Implacable Hostility

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4PB Family

I have been asked to speak about overcoming the difficulty of a hostile or implacably hostile primary carer who is frustrating contact or other child arrangements.

I will deal with this question by looking at the following topics:

1. At the point of instruction
2. Parenting resources
3. Collation of evidence
4. Recent case law
5. The voice of the child
6. Fact finding
7. Is a fact finding required
8. PD12J
9. Parental Alienation
10. Transfer of residence
11. The alternative perspective

At the point of instruction

1. At the outset of this short seminar, I would highlight a few key points.
2. It is, of course, vital that we, as practitioners come to child arrangements disputes with an open mind. The purpose of this seminar is to assist in dispute resolution when faced with a parent, or holder of parental responsibility, frustrating your client's contact. However, the starting point must always be: just because contact isn't happening as a client would like, doesn't necessarily mean that the other parent is frustrating contact. Parents in the grip of a relationship breakdown are often unable to access resources that might assist them in agreeing child arrangements that meet the relevant child or children's welfare needs.
3. Having said that, where a parent is frustrating contact, such cases tend to become extremely complex very quickly. Disputed facts require swift resolution so that contact can take place as quickly as possible.
4. Therefore my primary recommendation is that you build your team (solicitor, counsel and any expert or other resource that might assist) as quickly as possible. A full team

conference, to tease out exactly what your client's case is, as soon as possible is invaluable.

5. You will need to understand the reasonable efforts that your client has undertaken to establish appropriate child arrangements. You will need to evidence those efforts (a chronology from the client will be invaluable, and is a key request of them before any initial meeting). It will also assist to understand a little of the relationship breakdown and the context of that breakdown in order to be prepared to manage any sensitivities on the part of the parent you are negotiating with (who may well be in person at the initial stages of proceedings).
6. As soon as possible, set out your proposals to the other side. Set out the rationale behind those proposals.
7. Avoid protracted negotiations, especially where contact is not happening at all. (Subject to engagement with any parenting resources, as I discuss, below). In such cases move to proceedings, instructions permitting, as soon as it is clear that negotiations are failing to move matters forward.

Parenting resources

1. As I set out above there are many resources available online, and generally, that might assist clients who wish to resolve matters without entering into proceedings. I highlight these now for a number of reasons:
   (A) Because of what the research tells us about the impact of litigation on the subject children;
   (B) Because I have used some of these resources in parallel with complex proceedings concerning apparent implacable hostility, with good results;[1]
   (C) It is important to explore all avenues that might help our clients to parent when co-parenting with a potentially alienating parent. The more information that our clients have, the better.
2. Even if one's instructions are to enter into proceedings, directing clients to resources that inspire reflective parenting or assist with parenting after parting is often invaluable.

[1] There is clear authority for an adjournment to facilitate therapy - e.g Re C (A Child) [2004] EWCA Civ 1293

3. The Anna Freud Centre, for example, offers a range of online resources and direct services to parents in conflict: https://www.annafreud.org/parents-and-carers/in-conflict/.
4. The CAFCASS website also contains a wealth of useful resources for parents: https://www.cafcass.gov.uk/grown-ups/parents-and-carers/resources-parents-carers/, including links to the parenting plan process (https://www.cafcass.gov.uk/grown-ups/parents-and-carers/divorce-and-separation/parenting-together/parenting-plan/) and the SPIP.
5. There are various well regarded therapeutic organisations, therapists, independent social workers and other professionals who might be able to help at the outset of a case. Sometimes the use of these teams and resources (many now available online and at reasonable cost, including online training for those 'parenting after parting') can obviate the need for lengthy and costly proceedings. Your barrister will have their favourite resources, and will advise accordingly. This might surprise some readers, as we are intended for use at court, but I have successfully applied for adjournments in proceedings to permit previously warring parents to engage with a therapeutic or educative piece of parenting work before bringing their dispute back to court if required. Often, this work is transformative.
6. I could list endless resources here that have been of great value to my clients through the years, but I'm conscious that this is not the function of this presentation! The fundamental point, that we as professionals dealing with these issues, day in and day out, fundamentally understand, but that is not always obvious to our clients, is that a parental or co-parenting relationship does not end at the point of separation. It simply becomes a different sort of relationship. Many of our clients will have engaged with marriage or relationship counselling at the point of separation but might never consider the idea of support in formulating a new relationship with the other parent after separation.
7. It is no accident that Relate is referred to as a key resource both by CAFCASS and the AFC, within the links above.

