it is for the party seeking to prove the allegation to "adduce proper evidence of what it seeks to prove";

viii) The court must consider and take into account all the evidence available. My role here is to survey the evidence on a wide canvas, considering each piece of evidence in the context of all the other evidence. I must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the person making the allegation has been made out to the appropriate standard of proof;

ix) The evidence of the parties themselves is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability;

x) It is, of course, not uncommon for witnesses to tell lies in the course of a fact-finding investigation and a court hearing. The **court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear, and distress. I am conscious that the fact that a witness has lied about some matters does not mean that he or she has lied about everything** (see *R v Lucas* [1981] QB 720)…

Domestic Abuse – Re B-B (ctd)

xi)…As the Court of Appeal made clear in ***Re R [2018] EWCA Civ 198*** :

"The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, **so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes wide open to such risks as the factual determination may have established**"…

xii) At all times I must follow the principles and guidance at PD 12J of the Family Procedure Rules 2010.'

Guidance for Judges and Magistrates

- In March 2022, the President asked Macur LJ to produce, ‘short, clear and practical guidance for judges and magistrates concerning fact finding hearings and domestic abuse in Private Law children.’
- 5th May 2022 ‘**Fact finding hearings and domestic abuse in Private Law children proceedings – Guidance for Judges and Magistrates**’
- Forewarned is forearmed – a must read
- ‘Make every hearing count…Remain ‘in control’ throughout [1]
- Views of parties, cafcass, advocates may be persuasive, but not determinative, ‘interrogate their reasoning’ [2]

Guidance for Judges and Magistrates ctd

- Has MIAM taken place? If not why not? [4]
- Identify real issues in the case. What are the questions pertaining to the child's welfare? [5]
- What exactly is alleged in terms of DA and by whom. Consider the definitions in PD 12J [6]
- Has the C1A been completed, is there a response? [7]

a. If so, ensure the forms are considered in their entirety. Are there admissions? ***Does the form and/or response suggest a possible way forward to the satisfaction of the court that will permit safe continuation of relationships with the child and avoid conflict with other adults?***
b. If not, why not? ***Is it appropriate to obtain a verbal summary of any allegations and/or response during the hearing in order for progress to be made?***

Guidance for Judges and Magistrates ctd

- Does the information before the court contain sufficient detail to avoid directing further evidence/documentation to determine the issue? [8]
- If further evidence/documentation is required, ***H-N*** '…cautioned against allowing a Scott Schedule to distort the fact finding process (by becoming the sole focus of a hearing), but the **Court of Appeal did not rule out the use of a schedule as a structure to assist in analysing specific allegations**' [9]
- Allegations that may be clearly defined may be suitable for schedule, overview/patterns of behaviour may require a statement. Hybrid of two might be appropriate [10]

Guidance for Judges and Magistrates ctd

- Obtain essential information at an early stage - who, when, where, effect on child and parent, whether there are witnesses, is other evidence available? **Is the behaviour complained of because of the breakdown of the relationship rather than a/the cause of the breakdown?** [11]
- When determining if fact find necessary consider: [para 12]

a. the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of a child arrangements order;
b. that the purpose of a fact finding is to allow assessment of the future risk to the child and the impact of any abuse on the child;
c. whether fact-finding is necessary or whether other evidence suffices; and,
d. whether fact-finding is proportionate.

Guidance for Judges and Magistrates ctd

- Fundamentals are **relevance, purpose, and proportionalty** [13]
- Whether specific allegations or pattern of behaviour, **court only needs to determine allegations of such behaviour to the extent that it is relevant and necessary to determine the overarching issues** rather than every single subsidiary allegation that might be raised [14]
- Always **consider whether the allegations (at their highest) go to safeguarding in general or to particular circumstances that could be mitigated by supervision of contact or some other measures**. If the latter and mitigations are available, why is it said that a fact-finding hearing is required? [15]
- If your conclusion is that the allegations, if proved and however serious, would not be relevant to the decision, then no fact-finding hearing is required. [16]
- Record brief reasons for your decision whether or not a fact-finding hearing is necessary on the face of the order. [17]

Guidance for Judges and Magistrates ctd

Judicial case management of allegations [18-27]

- Relevance, purpose and proportionality is key
- Robust case management required, court controls the evidence, keep parties and advocates on point by reference to identified issues
- Order third party disclosure only where necessary and proportionate, refuse fishing exercises
- Summary of findings to be fairly and accurately recorded in the order or a document attached to it
- Guard against attempts to re-argue issues, if ‘new’ evidence relating to past events is presented ask why it has not been made available before, if no good reason refuse to admit it

Domestic Abuse – Re M (ctd)

