PUMP COURT

CHAMBERS

Children Law Update 2022

Andrew Grime & Simon Purkis

PUMP COURT
CHAMBERS

Statistics & Guidance

- Statistics:-
- Family Court Statistics Quarterly: January to March 2022
- Public Law 4,248 new cases: up 4% compared to equivalent quarter 2021. Disposals 3,426, down 16% on same period.
- Adoption down 14% - effect of pandemic thought to have played a part.
- Average time for care and supervision cases to reach disposal is now 49 weeks. An increase of 6 weeks on the same quarter in 2021 – highest average since 2012!
- Annual trend – 16,394 public law cases in year to 31.12.21 (drop of 9%)

PUMP COURT
CHAMBERS

Statistics & Guidance

- Department for Education – Children looked after in England including adoption 2020 to 2021:
- Year ending March 2021 – 80,850 looked after children – AN ALL TIME HIGH!;
- NSPCC – 8% increase in child protection referrals by police to local authorities (almost 245,000) –NSPCC news 01.02.22).
- Average of 669 police child protection referrals per day
- Record numbers of children affected by domestic abuse – NSPCC helpline saw 53% increase on pre-lockdown average.
- The Association of Directors of Children's Services research showed that the number of children who are looked after has increased by 33.33% since 2008 whilst local authorities have seen their budgets reduce by 50% over the same period! (See: https://adcs.org.uk/care/article/comment-on-dfe-children-looked-after-statistics)
- Fostering Network's State of the Nation's Foster Care 2021 report found critical shortage in foster placements accusing the government of relying on the goodwill of carers to supplement the state.
- Number of children living in unregulated accommodation has increased by 89% between end March 2010 and end March 2020.

PUMP COURT
CHAMBERS

Statistics & Guidance

- House of Commons Library research paper, 12.11.21 'Looked after children: out of area, unregulated and unregistered accommodation (England) (See: https://commonslibrary.parliament.uk > cbp-7560) – notwithstanding provision under the Children Act 1989 for looked after children to be '*accommodated within the local authority's area*' unless this is '*not reasonably practicable*', seen an increase of 41% (period end March 201 to end March 2020) of looked after children being accommodated out of area with consequent trauma that follows from being placed far from home.
- Always look on the bright side of life! – In the Autumn Budget and Spending Review 2021 the Government announced £104M by 2024-2025 '*to take forward reforms to unregulated provision in children's social care, improving safeguarding standards for some of our most vulnerable children and young people*'.
- **GUIDANCE**
- Make Every Hearing Count' Case Management Guidance in Public Law Children Cases: March 2022 (See: https://www.judiciary.uk/wp-content/uploads/2022/03/Case-management-guidance-March-22.pdf)
- The President understood the desire of judges to '*manage every element of the future care plan*' but said that they must narrow their focus to the core issues of whether the child is to live with parents, another family member or friend, or be placed under the LA's care.

PUMP COURT
CHAMBERS

Statistics & Guidance

- AIM: not to pile more work on the shoulders of practitioners but to remove unnecessary time and work from each case.
- Two Goals: '(i) Reduce the volume of applications by ensuring that an application is only made by a local authority for a care order after a thorough assessment process and where it is clear that a care order is necessary in that case; and (ii) allowing the court to engage immediately, and efficiently, with the determination of an application that has been made because of the soundness of the pre-proceedings assessment and process.'
- Annex: Public Law Working Group: Training & Implementation Top 10 Tips
- Local authorities to prepare 'short and focused' thresholds;
- Case management hearings to be timetabled to provide parents with a 'realistic opportunity' to take legal advice and respond substantively to threshold before the hearing.
- Applications for ISW or psychological assessments should be avoided unless they are required to help the court resolve proceedings justly.
- **PORTAL CASES**
- Protocol Governing Orders and Applications in Portal Cases Portsmouth, HHJ Andrew Levey, dated 13 June 2022 (copy appended to notes).

PUMP COURT
CHAMBERS

Fact-Finding Hearings

- **Lincolnshire County Council v. CB & Ors [2021] EWHC 2813 (Fam)** – factors to be taken into consideration when making a case management decision regarding the need or otherwise of a separate fact-finding hearing.
- XE was aged 11 years when he died. He had cerebral palsy, could not walk, move, hold his weight and was non-verbal. Threshold allegations went way beyond the child's death and included drug use, emotional harm and failing to need the needs of the children including a lack of supervision, domestic abuse and neglect.
- There was no dispute that XE had died from drowning. However, the issue of XE's death was live an before the court as Lieven J stated in para 10*:*

  'It is apparent from this account that there are only two areas of factual dispute between the parents: what precisely DE said to the Mother in the kitchen before he went out, and who left the taps on. The police have now decided not to charge either parent with murder or manslaughter, but a decision has not yet been made as to whether they will be charged with drug related offences'
- LA and the Guardian argued that a 5 day composite final hearing was appropriate whilst the parents sought a separate 20 day fact finding hearing.

PUMP COURT
CHAMBERS

Fact-Finding Hearings

- Lieven J confirmed that this was a case management decision and therefore the court had a broad discretion. The starting point is FPR 2010 and she also referred to the recent Court of Appeal decision **Re H-D-H(Children)[2021] 4 WLR 106** which confirms the continued applicability of the principles set out by MacFarlane J, as he then was, in **A County Council v. DP [2005] EWHC 1593(Fam), [2005] 2 FLR 1031**, in particular at [24]-[25]
- *'[24] The authorities make plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:*

  a. the interests of the child (which are relevant but not paramount)

  b. the time that the investigation will take

  c. the likely cost to public funds

  d. the evidential result

  e. the necessity or otherwise of the investigation

  f. the relevant of the potential result of the investigation to the future care plans of the child.

PUMP COURT
CHAMBERS

Fact-Finding Hearings

- g. the impact of any fact finding process upon the other parties
- h. the prospects of a fair trial
- i. the justice of the case.
- *'[25] I am well familiar with the concept of 'necessity', arising as it does from ECHR Art 8 and, indeed, from the pre Human Rights Act 1998 case law to which I have been referred. It is rightly at the core of Mr Tolson's submissions in this case and, without overtly labouring the issue by including substantial descriptive text in this judgment, it is at the forefront of my consideration of the point. Amongst th pertinent questions are: Is there a pressing need for such a hearing? Is the proposed fact finding hearing solely, as Mr Tolson put it, 'to seek findings against the father on criminal matters for their won sake? Is the process, which will be costly and time consuming, with potentially serious consequences for the father if it goes against him, proportionate to any identified need?'*
- Lieven J held that delay was a particularly weighty factor in the instant case but that the welfare of the children was not paramount in this consideration. Further, the impact on court resources and other cases was a relevant consideration but the true question was: Is a fact-finding hearing 'truly' necessary?