Collation of evidence

1. Supposing, however, that the parents, having been directed to various specialist resources and, having considered ADR, cannot agree sensible child arrangements (or very much at all) what then?
2. It is vital to use proceedings and, in particular, any short hearings listed, to the greatest advantage. The initial statement supporting any application should be full and clear. The emphasis must be on the client's efforts to reasonably agree appropriate, child focussed child arrangements.
3. It is important to prepare any written evidence with a view to the fact that our court system is extremely overloaded. The FHDRA will be short. The judge's list will be full. You will have limited time to seek any interim arrangements that might begin to resemble appropriate contact. So set out your proposals in that supporting statement. Any half way house that might get contact going will be welcomed by the court.
4. There is a presumption of contact which I set out below. That should be the starting point of any hearing.
5. It is also essential to formulate a plan for contact before attending court, having offered that plan to the other parent, with the logistics of that plan ready to be deployed (appropriate family or professional supervision for example) at the date of the hearing. This piece of preparation is likely to go a long way towards achieving the result the client seeks.
6. The parent who is frustrating contact will have to give reasons for doing so. It is not acceptable to simply stop or frustrate contact. Often those reasons will trigger FPR 2010 PD12J. I set out the key sections below.
7. I mention, above, the need for an early initial conference with your fully constituted team. The agenda for that conference ought to include a discussion of any issues that might trigger PD12J and collation of material from any relevant agencies that may have been involved with the family, for example, a local authority or the police. I have found coming to court with a complete overview of, for example, local authority

involvement,[2] has been, in some cases, sufficient to set aside false allegations at the first hearing. Forewarned here, is very much forearmed.

Key recent case law

1. When entering into proceedings it is essential to understand the degree of the potential harm a parent frustrating contact might cause. It is essential to communicate that issue to the judge.
2. In these cases I draft a very full position document for the FHDRA.
3. I remind the court of the presumption of contact.[3]
4. I then take the court to the relevant guideline cases. I include here the most recent although many of the principles I touch upon are well established. This line of authority dates back to the inception of the Children Act 1989 (e.g. O (A Minor) (Contact: Imposition of Conditions) [1995] 2 FLR 124)
5. ***Re M (Children) [2017] EWCA Civ 2164***

   Summary: there is a positive obligation on the court to encourage contact between a parent and child. Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child. Contact is to be terminated only in exceptional circumstances where there are cogent reasons for doing so and when there is no alternative. The judgment provides a helpful summary of existing principles derived from case law.

   Key Passages (Munby P):

[56] […] After a detailed analysis of both the Strasbourg and domestic jurisprudence, this court in Re C (Direct Contact: Suspension) [2011] EWCA Civ 521, [2011] 2 FLR 912, at para [47], summarised matters as follows:

[2] Clients will be entitled to minutes of all local authority meetings and material that concerns them, as of right and should be asked to provide it. The same point goes for those attending a police station for interview. They ought to have received at least some limited information as to any allegations made against them at the outset, sufficient to take interim instructions.

[3] Section 1(2A)CA1989, A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

- *Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.*
- *Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.*
- *There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact.*
- *He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.*
- *The court should take both a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.*
- *The key question, which requires "stricter scrutiny", is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.*
- *All that said, at the end of the day the welfare of the child is paramount; "the child's interest must have precedence over any other consideration".'*

[57] To that summary, which has been followed both in Re W (Direct Contact) [2012] EWCA Civ 999, [2013] 1 FLR 494, and Re Q (Implacable Contact Dispute) [2015] EWCA Civ 991, [2016] 2 FLR 287, we only add a reference to what Balcombe LJ said in Re J (A Minor) (Contact) [1994] 1 FLR 729, at 736:

> *'… judges should be very reluctant to allow the implacable hostility of one parent (usually the parent who has a residence order in his or her favour), to deter them from making a contact order where they believe the child's welfare requires it. The danger of allowing the implacable hostility of the residential parent (usually the mother) to frustrate the court's decision is too obvious to require repetition on my part.'*[4]

[4] Please note – all underlining is my own.

