The tension between domestic abuse, control and coercion, Scott Schedules and the welfare of the child:

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A generation of practitioners has been brought up reciting that the welfare of the child is paramount when the court considers any issue involving children. Thirty years has passed and s 1 Para 3 of the Children Act 1989 still is the first stop when considering any issue relating to children in the family courts. This generation of practitioners has also been brought up instinctively knowing that every child has the fundamental right to meaningful contact with his/her absent parent (United Nations Convention on the Rights of the Child (Art 9)). In 2014 we were introduced to the 'presumption of parental involvement' (see s 11 of the Children and Families Act 2014). The presumption means that when a court is considering whether to make an order relating to a child (in particular a Child Arrangements Order) it is to presume, unless the contrary is shown, that involvement of both parents in the life of the child concerned will further the child's welfare.

The Welfare Principle has withstood the odd tweak here and there but it could be perceived that a significant move came not from Parliament but from the judiciary in what became Practice Direction 12J ('PD 12J').

Practice Direction 12J (key paras)

No apologies for repeating some of its main provisions:

a. Paragraph 4 states the domestic abuse is harmful to children, and/or puts children at risk of harm. Children may suffer direct physical, psychological and/or emotional harm from living with domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents.

b. Paragraph 5 states:

   'The Court must, at all stages of the proceedings, consider whether domestic abuse is raised as an issue, either by the parties or by Cafcass and if so must –

   i. identify at the earliest opportunity the factual and welfare issues involved;

   ii. consider the nature of any allegation, admission or evidence of domestic abuse, and the extent to which it would be likely to be relevant in deciding whether to make a Child Arrangements Order;

iii. give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly;

iv. ensure that where domestic abuse is admitted or proven, any Child Arrangements Order in place protects the safety and wellbeing of the child and the parent with whom the child is living, and does not expose either of them to the risk of further harm; and

v. ensure that any interim Child Arrangements Order is only made having followed the guidance in paras 25–27 [of PD 12J]'

c. Then at para 7 the court presumes that the involvement of a parent in a child's life will further the child's welfare, unless there is evidence to the contrary. So the court must in every case consider carefully whether the statutory presumption applies, having particular regard to any allegation or admission of harm through domestic abuse to the child or parent or any evidence indicating such harm or risk of harm.

d. Resulting in para 36 of PD 12J which states the court should, in every case, consider any harm which the child and the parent with whom the child is living has suffered as a consequence of that domestic abuse, and any harm which the child and the parent with whom the child is living is at risk of suffering, if a Child Arrangements Order is made. The court should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during and after contact, and that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.

Squaring the circle:

The courts, in my experience, since PD 12J, have struggled to balance the issues relating to domestic abuse and the presumption of parental involvement ,post-family, separation as envisaged in the 2014 Act and the protection of victims from domestic abuse as defined by PD 12 J. Practitioners have had to balance everything they have understood following the implementation of the Children Act. Practice Direction 12J involves a more adversarial approach which practitioners and the judiciary have been discouraged from promoting for some time prior to its implementation.

Establishing control and coercion in the court

Returning to PD 12J;

Paragraph 16: The court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic abuse:

a. in order to provide a factual basis for any welfare report or for assessment of the factors set out in paras 36 and 37 of PD 12J
b. in order to provide a basis for an accurate assessment of risk;
c. before it can consider any final welfare-based order(s) in relation to child arrangements; or
d. before it considers the need for a domestic abuse-related assessment (such as a Domestic Violence Perpetrator Programme ('DVPP')).

Paragraph 17: In determining whether it is necessary to conduct a fact-finding hearing, the court should consider:

a. the views of the parties and of Cafcass or Cafcass Cymru;
b. whether there are admissions by a party which provide a sufficient factual basis on which to proceed;
c. if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;
d. whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;
e. whether the factors set out in paras 36 and 37 of PD 12Jcan be determined without a fact-finding hearing;
f. the nature of the evidence required to resolve disputed allegations;
g. whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and
h. whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.

