THE GAP BETWEEN FACTS AND NORMS: CONTACT, HARM AND FUTILITY

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ABSTRACT

This article presents the findings of a case file review of applications for child arrangement orders which were flagged as containing a risk of harm, and to which Practice Direction 12J was applicable. It begins by examining the development of the present version of the Practice Direction and the obligations it places on courts to engage in risk management so as to ensure that any contact between a child and parent accused of harmful behaviour is safe. It then proceeds to outline the means by which the case file review was conducted, and discusses the outcomes of the 102 cases examined across three courts. It then moves to assess how fact-finding hearings are used, examining the circumstances in which they were ordered, circumstances in which holding such a hearing was rejected by the courts, and means by which they were avoided. It also highlights the interaction between fact-findings and other investigative tools at the courts' disposal such as welfare reports. It concludes by framing the results within the context of increasing pessimism caused by recent judicial statements about fact-findings and the impact of harm allegations on contact.

KEYWORDS: Domestic abuse – contact – PD 12J – Fact-finding – Case review

INTRODUCTION

Contact between a child and their separated parents should only take place if it is in the child's best interests, and the contact is safe for all concerned. However, it is presumed that that involvement of a parent in a child's life is in their best interests unless the other parent can prove that involvement of any form would expose the child to the risk of harm. This, in essence, summarises the legal position that courts are supposed to use when deciding on applications for child arrangements orders. The relevant legal framework is comprised of the provisions of section 1 of the Children Act 1989, the case law of the courts interpreting this in the context of section 8 of the Act and the provisions of Practice Direction 12J of the Family Procedure Rules 2010 which guides the decision-making process in such cases. The simplicity of these statements masks a far more complex reality, a reality which has been coming to light slowly over the past two decades and which this article seeks to further illuminate. In doing so, it highlights a significant gap between the norms to which courts are expected to adhere and the often-disputed facts with which those same courts must grapple. Trapped in between are parents,

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usually mothers, who futilely ask that their experiences be designated as factual, or ask that facts be considered when making contact decisions.

Previous work relating to the relationship between harm, contact and court decisions has mostly focused on the outcomes of appellate courts, the experiences of litigants or practitioners, or reviews of data drawn from the statistics released by courts or other agencies,[1] although there have been some case file studies.[2] This article presents new insights for two reasons – first, it relies on a case file analysis of 102 first-instance applications made to the courts of England and Wales spread across three demographically distinct regions. This enabled the author to access the entirety of the documentation available to the court in making its decision, including statements of litigants and witnesses, CAFCASS and other reports, and correspondence. Secondly, all of these cases were initiated after the coming into effect of the current version of Practice Direction 12J (hereafter PD 12J) which places a heightened emphasis on the importance of risk assessment and which stipulates that the courts must consider in individual cases whether the presumption of parental involvement should apply in cases where domestic abuse is alleged. In this way, it addresses one of the recommendations of the Harm Panel Report by providing data on the implementation of PD12J (by variables such as court, region and judicial tier),[3] as well as the coincidence of domestic abuse and parental alienation allegations, information relating to the hearing of children's voices, and outcomes of cases.

This article will first outline the development of the current version of PD 12J, focusing largely on post-2014 developments, and the new emphasis on safe contact. It will then outline the study and a broad overview of its findings relating to the outcomes of the cases examined. As will be seen, the findings of earlier studies highlighting a pro-contact culture,[4] a belief that contact should progress towards unsupervised, overnight contact, and a minimisation of domestic abuse are repeated in this study. The article will then explore in greater depth the tension between what courts are supposed to do when confronted with an allegation of harm by looking at the role played by fact-finding hearings. In particular, it will examine the limited circumstances in which they are held, situations in which they

[1] See for example, R Hunter, A Barnett and F Kaganas 'Introduction: Contact and Domestic Abuse' (2018) 40(4) *Journal of Social Welfare and Family Law* 401, A Barnett 'Contact at all costs? Domestic Violence and children's welfare' (2014) 26 *Child and Family Law Quarterly* 439, R Hunter and A Barnett, 'Fact-finding Hearings and the Implementation of Practice Direction 12J' [2013] *Family Law* 431, S Choudhry, 'Contact, Domestic Violence and the ECHR', in M Freeman (ed), *Law and Childhood Studies* (2012) 14 Current Legal issues 339, M Kaye, 'Domestic Violence, Residence and Contact' (1996) 8 *Child and Family Law Quarterly* 285.

[2] L Trinder, J Hunt, A Macleod, J Pearce & H Woodward, *Enforcing Contact Orders: Problem-solving or punishment?* (University of Exeter and Nuffield Foundation, 2013), M Harding and A Newnham, *How do county courts share the care of children between parents? Full report* (University of Warwick 2015), Cafcass and Women's Aid, *Allegations of domestic abuse in child contact cases* (2017).

[3] R Hunter, M Burton, L Trinder, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases* (Ministry of Justice 2020).

[4] See for example, Barnett (n 1).

were avoided, and the relationship between these hearings and other mechanisms for gaining insight into the family situation such as welfare reports. Overall, it will become apparent that revised PD 12J is proving insufficient at ensuring that safety is a priority in contact determinations, to the point that there is growing concern over the ability of the system to meaningfully address safety concerns. The futility that must have been experienced by the parents whose cases were reviewed in this study highlight the significant gap that has developed between what the law does and what it is supposed to do.

THE DEVELOPMENT OF THE CURRENT PRACTICE DIRECTON

The development of the Practice Direction has been extensively recounted elsewhere,[5] and so a short summary of the position prior to its implementation will suffice. Numerous studies highlighted a pro-contact culture among first instance judges, a culture within which contact with both parents was assumed to be in a child's best interests regardless of the claim that one of those parents had abused the other, and within which the nature and quality of that contact was regarded as less important that the quantity of contact.[6] This view was supported by statements from the superior courts which continually ruled that, even in cases of where the "reprehensible violence" by a father would result in contact potentially being a "threatening life event" for a mother, the father would be awarded not only contact, but unsupervised contact.[7] Supervision of contact was reserved for extreme cases, including one where the father was convicted and imprisoned for attempting to strangle the mother and was alleged to have threatened to kill the children.[8]

Jo Harwood[9] identifies a shift in judicial attitudes in case law from the late 1990s, which culminated in the seminal decision of *Re LVMH*. While the Court of Appeal in this case made clear that domestic abuse was not, in itself, a barrier to contact, there was a clear recognition that the 'seriousness of the domestic violence, the risks involved and the impact on the child' must be weighed in every case

[5] See in particular A Barnett, '"Like gold dust these days": Domestic violence fact-finding hearings in child contact cases' (2015) 23 *Feminist Legal Studies* 47 and J Harwood, 'Child arrangement orders (contact) and domestic abuse: An exploration of the law and practice' (Unpublished PhD thesis, University of Warwick, 2018) available at http://wrap.warwick.ac.uk/135023/1/WRAP_Theses_Harwood_2019.pdf, last accessed 12 December 2022.

[6] R Bailey-Harris, J Barron, and J Pearce, 'From Utility to Rights? The Presumption of Contact in Practice' (1999) 13 *International Journal of Law, Policy and the Family* 111, M Hester and L Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (Policy Press 1996), C Harrison, 'Implacably hostile or appropriately protective? Women managing child contact in the context of domestic violence' (2008) 14(4) *Violence Against Women* 381, M Coy, K Perks, E Scott, and R Tweedale, *Picking up the pieces: Domestic violence and child contact* (Rights of Women 2012), G Macdonald, 'Domestic violence and private family court proceedings: Promoting child welfare or promoting contact?' (2016) 22(7) *Violence Against Women* 823.

[7] Specifically, *Re P (A Minor) (Contact)* [1994] 2 FLR 374; C Piper, 'Assumptions About Children's Best Interests' (2000) 22(3) *Journal of Social Welfare and Family Law* 261.

[8] *Re P (Contact: Supervision)* [1996] 2 FLR 314.