In ***Re M (A Child) [2021] EWHC 3225***, the parties originally met when mother was living overseas and providing online sexual services to father who was a customer. Subsequently the parties met, M gave up her sex work, moved to the UK and the parties had a child. Following the breakdown of the relationship M made serious allegations of abuse by father, including an allegation rape for which she produced a video tape. In response, F produced a large quantity of explicit videos and material (around 1000 pages). The judge at first instance considered all of the material produced and found that all sexual activity was consensual. There were two grounds of appeal: M did not have the benefit of participation directions; judge gave insufficient consideration that M may have been over-dependent on the relationship with father or vulnerable. In allowing the appeal, Judd J found:

- **Participation directions to enable best evidence to be given** - Under FPR 2010 Part 3A and PD3AA, M was a person who either is or is at risk of being a victim of domestic abuse person and so the assumption applied that the quality of her evidence and her participation in proceedings is diminished [FPR 2010 r3A.2A], consequently the court **must** consider whether it is necessary to make one or more participation directions. It had not done so. The obligation is on the court, which in this case went on to find that M was not a credible witness and intervened on several occasions to ask her to answer the question. Judd J observed that was not possible to know how the lack of special measures may have affected mother but the absence of any consideration of them risked the integrity of the trial being undermined [see paras 60, 61, 69, 70, 72]

Domestic Abuse – Re M (ctd)

Failure to weigh possibility of m's over-dependence on the relationship or vulnerability

'The **reason it was so important for the judge to give very careful consideration to the question of vulnerability in this case is because a vulnerable person may not act in the same way as someone more independent or confident if they are exploited or abused in a relationship**. Such an individual may be so anxious for the relationship to succeed that they accept treatment that others would not. They may be easy to exploit. **They may not even realise what is happening to them, and will cling to the dream of a happy family and relationship**. From my reading of the judgment I cannot see that the judge gives this possibility serious consideration, nor do I think the videos of sexual activity would have been a reliable guide to the relationship more generally. I know that the judge referred to her cross jurisdictional experience, but her reasoning as to the allegations of rape focusses closely on the issue of consent and capacity rather than abusive behaviour in the wider sense.' [para 82]

'…in rejecting a number (although not all) of the mother's allegations against the father the **judge relied very much on the fact she wanted to be in a relationship with the father, she tried to get him back when he rejected her, and that she engaged in sex with him after occasions when she said he had raped or abused her. These reasons may well hold good in many cases, but most definitely not all. In some cases it is a very unsafe premise upon which to base findings of fact, especially if the alleged victim is vulnerable or dependent as the mother said she was here**. Further, it seems to me that the judge's disbelief that the mother would have remained in an abusive relationship led her to conclude the mother was lying about it. This tainted the whole of her evidence, and was a thread which ran throughout the case.' [para 83]

Domestic Abuse - Vulnerable Parties

GK v PR [2021] EWFC 106 was a case decided by Peel J following the judgment in ***Re M***. Again the issue of the vulnerability of a potential victim of domestic abuse fell to be considered. Again the court found a material failure to comply with Part 3A and PD3AA of the FPR 2010:

- FPR 3A.2A 'where it is stated that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, a relative of another party, or a witness in the proceedings, **the court must assume that the following matters are diminished**—
  (a) the quality of the party's or witness's evidence;
  (b) in relation to a party, their participation in the proceedings.'
- **'…early identification of potential vulnerability, and a ground rules hearing, are indispensable elements of the case management process**.' [para 32]

Domestic Abuse – Intimate images

Following the successful appeal in ***Re M*** the case was allocated to Knowles J for case management. In ***M (A Child – Private Law Children Proceedings – Case Management – Intimate Images) [2022] EWHC 986 (Fam)*** Knowles J suggested a definition of 'intimate image' in the context of private law proceedings. She also made directions as to how such the provision of such images should be case managed.

- '…when I use the term *"intimate image"* in the context of private law proceedings, I am describing an image of a person, whether an adult or a child, naked or partially naked. Such an image can include part of a person's body, clothed or unclothed, such as breasts, genitalia or the anus, which are generally regarded as private. Intimate images include those of a person engaged in what is normally regarded as private behaviour such as washing, urinating, masturbating or engaged in other sexual acts either alone or with another being. The images with which I am concerned are both still and moving images. None of the parties sought to define what an intimate image was but it struck me that this might be helpful for courts and practitioners. In offering my suggested definition, I have deliberately not made reference to definitions contained in the criminal law as those did not seem to me to meet the needs of the family court.' [para 47]

Domestic Abuse – M (intimate images) ctd

A) Sexually explicit or intimate videos and photographs **should not be filed as part of evidence without a written application being made to the court in advance**.