A fact-finding hearing clearly must not be embarked upon without great consideration by the court. However, despite the new awareness embodied in the Practice Direction, it is suggested that both Cafcass and the courts find it hard to grasp the new sensibilities, in part this is because the mind-set for many years has been to avoid any adversarial aspects of private law proceedings as the common view was that if the parents argued between themselves then it was always damaging to the child/ren in the middle of it all. Further the court system is hamstrung by the austerity measures that have impacted on the Family Justice System in the last 10 years. If domestic abuse is identified as an issue this might lead to a perpetrator of domestic abuse having to attend a perpetrators course then the judge has to balance the delays in this sort of case awaiting court time for a fact finder (sometimes requiring 2 or more days of court time) then going on a waiting list for a perpetrators course (which is often 12 weeks in length) and then maybe having to await reports being prepared for court and awaiting a welfare hearing – a lengthy process. This can be considered counterproductive to the childs welfare. Many practitioners have been brought up to be aware

that time and delay is the child's enemy. A failure to grasp, early in the proceedings, that a fact finder is needed can cause delay damaging to the child. I have been in cases where the mother has carefully laid out what she has experienced only for judges to refuse (initially) to go down the fact-finding route. I have been in cases where, having convinced one judge of the need for a fact finder, on a day when that judge (and I) was unavailable, that order was set aside by a judge standing in for the original judge. Getting the balance right in protecting the victim and balancing welfare needs is difficult where I would argue they are one and the same (protecting the victim protects the child's welfare).

The court face an added difficulty in that the victim of the abuse may not necessarily, for whatever reason, be able to easily disclose what has happened in the parties' relationship. There are cases where one parent has been the subject of control through the relationship and as soon as the relationship is at an end the controller puts the issue of the child arrangements straight into the court arena continuing the pressure on the victim, who is still having to respond to pressure put on them by the aggressor. It is then difficult for the party to be empowered to tell their story. It maybe that the victim has been convinced that what they have experienced is 'normal' or they just don't see the point in making complaint because they believe it won't make any difference.

An experienced Cafcass officer should be the way forward and indeed Cafcass has devised their own tool kit for establishing control and coercion issues (www.cafcass.gov.uk/grown-ups/professionals/ciaf/resources-for-assessing-domestic-abuse). This is very similar to the DASH Assessment used by the police (www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/scott-schedule-note). It should be used by Cafcass so that control and coercion issues are properly considered at an early stage. In one area, after speaking to a local domestic abuse charity, concern was expressed that in their experience it was Cafcass that was reluctant to identify the domestic abuse suffered by the victim. Anecdotally I have been involved in a number of cases with 'experienced' Cafcass officers invariably acting as 9(5) guardians who, despite the allegations being made by a party, have not addressed them with their own checklist. In cases where domestic abuse has been complained of more often than not in my experience the tool for identifying the abuse has not been used.

The difficulty with a fact finder

Practitioners will be aware of the difficulties in embarking on a fact-finding hearing and why the courts and Cafcass are so reluctant to embark upon such an adversarial hearing:

a. Such a hearing pitches parent against parent and family against family where the parties have to have a lifetime of working together for the benefit of the child.
b. The cost for both parties.
c. The prospect of further delay awaiting a Child Arrangements Order.

d. What will the child make of the dispute when he/she's older?
e. Such a hearing is damaging to future relationships between the parties.
f. How will the perception of victory or defeat in pursuing the application affect the dynamics between parties and their families after the hearing ?
g. How will this impact on the child/children?
h. How will this make contact easier to manage?

Clearly such hearings should not be embarked upon lightly and there is a clear duty on the practitioners and the court to consider those issues highlighted above. In my view the procedure that follows the listing of a fact finder is not child friendly and is in need of reform.

Presently PD 12J, para 19c states that once a fact finder has been identified as necessary by the court the procedure is as follows: the key facts in dispute can be contained in a schedule or a table (known as a Scott Schedule) which sets out what the applicant complains of or alleges, what the respondent says in relation to each individual allegation or complaint. The allegations in the Schedule should be focused on the factual issues to be tried.

Scott Schedules and a lack of focus

Scott Schedules are defined on the HM Justice website as a vehicle to identify precisely the questions that the judge has to decide. Scott Schedules are often used in cases where there are several complaints of bad workmanship in civil cases. The Schedule is a table. In the first column after the item number, the claimant sets out each complaint about the workmanship (or in our case behaviour) separately. In the next column, the defendant/respondent sets out his response to each individual complaint.