[9] Harwood (n 5) 18-20.

against the positive factors, if any, of contact.[10] While there would still be an assumption in favour of contact, rather than a presumption of contact,[11] the presence of domestic abuse in the family's history was a highly material factor to be considered which may offset such an assumption. The Court of Appeal also fully endorsed the findings of the Children Act Sub-Committee's Report which found that domestic abuse ought to play a greater role in decision making.[12]

The Report's recommendation that a Practice Direction be developed was not immediately acted upon; it was not until 2008 that the first version of PD 12J was implemented. Indeed, it came about because of the recommendation of contained in a Family Justice Council report that the *Re LVMH* principles should be embodied in a Practice Direction, a report which also called for a cultural shift in how contact cases were perceived.[13] The first version of the Practice Direction contained a relatively limited definition of domestic abuse,[14] and did not attempt to displace any assumptions regarding the benefits of contact. Nevertheless, it did permit the holding of fact-finding hearings to determine if claims of domestic abuse were true, and provided a range of factors to be considered where abuse was shown to have taken place which, taken together, showed a greater appreciation of the need to ensure that the effect of contact on the parent with whom the child was living was considered, as well as the motivations of the parent seeking contact.[15]

The Practice Direction did not, however, operate as intended and required substantial revision in 2014.[16] The definition of domestic abuse was widened to bring it in line with a non-statutory definition then in place across government, a statement of general principles to aid local implementation was included, and more extensive guidance on fact-finding hearings. That same year, a statutory presumption of parental involvement was introduced,[17] although it should be noted that the

[10] *Re L (A Child) (Contact: Domestic Violence); Re V (A Child) (Contact: Domestic Violence); Re M (A Child) (Contact: Domestic Violence); Re H (Children) (Contact: Domestic Violence)* [2001] Fam 260.
[11] Ibid, 295, per Thorpe LJ.
[12] The Advisory Board on Family Law: *Children Act Sub-Committee, A Report to the Lord Chancellor on the Question of Parental Contact in Cases Where There Is Domestic Violence* (Lord Chancellor's Department 12 April 2000).
[13] See Family Justice Council*, Report to the President of the Family Division on the Approach to be Adopted by the Court When Asked to Make a Contact Order by Consent, Where Domestic Violence has been an Issue in the Case* (January 2007).
[14] Practice Direction: Residence & Contact Orders: Domestic Violence & Harm, [2].
[15] Ibid, [27].
[16] See Hunter and Barnett (n 1). Practice Direction 12J Child Arrangements & Contact Order: Domestic Violence and Harm, issued 22 April 2014, available at https://www.judiciary.uk/wp-content/uploads/2013/02/privatelaw-pd12j-child-arrangements-and-contact-orders-domestic-violence-and-harm.pdf, last accessed 12 December 2022.
[17] Children and Families Act 2014, section 111, introducing s 1(2A) into the Children Act 1989.

operation of this presumption is currently under review.[18] The effects of this presumption on first instance courts are still being investigated,[19] but there is a clear and obvious tension between the statutory language on one hand and PD 12J's requirement of safe contact on the other. The importance of the Practice Direction was nevertheless underscored by judgments of the Court of Appeal highlighting the requirement to undertake a risk assessment in line with the Practice Direction and the fact that it places obligations on courts to ensure the safety of contact, even where the agreed terms of contact are embodied in a consent order.[20]

Perhaps because of the tensions inherent in conducting a proper risk assessment in the shadow of a statutory presumption, the 2014 version of the Practice Direction still did not prove sufficient in bringing about the required change in court practice. In 2016, Sir Stephen Cobb's report recognised that while the Practice Direction was 'essentially sound', it also expressly quoted the concern of advocacy groups that it was not effectively or consistently implemented by judges or Magistrates.[21] The Cobb Review made extensive recommendations, the most far reaching of which would have been the displacement of the presumption.[22] This proposal was not adopted in the final version of the Practice Direction, being instead replaced by an obligation to 'consider carefully whether the statutory presumption applies, having particular regard to any allegation or admission of harm by domestic abuse to the child or parent or any evidence indicating such harm or risk of harm.'[23] This clearly does not displace the presumption, and instead invites courts to ask themselves whether it has been displaced, an exercise which the statute already invites them to undertake. The statement that they must pay particular regard to the allegation or admission adds nothing to the statutorily mandated exercise of a rebuttable presumption.

However, one of the key provisions of the current Practice Direction, paragraph 5, was also present in the earlier version. This provision states simply that 'the court must be satisfied that any contact ordered with a parent who has perpetrated domestic abuse does not expose the child and/or other

[18] See the announcement of the review at Ministry of Justice, 'Child protection at heart of courts review' (9 November 2020) available at https://www.gov.uk/government/news/child-protection-at-heart-of-courts-review, last accessed 20 March 2023.
[19] J Harwood, 'Presuming the status quo: The impact of the statutory presumption of parental involvement' (2021) 43(2) *Journal of Social Welfare and Family Law* 119.
[20] See, for example, In *Re A (A child)* [2015] EWCA Civ 486 and *Re H* [2016] EWCA Civ 988.
[21] The Hon. Mr Justice Cobb, *Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm – Report to the President of the Family Division* (January 2017), [8]. As background to this statement see Women's Aid, *Nineteen Child Homicides* (Women's Aid 2016); All-Party Parliamentary Group on Domestic Violence*, Parliamentary Briefing: Domestic Abuse, Child Contact and the Family Courts* (All-Party Parliamentary Group on Domestic Violence and Women's Aid 2016).
[22] Cobb Report, ibid [12].
[23] Family Proceedings Rule 2010: Practice Direction 12J Child Arrangements and Contact Orders: Domestic Abuse and Harm (hereafter PD12J), [7].

parent to the risk of harm and is in the best interests of the child.'[24] This captures the essence of a court's obligation when a risk of harm is identified. In order to establish that contact can proceed, then, the court must be satisfied that, where domestic abuse has occurred, two further conditions must be met before contact can proceed – contact must not expose the child or other parent to risk of harm, and contact must be in the child's best interests. Where the court is not satisfied that domestic abuse has been perpetrated, it appears that the ordinary welfare principle read in light of the statutory presumption of involvement will determine the matter.

The current Practice Direction, however, adds an important additional element which has so far been underappreciated in the literature on section 8 – the importance of reducing, and the courts' attitude to, risk. On reading paragraph 5 of the Direction, there now appears to be an additional duty of risk elimination imposed on courts, or at least risk minimisation. Both constructions of the duty are possible; however, paragraph 35 appears to clarify that it is really a duty of risk minimisation. Whereas the Cobb Review's version of this paragraph stated that 'the court should ensure that any order for contact will not expose the child to the risk of harm',[25] the accepted version of the revised Direction states that the child will not be exposed to "an unmanageable risk of harm".[26] The insertion of this single adjective completely changes the exercise which they must undertake. It is clearly a more realistic expectation; however desirable it may be to attempt to do so, risk cannot be eliminated.

Risk is not just exposure to hazard, artefact or event, but a highly complex, politicised and value-laden concept.[27] Other areas of law, notably child protection, have adopted an approach to risk which recognises this and therefore recognises that while risks have an underlying reality, they are also subject to elements of social construction and mediation. This process of the magnification, dramatization and minimisation of certain risks within a particular field of knowledge means that a risk can never be entirely eliminated,[28] but is instead subject to control and management strategies. This is precisely the approach to risk embodied in the Practice Direction when it stipulates that a court 'should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before during and

[24] Ibid, [5].
[25] Cobb, [35].
[26] PD 12J, [35], emphasis added.
[27] Mary Douglas, *Risk and Blame: Essays in Cultural Theory* (Routledge 1994).
[28] Ulrich Beck, *Risk Society: Towards a new modernity* (Sage 1992) 22-3. For an outline of how this approach to risk has influenced child protection, see Kieran Walsh, *The Development of Child Protection Law and Policy: Children, Risk and Modernities* (Routledge 2020).

after contact, and that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.'[29]

One would expect that this series of requirements would lead to a more cautious approach to contact. It is evident that the contact at all costs attitude exhibited by courts in earlier studies is expressly disavowed by the 2017 version of PD12J,[30] and replaced by a new 'safety first' norm. However, there is still a lack of clarity over the extent of the court's duties and their effectiveness at attaining this norm. First of all, there is no clarity over the applicability of these measures. These duties regarding risk apply in all cases where domestic abuse has occurred – a matter established by way of a fact-finding hearing, admissions or via some other means. The court should make findings of fact wherever practicable about the nature, degree, and effects of any domestic abuse and record this as part of any order it makes.[31] But what duties is the court under when no finding relating to domestic abuse has been made because a fact-finding hearing was not held, or no record of it mentioned in the order? It appears that this is one way that a court can escape the obligations imposed by paragraphs 35 and 36. Secondly, in cases where abuse is acknowledged, the extent of the protective measures required is unclear. Paragraph 38 makes clear that if the court feels that direct contact is safe and beneficial, it may make provision for contact to be supervised, it may impose conditions on the exercise of contact, and order the review of contact arrangements at a future date. However, in light of the potential lack of appropriate supervisors, the efficacy of this provision in doubt.[32] In cases where a parent seeking contact is deemed to be a risk to the child or to the other parent, contact via a centre or supervised by a relative is not appropriate. It does not state, however, that contact should not happen, leaving open the potential for it to take place in some other form.