PUMP COURT
CHAMBERS

Fact-finding Hearings

- *'[22] As the President of the Family Division set out in The Road Ahead (both 2020 and Addendum in 2021), in current circumstances the Family Courts do not have the resources to undertake hearings which do not meet the test of strict necessity. It is therefore essential that this test is properly applied, with appropriate scrutiny by the Court, even if the parties themselves do not argue against a fact finding hearing. The Court must be careful to ensure that there is a proportionate and effective use of court time. It is well known that the family justice system has come under very severe pressure during the Covid pandemic. Delays in the hearing of cases have become very much more lengthy and only through more rigorous case management will the delays be materially reduced.'*

  '[23] The outcome in the present case is in my view clear cut. The factual dispute between the parents in relation to XE's death is a very narrow one, namely what DE said in the kitchen to the Mother and who left the taps on. Only the parents were witnesses to these two events, save possibly for A, and none of the other witnesses who the parents seek to call can give direct evidence on the matters in dispute. There is body worn camera footage and recordings of the 999 calls so the Judge will have the direct, and thus best, evidence of the Mother and DE's immediate responses at the time of the incident.'

PUMP COURT
CHAMBERS

Fact-Finding hearings

- **Re L (Fact-Finding Hearing: Fairness)[2022] EWCA Civ 169** per Baker LJ
- Mother had 3 children, including a 2 year old L, by three different fathers. LA been involved with the family since 2017. The two older children were currently living with their respective fathers who were each seeking CAO's.
- Threshold concerns initially related to Z (father of L) exerting coercive control (incl verbal abuse, controlling behaviour) over the mother and various specific incidents were noted. Parenting assessments of M and Z were broadly positive and the LA filed final evidence proposing the child remain with M and Z subject to a child protection plan.
- One week later the LA submitted a revised threshold alleging arguments in front of the children, Z used M's money for gambling and that he used cannabis regularly. The Recorder decided that a fact-finding hearing was necessary and he proceeded to hear evidence over 3 days and made the finding sought, concluded threshold had been crossed and made additional findings.
- M and Z appealed on the grounds (i) the Recorder had been wrong to make findings outside the scope of the final threshold document and (ii) wrong to find the threshold was made out given a lack of adequate linkage between events found.

PUMP COURT
CHAMBERS

Fact-Finding Hearings

- Baker LJ makes clear that a judge can make findings that fall outside the scope of the local authority's threshold document '*known parameters*'.
- The totality of the evidence was plainly sufficient to support findings of coercive control over the mother.
- No party had been unfairly disadvantaged by the process by which the findings were ultimately made.
- The Recorder had good reason, based on the authorities, to depart from the LA's threshold document. Whilst coercive control had not been expressly pleaded in the final version of the threshold it was a concept that had featured prominently in the proceedings from the outset and had been addressed in written evidence. Whilst it would have been better for the parties to have clarified at the outset that coercive control was potentially part of the argument on threshold they knew the point was live and had the opportunity to address it while evidence was being taken.
- The Recorder's treatment of hearsay evidence was balanced and proportionate. Although a number of witnesses had been unavailable for cross examination, this had been taken into account.
- There was no merit in the second ground of appeal.

PUMP COURT
CHAMBERS

Vulnerable Parties & Fairness of proceedings

- **M (A Child)[2021] EWHC 3225 (Fam)**
- Judd J granted an appeal against a fact-finding judgment in private law proceedings, stressed the importance of the court complying with FRP 2010, rule 3a and PD3AA. *cam girl*
- Parents met online in 2015. M had been a '' lining in eastern Europe providing online sexual services. F had been a client. M moved to UK to live with F an became pregnant very shortly thereafter. They separated a few weeks after the child was born and disputes arose in respect of contact and money. In December 2019 M returned to her home country with the child; F made applications under the Hague Convention and the CA89 and M was ordered to return the babby which she did in February 2020. M applied for leave to remove and F sought a CAO. M made serious allegations of domestic abuse, incl. rape on three occasions, one in circumstances where she alleged she was unconscious and not consenting.
- Whilst both parties had been represented, at no stage was an application made, or consideration given to participation directions or a ground rules hearing.
- Judd J referred to S.63 of Domestic Abuse Act 2021 which provides that where a person is, or is at risk of being, a victim of domestic abuse, the court **must** assume

PUMP COURT
CHAMBERS

Vulnerable Parties & Procedural Fairness

- (contd) that their participation and evidence would be diminished by reason of vulnerability. This triggers FPR rule 3A and PD3AA. If a vulnerable witness is to give evidence there **must** be a ground rules hearing to consider how the evidence should be given
- '*this was a case which cried out for participation directions and a ground rules hearing, not just for the sake of the mother, but for the integrity of the court process itself*'
- The judge identified particular matters for consideration in such a ground rules hearing including:
- (a) visual Shielding
- (b) topics to be covered in cross examination;
- (c) restriction of questioning of M to what was necessary for a fair trial
- Judd J allowed the appeal in relation to both the failure to consider or implement participation directions/special measures, and in relation to the failure to balance the evidence property looking overall at the allegations

PUMP COURT
CHAMBERS

Vulnerable Parties & Procedural Fairness

- **Re S (Vulnerable Party: Fairness of Proceedings)[2022] EWCA Civ 8 (Baker and Whipple LJJ and Francis J)**
- Appeal from a fact-finding concerning injuries sustained by a child J, who was not subject of the proceedings, but was a child who had spent periods of time in the care of the subject child's parents. At the fact-finding hearing the judge concluded that two injuries to J were inflicted by M after he had returned to her from X and Y and that she had attempted to demonstrate that X and or Y had inflicted those injuries knowing that she had caused them herself and that her use of ketamine was higher than she had admitted.
- J's mother had never met her counsel in person, had given instructions over the telephone and attended the fact-finding hearing remotely. She appealed against those finings and applied for permission to add a new ground of appeal based upon procedural irregularity unfairness.
- Subsequent to the hearing, two psychologists reported on M's cognitive difficulties and low IQ and recommended regular breaks, the repeat of information and an intermediary in formal meetings and interviews.

PUMP COURT
CHAMBERS

Vulnerable Parties & Procedural Fairness

- Granting permission to amend the grounds of appeal and to adduce evidence relating to cognitive difficulties, allowing the appeal and remitting the proceedings to the Family Liaison Judge for consideration as to whether there should be a rehearing as to the cause of J's injuries for the following reason:
- (i) the express provisions of FPR Part 3A and PD3AA)"these comprehensive provision are of fundamental importance to the administration of family justice" per Baker J) and the overriding objective make clear that it is the duty of the court to identify 'at the earliest possible stage' a party or witness who may be vulnerable. The duty to identify a vulnerable party or witness would almost invariably fall on the party's representative rather than the court. The failure to identify J's mother's cognitive difficulties and to make appropriate participation directions to ensure the quality of her evidence was not diminished as a result of vulnerability amounted to a serious procedural irregularity and, consequently, the outcome of the hearing was unjust.
- Baker J acknowledged that the requirements of remote hearings during the pandemic made the identification of vulnerability more difficult and he expressed sympathy for judges hearing complex care cases during the public emergency.
- Importantly, unlike Re M (supra) this case concerned new material which had an obvious bearing on the M's credibility. The trial judge's assessment of M's character had been of central importance to the findings made and thus her evaluation could have been different had she been aware of M's vulnerability.