B) Any such application will require the court's adjudication, preferably at an already listed case management hearing.

C) It is for the party making such an application to **persuade the court of the relevance and necessity of such material to the specific factual issues which the court is required to determine**.

D) The court should **carefully consider the relevance of the evidence to the issues in the case together with the likely probative value of any such evidence**.

E) As part of its analysis and balancing exercise, the court will need to **consider all the relevant factors including** (i) **any issues as to vulnerability** in relation to any of the parties and the likely impact on any such parties of the admission of such evidence and the manner in which it is used in the proceedings;
and (ii) if it is able to do so at a preliminary stage, whether the **application/use of such images is motivated, in whole or in part, by a desire to distress or harm a party.**

F) The circumstances in which a court will permit the inclusion in evidence of sexually explicit or intimate videos or photographs of any person are likely to be **rare**, in particular, in circumstances in which that person does not consent to such material being admitted

Domestic Abuse – M (intimate images) ctd

G) Where the court is being asked to admit such material, the **court should consider whether there may be a range of alternatives to the viewing of such material**, for example but not limited to:

i) seeking an admission/partial admission in respect of the alleged conduct

ii) agreed transcripts and/or descriptions of any videos

iii) playing only the audio track of any video recordings

iv) using a still image rather than a video or a short excerpt from a longer video

v) editing images to obscure intimate parts of the body

vi) extracting meta data as to the timing and location of the evidence

vii) focused and specific cross examination on the issues

viii) consideration of the use of other evidence to prove the particular fact in issue instead.

Domestic Abuse – M (intimate images) ctd

H) If the court decides to admit any sexually explicit or intimate images/videos for any purpose**, care should be taken to limit the volume of such evidence to that which is necessary to fulfil the purpose for which it is admitted;**

I) The **court should determine who can view the material that is to be admitted and limit this where necessary**, bearing in mind its private character and the humiliation and harm caused to those both depicted and involved in the proceedings;

J) If the evidence is considered relevant, a **starting point should be to say that it should incorporate the lowest number of images, seen by as few people as necessary**, and viewed in the least damaging way;

K) It would be helpful to consider how best to ensure that the evidential security of such material can be maintained (for example, by using only password protected files) both within the hearing itself and outside it, and how the material is deployed within the proceedings;

L) Likewise, **specific consideration should be given to the protection and safeguards necessary in respect of any video evidence relied upon** (for example, such evidence being made available on a single laptop and brought to court, or the distribution being limited to a core specified legal team on behalf of each party).

Publication of information identifying party

MacDougall v SW & Ors (sperm donor: parental responsibility or contact) [2022] EWFC 50, Lieven J

- Mr MacDougall has Fragile X syndrome, an inheritable genetic condition which causes developmental problems including learning difficulties and cognitive impairment. Through advertising as a sperm donor, Mr MacDougall had fathered a total of 15 young children with different young women in unregulated arrangements. He has learning difficulties and is on the autistic spectrum. The applications in three linked cases concerned parental responsibility and contact. The judge considered whether father should remain anonymous.
- Section 12 of the Administration of Justice Act 1960 and s97(2) Children Act 1989 impose restrictions on reporting and publication of material which may identify a child involved in children proceedings. Section 97(4) relaxes the prohibition where the child's welfare requires it
- Usual approach **of anonymity should not be used to permit parents to behave in an unacceptable manner and then hide behind a cloak of anonymity. The provisions and practice of anonymity in family law are to protect the children not the parents**.
- Judge had no confidence that Mr MacDougall would cease to act as a sperm donor as he claimed, or that he would properly explain to any woman the true implications of his Fragile X syndrome. **The public interest in naming father was sufficiently great to outweigh the risk of identification of the children and their Article 8 right to privacy.**

Cautionary tale – improper disclosure

Griffiths v Tickle & Ors (Re: Disclosure by Counsel for Appellant and Application by First Respondent) [2022] EWCA Civ 465

- Counsel for father in child proceedings fact find (Richard Clayton QC) secured permission to appeal and then arranged for the order granting permission to appeal and his own skeleton argument on the permission application to be forwarded to the Association of Lawyers for Children to ascertain whether they may be interested in intervening on behalf of the child. Solicitors for the ALC alerted the parties to the appeal that they had received the documentation.
- **The skeleton argument contained considerable detail about the evidence and the hearing at first instance. In sending it to ALC without the permission of the court, counsel had breached the prohibition on, 'The publication of information relating to proceedings**' in s12(1)(a)(ii) of the AJA 1960. The Court of Appeal found that Mr Clayton QC may be in contempt of court, which was not 'a trivial or technical matter' but in all the circumstances did not initiate contempt proceedings. [paras 32-33]
- FPR 12.73(1)(iii) allows disclosure to a "professional legal adviser", but it seems clear from the context and the language that this only extends to someone representing an existing party: see *Re B (A Child) (Disclosure of Evidence in Care Proceedings)* [2012] 1 FLR 142. [para 30]