Despite the limitations caused by the rejection of some the Cobb Review's recommendations and the limitations addressed above, the revised PD 12J represents an improvement of the legal framework governing post-separation parenting. Its terms represent a clear acknowledgement that domestic abuse continues after separation and that contact needs to be managed in such a way that the risks are mitigated. While the presumption of parental involvement has not been replaced, the importance of safe contact is highlighted to such an extent that we can realistically see PD 12J as introducing a new norm of safety first. The formulation of paragraph 36 as a directive or prescription to first instance

[29] PD 12J, [36].
[30] Barnett (n 1).
[31] PD 12J, [29].
[32] Studies by Perry and Rainey and Hunter and Barnett both show that where courts find that supervised contact is required but is not available, it tends to end up supported or unsupervised rather than not at all. See A Perry and B Rainey, 'Supervised, Supported and Indirect Contact Orders: Research Findings' (2007) 21(1) *International Journal of Law, Policy and the Family* 21 and Hunter and Barnett (n 1).

decision makers confirms this, expressing the command that only contact which can, as far as possible, be made safe should be permitted. Any other contact, such as contact that takes place under conditions of unmanaged risk or where safety measures have not been taken as far as possible, should not occur. This is a clear command to first instance courts to do what they can to ensure that safety is prioritised, and an empowerment of them to take active steps to do this. What becomes clear, however, is that the norm is being ignored. Courts are routinely making orders for contact which evidence a reluctance to establish that domestic abuse suffered by one parent, and perhaps witnessed by the children, is worth recognition as a fact, or if it has been so recognised, that it influences the structure of the relationship between a child and an abusive parent in any significant way.

THE STUDY AND METHODOLOGY

This study used case file research to gain an insight into the operation of section 8 applications. Although relatively common in related areas such as child protection where social work files are examined, case file research is less common in the legal context because of the difficulties associated with accessing data held by courts and because of particular methodological challenges.[33] The relative difficulty of access is outweighed, however, by the benefits of accessing data which allows the study of a family's trajectory through the court system in a non-intrusive way. The process of collating case files whose primary function is not research can also tell us something about the institutions involved – the personnel, their institutional biases and preferences, and the pressures they work under. Thus, we cannot see the contents of a file as neutral and transparent, but as the result of an iterative process.[34] Case files are thus inherently messy.[35] The importance of this will be become apparent later in the article when the choices made by courts over how to respond to allegations of harm are discussed; depending on the choices made by courts and other actors, including the parties themselves, the contents of files may differ significantly even in ostensibly similar situations. Further, the content of the files will be a mixture of professionally constructed reports designed to fulfil predetermined procedural functions and self-reporting narratives of both victims and perpetrators of abuse seeking to justify their choices, meaning that the information contained in the files is further

[33] On which generally, see S Witte, 'Case file analyses in child protection research: Review of methodological challenges and development of a framework' (2020) 108 *Children and Youth Services Review* 104551. See also the comments on methodology made by Harding and Newnham (n 2), Trinder et al (n 2), and Cafcass and Women's Aid (n 2).

[34] S Huskonnen, *Recording and use of information in a client information system in child protection work* (Tampere University Press 2014), C Taylor, 'Trafficking in Facts: Writing Practices in Social Work' (2008) 7(1) *Qualitative Social Work* 25.

[35] BA Lucenko, IV Sharkova, A Huber, R Jemelka, D Mancuso, 'Childhood adversity and behavioral health outcomes for youth: An investigation using state administrative data' (2015) 47 *Child Abuse & Neglect* 48.

complicated by the information writer's own motivations.[36] Beyond this, there may be gaps in the data caused by missing information, practices which may be different between different locations, and omissions caused by simple clerical errors. Each of these challenges was encountered during the course of the study, but the overall effect on the findings was limited.

This study examined case files relating to applications under section 8 of the Children Act 1989 issued between January 2018 and September 2019 in three Designated Family Court Centres. The files were examined on site at Designated Family Court Centres in November and December 2019. Anonymised data was extracted from each file, and each file was given a code number consisting of a letter, corresponding to the court centre which dealt with it, and a number. A total of 684 cases were identified by HM Courts and Tribunal Service as having a risk of harm flag, meaning that the 2017 version of the Practice Direction applied to each of the cases reviewed. Each application is assigned a file number when received by the courts, meaning that one family may have several linked applications if there are cross-applications from each parent relating to the same child, applications for variation of a previous order, or applications for enforcement of a previous order. At the sampling stage, it was not possible to tell if applications related to the same family or not, as it only became apparent when the court centre was visited that a particular application had been consolidated with another, which was designated as the 'lead application'. At the sampling stage, it was therefore possible that a group of four files would have been selected, but on arrival at the court it could have been the case that the four files related to a single family and had been consolidated into a single bundle for the purposes of court hearings.[37]

A random sample of 50 cases at each court centre was then selected for analysis, spread across the full date range; while this meant that some cases would not have been completed by the time of the site visit, it allowed for the possibility that some of these applications may have been connected to earlier proceedings or may have been dealt with in a relatively short space of time. Both possibilities were, in fact, borne out. Some incomplete cases also yield some very important data on interim orders and other matters. A total of 14 cases were incomplete at the time of the study. Given this fact, and the consolidation of files noted above, it was not possible to examine 50 full, completed files at each location. Instead, a total of 102 'lead' applications were examined, spread as evenly as possible across the three centres. This represents 14.9% of all applications issued during the relevant period.

[36] P Fleming, L Biggart, C Beckett, 'Effects of professional experience on child maltreatment risk assessments: A comparison of students and qualified social workers' (2015) 45(8) *British Journal of Social Work* 2298.
[37] The sample showed that there was a total of 15 cross-applications relating to the same family – two in Centre A, 7 in Centre B and 6 in Centre C. There is no obvious reason why Centre A had fewer cross-applications.

Designated Family Court Centres do not only deal with cases from that city, but from their immediate environs as well. The first Designated Family Court Centre (A) was located in a southern English city. This city is characterised by a relatively younger and wealthier population than the national average.[38] A lower percentage of children live in low-income families and a higher percentage of adults have qualifications when compared to the national average. When looking at the wider catchment area, this relatively prosperous picture is maintained, as there is a higher life expectancy and lower levels of economic deprivation in this area than across the rest of England. The second Court Centre (B) was located in a Welsh city with a slightly younger population than the Welsh average. The area has experienced significant economic deprivation, and lags behind the rest of Wales in a variety of economic and educational markers. The third Court Centre (C) was located in a town in south-east England. The town and its surrounding area measured comparatively poorly on educational disadvantage compared to national averages, but was mid-ranking on most other metrics relating to the economy and health. However, there was significant variation within the area covered by this court centre, with some areas attaining standards significantly above the national average nestled very close to areas of significant deprivation. As a result, the study examined files from court centres that are broadly reflective of the population across England and Wales. It was important to include a Welsh centre in the study so that any potential variations between English and Welsh courts could be examined, although it was not feasible to include more than one due to resource constraints. Such constraints, as well as others mentioned below, also prevented the examination of files from a northern English family court centre.