PUMP COURT
CHAMBERS

Disclosure

Re L (Third Party Disclosure Order: Her Majesty's Prison and Probation Service)[2022] EWHC 127 (Fam)

- The case concerned public law proceedings scheduled for final hearing in February 2022. In 2015, F was convicted of offences under the Terrorism Acts 2000 and 2006. He was sentenced to 8 years imprisonment.
- In April 2021 he was released on licence. The central issue in the case was the potential risk posed to the children by having contact with him, given his proven engagement in terrorist activities. M and F remained married and wished to live together with the children. The children were having supervised contact with F at approved premises.
- At a case management hearing, Cobb J directed disclosure from 'HMPPS' in relation to the circumstances of F's offences, his current attitude to those offences and his conviction and ideology. An SJE psychologist was instructed to undertake a risk assessment of the risk posed by F and M's capacity to protect the children. Subsequently, the SJE requested further disclosure from HMPPS and a further direction was made by consent.

PUMP COURT
CHAMBERS

Disclosure

- Whilst the Secretary of State for Justice complied with the disclosure order, they indicated through counsel their wish to make wider submissions as to the process by which disclosure was ordered in the instant case and in future cases.
- HELD: providing guidance on third party disclosure orders against HMPPS and similar bodies connected with the criminal justice system, whether or not they give rise to potential national security issues, should proceed as follows:
- (a) The Applicant for a third party disclosure order should serve the application on the SSJ by the Government Legal Department through the new proceedings inbox Newproceedings@governmentlegal.co.yk;
- (b) the application should be served in the usual way;
- (c) any request for disclosure on a rolling basis should be made explicitly clear in the application and/or order;
- (d) any correspondence should continue to be addressed exclusively to HMPPS;
- (e) any requests to third-party disclosure which are not accompanied by an order or application should, as now, be sent to the person or body believed to hold the material in question and not to the GLD.

PUMP COURT
CHAMBERS

Threshold

- ***Re W [2021] EWHC 2844 (Fam) Hayden J***
- This case concerned a 12 year old boy with profound disabilities arising from a genetic defect who required one-to-one care throughout the day with two-to-one care for moving and handling.
- Proceedings arose after the private care company responsible for delivering the care package stated they were no longer able to do so as a result of what they perceived to be interference and resistance from the child's parents.
- An SJE psychologist and psychotherapist was instructed to prepare a psychological assessment of the parents. Her ''*landmark report*' was instrumental in the resolution of the dispute and an agreed way forward in the case.
- HELD: focusing on that part of the S.31(2) test as to whether the care provided is "*not being what it would be reasonable to expect a parent to give*" under S.31(2)(b)(i). He emphasised that this is not to be regarded as an abstract or hypothetical test but must be evaluated by reference to the circumstances that the parent is confronting and the individual child, rather than some achievable gold standard or parenting. Above all, it requires recognition that '*in a challenging situation many of us behave in a way which might not objectively be viewed as reasonable*' (see para [19])

PUMP COURT
CHAMBERS

Covid 19 Vaccination

- **Re C (Looked After Child)(Covid-19 Vaccination)[2021] EWHC 2993 (Fam) Poole J**
- This case concerned a boy, now 13, who had been in care since 2015. In September 2021 M contacted the LA to object to her son receiving the vaccination. Subsequently, during supervised contact, the child told his mother, and confirmed with his social worker, that he wished to receive the winter flu and Covid 19 vaccinations. M sent the LA a signed 'vaccine refusal declaration'. F supported the child's wishes.
- The LA considered that it was in the best interests of the child to have both vaccines and that pursuant to S.33 CA 1989 they had the right to exercise parental responsibility by arranging for and consenting to the two vaccines being administered. They sought confirmation from the court.
- HELD: Pursuant to S.33(3)(b) the LA with a care order could arrange and consent to the child being vaccinated, notwithstanding parental objections given that the vaccinations were part of an ongoing national programme, that the child was Gillick competent and consented and that the LA were satisfied that it was necessary to safeguard and promote his welfare. The principles in **Re H (A Child: Parental Responsibility: Vaccination)[2020] EWCA Civ 664, [2020] 2 FLR 753** applied.

PUMP COURT
CHAMBERS

Proportionality

Re H-W (Children: Proportionality)[2021] EWCA Civ 1451

- This case concerned a mother with six children. The LA had been involved with the family throughout M's life due to long standing concerns relating to sexual abuse and neglect. Earlier care proceedings resulted in findings being made about the eldest child's sexual behaviour and although the children were made the subject of child protection plans in 2018 the matter had been closed by the LA in October 2019.
- Shortly thereafter, concerns re-emerged when M allowed A, aged 20 years, to say in the family home for 2 weeks during which time he sexually assaulted his sibling, then aged 6 years. M did not report this assault for 3 days and permitted A to remain staying in the family home.
- Two substantial judgements followed. The first focused upon the risk posed by A and the second, a welfare hearing, concerned the LA's care plan for the removal of the three younger children to separate foster homes with the youngest child (aged 18 months) being placed for adoption. The SJE, Dr Judith Freedman, psychiatrist and the Children's Guardian supported the LA care plans.

PUMP COURT
CHAMBERS

Proportionality

- Dr Freedman concluded that although matters had repeatedly involved the local authority, definitive changes had not been made by M. The children had struggled in education and M was unlikely to recognise and protect the girls from sexual harm. The parenting assessment undertaken by the allocated social worker was negative.
- At first instance the trial judge held that the mother loved all her children and that they wanted to stay with her but that it was not safe for them to remain; each girl was at risk of significant sexual harm and E had suffered actual and significant sexual harm. Whilst acknowledging the risks with foster care, he considered that both parents lacked insight and made final care orders in respect of C, D and E, effectively ruling them out as their future carers. An interim order was made in respect of the youngest child with a care plan that she be wither placed with her sister or in a foster to adopt placement.
- M, supported by one of the father's, was granted permission to appeal on the basis that the current risks to the children had not been properly considered and that the court's orders were disproportionate to those risks.