6. Where implacable hostility is an issue Mumby LJ has set out guidance that in all such cases there must be:

   (a) judicial continuity

   (b) judicial case management (including timetabling),

   (c) a judicial strategy

   (d) and consistency of judicial approach: ***Re L-W (Enforcement and Committal: Contact); CPL v CH-W and Others [2011] 1 FLR 1095, CA,*** at [97]

   "The proper handling of contact cases which have become or are on the way to becoming intractable requires judicial continuity and effective timetabling as essential components of the necessary judicial case management: see *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam), [2004] 1 FLR 1226, paras [48]–[49]. Moreover, as I went on to say, referring to the judgment of Wall J (as he then was) in *Re M (Intractable Contact Dispute: Interim Care Orders)* [2003] EWHC 1024 (Fam), [2003] 2 FLR 636:'proper judicial control and judicial case management requires what Wall J referred to in *Re M* at para [115] as "consistency of judicial approach" within the context of a judicially set "strategy for the case". This must form what he described at para [118] as "part of a wider plan for [the] children, which … needs to be thought through". 'I added (at para [57]): 'It may be that committal is the remedy of last resort but, as Wall J recognised in *Re M* at para [115], the strategy for a case may properly involve the use of imprisonment. Interestingly he seems to have accepted (see at para [117]) that imprisonment, even for a day, might in some cases be an appropriate tool in the judicial armoury. I agree. A willingness to impose very short sentences – 1, 2 or 3 days – may suffice to achieve the necessary deterrent or coercive effect without significantly impairing a mother's ability to look after her children.'

7. A court must, in those circumstances be ready to consider enforcement pursuant to CA 1989, ss 11J–11N. In terms of the need for a judicial strategy to be formulated and applied consistently with a view to enforcement of any order where required and an

understanding that enforcement might well be a required or useful tool please see also *Re A (Intractable Contact Dispute: Human Rights Violations)* [2014] 1 FLR 1185, *CA*.

The voice of the child

1. Please note that cases of implacable hostility are paradigm cases that engage r.16.4 FPR 2010. Please see PD16A, 17.2:

   The decision to make the child a party will always be exclusively that of the court, made in the light of the facts and circumstances of the particular case. The following are offered, solely by way of guidance, as circumstances which may justify the making of such an order –

   ….. (c) where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;
2. When representing the parent seeking contact having a separate, reasonable voice representing the child or children is likely to assist and should be considered by your team prior to the FHDRA. The court is highly likely to consider this issue at the first possible opportunity.

Fact finding

1. Should there be a factual dispute such that requires a fact finding in cases of implacable hostility the court has a duty to list such hearings expeditiously. (PD12J)
2. In *Re J (Children) (Contact Orders: Procedure)* [2018] 2 FLR 998 the Court of Appeal repeated the (well-established) principle that fact-finding hearings are a fundamental element of the court's positive duty to strive to achieve contact between a parent and child, especially where there is a "polarise dispute" [para84] .

   "[40] Through a series of practice directions, the most recent of which is the version of the FPR 2010, PD 12J ('Child Arrangements and Contact Orders: Domestic Abuse and Harm') which was issued in October 2017, courts are required, at an early stage in proceedings, to identify whether there are issues of domestic abuse and, if so, apply the requirements of PD 12J to their management of the case."

3. This authority also repeats the need for such hearings to take place before the s7 report.

Is a fact finding required?

1. Any fact that is to be litigated must have a bearing on the child's welfare and the substantive orders being sought. The key resources are summarised in Re H-N & Others [2021] EWCA Civ 448 with the Court setting out the following approach:[37]

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

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

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

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

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

2. Within this case the Court of Appeal, as all readers of this note will know, found PD12J fit for purpose and referred to the checklist within this PD as a useful tool in determining whether or not a fact finding was required. CAFCASS submitted to the Court that they ought to be involved earlier in proceedings, rather than just by way of provision of the safeguarding letter, and prior to the determination of whether a fact

finding hearing was required. This has been left for consideration by those who are reviewing PD12J. [40]

PD12J

1. Practice Direction 12J must be applied in cases of alleged or admitted abuse, or where there is other reason to believe that the child or a party has experienced domestic abuse perpetrated by another party or that there is risk of such abuse.
2. I set out here some key paragraphs for ease of reference.