As noted above, the files were examined on site at each of the three court centres. Due to data access constraints, the data could only be extracted from paper-based files; access to electronic files was not permitted. This immediately ruled out the possibility of accessing court centres which used electronic file management processes. No electronic equipment was permitted in the initial data capture, as files could not be copied or scanned. As a result, comprehensive handwritten notes were made about each file, which were later transferred to electronic format to assist the analysis. A mixture of quantitative and qualitative data was captured from each case file included the type and date of application, the risk of harm alleged by the parent applying for the order, any cross-applications or related applications, details of any CAFCASS or other professional reports, correspondence, interim orders and final orders. Where there were allegations of harm which were fleshed out via statements, reports, correspondence or Scott Schedules, this data was also captured. Some files included extensive

[38] Details of the demographic data outlined here are based on measurements against data obtained from the Office of National Statistics Regional Accounts system. See ONS, 'Regional Accounts' available at https://www.ons.gov.uk/economy/regionalaccounts, last accessed 21 March 2023.

information about earlier proceedings involving the same family, or occasionally documentation relevant to the case produced by other agencies. A chronological case history was created for each file examined, from which information relating to key variables as extracted and coded using SPSS, which was then used to generate descriptive statistics about the cases; the more qualitative data was also coded to identify different types of risks of harm and case outcome.

OVERVIEW OF GENERAL FINDINGS

The findings of this study partly confirm the results of earlier studies on section 8 applications generally as well those looking at applications with allegations of harm, but in some ways go significantly further than those studies. The data show that the majority of applications were made by fathers. In total 55.8% of applications were made by fathers, 41.1% by mothers, and the remainder were initiated by other family members, often grandparents who were also the children's special guardians. The majority of the time, the children were living with their mothers at the time of the application, and fathers were seeking 'spend time with' orders, either to regularise the arrangements following an informal agreement, or were seeking the restoration of contact which had been stopped or reduced by either the mother or the children themselves. A minority of parties were legally represented at some stage in the proceedings, with 36.3% of fathers and 33.3% of mothers having legal representation. However, parity of representation was often absent. Of the 53 cases in which at least one of the parties was represented, both parties were represented in only 18 (33.9%). Most likely, neither party would be represented, with the parents having to act as litigants in person. Table 1 below provides an overview of the cases surveyed and some of their key characteristics:

Table 1 – Profile of cases surveyed (n=102)

Mother Applicant	42
Father Applicant	57
Cross-Application	15
Mother only alleged domestic abuse	57
Father only alleged domestic abuse	1
Cross allegation of domestic abuse	15
Parental alienation alleged	17
Local authority involved	51
Previous Child Arrangements Order	37
Previous Domestic abuse order/Police involvement	37

The cases found in the sample could fairly be described as demonstrating reasonably high levels of interparental conflict. A significant number of cases had a child arrangements order already in place – 37, or 36.2% of the total. These were a mixture between cases with relatively recent orders which had

broken down, and other orders which were the result of long-term, protracted litigation spanning a decade, meaning that these cases contained a significant number of repeat court users. The characterisation of these as high conflict cases is supported by the significant presence of claims of domestic abuse and parental alienation allegations. Domestic abuse was alleged in 71.6% of all cases, with a remarkably consistent spread across all three court locations. Of these, 57 cases were allegations of domestic abuse made solely by a mother against the father, representing 78% of the total. Only 1 case (1.4%) involved a claim of domestic abuse committed by the mother against the father. 15 cases (20.5%) cases involved cross-allegations, where both parents made allegations against each other. In 23.3% of all cases involving domestic abuse allegations, there had been police involvement with the family stemming from domestic abuse concerns, and in 14 cases (19%) the parties had been involved in earlier domestic abuse litigation resulting in an order under the Family Law Act 1996. The local authority had also been involved, or were at present involved, in 51 cases in total, or 69.9% of those where domestic abuse had been alleged. Parental alienation allegations were often made by fathers in response to allegations of domestic abuse, with parental alienation claims featuring in a total of 17 cases, but only in three cases was it alleged in the absence of a domestic abuse claim by a mother.[39]

Table 2 – Outcomes of cases via an order (n=79)

Case resolved on consent	51
Case resolved by court order	28
Unsupervised day-time contact	14
Overnight contact	50
Managed contact – supervised, supported or indirect	15
Hand-over or other conditions	39

Despite the high level of animosity and clear risks to the safety of the families involved, the outcome of the cases examined in this sample was, almost inevitably, significant levels of unsupervised and overnight contact. Stephen Gilmore has argued that, once a court finds that contact should in principle be ordered, having considered the child's welfare as paramount, the court will then try to put in place as extensive a contact regime as possible.[40] Research such as the Harm Panel Report has shown that courts will grant as much contact, with as few restrictions, as possible.[41] This study confirms that view,

[39] Parental alienation is clearly an issue of major significance in cases such as this, and will be the subject of further research by the author based on this sample of files.
[40] S Gilmore, 'Disputing Contact: Challenging Some Assumptions' (2008) 20(3) *Child and Family Law Quarterly* 285, 297.
[41] See also Hunter et al (n 3).

even in cases deemed at the outset to involve harm and to which the latest and most robust version of the Practice Direction applies. Another point made in earlier studies which was confirmed by this sample relates to the complexity of the issues raised in section 8 applications. Some of the complicating factors mentioned in earlier analyses, and observed in the present study, included risks of serious harm, criminal convictions for serious offences, sectioning under the Mental Health Act 1983, and high levels of drug abuse.[42] This study also observed additional complicating factors such as the presence of previous domestic abuse related court orders, high levels of coercive control and significant levels of involvement from local authority safeguarding teams, as indicated above.[43] Despite these complex risk factors, the majority of cases were concluded via consent orders. 51 cases were resolved in this manner, as opposed to 28 resolved via a court order. Therefore, in almost two-thirds of concluded cases, all of which involved a risk of harm flag and many of which contain allegations and perhaps clear indications of physical and sexual violence, the courts abdicated decision-making to the parties themselves. There was no evidence that consent orders were scrutinised against the requirements of PD 12J, beyond occasional pro-forma statements.

In spite of the level of risk evident in the cases examined, contact was invariably the most likely outcome of a case, with only 9 cases out of 88 completed cases (10.2%) resulting in an order which would have permitted no contact; in one of these 9 cases, contact was not necessarily deemed inappropriate, but an order was deemed futile as the child was about to turn 16.[44] Such a finding shows that first instance courts are clearly heeding the general principle outlined in many cases that contact should only be terminated in exceptional circumstances, where there are cogent reasons and there is no alternative.[45] Yet the level of risk and harm which may be experienced by both the child and the parent with whom the child lives should serve to displace such a general principle, or at least allow for the creation of a new principle applicable to risk of harm cases. This is, in part what PD12J was designed to do and appears to be failing to do, proving the veracity of the judgement that the law is trapped in a cycle of failure.[46]

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[42] See generally, C Smart, V May, A Wade and C Furniss, 'Residence and contact disputes in court', Vol 1 (Lord Chancellor's Department, Research series, no 6/2003, 2003) and L Trinder, J Conolly, J Kellett and C Notley, 'A Profile of Applicant and Respondents in Contact Cases in Essex' (DCA research series, 2005), A Newnham and M Harding, 'Sharing as caring: Contact and residence disputes between parents' (2016) 28(2) *Child and Family Law Quarterly* 175.

[43] Research by Cafcass and Women's Aid (n 2) also found that domestic abuse was rarely a standalone problem.

[44] Section 9(6) of the 1989 Act stipulates that an order will cease to have effect after the child reaches the age of 16.

[45] See the outline of general principles in *Re O* [1995] 2 FLR 124 and *Re C* [2011] EWCA Civ 521.

[46] Hunter, Barnett and Kaganas (n 1).