PUMP COURT
CHAMBERS

Proportionality

- HELD: Dismissing the appeal:-
- (i) There had been no identifiable error in the judge's approach including 'impeccable legal self-directions';
- (ii) The system for making and supervising difficult decisions such as those in the instant case required conscientious and diligent judges in the family court, bringing all their experience to bear, making multi-faceted assessments of the evidence and making decisions within a well-defined legal framework. In such circumstances, the appellate court had to take the greatest care to resist the temptation to disagree with the decision of the fact-finder. It could only interfere if the decision had been wrong and in marginal cases it was all the more important to trust to the wisdom and discretion of an experienced family judge.
- Lewison LJ concluded that in the instant case he was 'in the uncomfortable position of reviewing a decision which I cannot say was right or wrong'.
- Peter Jackson LJ provides a compelling list of reasons why the appeal should be allowed including the question of proportionality. Did the trial judge truly evaluate the harm the children might suffer and properly balance up the positives and

PUMP COURT
CHAMBERS

Proportionality

- (Contd) and negatives of the removal of the children from their mother's care. In considering the final item of the welfare checklist namely '*the range of powers available to the court under this Act in the proceedings in question*' and the opportunity this provides to explore what might be achieved under different possible orders.
- Nevertheless, Lewison and Laing LLJ also provided compelling reasons for their majority judgment in the matter. In particular stressing the history of the decision making regarding the family (eg. 9 day fact-finding hearing and a 6 day welfare hearing). They recognised the competing factors and, as Lord Nicholls stated in **Re B (Adoption: Natural Parent) [2001] UKHL 70, [2002] 1 FLR 196** '*There is no means of demonstrating that one answer is clearly right and another clearly wrong*'.
- Lewison LJ drew on **Re B (A Child)(Care Proceedings: Threshold Criteria)[2013] UKSC 33** where Lord Neuberger concluded that when the appellate judge cannot say whether the trial judge's conclusion on proportionality is right or wrong '*the appeal should be dismissed*'.
- BUT…

PUMP COURT
CHAMBERS

Proportionality

- **Re. H-W (Children)(N0.2)[2022] UKSC 17 per Dame Siobhan Keegan**
- M and F3 appealed to the Supreme Court who refined their grounds of appeal into two questions. Firstly, in order to decide whether those orders were proportionate, was it necessary for the judge as a matter of law to assess the likelihood that if left in M's care, (a) the children would suffer sexual harm; (b) the consequences of such harm arising; (c) the possibility or reducing or mitigating the risk of such harm; an (d) the comparative welfare advantages and disadvantages of the options presented. Secondly, whether the judge erred in law by failing to make any or any proper assessment of those matters.
- HELD: Appeal allowed and remitted for rehearing. The real issue in this case was not whether the judge reached a conclusion that was wrong, but the adequacy of the judge's ***process of reasoning*** (my emphasis) in reaching his conclusion.
- Supreme court had '*no hesitation*' in concluding that the judge was required to assess all four of those matters (a)-(d) above.
- In respect of whether the court must consider the possible reduction or mitigation of the risk which pertains and the welfare advantages and disadvantages of imposing an order, the court was clear in para 54:-

PUMP COURT
CHAMBERS

Proportionality

- *'[54] Again it is clear that this question should be asked when a court is considering whether to make a care order. That is because a court must look to determine whether any order is necessary by virtue of the Act; section 1(5), and whether or not the most interventionist order is necessary; article 8(2) of the Convention.*
- *[55] in addition, point (g) of the welfare checklist specifically refers to the range of powers available to the court under the Act. Consideration of the range of orders obviously includes the ability of the court to consider in a care order case a supervision order or other orders and options.'*
- Insofar as the second issue before the Supreme Court, concerning whether the judge erred in lay by failing to make a proper assessment of those matters and in particular matters (c) and (d) '*mitigations and options*'. The judge failed to mention the efficacy of the injunction against F" and the non-molestation order made against A:-
- '[*60] …one looks in vain for the critical side-by-side analysis of the available options by way of disposal, and for the evaluative, holistic assessment which the law requires of a judge at this stage. Whilst the judge has identified the risk of sexual harm as satisfying the threshold criteria for intervention, there is no evaluation of the extent of the risk of significant harm by way of sexual harm, nor of any …*

PUMP COURT
CHAMBERS

Proportionality

- *'[60]cont'd.. Available means by which the risk might be reduced for each child. Nor is there any comparison of the harm which might befall the children if left at home with the harm which would be occasioned to them if removed, and separated not only from the parents but from each other.'*

PUMP COURT
CHAMBERS

PRIVATE LAW - Statistics & Guidance

Family Court Statistics Quarterly: January to March 2022

- Private law 13,197 new cases: down **9%** compared to equivalent quarter 2021. Disposals 28,647, down **9%** on same period.
- Average time for private law cases to reach final order is now 46 weeks. An increase of 7 weeks on the same quarter in 2021 – **highest value since records began**!
- Continues the upward trend seen since the middle of 2016 where the number of cases overtook the number of cases disposed of.
- Legal representation: proportion of disposals where neither party legal representation was 41%. Up 27% since January-March 2013!

PUMP COURT
CHAMBERS

Statistics & Guidance: PD12Q

FPR 2010, PD12Q: https://www.justice.gov.uk/courts/procedure-rules/family:

- On 19 May 2022 a Practice Direction Update (No.4 of 2022) was issued including PD12Q accompanying new S.91A of the Children Act 1989 (inserted by S.67 of the Domestic Abuse Act 2021).
- Provides detail on the circumstances in which an order under section 91(14) might be appropriate, incl domestic abuse circumstances – to prevent abusive partners from using court proceedings to continue coercive control or other abuse
- Where persons conduct means an order is merited to protect the welfare of the child and where conduct includes harassment or other oppressive or distressing behaviour
- It provides further direction as to duration of a S.91(14) order, the process for applying for such an order, the considerations the court should take into account when deciding whether to make an order, and the process that should apply if a subsequent application is made for permission to apply

PUMP COURT
CHAMBERS

Guidance for Judges and Magistrates

Guidance for Judges and Magistrates for Fact-Finding hearings was compiled by Lady Justice Macur and published by the President on 5 May 2022
https://www.judiciary.uk/announcements/fact-finding-hearings-and-domestic-abuse-in-private-law-children-proceedings-guidance-for-judges-and-magistrates/

- Forewarned is forearmed – ESSENTIAL READING!
- 'Make every hearing count… seize the opportunity to probe…Remain 'in control' throughout [1];
- Views of parties, CAFCASS officer or the advocates may be persuasive, but not determinative, 'interrogate their reasoning' [2]
- Has MIAM taken place? If not why not? [4(a)]
- Identify real issues in the case. Is one parent denying contact per se or seeking to add conditions for or in relation to contact arrangemnts? What are the questions pertaining to the child's welfare? [5]
- What exactly is alleged in terms of Domestic Abuse and by whom. Consider the definitions in PD 12J (2A) and (3) in addition to PD12J [6]

PUMP COURT
CHAMBERS

Guidance for Judges and Magistrates

- Has a Form C1A been completed, is there a response? [7]
- *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?***
- Does the information before the court (eg. C100, C1A and any safeguarding report) contain sufficient detail to avoid directing further evidence/documentation to determine the issue? [8]
- If further evidence/documentation is required, what is necessary in fact specific circumstances of the case? ***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]

PUMP COURT
CHAMBERS

Guidance for Judges and Magistrates

- Ensure essential information obtained in respect of any allegation at an early stage - what, when, where? effect on child and parent?, were there 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 whether to order a fact-finding hearing, 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.