It is my view that Scott Schedules are outdated and are not child focussed especially now PD 12J should focus our efforts. Scott Schedules, it is argued, are outdated in Children Act proceedings because:

a. They are presented in landscape format on A4 paper which is hard enough to use in a hard copy bundle but may be even more problematic in electronic format.
b. Quite often when drafting the document, the applicant's solicitors will cut and paste allegations contained at page 4 of the C1A form. This means the allegations are invariably hastily drafted which can lead to problems later on.
c. Because of the columns sometimes dates slip in preparation against the detail of the allegation causing confusion in the court.
d. Despite the fact that control and coercion type of behaviour is usually a persistent course of action by the abuser which needs to be evidenced in some detail by a number of incidents, quite often judges still limit the number of allegations to be included in the Schedule. Many practitioners get round this by putting a small number of headings and then demonstrate the controlling act by providing

subheadings.

In cases I have dealt with I have found it easier to focus the court's mind by drafting a findings document and drafting the findings sought so that it related to how the child/children would suffer. This is obviously the format required in public law proceedings.

Such a findings document prepared for a mother could appear as follows:

a. It will be submitted on behalf of the mother that the father is antagonistic and unsupportive of the mother. In order to establish this conduct the mother seeks the following findings:
    i. The child (name) is at risk of suffering significant emotional harm through the antagonistic, unsupportive, argumentative and deliberate undermining of the mother by the father.
    ii. The father has conducted litigation unreasonably in a number of applications over a 4-year period often changing the nature of his application prior to the court hearing.
    iii. The father has used the communication book as an instrument in his unreasonable conduct towards the mother.
    iv. The father has used social media to intimidate and abuse the mother deliberately to undermine and distress her. The mother's health is being significantly damaged by the behaviour of the father who has, by a deliberate or reckless course of action, engaged in unhelpful and abusive communication and shown a deliberate disregard for maternal routine.
    v. The father has deliberately undermined the mother's parental responsibility by making persistent derogatory remarks about the mother. This level of consistent misconduct not only impacts on the mother's health but puts the child at risk of emotional harm. The father's behaviour seeks to oppress, harass and intimidate the mother in order to pressurise her, unreasonably influence her or deliberately harm her.
b. The father 'gaslights' the mother, persistently manipulating her and causing the victim to doubt her or himself, and ultimately lose her or his own sense of perception, identity, and self-worth (give examples from mothers statement).
c. The father uses financial abuse using or misuses money as a method of pressurising the mother.
d. The relationship between the parties is such that the ongoing difficulties in the parties' relationship will ultimately impact on the child's health and well-being.

Practitioners who have experience in both private law and public law proceedings will note the similarities with the threshold document drafted by local authorities in care proceedings and so the same standards must apply as discussed Aikens LJ below

'The formulation of "Threshold" issues and proposed findings of fact must be done with the

> utmost care and precision. The distinction between a fact and evidence alleged to prove a fact is fundamental and must be recognised. The document must identify the relevant facts which are sought to be proved. It can be cross-referenced to evidence relied on to prove the facts asserted but should not contain mere allegations ("he appears to have lied" etc.).
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> It is for the local authority to prove that there is the necessary link between the facts upon which it relies and its case on Threshold. The local authority must demonstrate *why* certain facts, if proved, "justify the conclusion that the child has suffered or is at the risk of suffering significant harm" of the type asserted by the local authority. "The local authority's evidence and submissions must set out the arguments and explain explicitly why it is said that, in the particular case, the conclusion [that the child has suffered or is at the risk of suffering significant harm] indeed follows from the facts [proved]."' (*Re J (A Child)* [2015] EWCA Civ 222)

It is clear that such pleadings should be carefully and properly drafted. The private law practitioner should read the accompanying article to this piece written by my colleague Charlotte Wilce of Park Lane Plowden Chambers in the next issue of this journal in relation to the important case law on Fact Findings Hearings.

The findings document, it is suggested, makes the proceedings more child focussed and allows the victim to submit how the behaviour they have been subjected to either during the time they lived with the abuser or alternatively after they separated has either impacted on the child or alternatively could be a risk to the child.

The judiciary have many things to balance – child welfare, proportionality, the availability of local DAPP provision, the impact on their own court commitments and the potential for delay. They have to balance all these matters in considering issues of child contact where that balance will always be in favour of the welfare of the child. Is there any more protection for the victim of control and coercion now that PD 12J has 'bedded down'? Contact management and education should be possible but the work of Mr Justice Cobb and PD 12J's influence is slow to turn around the attitudes of many professionals brought up on the long-standing principles of the Children Act 1989.