Paragraph 5:

The court must, at all stages of the proceedings, and specifically at the First Hearing Dispute Resolution Appointment ('FHDRA'), consider whether domestic abuse is raised as an issue, either by the parties or by Cafcass or CAFCASS Cymru or otherwise, and if so must –

- identify at the earliest opportunity (usually at the FHDRA) the factual and welfare issues involved;
- 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 and, if so, in what terms;[5]
- give directions to enable contested relevant factual and welfare issues to be tried as soon as possible and fairly;
- 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
- ensure that any interim child arrangements order (i.e. considered by the court before determination of the facts, and in the absence of admission) is only made having followed the guidance in paragraphs 25–27 below.
  In particular, 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 parent to the risk of harm and is in the best interests of the child.

[5] The allegation must be relevant to child arrangements and potential risk to the child.

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 paragraphs 36 and 37 below;
b. in order to provide a basis for an accurate assessment of risk;
c. before it can consider any final welfare-based order(s) in relation to child arrangements; or
d. before it considers the need for a domestic abuse-related Activity (such as a Domestic Violence Perpetrator Programme (DVPP)).

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 paragraphs 36 and 37 below can be determined without a fact-finding hearing;
f. the nature of the evidence required to resolve disputed allegations;
g. whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court; and
h. whether a separate fact-finding hearing would be necessary and proportionate in all the circumstances of the case.

See also paras 58 and 59 in Re H-N[6]

"As part of that process, we offer the following pointers: a) PD12J (as its title demonstrates) is focussed upon 'domestic violence and harm' in the context of 'child arrangements and contact orders'; it does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court; b) PD12J, paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is 'necessary' in order to: i) Provide a factual basis for any welfare report or other assessment; ii) Provide a basis for an accurate assessment of risk; iii) Consider any final welfare-based order(s) in relation to child arrangements; or Judgment Approved by the court for handing down. Double-click to enter the short title iv) Consider the need for a domestic abuse-related activity. c) Where a fact-finding hearing is 'necessary', only those allegations which are 'necessary' to support the above processes should be listed for determination; d) In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other.

Paras 19, 20, 28 and 29 of PD12J provide detailed guidance regarding the conduct of a fact-finding hearing.

Paragraph 19 of the Practice Direction contains a list of matters that the court must consider when making directions for a fact-finding hearing in a case of this kind, including the following:

Where the court considers that a fact-finding hearing is necessary, it must give directions as to how the proceedings are to be conducted to ensure that the matters in issue are

[6] Re H-N & Others [2021] EWCA Civ 448

determined as soon as possible, fairly and proportionately, and within the capabilities of the parties. In particular it should consider –

a. what are the key facts in dispute;
b. whether it is necessary for the fact-finding to take place at a separate (and earlier) hearing than the welfare hearing;
c. whether the key facts in dispute can be contained in a schedule or a table (known as a Scott Schedule) which sets out what the applicant complains of or alleges, what the respondent says in relation to each individual allegation or complaint; the allegations in the schedule should be focused on the factual issues to be tried; and if so, whether it is practicable for this schedule to be completed at the first hearing, with the assistance of the judge;
d. what evidence is required in order to determine the existence of coercive, controlling or threatening behaviour, or of any other form of domestic abuse;
e. directing the parties to file written statements giving details of such behaviour and of any response;
f. whether documents are required from third parties such as the police, health services or domestic abuse support services and giving directions for those documents to be obtained;
g. whether oral evidence may be required from third parties and if so, giving directions for the filing of written statements from such third parties;
h. where (for example in cases of abandonment) third parties from whom documents are to be obtained are abroad, how to obtain those documents in good time for the hearing, and who should be responsible for the costs of obtaining those documents;
i. whether any other evidence is required to enable the court to decide the key issues and giving directions for that evidence to be provided;
j. what evidence the alleged victim of domestic abuse is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence;
k. in cases where the alleged victim of domestic abuse is unable for reasons beyond their control to be present at the hearing (for example, abandonment cases where the abandoned spouse remains abroad), what measures should be taken to ensure that that person's best evidence can be put before the court. Where video-link is not

available, the court should consider alternative technological or other methods which may be utilised to allow that person to participate in the proceedings;

l. what support the alleged perpetrator may need in order to have a reasonable opportunity to challenge the evidence; and

m. whether a pre-hearing review would be useful prior to the fact-finding hearing to ensure directions have been complied with and all the required evidence is available.