Cautionary tale – improper disclosure ctd

- FPR 12.75(1)(a) authorises the legal representative of a party to communicate information relating to the proceedings "to any person where necessary to enable that party ... by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings." **This language cannot be stretched to cover a disclosure made in an attempt to procure a supportive intervention from a third party**. [para 30]
- **Lawyers involved in cases of this kind have a professional responsibility to inform themselves about the rules and to abide by them. In case of doubt an application should be made to the court**. [para 33]
- After receiving the draft judgment but before it was formally handed down, Mr Clayton QC had at a dinner discussed the case with a solicitor who was not acting for any party: 'it is unwise for a person in Mr Clayton's position to have any discussion about a case with any third party at a time when a judgment is subject to embargo. As the Master of the Rolls reiterated only a few weeks ago, **strict adherence to the terms of the embargo on draft judgments is of great importance**: *R (Counsel General for Wales) v The Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181.

Privilege against self-incrimination

P (Children) (Disclosure) [2022] EWCA Civ 495 – Lord Burnett of Maldon CJ

- Father had been found at a fact finding hearing to have committed serious acts of domestic abuse against mother, including rape. The fact finding judgment had been disclosed to the police. Before the welfare hearing father sought a declaration from the court that any statements or admissions made by him in the proceedings, in reference to the findings that have been made by the court, will not be disclosed to the police or CPS. The Court of Appeal rejected father's appeal against the judge's refusal to grant the declaration.
- **It was premature to consider a question of disclosure to the police without knowing the content of any statement or admission in respect of which the question arose.** Father could not have a privilege to self-incriminate with absolute protection as to the consequences [para 41]
- **Father retains his privilege to refuse to answer questions which tend to incriminate him.** He does not have a privilege to refuse to engage in proceedings or to answer any questions at all.
- **Children Act 1989 s98 on self-incrimination applies to public law proceedings only**

Privilege against self-incrimination (ctd)

- Principles on which the court decides whether to disclose to third parties are set out in *Re C (A Minor) (Care Proceedings: Disclosure) [1997] Fam 76* at para [85]
- The fact-finding judgment itself is not admissible in criminal proceedings
- At para [26] Lord Burnett CJ sets out a helpful summary of the provisions under which a criminal court might admit admissions or previous inconsistent statements made in the family court
- Section 78 of PACE represents the ultimate guarantee that no evidence will be admitted in a criminal trial which would by its admission render that trial unfair

Parental responsibility - Property

B (A Child) [2022] EWFC 7 – Peel J

- Mother's 17 year old son had inherited property in France on the death of his father. Mother applied for a specific issue order authorizing her to accept a French inheritance on her son's behalf as required by French law, and also to enter a contract of sale of a French property on his behalf.
- What mother sought fell squarely within the definition of parental responsibility set out at s3 Children Act 1989. Peel J referred to his own reasoning set out in the similar case of *Re AC (A Child) [2020] EWFC 90.*
- The application was properly made by C100, which states that brief reasons rather than a full statement should be submitted with the application. Peel J however considered, '…**it essential that a witness statement is filed in support, setting out the circumstances in full' [para 17], because of the technical nature of such applications involving applicable law in a foreign jurisdiction.**
- It is unlikely that the child needs to be joined to the application unless they disagree fundamentally. Where the child is Gillick competent their views usually should be sought informally by the applicant

Termination of Parental Responsibility

D v E (termination of parental responsibility) [2021] EWFC 37 – Macdonald J

- Father had a history of harassment of mother and others, and of sexual offences against a child and breaches of sexual harm prevention orders. Father's probation officer deemed him at risk of sending malicious communications and stalking intimate partners. Father did not attend court.
- Father was registered on the child's birth certificate and so his parental responsibility may only be removed under Children Act 1989 s4(2A).

Termination of Parental Responsibility

- The authorities…make clear that the court must ask itself whether, were the father now to be applying for an order conferring parental responsibility for G on him, an application for parental responsibility would be granted. In seeking the answer to this question the **court will consider, amongst other factors, evidence of attachment and a degree of commitment, the presumption being that, other things being equal, a parental responsibility order should be made rather than withheld in an appropriate cas**e. I also have regard to the fact that the **removal of parental responsibility from a parent is serious step that must be justified on the available evidence and proportionate**. However, these factors must all be considered with a view to answering that the ***fundamental*** **question for the court, namely whether it can be said to be in G's best interests for the father to have parental responsibility for her, taking her welfare as the court's paramount consideration**.