- Fundamentals are **relevance, purpose, and proportionality (FPR12J (14) & (17)**[13]
- Allegations that require the assessment of a pattern of behaviour eg. Controlling and coercive behaviour, o not justify a different approach. The **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]

PUMP COURT
CHAMBERS

Guidance for Judges and Magistrates

- 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]

Case management of allegations if a fact-finding is required [18-27]

- Relevance, purpose and proportionality is key [18]. Court controls the evidence [20]
- Robust case management required, court controls the evidence, keep parties and advocates on point by reference to identified issues FPRr1.1, 1.4 and 4.4 [19]
- Only order third party disclosure where necessary and proportionate, refuse fishing exercises [21]
- Summary of findings to be fairly and accurately recorded in the order or a document attached to it [26]Guard against attempts to re-argue issues [27]

PUMP COURT
CHAMBERS

FJC GUIDANCE ON EXPERT WITNESSES

Interim Guidance was published in May 2022 by the Family Justice Council in relation to expert witnesses in cases where there are allegations of alienating behaviours
https://www.judiciary.uk/wp-content/uploads/2022/05/FJC-interim-Guidance-use-of-experts-in-cases-with-allegations-of-alienating-behaviours.pdf

Key Points:-

- Conflict of interest;
- How and when can conflicts of interest be avoided
- Practice Directions – PD25B, para 9.1 requires four declarations. This includes a declaration that the expert has no conflict of interest of any kind, and the mandatory wording of the Statement of Truth;
- Letter of Instruction – court to carefully consider. Ensure it identifies the issues and preserves integrity of the assessment. Court should be alert to consideration of actual or anticipated conflict of interest for the expert, in carrying out their assessment and making recommendation for further work.
- Scrutiny of further recommended work – the court should be mindful of any program of work proposed that raises a professional conflict is contrary to best practice and challenges the integrity of any updating expert opinion.

PUMP COURT CHAMBERS

Fact-Finding Hearings:Vulnerable parties

Re M (A Child) [2021] EWHC 3225 per Judd J

- Appeal following a fact-finding hearing as to allegations of rape and domestic abuse The parents met when mother was living overseas and providing online sexual services as a 'cam girl' and the father was a customer. When the parties met M gave up her sex work, moved to the UK in favour of the developing relationship. Some years later the mother became pregnant. They lived together during the pregnancy but separate shorty after the baby was born. Following the breakdown of the relationship M made serious allegations of domestic abuse by father, incl 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).
- When directions were made prior to the fact-finding hearing there was no reference to FPR 2010, r3A and PD3AA. During the fact finding hearing there was no application for participation directions at any time and no ground rules hearing.
- The judge at first instance considered found that all sexual activity was consensual.
- Grounds of appeal concerned the treatment of vulnerable witnesses in the family court and whether, as in the instant case, the failure by the judge to implement any special measures rendered the hearing unfair.

PUMP COURT CHAMBERS

Fact-Finding Hearings:Vulnerable parties

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]
- Judd J emphasized the importance of giving careful consideration to the question of vulnerability '[82]*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 may 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*

PUMP COURT
CHAMBERS

Statistics & Guidance: PD12Q

happy family and relationship' [para 82 cont'd].

'[83]…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.'* .

PUMP COURT
CHAMBERS

Fact-finding hearing:Vulnerable parties

GK v. PR [2021] EWFC 106 per Peel J

- Appeal from a fact-finding hearing where allegations against the father of domestic abuse were dismissed. During that hearing, and after M ha given her evidence, she was taken ill and admitted to hospital. She asked for the matter to continue and stated that she would participate from hospital via her phone using earphones. The trial judge rejected M's case and made no findings on her allegations. M appealed on grounds she was at least potentially, a vulnerable party and witness, with reference to the impact on her of any actual or perceived intimidation.
- Peel J in allowing the appeal 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.'

PUMP COURT
CHAMBERS

Fact-Finding hearing:Vulnerable parties

'[32]…early identification of potential vulnerability, and a ground rules hearing, are indispensable elements of the case management process.' [para 32]

- Peel J was troubled by a number of matters:-
- (i) no ground rules hearing took place before the Fact-finding trial;
- (ii) The judge made no reference to Part 3A in his judgment;
- (iii) the allegations were numerous and some were of the utmost gravity;
- (iv) the mother had a medical condition which was exacerbated by stress;
- (v) no thought was given to a different process of cross examination;
- (vi) it became clear during the hearing that, during the mother's evidence the father was able to see her throughout on screen; and
- (vii) the judge nowhere considered the impact of the mother' vulnerability on her giving evidence.
- '*the mother was not afforded the opportunity to give evidence in the most appropriate form and, in a case where witness presentation was of the utmost importance to the judge, that in itself risks undermining the conclusions*.'

PUMP COURT
CHAMBERS

Fact-Finding hearing: Domestic Abuse

F v. M [2021] EWHC 3133(Fam) per Hayden J

- Following a fact-finding hearing where F had been found responsible for coercive, controlling and violent behaviour in two separate relationships the court ordered a S.7 report. CAFCASS attempts to contact F were unsuccessful. In evidence he stated he would attend the 'Promoting Positive Relationship Programme'. F stated he was effectively prohibited from engaging with CAFCASS and the Court as to do so might lead to him incriminating himself and potentially expose him to prosecution. F argued that the most appropriate way by which the court should redress this position was to rule that any statement or admission made by him, at any stage of the proceedings, in relations to the findings made against him in the fact-finding judgment, shall not be disclosed to the police, CPS. This was to include any admissions made in oral evidence.
- In considering s.98, Children Act 1989, Hayden J held:
- 'Parliament granted the protection of s.98 to public law care proceedings but not to private law cases…though the consequences of orders in private law may have far reaching effect on children and parents (eg. orders inhibiting access to the court pursuant to S.91(14)) and though some of the orders available might also properly be characterised as draconian, they do not carry resonances of quite the same

PUMP COURT
CHAMBERS

Fact-Finding hearing: Domestic Abuse

-magnitude'

- Hayden J suggested that a Scott Schedule is of limited utility in a case concerning allegations of a pattern of coercive and controlling behaviour:

'[113] **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.'