It could be argued that, because 10% of cases resulted in no contact, that the law is working. This is clearly a higher figure than found by Alison Perry and Bernadette Rainey's study (less than one percent of cases resulting in no contact),[47] and Annika Newnham and Maebh Harding (2.9%).[48] However, important differences should be borne in mind, the most important of which is that the entire sample here showed a risk of harm, whereas this was not the case for those studies. Secondly, the data collection by Newnham and Harding was completed in 2011, and by Perry and Rainey a decade earlier. The legal framework has changed significantly in that time in that the Practice Direction has undergone significant revisions, and coercive or controlling behaviour is now recognised as part of the definition of abuse and can be a criminal act in itself.[49] Thirdly, the social and judicial understanding of domestic abuse was supposed to have changed given advances in, for example, judicial training. As a result, a higher incidence of no-contact orders should be expected, and the magnitude of change is perhaps disappointing. The types of abuse leading to no-contact, and conversely the risks and proven harm which were seen as irrelevant to contact, will be addressed in greater detail below.

Within this group, 79 completed cases lead to contact. Overnight contact was the end result in 50 cases, representing 63.2% of all contact outcomes. When uncompleted cases are included, there were 93 cases leading to contact, of which 53 (57%) led to overnight contact. This is substantially higher than the results of Joan Hunt and Alison Macleod's study who found that overnight contact was the result of 49% of cases. Given that all of the present cases involved an identified risk of harm, it would not be unreasonable to hypothesise that the figure would have been lower. An additional 14 completed cases resulted in unsupervised day-time contact, meaning that in 72.7% of all completed cases, the outcome was for some element of unsupervised contact. This finding firmly supports the idea that there is a pro-contact culture, and that the factor most influential in driving decision making is not safety, but a desire to maximise contact.

Newnham and Harding found that supervised and supported contact were usually used as a stepping stone to unsupervised contact, rather than as an endpoint in themselves.[50] It appears that supervision and support, as well as the attachment of conditions around handover, are the main safety measures being adopted by courts in response to PD 12J. However, these are often temporary arrangements. A decision of supervised or supported contact was made in 22 cases; in 10 of these, a progression to

[47] Perry and Rainey (n 32) and Newnham and Harding (n 42) 192.
[48] Newnham and Harding, ibid, based on the number of cases they examined which prohibited contact rather than cases with no functioning directive provisions.
[49] See Serious Crime Act 2015, s 76.
[50] J Hunt and A Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (Ministry of Justice, 2008) 27; C Smart et al, *Residence and Contact Disputes in Court: Volume 2* (University of Leeds, 2003), at 90, Newnham and Harding (n 42) 191.

unsupervised contact was envisaged. Interestingly, Court Centre A accounted for over half of the supervised or supported contact cases, with 12 of the 22 such decisions being ordered there. It was also the Centre with the highest number of cases which did not progress to unsupervised contact, accounting for 7 of the 10 such decisions. Court Centre B in Wales accounted for only 2 cases of supervised or supported contact, both of which were expected to result in unsupervised contact in due course. Contact supervisors were most commonly family members of the parties, and in particular, of the alleged perpetrator of abuse – family members were designated as supervisors in 13 cases, as opposed to 6 in which independent supervisors were to be used. In one particular case,[51] the father was accused of sexual abuse of a child who was not subject to the present proceedings. When the mother objected to contact because of these allegations, the court ordered that the paternal grandmother act as supervisor, despite her express statement that she did not believe the sexual abuse claim. The attitude to safety measures could, therefore, legitimately be described as desultory and contrary to the express statement in paragraph 38 of the Practice Direction that contact supervised by a relative is not appropriate.

FACT-FINDING HEARINGS

One way of assessing, and then managing, risk is through the use of fact-finding hearings. The Practice Direction states that the court must consider "the nature of any allegation, admission or evidence of domestic abuse, and the extent to which it would be likely to be relevant".[52] In doing so, it must consider whether a fact-finding hearing is necessary to determine what actually happened when allegations are disputed, to manage the risks involve, and before any welfare-based decision on the substantive issue of child arrangement orders can be made.[53] It must also consider whether the information available in the absence of a fact-finding hearing provides a sufficient factual basis on which to proceed, and whether a hearing is therefore necessary and proportionate.

It has been claimed that fact-finding hearings in section 8 applications are a rarity.[54] Various studies have given the impression that such findings happen in a very small number of cases, often with claims coalescing around a figure of less than 10%; however, no systematic review of court files had taken place to determine their exact frequency.[55] This study fills that gap and outlines the circumstances in which fact-findings are likely to be ordered and the situations where they were considered at some point in the proceedings, but did not proceed. Out of the total of 102 cases, a completed fact-finding

[51] Case A 30.
[52] PD 12J, [5].
[53] PD 12J, [16].
[54] Barnett (n 5).
[55] A Barnett, *Domestic abuse and private law children cases: A literature review* (Ministry of Justice 2020) 92

hearing was held in a single case, C28, which is discussed further below. A fact-finding was scheduled to be held in one other case, but it had not been conducted by the time of the study. In two other cases, a fact-finding had taken place in earlier linked proceedings. No cases involved a full admission of abusive behaviour which would have obviated the need for a fact-finding, but some cases discussed below did feature limited, tactical admissions which served a similar purpose. As a result, fact-findings can be said to have been ordered in 3.9% of cases encountered in this sample group, but were only completed in 0.9% of all cases. Fact-findings were, indeed, rarer than gold dust.[56]

As indicated above, the current version of PD 12J is more concerned with reducing the risk to which children and parents are exposed than previous versions. These obligations were analysed in *Re H-N*,[57] where the Court of Appeal highlighted the issues of relevance, necessity and proportionality as being key to the decision on whether to hold a fact-finding hearing or not. Central to the assessment of proportionality is the "overriding objective" of dealing with cases justly, having regard to any welfare issues,[58] which the President of the Family Division had recently highlighted involved allotting to each an appropriate share of the court's resources, dealing with matters expeditiously and saving expense.[59]

One feature about fact-finding which caused concern for the Court of Appeal in *Re H-N* was the use of Scott Schedules, a table to allegations and counter-allegations of specific incidents which the parties claimed demonstrated abusive behaviour. All parties involved in the appeal felt these to be a barrier to fairness and good process, because they give a misleading impression of their relationships; the Schedules tended to characterise abuse or violence as single incidents, rather than as part of an overarching patter of controlling behaviour.[60] The reduction of a pattern of behaviour to a list of events therefore inhibits the court from discharging its obligations of undertaking a meaningful risk assessment. The Court made clear that Scott Schedules were not fit for purpose and a new way of summarising and organising allegations which would be dealt with at a fact-finding would be needed so that the pattern of behaviour would not be distorted and evidence of ongoing controlling behaviour could be before a court in all appropriate cases, though it declined to become involved in further discussion of what that process would look like.[61]

Even though the decision of the Court of Appeal in *Re H-N* postdates the study, the first instance hearings in the linked cases comprising the appeal were largely contemporaneous with the files under

[56] Barnett (n 5).
[57] *Re H-N* [2021] EWCA Civ 448.
[58] Family Procedure Rules, r 1.1 – see Re *H-N*, ibid, [36]-[37].
[59] *Re H-N* (n 57).
[60] Ibid, [43]. See also *F v M* [2021] EWFC 4.
[61] Ibid, [46]-[47].

review, with some happening in the weeks or months immediately prior to the case review. The only appreciable difference between the four cases considered in *Re H-N* and the cases outlined below is that the cases which comprised the appeal were all decided initially by Circuit level judges at first instance, whereas the files examined during the case review were all dealt with by either District Judges or at Magistrates Court level. More complex cases are supposed to be allocated to Circuit level judges. While the District level may deal with cases involving allegations of significant abuse or risk, those cases involving significant factual disputes concerning abuse or risk, particularly where it appears that a fact-finding hearing of three days or more is a real possibility, should be allocated to Circuit level. Cases can be, and are, referred to different levels even after the initial allocation has been made.[62] One fact that seems to become apparent from the cases described below, however, is that local courts have appeared to interpret the necessity and proportionality requirement for having a fact-finding hearing mostly very stringently but with one notable exception – the one case with a completed fact-finding. It is also evident from the cases examined that tactical admissions of less serious abusive behaviour or consent to contact will not be followed by an examination by the court of the reality the admissions or the voluntariness of consent. Where this happened, no evaluation of risk was conducted. It is as if the removal of the apparent need for a fact-finding removed the need to conduct a meaningful risk assessment.