Specific Issue - Vaccination

M v H (private law vaccination) [2020] EWFC 93 – Macdonald J

- Parents were unable to agree whether their children should receive normal childhood vaccines. The court decided that they should.
- '…the concept of **parental responsibility describes an adult's responsibility to secure the welfare of their child, which is to be exercised for the benefit of the child not the adult**. The status conferred by parental responsibility relates to welfare and not the mere existence of paternity or parenthood. ' [para 14]
- '…where two parents with parental responsibility disagree as to the proper course of action with respect to vaccination, the court becomes the decision maker through the mechanism of a specific issue order made pursuant to its jurisdiction under s 8 of the Children Act 1989. **When considering whether to grant a specific issue order requiring vaccination as being in each child's best interests, those best interests are the court's paramount consideration pursuant to s 1(1) of the 1989 Act and the court must have regard to the matters set out in the 'welfare checklist' contained in s 1(3) of the Children Act 1989** (*Re C (Welfare of Child: Immunisation)* [2003] 2 FLR 1095). Pursuant to s 1(5) of the 1989 Act the court should not make a specific issue order unless doing so would be better for the child than making no order at all.' [para 38]

Child Arrangements – Interim Order

A, B and C (Children: Nesting Arrangement) [2022] EWCA Civ 68 – Baker LJ

- Post separation in 2018 the parties reached an interim agreement for child arrangements, creating a 2:2:5:5 'nesting' arrangement where during school term each party took turns to vacate the FMH for 2 or 5 days leaving the other party living there with the children aged 9, 15 and 17. At the first appointment in financial remedy proceedings Cohen J described the arrangement as 'desperately unsatisfactory' and encouraged a solution where each party had a home and the children rather than the adults did the shuttling. At an interim hearing in subsequent child arrangements proceedings Cohen J acceded to mother's request that in the interim the division of time would be 7:7 and the children would gradually spend more time at mother's home. Father appealed the interim order.
- There was no unfairness in the procedure where the interim hearing was conducted on the papers and the judge read the ISW report without the opportunity for cross-examination. Under **FPR 22.7(1) the general rule is that evidence is given in writing at hearings other than final hearings unless another rule, practice direction or enactment requires it. Under FPR 22.8(1) at a hearing other than a final hearing, where evidence is given in writing a party may apply ot the court for permission to cross-examine the person giving the evidence**. F had not done so at the case management hearing and effectively agreed to the interim application being dealt with on paper. [paras 27-30]

Child Arrangements – Interim Order (ctd)

- While the judge had expressed views in clear terms about existing arrangements at a financial remedy hearing two years previously, it could not be said that the judge had closed his mind to an objective assessment. No party had made an application for recusal. Cohen J's judgment was balanced and child focused. [paras 32-33]

- A judge should be careful about making an interim order which effectively determines a final issue, but a judge has to make orders in accordance with Children Act s1. If a judge concludes that a certain course is necessary in the interests of a child's welfare, he must take it. The variation of the interim arrangements did not preclude the court from reverting to them at the final hearing. [para 35]

Child Arrangements – Contact Costs

Griffiths v Griffiths (Guidance on Contact Costs) [2022] EWHC 113 (Fam) – Arbuthnot J

- At a fact finding father had was found to have engaged in serious domestic abuse against mother, including rapes. Subsequently direct contact was ordered with a direction that mother share the costs of the supervised contact. Mother appealed on the grounds: that as a rape victim she should not be paying the costs for her rapist to have contact; and that in ordering direct contact the judge failed to apply PD 12J.
- Arbuthnot J held that **s11(7) of the Children Act 1989 provides jurisdiction for the court to make orders in respect of contact expenses** [para 55] - [s11(7) contact directions/conditions and under s11(7)(d) 'such incidental, supplemental or consequential provision as the court thinks fit']
- Arbuthnot J found that the first instance judgment was deficient on the issue of direct contact because the judge had not adequately addressed PD12J paras 36 and 37 in her reasons [paras 100-111]. The court was required to consider any harm caused by the domestic abuse to mother or that she is at risk of suffering. Under PD 36(3) court should make order '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…'. Under PD 37(e) the court should have considered the capacity of father to appreciate the effect of past domestic abuse and the potential for future domestic abuse.