PUMP COURT
CHAMBERS

Fact-Finding hearing: Re B-B

Re B-B (Domestic Abuse: Fact Finding)[2022]EWHC 108 Fam, per Cobb J

- This case was remitted to the High Court for a fact-finding hearing following the conjoined appeals which were reported as **Re H-N and Others (Children)(domestic abuse: finding of fact hearings)[2021] EWCA Civ 448**.

i)Cobb J stated that the case highlighted the benefit of considering the evidence relevant to each different form of alleged domestic abuse in '*clusters'. The evidence relevant to each form of abuse overlapped in places, but '[6] 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*'

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

PUMP COURT
CHAMBERS

Fact-Finding hearing: Re B-B

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**;

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

PUMP COURT
CHAMBERS

Fact-Finding hearing: Re B-B

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.'

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;

PUMP COURT
CHAMBERS

Fact-Finding hearing: B-B

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';

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

PUMP COURT
CHAMBERS

Fact-Finding hearing: Re B-B

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)…

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.'

PUMP COURT
CHAMBERS

Fact-Finding hearing: Re K

Re K [2022] EWCA Civ 468 per Vos MR, McFarlane P and King LJ

- Court of Appeal guidance on the proper approach to fact-finding hearings in private law cases following Re H-N [2021] (supra). 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 as to whether a fresh fact-finding hearing was required. 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.

- **Re *H-N [2021] (supra)*** was endorsed
- The court expressed concern at the failure of the parties to engage in a MIAM: '***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]

PUMP COURT
CHAMBERS

Fact-Finding hearing: Re K

- 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](see also para [8] & [139] in Re H-N)
- '*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]

PUMP COURT
CHAMBERS

Fact-Finding hearing: Re K

- '*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]

PUMP COURT
CHAMBERS

Fact-Finding hearing: Re K

'[67] all judges hearing children cases will know that there will almost inevitably be emotional fallout following the separation of adults who have been in a close relationship. Whilst the court will not hesitate to adjudicate upon parental behaviour where this impacts upon the protection or welfare of a child, it is not for a court to hear about, much less to resolve, issues between the parents relating to their time together, unless to do so is likely to be necessary for, and proportionate to, the resolution of a dispute relating to the protection or welfare of a child'

- 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]

PUMP COURT
CHAMBERS

Fact-Finding hearing: B v. P

B v. P [2022] EWFC B18 per Levey HHJ

- Proceedings concerned two children aged 9 and 7. In December 2019 F made an application for enforcement of a child arrangements order. M applied for a variation of that order making allegations of domestic abuse. During the proceedings M was represented and F was a litigant in person.
- At a fully remote fact-finding hearing the judge heard evidence from the parents, maternal uncle and a social worker. There was no ground rules hearing and no consideration of special measures. As far as HHJ Levey could tell, the judge was not referred to the need for a ground rules hearing, FPR 2010 Part 3A, PD3AA or PD12J, nor was she referred to the definition of domestic abuse or reminded of the decision in Re H-N[2021] (supra). The trial judge found most of M's allegations not proved, while most of F's allegations against the mother on the enforcement application were proved. M appealed.
- Appeal allowed on all EIGHT grounds of appeal and thus held that the findings of fact could not stand. He found the trial judge had erred in the following respects:-
- (i) The trial judge failed to follow the approach endorsed in Re H-N of stepping back from the precise allegations and considering the behaviour as a whole or whether there was a pattern of coercive and controlling behaviour

PUMP COURT
CHAMBERS

Fact-Finding hearing: B v. P

(ii)The judge was found to have made 'significant omissions' in her judgment in not referencing Part 3A FPR 2010, PD 3AA or PD12J, or he definition of domestic abuse in a case where such decisions were critical [47]. The absence of PD3AA ground rules hearing to consider whether an special measures needed to be in place led to unsatisfactory aspects of the hearing eg. parties being able to observe each other throughout and F at times addressing the mother directly (See para [45]). HHJ Levey considered that such factors rendered the fact-finding decision unsafe as they raised significant concerns as to whether M could have participated effectively in the hearing (see para [50]). He made clear that the duty to consider whether special measures are necessary and if so, what they should be, lies with the court.

(iii) It was a procedural irregularity for the trial judge to have made findings that M had breached the child arrangements order without those allegations being put to her in cross examination. It was not a fair process to make findings on allegations without allowing M the opportunity to respond to them.

PUMP COURT
CHAMBERS

Privilege against self incrimination

Re P (Children: Disclosure)[2022 EWCA Civ 495, per Lord Burnett of Maldon CJ

- The father was the subject of serious findings of domestic abuse, including the rape of the mother; he sought an order for contact. 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 had been made, would not be disclosed to the police or CPS. F submitted that a party to family proceedings can only take part in those proceedings fairly and in compliance with his rights under Art 6 ECHR if they were immunized from the possibility of the use in criminal proceedings or admissions or incriminating evidence. The Court of Appeal rejected father's appeal against the judge's refusal to grant the declaration.
- '*In making the argument, the father is not seeking a privilege not to incriminate himself but a privilege to self-incriminate with absolute protection as to the consequences. That would be contrary to the sound administration of justice…the father's submission risks undermining aspects of the rule of law and giving no weight to the public interest in the conviction of those guilty of serious criminality*'

PUMP COURT
CHAMBERS

Privilege against self incrimination

- **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**
- 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.
- Lord Burnett CJ at para [26] provides 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.

PUMP COURT
CHAMBERS

Case Management: Intimate Images

Re M: Private Law Children Proceedings: Case Management: Intimate Images)[2022] EWHC 986 (Fam)

- Following the successful appeal in Re M (supra) the case was allocated to Knowles J for case management and concerned a judgment concerning the use of intimate images within those proceedings. There were cross applications before the court with F seeking a child arrangement order for shared care; M seeking to permanently remove the child to live in Romania.
- A number of 'intimate images' had been filed by the parties (initially instigated by the mother, and followed by the father) as part of the evidence in the proceedings. Knowles J considered that the term, in the context of private law proceedings, described ' [47] *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.'*

PUMP COURT
CHAMBERS

Case Management: Intimate images

The intimate images were both still and moving images including numerous graphic and intimate videos of the parties engaging in sexual activity. It included material relating to an alleged rape. There were also audio recordings taken covertly. The deployment of the material was '*wholly un-boundaried and disproportionate*'.

- In considering the necessity for such evidence the court's starting point was the relevance of the material to the allegations made by both parties and its probative value. Knowles J stated that the material '*will be excluded if it is deployed in great amounts without justification or addresses the same issue repeatedly and without bringing anything of forensic value to what has already been admitted*'
- In providing wider guidance, and acknowledging the emotional and psychological harm which may be caused to the parties, and particularly to an alleged victim of abuse, by the indiscriminate use of this material; the court held:-

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.