THE NESESSITY AND PROPORTIONALITY REQUIREMENT

Fact-findings Ordered

The cases examined in this study show that claiming that a fact-finding is necessary and proportionate will prove difficult. Not only were fact-findings rarely ordered, but there was an inconsistent interaction between fact-findings and other court processes such as welfare reports which makes it impossible to accurately predict the circumstances in which one may be even considered.

Fact-findings were ordered in only two cases, and completed in one, both of which were dealt with in court centre C. In the first of these,[63] the case actually originated in another court centre outside the scope of the study, so it cannot be said that the courts of this centre were significantly more proactive in ordering fact-findings than those of other centres. Nonetheless, the circumstances leading to the hearing are instructive given the paucity of such hearings. This was an application concerning a one-

[62] President's Guidance on Allocation and Gatekeeping for Proceedings under Part II of the Children Act 1989 (Private Law) issued in accordance with rule 21 of the Family Court (Composition and Distribution of Business) Rules 2014, available at https://www.justice.gov.uk/downloads/family-justice-reform/allocation-and-gatekeeping-guidance.pdf and Schedule to the Allocation and Gatekeeping Guidance – Private Law available at https://www.justice.gov.uk/downloads/family-justice-reform/schedule-to-allocation-and-gatekeeping-guidance.pdf, both last accessed 12 December 2022.

[63] Case C 9.

year-old boy, and was brought by a mother seeking a child arrangements order and a prohibited steps order. The father cross-applied for a child arrangements order a month later seeking the return of the child from the mother who, he claimed, was abusive to the child and had abducted him. The mother was legally represented while the father was a litigant in person.

The mother's initiating documentation made clear that she had been physically abused in the presence of the baby, and that she had been isolated from her family by the father. It was also evident that the Local Authority were involved with the family as a child protection plan was in place in respect of the child. The father's initial claims included threats by the mother to remove the child to another jurisdiction, claims that she was suicidal, that she was jealous of the attention the child received leading her to hit the child, claims that she hit the child when he wouldn't eat and that she had moved back to the jurisdiction of Court Centre C to pursue a relationship with an ex-partner, whom she had previously feared would subject her to an acid attack.

The initial letter from CAFCASS made clear that the father had a long history of violent behaviour and there had been concerns about the child's welfare even prior to his birth. The Local Authority initiated a child protection plan due to concern that the father was suicidal and had threatened to kill the baby and had punched the mother in the face. He also had 15 convictions for 39 suspected offences over a 16-year period, including violent offences, drug offences, property offences and harassment. He had been sentenced to several periods of imprisonment, and a Domestic Violence Protection Order was in place to protect the mother. The mother had several convictions for minor offences. When this information was before the court, the decision was made to hold a fact-finding hearing, and transfer the matter to Court Centre C. A non-molestation order was also granted to the mother. It was ordered that the child would live with the mother, but there was no mention of contact at this stage.

Only the mother filed a statement outlining further abuse. She outlined evidence of controlling behaviour whereby all benefits payments were paid to the father and she would have to ask for money, isolating her from her family and friends. She would not be left alone in the family home while the father was out. There was evidence of physical abuse as well; the mother was given a black eye, hit with a vacuum cleaner pipe or a rolling pin, had a tea towel tied around her mouth so she could not scream, she was choked until she passed out, and the father hit her when she had a different opinion from him. There was also emotional and psychological abuse, with the father undermining her as a mother and telling her about relationships he had with other women he had met online so as to make her feel worthless. Finally, there were threats to maim and kill the mother, threats to throw acid in her face, and a threat that if she prevented contact with the child she would be 'in a wooden box or eating through a plastic straw'.

The father did not file any further statement, and so the mother's solicitor put in writing to the court that no fact-finding hearing should be held. When the matter was listed again, the father appeared in person and claimed that he had delivered a response. He also sought contact that day, but the court refused any contact until after the fact-finding hearing, which was deemed necessary and proportionate and listed for a date after the study was undertaken. The non-molestation order was granted, and no further information is available about the case. What can be said, however, is that the Practice Direction does seem to have been followed properly until this stage – no contact was deemed appropriate in light of the serious risk of harm to both the mother and child, and indirect contact would have been both inappropriate and ineffective. Given that the father was challenging the claims made, a fact-finding was also clearly appropriate.

The other fact-finding in the sample was completed, and shows some very unusual characteristics.[64] It concerned a girl of 12 and a boy of 7. Both parents acted in person. The application had been filed by the father who sought that the children should reside for seven days alternately with each parent. Both parents were very wealthy, and in one of the more telling aspects of the case, the father had extensive professional knowledge of the legal system. The father's initiating documents raised allegations of physical abuse by the mother and claimed that she was neglectful of the children and had physically assaulted the girl. Because of a threat by the mother to remove the children from the jurisdiction, he sought an urgent ex parte order confirming the existing residence arrangements. This was granted and the court advised the parties to consider mediation. The CAFCASS safeguarding letter showed no police concerns, but it also made clear that the main risk factor in the case was a high level of interpersonal conflict. Each parent accused the other of stoking this by using the children to relay messages and of having poor relationships with the children. The father claimed that he had been physically abused by the mother and did not report this out of embarrassment. The mother denied this, stating that the father was exaggerating and claimed that she was subject to coercive and controlling behaviour. CAFCASS recommended a fact-finding followed by a section 7 report in order to determine how to manage the risks involved.

The statements furnished by the parties contained allegations which, taken at their highest, show a pattern of significant dysfunction and incidents of physical assault by the mother. The father supplemented his statement with photographs of injuries which he claimed corroborated his account and legal submissions on the task of the court in a fact-finding. The mother also admitted physical chastisement of the children. The local authority expressed significant concern over the eldest child whom they described as very bright but manipulative, making up allegations to tell each parent, and

[64] Case C 28.

when the police became involved, was rude to them and refused to cooperate. The court gave a written account of its findings. It established that while some of the incidents claimed by the father had happened, it was unclear exactly what had transpired and so no finding could be made. Other incidents were, however, substantiated and the account he gave found to be true. In conclusion, the court noted that 'the mother has overstepped and used physical force against the father, that in the mother's make up the situation going on in the house was difficult for all, and very simply she went too far. The father knows which buttons to push to achieve the mother's behaviour.'

At the final hearing, the court made an order effectively awarding a 50-50 split in care with the handovers to be conducted via the children's school. Unusually among the cases in the sample, there is also a written explanation of the reasons for the decision, as the father sought permission to appeal the decision; permission was refused. It is not clear from the available material what additional measures he hoped to achieve via an appeal, but it appears that he felt discriminated against and felt that the fact-finding was insufficient. Permission was refused as the trial court had handled everything effectively; despite the possibility that it may have downplayed or underestimated the extent and effect of the mother's behaviour there was no basis for a claim of gender discrimination and the description of the relationship between the parties as toxic did not diminish the extent of the role of each party. Permission was also refused on the basis that the trial court had been correct in adopting a narrow approach to issues of fact related to each alleged incident, and correct in declining to entertain the argument that the parties' relationship was characterised by domestic abuse. Finally, there was no need to make a finding in respect of every alleged incident.

Fact-findings had been heard in earlier proceedings relating to two cases in the present sample. In the first of these,[65] there was a concern that a father was sexually abusing his young daughter. In previous proceedings between the parents, where the father had sought a 'spend time with' order, a fact-finding hearing had been held following allegations of domestic abuse made by the mother against the father. These included emotional, physical and sexual abuse including rape allegations. The fact-finding made no determinations relating to abusive behaviour, save relating to one incident which was consensual but had gone too far. Following this, contact arrangements were agreed between the parents, including provision for a gradual move to overnight staying contact with the father. The earlier fact-finding had no bearing on the present case which, following the determination by the police and local authority that there was no basis for further action regarding the sexual abuse claim relating to the daughter, resulted in the resumption of direct contact. In the second such case,[66] very

[65] Case A 21.
[66] Case C 16.

little information was present on the file regarding a fact-finding held two years previously. This is unfortunate, as the case presented a complex set of care arrangements involving special guardianship and directions made under family assistance orders. The fact that no findings made by the earlier hearing were recorded or easily accessible for those involved in the present case is deeply concerning and demonstrates how easy it is for vital information about vulnerable families to be simply lost amidst the swell of claims involved in high conflict litigation.