Child Arrangements – Contact Costs (ctd)

Arbuthnot J tentatively offered the following guidance in cases where it was suggested that a victim of domestic abuse may pay for, or contribute to, the costs of their abuser's contact:

'128. Lieven J suggested that guidance is required on the question of costs**. I am wary of giving guidance which is too narrow and which might not cater for an extraordinary situation**.

129. I cannot envisage a situation where a court would order the victim to share the costs of contact, but I bear in mind it is impossible to give guidance which will cater for every case that comes before the family courts which must be able to do justice to all the different situations which they encounter.

130. My guidance in relation to cases where abuse has been found or admitted is the following:

131. First, there **must be a very strong presumption against a victim of domestic abuse paying for the contact of their child with the abuser**.

132. Second, **if, wholly exceptionally, the court has to consider thi**s, the matters a court might want to take into account could include the following:

a. The welfare checklist including the age of the child

b. The factors in PD12J (set out above)

Child Arrangements – Contact Costs (ctd)

c. The nature of the abuse proved or admitted, and the parties' conduct that the court considers relevant

d. The impact of the abuse on the caregiver with consideration as to whether any payment would give rise to financial control

e. The extent of the relationship between the child and the abusive party

f. The nature of the section 8 order made

g. The parties' financial resources

h. The cost of the contact

i. **Whether, if the contact is in the best interests of the child, it would take place without a sharing of the costs**.

Parental Orders – time limit

Re X, Y and Z (Children: Parental orders: time limit) [2022] EWHC 198 (Fam) – Knowles J

- The parents are respectively a British citizen and a Danish citizen. They were resident in Denmark when they had twins via surrogacy in the US. The twins were registered as Danish. When the parents had a third child by a US surrogate, the Danish authorities refused to grant the child Danish citizenship and rescinded the twins citizenship. Hence the parents relocated to the UK and made applications for parental orders here.
- All of the criteria under s54 of the Human Fertilisation and Embryology Act 2008 were satisfied save for the six month time limit from birth for making an application for a parental order.
- Munby P in *Re X (A Child) (Surrogacy: Time Limit) [2015] 1 flr 359* set out a fact specific approach to extending the time limit. **The applicants had been careful and organized in all aspects of the surrogacy arrangements and had received legal advice in the USA as to way in which they would acquire legal parentage and they believed it would apply in all jurisdictions. It was plainly in the children's interests that the applicants should be recognized as their legal parents in this jurisdiction where they now intended to live permanently**. The parental orders were made.

Section 91(14)

Re A (A Child) (supervised contact) (s91(14) Children Act 1989 orders) [2021] EWCA Civ 1749 – King LJ

- Mother appealed against an order for supervised contact which was made alongside a two year s91(14) bar. Mother had previously abducted the child and it had been found that she had deliberately placed barriers in the way of father having a natural relationship with the child. Mother had made 'endless applications' [para 13] during the course of the proceedings.
- The guidelines for making s91(14) orders which were set out by Butler-Sloss in *Re P (Section 91(14) (Guidelines) (residence) and Religious Heritage) sub nom: In Re P (A minor) (Residence Order: Child's Welfare) [199] 2 FLR 573* remain good law, but King LJ did express some concern that they may require revisiting in order to meet the reality of modern communications:

'Although **the guidelines have substantially withstood the test of time** and have received the endorsement of this court on a number of occasions in the intervening period, **the fact remains that they were set out in April 1999, some 22 years ago**. In the intervening period the forensic landscape has changed out of all recognition. Amongst the many advances is the **advent of the smart phone and of social media in all its forms**. Of particular relevance in this context is the **almost universal use of email as a means of instant communication**. Another development of relevance is that as a result of the withdrawal of legal aid in the majority of private law cases, **a large proportion of parents are unrepresented and therefore do not have, as the judge described it in the present case, the 'steadying influence' of legal advisors**.' [para 34]

Section 91(14)

‘**One of the consequences of these changes** which is seen not uncommonly in private law proceedings is that the other parties, and often the judge him or herself, can be (and often are) **bombarded with emails from a parent, whether male or female, who is representing him or herself**. Such behaviour may be the result of anxiety but in other cases, as in this case, it is **part of a campaign of behaviour by one parent against the other which amounts to a deeply disturbing form of oppressive behaviour on their part**. [para 35]

Regardless of the motivation, behaviour of this type, as exhibited by the mother in this case by way of an example, **is deeply distressing to the parent who is the subject of such abuse and litigation at this level and is highly debilitating to each of the parties and to their children. All too often such communications are ill-considered and ill-judged with the consequence that every minor dispute or misunderstanding is met with an application to the judge**. More importantly, the distress and anxiety caused to the other parent and to the children at the centre of such a raging dispute cannot be overestimated, nor can the damaging consequences where the focus of the litigation veers away from what, on any objective view, would and should be regarded as the real issues going to the welfare of the children concerned. [para 36]