PUMP COURT
CHAMBERS

Case Management: Intimate Images

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.

PUMP COURT
CHAMBERS

Case Management: Intimate Images

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.

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;**

PUMP COURT
CHAMBERS

Case Management: Intimate Images

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).

PUMP COURT
CHAMBERS

S91(14) "barring" orders

What is a Section 91(14) order?

- Section 91(14) of the Children Act 1989 allows family courts to bar individuals from making further specified applications under the Children Act 1989 *without permission of the court*. These orders are known as section 91(14) orders or "barring orders".
- S.91(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."*

PUMP COURT
CHAMBERS

Re P (Section 91(14) Guidelines) (Residence and Religious Heritage) [1999] 2 FLR 573, CA

- Butler-Sloss LJ drew up a number of guidelines from the reported cases, while indicating that the court always has to carry out a balancing exercise between the welfare of the child and the right of unrestricted access of the litigant to the court.

1) Section 91(14) should be read in conjunction with s 1(1) which makes the welfare of the child the paramount consideration.

2) The power to restrict applications to the court is discretionary and in the exercise of its discretion the court must weigh in the balance all the relevant circumstances.

3) An important consideration is that to impose a restriction is a statutory intrusion into the right of a party to bring proceedings before the court and to be heard in matters affecting his/her child.

PUMP COURT
CHAMBERS

4) The power is therefore to be used with great care and sparingly, the exception and not the rule.

5) It is generally to be seen as a weapon of last resort in cases of repeated and unreasonable applications.

6) 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 (see also *Re P (Children Act 1989, ss 22 and 26: Local Authority Compliance) [2000] 2 FLR 910, FD*).

PUMP COURT
CHAMBERS

7) In cases under para 6 above, the court will need to be satisfied first that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute or between the local authority and the family; and secondly that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain (see also *Re S (Contact: Promoting Relationship with Absent Parent) [2004] 1 FLR 1279, CA*).

- The Court of Appeal has reiterated the principle that a need for time to settle to the regime ordered is not sufficient to justify a s 91(14) order: the purpose of the order could and should have been achieved by giving the order time to work itself out: *Re G (Residence: Restrictions on Further Applications) [2009] 1 FLR 894, CA*.

PUMP COURT
CHAMBERS

8) A court may impose the restriction on making applications in the absence of a request from any of the parties, subject, of course, to the rules of natural justice such as an opportunity for the parties to be heard on the point. In particular it is wrong in principle, except in exceptional circumstances, to put a litigant in person in the position, at short notice, of having to contest a s.91(14) order (*Re C (Prohibition on Further Applications*) *[2002] 1 FLR 1136, CA*).

PUMP COURT
CHAMBERS

9) A restriction may be imposed with or without limitation of time.

- In *Re B (Section 91(14) Order: Duration) [2004] 1 FLR 871, CA*, it was said that where the mother was determined to excise the father from a child's life the court should never abandon endeavours to right the wrongs within the family dynamics.
- An order which is indeterminate or is to last until a child is 16 should be an *exceptional step* because it is, in effect, an acknowledgement that nothing more can be done. If such an order is made the court must spell out why and what needs to be done to make a successful application in the future (*Re S (Permission to Seek Relief) [2007] 1 FLR 482, CA*).

PUMP COURT
CHAMBERS

10) The degree of restriction should be proportionate to the harm it is intended to avoid. Therefore the court imposing the restriction should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of order (see also *Re G (Contempt: Committal) [2003] 2 FLR 58, CA*).

11) It would be undesirable in other than the most exceptional cases to make the order *ex parte*.

PUMP COURT
CHAMBERS

Change in landscape since Re P (1999)

- In *Re A (Supervised Contact) (s 91(14))* *[2021] EWCA Civ 1749*, while endorsing the decision in *Re P* King LJ also observed:
- *"The easy accessibility to the court and the other parties as a result of emails means that Guideline 5 in Re P which says that s91(14) orders are: 'generally to be seen as a useful weapon of last resort in cases of repeated and unreasonable applications', has even more resonance now than it did in 1999. It seems, however, that the phrase 'weapon of last resort', when put together with Guideline (4) which says that: 'The power is therefore to be used with great care and sparingly, the exception and not the rule', has led to an understandable, but perhaps misplaced, reluctance for judges to make orders under s91(14), save for the most egregious cases of which, on the facts as found by the judge, this is one."*

PUMP COURT
CHAMBERS

Procedural imperatives:

Before making a s 91(14) order, the court must be satisfied that the parties affected:

I. are fully aware that the court is seised of an application and is considering making such an order;

II. understand the meaning and effect of such an order;

III. have full knowledge of the evidential basis on which such an order is sought;

IV. have had 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: *Re T (A Child) (Suspension of Contact) (s 91(14) ChA 1989) [2016] 1 FLR 916, CA*.

The power to make a s 91(14) order is to be used with 'great care', but it is clear that the circumstances in which a child's welfare will justify the making of such an order are many and varied. They are not confined to cases of repeated and unreasonable applications: *Re C-D (A Child)* [2020] EWCA Civ 501 at [85].

PUMP COURT
CHAMBERS

UPDATE: Section 91A

(as inserted by the Domestic Abuse Act 2021, effective 19/5/22)

1) This section makes further provision about orders under section 91(14) (referred to in this section as "section 91(14) orders").
2) The circumstances in which the court may make a section 91(14) order include, among others, where the court is satisfied that the making of an application for an order under this Act of a specified kind by any person who is to be named in the section 91(14) order would put—
   a) the child concerned, or
   b) another individual ("the relevant individual"), at risk of harm.
3) In the case of a child or other individual who has reached the age of eighteen, the reference in subsection (2) to "harm" is to be read as a reference to ill-treatment or the impairment of physical or mental health.
4) Where a person who is named in a section 91(14) order applies for leave to make an application of a specified kind, the court must, in determining whether to grant leave, consider whether there has been a material change of circumstances since the order was made.

PUMP COURT
CHAMBERS

(5) A section 91(14) order may be made by the court—

(a) on an application made—

(i) by the relevant individual;

(ii) by or on behalf of the child concerned;

(iii) by any other person who is a party to the application being disposed of by the court;

(b) of its own motion.

(6) In this section, "the child concerned" means the child referred to in section 91(14).

PUMP COURT
CHAMBERS

PRACTICE DIRECTION 12Q - ORDERS UNDER SECTION 91(14) OF THE CHILDREN ACT 1989

- **1.1**In this Practice Direction –
- "2021 Act" means the Domestic Abuse Act 2021;
- "child concerned" has the same meaning as in section 91A(6) of the 1989 Act;
- "domestic abuse" has the same meaning as in Practice Direction 12J;
- "harm" has the same meaning as in Practice Direction 12J subject to sections 31(9) and 91A(3) of the 1989 Act;
- "victim of domestic abuse" has the same meaning as in Practice Direction 12J; and
- "named person" means the person named in a section 91(14) order who must seek the court's leave before making a specified application.