4. Please also note the guidance on interim orders pending fact-finding: PD12J, paragraphs 25, 26 and 27 -

25. Where the court gives directions for a fact-finding hearing, or where disputed allegations of domestic abuse are otherwise undetermined, the court should not make an interim child arrangements order unless it is satisfied that it is in the interests of the child to do so and that the order would not expose the child or the other parent to an unmanageable risk of harm (bearing in mind in particular the definition of "victim of domestic abuse" and the impact which domestic abuse against a parent can have on the emotional well-being of the child, the safety of the other parent and the need to protect against domestic abuse).

26. In deciding any interim child arrangements question the court should–

(a) take into account the matters set out in section 1(3) of the Children Act 1989 or section 1(4) of the Adoption and Children Act 2002 ('the welfare check-list'), as appropriate; and

(b) give particular consideration to the likely effect on the child, and on the care given to the child by the parent who has made the allegation of domestic abuse, of any contact and any risk of harm, whether physical, emotional or psychological, which the child and that parent is likely to suffer as a consequence of making or declining to make an order.

27. Where the court is considering whether to make an order for interim contact, it should in addition consider –

(a) the arrangements required to ensure, as far as possible, that any risk of harm to the child and the parent who is at any time caring for the child is minimised and that the safety of the child and the parties is secured; and in particular:

(i) whether the contact should be supervised or supported, and if so, where and by whom; and

(ii) the availability of appropriate facilities for that purpose;

(b) if direct contact is not appropriate, whether it is in the best interests of the child to make an order for indirect contact; and

(c) whether contact will be beneficial for the child.

Parental Alienation cases

1. What if the facts indicate parental alienation? When faced with a child who expresses resistance to contact, courts must be alert to the possibility of parental alienation taking place.
2. Whilst McFarlane P (in his keynote address to the Families Need Fathers conference) noted that it is not important to determine definitely whether or not a 'parental alienation syndrome' actually exists, he accepted that in some cases a parent can, either deliberately or inadvertently, turn the mind of their child against the other parent so that the child holds a wholly negative view of that other parent where such a negative view cannot be justified by reason of any past behaviour or any aspect of the parent-child relationship. He further observed, '… where that state of affairs has come to pass, it is likely to be emotionally harmful for the child to grow up in circumstances which maintain an unjustified and wholly negative view of the absent parent'.
3. The recent case of ***Re S (Parental Alienation: Cult) [2020] EWCA Civ 568*** outlines the potential signs of alienation:

- Portraying the other parent is unduly negative light
- Suggesting that the other parent does not love the child providing unnecessary reassurances to the child about the time with the other parent
- Contacting the child excessively when with the other parent
- Making unfounded allegations

4. It also sets out how to proceed in such cases: fact-finding and instruct experts who have experience with parental alienation. Worth having an eye to medical records and school records, to see whether a parent has taken any unilateral decisions
5. Key Passages (Peter Jackson LJ):

[13] In summary, in a situation of parental alienation the obligation on the court is to respond with exceptional diligence and take whatever effective measures are available. The situation

calls for judicial resolve because the line of least resistance is likely to be less stressful for the child and for the court in the short term. But it does not represent a solution to the problem. Inaction will probably reinforce the position of the stronger party at the expense of the weaker party and the bar will be raised for the next attempt at intervention. Above all, the obligation on the court is to keep the child's medium to long term welfare at the forefront of its mind and wherever possible to uphold the child and parent's right to respect for family life before it is breached. In making its overall welfare decision the court must therefore be alert to early signs of alienation. What will amount to effective action will be a matter of judgement, but it is emphatically not necessary to wait for serious, worse still irreparable, harm to be done before appropriate action is taken. It is easier to conclude that decisive action was needed after it has become too late to take it.