Fact-findings Refused

Applications for fact-findings were explicitly rejected as neither necessary nor proportionate in nine cases, with this serving as an implicit basis for the rejection of such hearings in a further two cases. In one further case, a fact-finding was being considered, but a decision had not been made by the time of the study. An examination of the allegations raised in these cases can tell us as much about the circumstances in which they will be held as those where the need for a fact-finding was accepted. In cases where a fact-finding was rejected as neither necessary nor proportionate, contact was always ordered to take place.

One unexpected finding of the study relates to the interaction between section 7 reports and fact-findings. Section 7 empowers the court to direct that a report be commissioned on any question relating to the child's welfare. Section 7 reports are ordered, however, in only one third of cases.[67] Nonetheless, the Practice Direction makes clear that section 7 reports should play a vital role in the context of proceedings involving allegations of harm. In particular, it states that the court should consider ordering a report unless the court considers it unnecessary to protect the child's interests. This is so even in the context of cases where the parties have agreed on the substantive matters,[68] underlining the report's function as the 'eyes and ears' of the court, capable of providing an independent and objective assessment of the relationships involved in the case.[69] Further, the reporter is recognised by the Family Procedure Rules as an officer of the court;[70] this makes ignoring the advice of the reporter all the more serious. While the court is not bound by any recommendations made by the reporter, reasons for departing from clear recommendations need to be outlined.[71] The authors of Bromley go so far as to say that '[a]lthough there are reported examples of the court not

[67] Hunter et al (n 3) 69.
[68] PD 12J, [21]-[24].
[69] *Re P (A Minor) (Inadequate Welfare Report)* [1996] 2 FCR 285, 291.
[70] Family Procedure Rules, r 16.33(5).
[71] *Re M (Residence)* [2004] EWCA Civ 1574, [2005] 1 FLR 656.

following a recommendation, in practice the children and family reporter's view commands great respect and is often the most influential figure in the decision-making process.'[72]

On several occasions in the present study, a section 7 report was ordered in order to help determine whether a fact-finding should be held. This may be a questionable practice, given that they serve very different purposes, and it adds a potentially significant delay to the proceedings. This is illustrated by one particular case where a delay of several months was caused by the avoidance of an early fact-finding.[73] The case was filed in early 2019 by a father seeking a spend time with order. An initial CAFCASS report indicated that there was a high risk of domestic abuse, given that the local authority had received several referrals because of domestic abuse concerns. On this basis, CAFCASS suggested that the court consider a fact-finding hearing. At the next court date, the case was reallocated from Tier One to Tier Two and the domestic abuse allegations were deemed to be potentially relevant but that more information was needed to determine if a fact-finding should be held. It was asserted further that contact could be made safe by having handover managed by the paternal grandmother, and that a section 7 report should be ordered. The section 7 report was filed some two and a half months later, and it disclosed clear evidence of domestic abuse by the father, including physical and emotional abuse of the mother, with an incident of physical abuse resulting in the father being arrested; one of the conditions of his bail was that he have no contact with the mother or children. However, the mother later retracted the statement and the CPS discontinued the prosecution. The reporter noted how the parties continued to minimise the abusive behaviour despite the significant impact on the mother's mental health which resulted in her self-harming. Over multiple court dates, several revisions were made to the interim orders which permitted supervised weekend and midweek contact and managed handovers, the appointment of a guardian for the children and the referral of a question relating to immunisations to a Tier 4 judge. In August 2019 the parties were ordered to file position statements, but the matter was still repeatedly adjourned, so that by the time of the visit to this court office in late November, the matter had not yet been finalised.

There appears to have been no clear reason why a section 7 report was used instead of a fact-finding, and no justification for the failure to decide on whether a separate fact-finding should be ordered. The delay caused by deciding to seek a welfare report rather than moving directly to a fact-finding, or indeed arranging these in tandem, would also seem to be have been contrary to the principle that the desirability of avoiding delay should be balanced against the child's best interests.[74] In another case,[75]

[72] N Lowe, G Douglas, E Hitchings, R Taylor, *Bromley's Family Law* (Oxford University Press, 12th edn, 2021) 551, internal reference omitted.
[73] Case A 27.
[74] *Re H (Minors) (Welfare Reports)* [1991] FCR 866.
[75] Case B 6.

a section 7 report was ordered which made no mention of the desirability or otherwise of a separate fact-finding, despite reference to clear instances of domestic abuse, harassment, and death threats being included in the report. In this particular instance, the mother withdrew her application for a fact-finding, and the parties agreed to put in place a shared care arrangement. This shows the limitations of ordering a section 7 report as a wait and see measure before ordering a fact-finding – in the absence of a clear direction from the court, a reporter may not always consider the question of whether a fact-finding is required. If none is recommended, as happened in this case, the likelihood is the case will be resolved in relation to contact, but without any reference to the safety concerns in direct violation of the Practice Direction.

Even when the section 7 report does recommend a fact-finding, the court may not deem it necessary or proportionate. While it is perfectly within the remit of the court to depart from the recommendation, there is little evidence in files examined as part of the study to show that there were cogent reasons for doing so. While it has been argued that the reporter's recommendations will be highly influential, this must be questioned in light of three cases where a fact-finding was recommended but the court rejected the recommendation, while in two further cases a fact-finding was avoided because of what can only be characterised as tactical admissions by the father so as to avoid potentially serious findings being made. One of these occurred in each court location, showing that the problem is not one that can be explained away by reference to local conditions or practices.

In the first such case,[76] the children were currently living with the father and the mother was seeking a 'spend time with' order so that a previously informal arrangement could be concretised following a breakdown in this agreement. There was clear evidence of domestic abuse and coercive and controlling behaviour by the father, and evidence of physical abuse against one child by the mother. There were safeguarding concerns regarding the mother's new husband, as one of the children had alleged that he had sexually abused her, and that child was now self-harming. While the case had not concluded by the time of the study, the court had already ruled that a fact-finding was not necessary as the concerns relating to the mother's and father's behaviour to each other were historic and of no relevance, despite the clear CAFCASS recommendation that one was needed. No statement was made regarding the other issues in the case, including the sexual abuse or the mother's safety from the father. The second instance of clear recommendation being ignored involved very clear indications of physical, emotional and sexual abuse.[77] The mother was assessed by Women's Aid as being at high risk of significant harm or death, after which a Multi-Agency Risk Assessment Conference was held,

[76] Case A 33.
[77] Case B 5.

and a non-molestation order granted to the mother. CAFCASS recommended a fact-finding, in part because it noted that the mother felt unable to oppose contact. Nonetheless, the court ordered that contact take place with the paternal grandmother both managing handover and acting as supervisor for six sessions which would then develop into unsupervised contact sessions.

In the final case of this nature,[78] an earlier court-ordered arrangement for significant overnight contact had broken down amidst concerns raised by the children about the father's inappropriate behaviour around them, including making highly sexualised and suggestive comments, accusations of physical violence towards the children, and the mother's recognition that she had been the victim of coercive and controlling behaviour during the relationship. One child was self-harming, and the other was showing other signs of significant emotional distress. The local authority safeguarding team submitted a report stipulating that no overnight contact should take place, and any contact should be supervised at a contact centre. The court's response was to state that in light of the allegations, and pending a section 7 report, the amount of contact was reduced but that overnight contact at weekends was to remain in place. The section 7 report disclosed that the three children all had reservations about contact, ranging from having some concerns to outright objection to any contact. They had, in fact, refused to have contact since the previous court hearing. The reporter recommended a fact-finding hearing; however, the court ultimately rejected this as unnecessary and ordered significant overnight contact to the father with no clear reasons given for either rejecting CAFCASS's advice or for ignoring the children's concerns.