PUMP COURT
CHAMBERS

2. Key Principles

- **2.1** Section 91(14) orders are available to prevent a person from making future applications under the 1989 Act without leave of the court. They are a protective filter made by the court, in the interests of children.
- **2.2**The court has a discretion to determine the circumstances in which an order would be appropriate. These circumstances may be many and varied. They include circumstances where an application would put the child concerned, or another individual, at risk of harm (as provided in section 91A), such as psychological or emotional harm. The welfare of the child is paramount.
- **2.3** These circumstances can also include where one party has made repeated and unreasonable applications; where a period of respite is needed following litigation; where a period of time is needed for certain actions to be taken for the protection of the child or other person; or where a person's conduct overall is such that an order is merited to protect the welfare of the child directly, or indirectly due to damaging effects on a parent carer. Such conduct could include harassment, or other oppressive or distressing behaviour beyond or within the proceedings including via social media and e-mail, and via third parties. Such conduct might also constitute domestic abuse.

2.4 A future application could also be part of a pattern of coercive or controlling behaviour or other domestic abuse toward the victim, such that a section 91(14) order is also merited due to the risk of harm to the child or other individual.

2.5 There is no definition in section 91A of who the other individual could be that could be put at risk of harm. However, it is most likely to be, but is not limited to, another person who has parental responsibility for the child and/or is living with or has contact with the child, or any other individual who would be a prospective respondent to a future application.

2.6 In proceedings in which domestic abuse is alleged or proven, or in which there are allegations or evidence of other harm to a child or other individual, the court should give early and ongoing consideration to whether it would be appropriate to make a section 91(14) order on disposal of the application, even if an application for such an order has not been made (since the court may make an order of its own motion – see section 91A(5)).

2.7 Section 91(14) orders are a protective filter – not a bar on applications – and there is considerable scope for their use in appropriate cases. Proceedings under the 1989 Act should not be used as a means of harassment or coercive control, or further abuse against a victim of domestic abuse or other person, and the court should therefore give due consideration to whether a future application would have such an impact.

2.8 The court should consider case law for further guidance and relevant principles, bearing in mind Parliament's insertion via the 2021 Act of section 91A into the 1989 Act.

PUMP COURT
CHAMBERS

Procedure:

- **3.1** Under section 91A, a section 91(14) order may be made by the court of its own motion. If at any stage of the proceedings the court is considering making such an order of its own motion, it should record this fact in an order, together with any related directions (see, for example, paragraph 3.5).
- **3.2** An application for such an order may also be made by an individual who alleges a risk of harm from a future application, or by or on behalf of the child to whom the application would relate, or by another party to the application being disposed of.
- **3.3** If an application is made, the Part 18 procedure should be used. The application may be made in writing using Form C2, or orally during the hearing.

PUMP COURT
CHAMBERS

3.4 Under section 91(14), an order may only be made when disposing of another application under the Act, but section 91(14) is silent on when an application for such an order may be made. In proceedings in which risk of harm is alleged or proven, including but not limited to domestic abuse, the court should therefore give early and ongoing consideration to the question of whether a section 91(14) order might be appropriate on disposal of the application, and to whether any particular findings of fact will be needed to determine the section 91(14) application.

3.5 If an application is made, or the court is considering making an order of its own motion, the court should also consider what opportunity for representations should be provided to the parties. Courts should look to case law for further guidance and principles.

3.6 If the court decides to make a section 91(14) order, the court should give consideration as to the following matters:

a. the duration of the order (see section 4);

b. whether the order should cover all or only certain types of application under the 1989 Act;

c. whether *service* of any subsequent application for leave should be prohibited until the court has made an initial determination of the merits of such an application (see section 6). Such an order delaying service would help to ensure that the very harm or other protective function that the order is intended to address, is not undermined; and

d. whether upon any subsequent application for leave, the court should make an initial determination of the merits of the application without an oral hearing (see s.6).

PUMP COURT
CHAMBERS

4.Duration

4.1 Sections 91(14) and 91A are silent on the duration of a section 91(14) order. The court therefore has a discretion as to the appropriate duration of the order. Any time limit imposed should be proportionate to the harm it is seeking to avoid. If the court decides to make a section 91(14) order, the court should explain its reasons for the duration ordered.

5.Types of application

5.1 Sections 91(14) and 91A give a discretion to the court as to the types of application under the 1989 Act that can be made subject to permission from the court. If the court decides to make a section 91(14) order, the court should consider which types of application should be specified in the order, and it should explain its reasons.

PUMP COURT
CHAMBERS

6.Application for leave

6.1 If, once a section 91(14) order has been made, the named person wishes to seek the court's leave to make a specified application, the Part 18 procedure applies subject to the following directions.

6.2 The application for leave must be made using Form C2, with two attachments: (i) a draft of the application for which permission is sought; and (ii) a witness statement setting out the grounds on which permission is sought, including whether there has been a material change of circumstances since the court made the section 91(14) order.

6.3 If the named person applies for leave, the Part 18 service rules apply, unless the court, when it made the section 91(14) order, prohibited service until initial determination of the merits of the application for leave (see section 3 above). In that case, the named person or court officer, as the case may be, must await that determination, and any directions from the court, before serving the respondent(s).

PUMP COURT
CHAMBERS

- **6.4** In determining any application for leave, the court has a discretion as to the circumstances in which leave should be granted. Section 91A(4) requires the court to consider whether there has been a material change of circumstances since the section 91(14) order was made. In other words, a material change of circumstances is not necessarily required in order for leave to be granted, but the question of whether there has been such a change, is something that the court must consider.

- **6.5** In determining any application for leave, the court should not ordinarily direct a report to be prepared under section 7 of the 1989 Act, in particular since, if leave were granted and the specified application were made, the court would then consider such a direction if appropriate.

- **6.6** The court may make an initial determination, without an oral hearing, of the merits of the application for leave. If the court does so, the applicant may, within 7 days of receipt of notice of the court's decision, request an oral hearing. If the court receives such a request, it must make directions as to service of the application and any other documents on the respondent, including the possibility that the respondent would not be served, and as to any representations or other matters in relation to the oral hearing.

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.

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 to 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**.

PUMP COURT
CHAMBERS

- Thank you for attending this seminar
- If you have any questions arising out of this presentation please do not hesitate to contact us by email at a.grime@pumpcourtchambers.com and s.purkis@pumpcourtchambers.com

J. ANDREW GRIME

SIMON PURKIS

29 September 2022

PUMP COURT

CHAMBERS

Children Law Update 2022

Andrew Grime & Simon Purkis