Section 91(14)

- King LJ expressed the hope that the new ‘s91A Section 91(14) orders’ to be introduced under the Domestic Abuse Act 2021, will help with this problem.
- In particular King LJ identified the **new s91A(2)** which she thought would give statutory effect to guideline 6 of ***Re P*** [*In suitable circumstances (and on clear evidence), a court may impose the leave restriction in cases where the welfare of the child requires it, although there is no past history of making unreasonable applications*], by **permitting a s91(14) order to be made where an application under the Children Act would put the parent or child at risk of physical or emotional harm**. [para 45]

Costs

C v S [2022] EWHC 800 (Fam) – Arbuthnot J

- Arbuthnot J allowed an appeal against a circuit judge's refusal to make any costs order in favour of the successful father at the conclusion of long-running section 8 proceedings.
- Mother's behaviour led to a 4 day hearing becoming a 10 day hearing, and she made up her evidence, exaggerated or embellished incidents and made unsubstantiated allegations of physical and sexual abuse.
- Arbuthnot J was satisfied that mother had **behaved reprehensibly or adopted an unreasonable stance**, as contemplated by Lord Phillips PSC in *Re T (Children Care Proceedings: Costs) [2012] 1 WLR 2281* at para 44.

Costs – Security for Costs

MG v AR [2021] EWHC 3063 (Fam) – Mostyn J

- Father applied for an order that a child who was living with mother in Canada, should live with father in Dubai. Mother successfully applied for security for costs.
- Since the power to award security for costs in family proceedings was introduced in FPR 2010 r20.6 and r20.7, applications have been few and there has been no reported case. At paragraph 53 of his judgment, Mostyn J summarized the principles to be applied:

i) The court must find as a fact which gateway condition applies.

ii) The court must have regard to all the circumstances in order to determine whether to make the order for security would be just. In making that determination the court will form a value judgment until it reaches the stage of quantification of the amount of security, where it will exercise a true discretion.

Costs – Security for Costs (ctd)

iii) If the applicant has a **meritorious case and is of limited means so that the imposition of an order for security would hinder or stifle his substantive application then it would not normally be just to make an order for security.**

iv) Subject to para (iii) above, the court must have regard to the merits of the substantive application and to the strength of the defence, as well as to the means of the parties, in order to **determine if the respondent has a good chance of being awarded an order for costs at the final hearing of the substantive application**. If the court concludes that the respondent does not have that good chance, then it would not normally be just to make an order for security.

v) When assessing the ability of the applicant to pay an order for costs and, ex hypothesi security for those costs, the court should apply the principles in *TL v ML* at [124] and make robust assumptions about his ability to pay where his disclosure had been deficient or where he maintains that a source of support has been cut off.

vi) If the court determines that the respondent has that good chance, it must then be satisfied by evidence adduced by her that there is a real risk (albeit not as high as a 50% probability) that she will not be in a position to enforce an order for costs against the applicant. Findings as to gateway condition (b) or (d) are likely to be highly relevant to the assessment of this risk.

Costs – Security for Costs (ctd)

vii) In determining whether it would be just to make an order for security the court will pay particular attention to whether the application for security was made promptly. It may not allow historic costs if the application for security was made unduly late.

viii) If the court decides to make an order for security it will fix the amount in a robust, broad-brush manner, deploying a wide discretion. Historic costs are fully claimable. The evidence of the respondent seeking security must provide full detail of claimed historic costs and a detailed estimate of future costs.

ix) The court may reflect future litigation uncertainties, as well as potential reductions on a detailed assessment, in a percentage discount from the sum claimed.

x) **In the first instance, security should only be provided** in a financial remedy case up to the FDR; **in a children's case it should be provided up to the pre-trial review (or equivalent). Security should be payable in monthly instalments rather than in a single lump sum.**

Costs – Security for Costs (ctd)

xi) Before making an order for security, the court must finally stand back and satisfy itself that what it is going to do is just. In a **children's case the court must be satisfied that what it is proposing to do is consistent with the best interests of the children, or at least not contrary to their interests**.

xii) In the event of default in the provision of security there should not be an automatic strikeout of the claim. Rather, the respondent should be entitled to apply urgently for a hearing at which the court will consider what measures should be taken in the light of the default. Such measures will include a summary dismissal of the substantive application, but in children's proceedings the court must be satisfied that such an order is in the best interests of the children, or at least not contrary to their interests.