Tactical admissions to avoid a fact-finding

In two further cases fact-findings were avoided in circumstances where the father admitted to comparatively less serious allegations. In the first of these,[79] the mother was seeking to regularise the time that the father spent with their young son and the conditions under which this happened. There were significant indications that the father had been abusive to the mother, although he also made cross allegations. There were also cross allegations relating to substance abuse and threats of child abduction. A housing referral had been made to the local authority because of domestic abuse concerns, but this was withdrawn when the mother felt that she no longer needed assistance. The court initially ordered a fact-finding, but it never went ahead because the father made a series of admissions including drinking to excess (but not being an alcoholic) and isolated incidents of physical abuse. At the same time, it was agreed the contact would move from being supervised to supported. Following a further CAFCASS assessment, the mother was assessed as being at moderate risk of

[78] Case C 6.
[79] Case A 26.

domestic abuse, but it was also recommended that contact increase to unsupervised contact sessions of eight hours. Nonetheless, the case concluded with a consent order which envisaged a rapid escalation in contact which would result in weekend staying contact on alternate weekends.

The second case in which a father made admissions of abusive behaviour represented perhaps an even more egregious use of tactical admissions. The father in this case was under investigation by the police for a series of assaults and sexual offences, including rape, against the mother, and his bail conditions included a ban on him attending the former family home and a stipulation that any contact with the children should be done via the local authority safeguarding team. He was also alleged to have dislocated one of his other children's shoulder in the course of using physical chastisement. In the event, the mother had stopped making the children available for contact following an incident in which the father had attempted to abduct the children and committed criminal damage at the mother's home. The father also made a statement to the effect that if he could not see his children, no one could, which the mother took to be a threat against their lives. Despite this information, the court file shows that the parties were offered the opportunity to participate in a settlement conference organised through the courts, and a separate fact-finding was deemed not necessary given that he admitted to a number of minor incidents including grabbing the mother's arm, making harassing phone calls, being verbally abusive and punching walls when angry. Supervised contact was ordered as an interim measure, as was the use of separate waiting areas and screens in future hearings. When it became evident that unsupervised contact would not be permitted in the short term, the father decided to withdraw his application for a spend time with order, effectively walking away from the relationship with his children.

ANALYSIS

The cases outlined above present serious problems for any claim that the law is currently operating in a way that prioritises safety over contact. That contact resulted from the majority of applications should perhaps not be surprising; what is surprising is the repeated resistance to using fact-findings as a means of establishing the nature and scale of domestic abuse, given that the 2017 version of PD 12J is supposed to establish a renewed focus on safety. Echoing the findings of research stretching back over a decade,[80] the view that abuse allegations were historic or were not relevant to the question of establishing or developing contact was consistently evidenced throughout the sample. Serious allegations of violence, including sexual violence, were overlooked as potential risk factors if the mother ended up consenting to contact or agreeing not to pursue a fact-finding. This was so even

[80] Hunter and Barnett (n 1), Barnett (n 1), Barnett (n 5), Coy et al (n 6).

where the mother was not legally represented while the father was. CAFCASS recommendations for fact-findings were rejected, or avoided by the use of tactical admissions.

A significant gap has therefore opened up between the norm of safe contact and the facts emerging from contact hearings. Not only that, but it can reasonably be asked whether there really is a norm in favour of safe contact at all. Recent guidance from the President of the Family Division has attempted to clarify the situations in which a fact-finding should be held.[81] The tenor of this guidance is disappointing for anyone hoping to see an increase in the number of such hearings. In particular, it highlights that the court should ask itself "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?"[82] Further, if "the allegations, if proved and however serious, would not be relevant to the decision, then no fact-finding hearing is required."[83] The framing of the necessity and proportionality requirements of PD 12J in this way seems to be at variance with the requirement of risk management by nudging local courts away from holding fact-findings. When read in conjunction with the near-contemporaneous Court of Appeal decision of *K v K*, which highlighted that a fact-finding was held prematurely despite the presence of rape allegations which were substantiated as facts and the importance of utilising mediation,[84] it is becoming clear that raising allegations of harm is increasingly futile. The failure to hold fact-findings is one more manifestation of the minimisation of domestic abuse and other risks of harm in the face of the deeply entrenched pro-contact culture.

The Harm Panel Report has sought to address problems within the system by highlighting a set of new design principles for private family law cases.[85] These include decisions being safety-focused and trauma aware, the importance of an investigative, problem-solving approach based on open enquiry into what is happening for the child and their family, allowing courts the resources needed to operate effectively and using resources efficiently in accordance with these fundamental principles, and working in coordination with connected systems, procedures and services. The needs of litigants in person and the consideration of domestic abuse and other safeguarding concerns are also highlighted as central elements in an effective contact system, while the presumption of parental involvement is subject to a recommendation that it be urgently reviewed. While the design principles represent a

[81] Sir Andrew McFarlane, Guidance concerning fact-finding hearings and domestic abuse in Private Law children proceedings (Courts and Tribunals Judiciary, issued 5 May 2022) available at https://www.judiciary.uk/guidance-and-resources/fact-finding-hearings-and-domestic-abuse-in-private-law-children-proceedings-guidance-for-judges-and-magistrates/, last accessed 12 December 2022.
[82] Ibid, [15].
[83] Ibid, [16].
[84] [2022] EWCA Civ 468.
[85] Hunter et al (n 3) chapter 11.

valuable framework for structural change within the private family justice system, perhaps the most important recommendation is the most fundamental and difficult to achieve – a cultural change programme to introduce and embed reforms to private law children's proceedings and help to ensure their consistent implementation.[86]

The necessity of cultural change is highlighted by the research by Women's Aid which has identified how progress towards reform has stalled since the Harm Panel Report with many of the problematic factors influencing decision making seeming to remain as strong as ever.[87] In particular, some survivors highlighted the *K v K* judgment and how they found it disheartening to read.[88] The findings of this study show how the Court of Appeal's recent guidance in fact mirrors what has been happening at local level – fact-findings are regarded as an impediment to progressing cases towards routine, unsupervised, overnight contact even when significant safety concerns are raised. The futility of exposing abusive behaviour in the face of such attitudes fatally undermines the claim that child welfare is really at the centre of the decision-making process.

CONCLUSION

The findings of this study, and the recent dissonance between the Court of Appeal's views as expressed in *K v K* and those of abuse survivors raises concerns for the family justice system – it is proving incapable of adequately responding to legitimate safety concerns and conducting meaningful assessment of the risks faced by parents and children. As a result, it risks a legitimacy crisis – citizens subject to the law must believe in its legitimacy; without this, it cannot function.[89] This is the central challenge posed by the consistent failure to implement safety as the first principle of contact. When survivors describe the system as byzantine, a dystopian horror, and terrible for women and children,[90] and positive measures are seen as undermined by the lack of awareness and appreciation of safety concerns, a serious challenge to the credibility of the law is presented. This study has provided an overview of contact arrangements in cases where risk of harm is alleged at the outset of a case, and demonstrated that even where there are significant indications of genuine safety concerns, unsupervised overnight contact remains the usual outcome of child arrangements applications. It has also shown how fact-findings are rarer than previously thought, and how courts interpret the requirements of necessity and proportionality in first instance decisions. Further, the relationship

[86] Ibid, 184.
[87] J Birchall, *Two years, too long: Mapping action on the Harm Panel's findings* (Women's Aid, 2022)
[88] *K v K* [2002] EWCA Civ 468.
[89] J Habermas, *Between Facts and Norms Contributions to a Discourse Theory of Law and Democracy* (Massachusetts Institute of Technology Press 1996).
[90] Birchall (n 87) 24.

between fact-findings and welfare reports was explored, with the result that even where a welfare report recommends a fact-finding, this is routinely ignored.

Why, then, should survivors continue to report safety concerns? The feeling of futility experienced by many of those working with these issues must be immense, especially when the opportunities for genuine engagement with the needs of women and children who have suffered abuse are routinely missed and obligations of meaningful risk assessment ignored. Accounts from survivors are increasingly despondent and the present legal framework and culture is inadequate and incapable of ensuring safety. Perhaps the best reason for continuing to speak about harm in contact cases, apart from the slim possibility that it may impact on the outcome, is provided by one particular survivor who reported that 'I went through it because I knew that when my son is old enough to ask, I wanted to be able to say I did everything I could.'[91] If this type of personal justification is the best that the law can offer, rather than any clear evidence that it works and can offer meaningful protection, it has failed.

[91] Ibid 28.