6. In ***Re A (Children) (Parental Alienation) [2019] WLUK 445*** the court commented on an exceptional case of parental alienation. Early intervention was essential to identify the problems within the family before the children's views became entrenched. The judgment sets out markers by which parental alienation can be identified and highlights the importance of dealing with parental alienation at an early stage. This case can be used to support a request for speed in dealing with parental alienation cases, asking for a fact-finding.
7. When faced with a child who expresses resistance to contact, courts must be alert to the possibility of parental alienation at play.
8. Key Passages:

   [6] My intention in releasing this judgement for publication is not because I wish to pretend to be in a position to give any guidance or speak with any authority; that would be presumptuous, wrong and beyond my station. However, this is such an exceptional case that I think it is in the public interest for the wider community to see an example of how badly wrong things can go and how complex cases are where one parent (here the mother) alienates children from the other parent. It is also an example of how sensitive the issues are when an attempt is made to transfer the living arrangements of children from a residential parent (here, the mother) to the other parent (the father); the attempts to do so in this case failed badly.

[10] It is beyond doubt that, in the long-term, what has occurred within this family will cause these children significant and long-term emotional harm, even if they cannot understand that now. I have said it and so have all the experts in this case. I am afraid that the cause of that harm lies squarely with this mother; whatever may be her difficulties, she is an adult and a parent with parental responsibility for her children. That parental responsibility, which she shares with the father, requires her to act in the best interests of her children. It also required her to promote the relationship between these children and their father. She has failed to do so. She had adult choices to make; the choices that she made were bad ones and deeply harmful to the children.

13. With all the benefit of hindsight, I consider that there were these ten factors which have contributed significantly to the difficulties that have arisen:

[…]

v) The use of indirect contact in a case where there is parental alienation has obvious limitations, as this case demonstrates. The father's letters, cards and presents were being sent by him into a home environment where he was 'demonised', to use the terminology of Dr Berelowitz. They served no purpose in maintaining any form of relationship between the father and the children. It is regrettable that there was not more perseverance in the earlier private proceedings to resolve the obstructions to contact.

vi) These proceedings have seen a vast number of professionals. I have counted 10 and I am sure that I have omitted some. The difficulty that that creates is obvious. Each new person brings a new, personal and different insight into a case of this nature. Family members (especially children) are embarrassed about speaking of personal issues with strangers, develop litigation fatigue and learn to resent the intrusions into their lives by a succession of professional people. As the children have done, people reach a stage where they say: 'no more.'

vii) A particular difficulty in this case has been the absence, at times, of collaborative working by professionals. A particular example of that occurred when an attempt was made to move the children to the father's care. The professionals involved with the court process and the schools had not had sufficient dialogue before that move was attempted and now have very strong and opposing opinions about what occurred and the merits of moving the children from the mother. Pre- planning for the move was

inadequate, in my opinion. If professional people show their disagreements, as happened here on the day of transfer, it undermines the process and allows cherry-picking by family members of what they want to hear.

viii) Early intervention is essential in a case such as this, in my opinion. It did not occur in this case. It took years (probably five) to identify the extent of the emotional and psychological issues of the mother. By that stage it was too late for there to be any effective psychotherapeutic or other intervention in relation to her, the children's views having already become so entrenched.

ix) There is an obvious difficulty about how to approach the expressed wishes and feelings of children who are living in an alienating environment such as this. If children who have been alienated are asked whether they wish to have a relationship with the non-resident parent there is a likelihood that the alienation they have experienced will lead them to say 'no.' Therefore, in this type of case, the approach to the wishes and feelings of children has had to be approached with considerable care and professionalism. To respond simply on the basis of what children say in this type of situation is manifestly superficial and naive. The children in this case have been expressing wishes that they should not see their father for many years now. The lack of an effective and early enquiry into what was happening within this family meant that there was no effective intervention. That, in turn, has led to the children's expressed wishes being reinforced in their minds. It has also resulted in the mother being able to say 'we should listen to the children', rather than addressing the underlying difficulties. […]

9. Be alive to the need to line up an expert to assess the family after and fact finding. Again your barrister will be ready to advise on appropriate experts depending on the facts of the case, pending any Part 25 application.

Transfer of residence

1. Clearly lack of compliance with an order brings with it a number of potential sanctions. An important sanction in cases of this sort is that of a transfer of residence, although it may be wrong to refer to this as a sanction, as recent key cases indicate. (Although it will almost certainly be seen as such by the hostile parent.)