Fact finding - Witness Demeanour

B-M (Children: Findings of Fact) [2021] EWCA Civ 1371 – Lord Justice Peter Jackson

- The Court of Appeal considered the proper approach to judicial consideration of demeanour in family cases. The Court was disparaging about what it described as, 'harvesting obiter dicta expressed in one context and seeking to translate them to another' [para 23].
- The judgment highlighted that the oft cited dicta about demeanour in *Gestmin v Credit Suisse (UK) Ltd* and *SS (Sri Lanka),* concerned respectively the reliability of recollections of business conversations, and whether a delay of three months in the production of an immigration tribunal's judgment had unfairly lessened the impact that should have been made upon the judge by the appellant's demeanour.
- Consideration of a witness' demeanour does have a place in a family court's assessment of reliability.

Fact finding - Witness Demeanour (ctd)

‘25. No judge would consider it proper to reach a conclusion about a witness's credibility based solely on the way that he or she gives evidence, at least in any normal circumstances. The ordinary process of reasoning will draw the judge to consider a number of other matters, such as the consistency of the account with known facts, with previous accounts given by the witness, with other evidence, and with the overall probabilities. However, **in a case where the facts are not likely to be primarily found in contemporaneous documents the assessment of credibility can quite properly include the impression made upon the court by the witness, with due allowance being made for the pressures that may arise from the process of giving evidence**. Indeed in family cases, where the question is not only 'what happened in the past?' but also 'what may happen in the future?', a witness's demeanour may offer important information to the court about what sort of a person the witness truly is, and consequently whether an account of past events or future intentions is likely to be reliable.

26. I therefore respectfully agree with what Macur LJ said in *Re M (Children)* at [12], with emphasis on the word 'solely’: "It is obviously a counsel of perfection but seems to me advisable that any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment **solely** by virtue of their behaviour in the witness box and to expressly indicate that they have done so.”

Contact in non-Hague Convention country

AA v BB [2021] EWFC 55 – Richard Harrison QC, Deputy High Court Judge

- The children lived with their English mother in the UK, their Jordanian Father sought an order that the children spend holiday time with himself and the children's paternal family in Jordan, which is a non-Hague Convention Country.
- The court applied the dicta of Patten LJ at paragraph 23 of *Re A (Prohibited Steps Order) [2013] EWCA Civ 1115*:

'**The overriding consideration for the court** in deciding whether to allow a parent to take a child to a non-Hague Convention country is **whether the making of that order would be in the best interests of the child**. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the **court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entai**l. This will therefore routinely involve the court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the chart's return if that transpires. Those **safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the UK based parent**.'

Contact in non-Hague Convention country

- The judge found that the risk that father would retain the children outside the jurisdiction was, ‘significant and real (meaning realistic as opposed to fanciful)’ [para 101].
- The judge was **not satisfied that adequate protective measures could be put in place to mitigate the risk**. A written agreement or judgment in Jordan or Dubai would not bind paternal family members. Mother would be regarded as an apostate and unlikely to receive the assistance of the local courts if the children were retained after a holiday.
- The judge concluded that the undoubted benefits of the children spending time with the family in Jordan or Dubai were outweighed by the risks.

Free standing Port Alert orders

A v B [2021] EWHC 1716 (Fam) - Mostyn J

- The court concluded that a port alert could be ordered on application to the Family Court, effectively free standing from a tipstaff order or any High Court application.
- The jurisdiction for the Family Court to make such an order is found in s31E(1)(a) of the Matrimonial and Family Proceedings Act 1984 which provides that, 'in any proceedings in the Family Court, the court may make any order which could be made by the High Court if the proceedings were in the High Court'
- Templates and procedural guides which indicate that a Port Alert can only be made on application to the High Court are wrong.
- A port alert may be made in the Family Court where, '…such an order is justified on the facts and is an incidental and supplemental order to give effect to a decision of the Family Court' [para 37]. For example where a prohibited steps order is made preventing the removal of a child from the country, a port alert would be a supplementary measure to ensure the efficacy of the PSO.

Free standing Port Alert orders (ctd)

- The initial application for a port alert order will almost invariably be made *ex parte* for obvious reasons. Although arrangements will vary between Designated Family Judge ("DFJ") areas of the Family Court, there should always be a transparent and accessible facility to make an urgent *ex parte* application.
- An application for an *ex parte* port alert order (or, for that matter, any urgent *ex parte* order) should always be made, if possible, to a hearing centre in the applicant's local DFJ area. But if a DFJ area for one reason or another cannot provide an urgent business judge on the day to hear the application then there is no reason why the applicant cannot make the application in another area.
- Applications should be allocated to a judge of circuit judge level or, in a complex case, High Court Judge level
- Mostyn J annexed to his judgment a pro forma Port Alert order for use in the Family Court