2. *Re L (a Child) [2019] EWHC 867* reminds us that the decision to transfer residence is a balancing exercise and requires a holistic view as to the welfare checklist. This case confirms that transfer of residence is not an option of last resort, an important point not necessarily clear to date. Key Passages:

   [59] Having considered the authorities to which I have referred, and others, there is, in my view, a danger in placing too much emphasis on the phrase "last resort" used by Thorpe LJ and Coleridge J in Re: A . It is well established that the court cannot put a gloss on to the paramountcy principle in CA 1989, s 1 . I do not read the judgments in Re: A as purporting to do that. ***The test is, and must always be, based on a comprehensive analysis of the child's welfare and a determination of where the welfare balance points in terms of outcome.*** *It is important to note that the welfare provisions in CA 1989, s 1 are precisely the same provisions as those applying in public law children cases where a local authority may seek the court's authorisation to remove a child from parental care either to place them with another relative or in alternative care arrangements. Where, in private law proceedings, the choice, as here, is between care by one parent and care by another parent against whom there are no significant findings, one might anticipate that the threshold triggering a change of residence would, if anything, be lower than that justifying the permanent removal of a child from a family into foster care. Use of phrases such as "last resort" or "draconian" cannot and should not indicate a different or enhanced welfare test. What is required is for the judge to consider all the circumstances in the case that are relevant to the issue of welfare, consider those elements in the s 1(3) welfare check list which apply on the facts of the case and then, taking all those matters into account, determine which of the various options best meets the child's welfare needs.*

3. *Re H (Parental Alienation) [2019] EWHC 2723 (Fam)*

   Summary: It was in a child's best welfare interests for his residential care to be transferred from his mother to his father after the mother had alienated the child from the father. While the child might suffer traumas and harm as a result of being transferred to the father's care, those potential adverse consequences were outweighed by the fact a transfer of residence was the only means by which he could enjoy a relationship with both of his parents.

   Key Passages:

[34] It is the only realistic option that ensures H's welfare best interests are met. I am satisfied that this order is a necessary and proportionate response to the harmful and damaging situation that H has found himself in recent years.

4. *Re T (Parental Alienation [2019] EWHC 3854 (Fam)*

Summary: Applying the welfare checklist, it was in a five-year-old child's best interests to make a child arrangements order, directing that she be transferred from her mother's care to live with her father.

Key Passages:

[69] In relation to further findings I find as follows:-

d) That T has suffered and continues to suffer emotional harm from living with her Mother for denying her a positive paternal relationship. This is the opinion of the professionals in the case (SW, Dr Shbero, the Guardian) and I accept it.

e) That historically the Mother has provided T with an extremely negative picture of her Father which T now acts out in play. This was evidenced by Dr Shbero and the Social worker, both of whom had seen this and heard T's violent games directed at the 'daddy' toy.

f) That Mother has and continues to minimise the role of Father in T's life. I base this finding on the clear evidence of the SW and Dr Shbero that in spite of the therapy undertaken by the Mother, she has not yet been able to demonstrate or evidence any actual change of approach. The Guardian's report, dated 12th December 2019 at para 9.10 reports that the Mother struggled to articulate any positives for T in having a relationship with her Father. Sadly, in spite of the work and the professional input, BR has some way to go before this deep-rooted mind- set can be varied.

g) That on the evidence, the Father is better able to promote a relationship between T and her Mother than the Mother can promote a relationship between T and her Father. There has been a parenting assessment of the Father and numerous other experts have interviewed him. He has consistently said that, provided it is safe for T, he will promote a relationship with T's mother. He repeated that in court. Neither I, nor any of the other professionals, have been given any reason to doubt this. Unfortunately, there is clear evidence that the Mother cannot promote the relationship with the Father at this time.

f) I find that T has been the subject of proceedings and interventions and assessments for most of her short life, and that she needs a period of stability and calm and freedom

from litigation and expert analysis in so far as is possible. This, it seems to me, is self-evident. I am not an expert in autism, but I agree with Dr Shbero that there are probably other important factors operating on T which may explain her behaviours apart from a diagnosis of autism. My suggestion is that the parents should be led by the school and social worker in due course as to whether there is a need for any further assessment of T's educational or social/emotional needs.

5. *Re A (Children) (Parental Alienation) (No.1) [2020] EWHC 3366 (Fam)*

   Summary: The judge ordered a transfer of residence for two children, having found that the mother made false allegations against the father and alienated the children from him. The judgment concluded that it was in the best interests of the child to reside with their father.

   Key Passages:

   [57] A child arrangements order will be made in the terms that I have set out above. Either party and/or Mrs Woodall will have liberty to apply for urgent directions made by email to my clerk. Any further applications in respect of these children, whether issued or to be issued will be reserved to me. I am completely satisfied that the child arrangements order detailed by me above meets the needs of the children and most likely is the one which enables them to overcome the emotional and psychological harm which they have suffered and are suffering at the hands of their mother.

6. *FA v MA [2021] EWFC 58*

   Summary: The Family Court ordered the transfer of a four-year-old child's residence from her mother to her father following the mother's persistent breaches of contact orders over several years. While the order was likely to cause short-term distress to the child, she would suffer long-term emotional harm if denied a relationship with her father and his family. A transfer of residence would provide the best opportunity for the child to have a meaningful relationship with both sides of her family.

   Key Passages:

   [124] In the medium to long term it is likely that if A lived with their father this would provide the best opportunity to have a meaningful relationship with both sides of the family. How they would cope with missing their mother and their home in Scotland is not known. It may be profoundly difficult for them. The depth of A's distress cannot be known at this time. A is not thought to show any additional psychological or emotional

disturbance. However, the effect of the move may be to cause these symptoms. The Guardian does not have sufficient knowledge of A to advise on this matter. The psychologist thought that he did not need to see A in this case to make his recommendations.

[125] I am aware that for some children the sort of move contemplated in this case can cause long-term scarring, a sense of fear and loss which they cannot come to terms with. In some children the reaction is so strong that the change in residence has had to be reviewed and changed.

[126] Against this, A is young, knows their father and is not thought to think bad of him. It is suggested by the psychologist and the Guardian that transfer of residence is a necessary step to take.

[127] There is an obvious risk of emotional harm if the move is implemented. Indeed, the move itself is likely to be traumatic

[128] If no move is allowed it is likely that A will continue to suffer emotional harm through the impairment of a relationship with their paternal family. Although at times MA has talked in positive terms about the need for this relationship, and at times she has done well to promote this, she has also acted decisively in the opposite direction by refusing contact and disobeying orders on numerous occasions. Even since the hearing in February 2021 her compliance with the order for contact has been less than half of what was expected of her. She is not in court to explain her reasons for denying contact in Scotland in July. Based on the evidence of FA, it would appear that she had no good reason to refuse to accommodate contact on the dates which he proposed.

[159] I am satisfied that an order to transfer of residence, option 3, would better enable A to maintain a relationship with both sides of the family. The more difficult question is whether it is justified in the best interests of A given the likely risks of emotional harm.

7. There are many examples of cases where a transfer of residence has been determined as the appropriate step to be taken by the Court. Do bear in mind the possibility of a suspended transfer of living arrangements, although one has to query whether in the light of recent authority courts will still make such orders given the tenor of recent authority.
8. Also bear in mind the risk of foster care as a bridging position in these cacses. (e.g. In *Re L-H (Children)* (December 2017, CA)

The alternative perspective

1. It is important to be aware of the Ministry of Justice's 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases Final Report' [the Harm Report], when taking instructions and in particular when negotiating with the other side in cases of implacable hostility.
2. The report considered how the family courts deal with assessing domestic abuse and noted:

   "Whilst the panel has identified some good practice and widespread good intentions, it has unveiled deep-seated and systemic problems with how the family courts identify, assess and manage risk to children and adults, which help to explain this disparity." Page 39

   "We set out four barriers that make it difficult to identify and address domestic abuse: resource constraints, the court's pro-contact culture, the lack of a joined-up approach (the family court working in a silo), and the adversarial process." Page 40

   "The evidence submitted to the panel suggested that the pro-contact culture results in a pattern of minimisation and disbelief of allegations of domestic abuse and child sexual abuse. For example, in subsequent chapters we analyse the evidence suggesting that domestic abuse may be treated as 'historic' to enable contact to occur, rather than considering whether abuse has ongoing relevance to the welfare of the child and non-abusive parent. We also explore the evidence as to how allegations of domestic abuse can sometimes be reformulated as mutual 'high conflict' or, increasingly, used by the other parent as evidence of 'parental alienation'" Page 43
3. As yet the details of any administrative response to this report remain opaque.

Cleo Perry QC

4 Paper Buildings

8.12.21