A NEW DAWN? A NEW 12J?
HAS THE COBB REVIEW NOW GOT THE BALANCE RIGHT BETWEEN PROTECTING CHILD AND PRIMARY CARER AND FACILITATING CONTACT WHEREVER POSSIBLE?

Introduction

1. The tension that lies at the heart of this question is by no means new, and can in many respects be traced back to the seminal case of ***Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)*** [2000] 2 FLR 334 – a case whose guidance was the forerunner of what in time became Practice Direction 12J.

2. It will be recalled that, so as to assist their decision-making, the Court of Appeal commissioned expert evidence from two very eminent child psychiatrists – Dr Claire Sturge and Dr Danya Glaser – and it is worth bearing in mind what that expert advice was in relation to whether, where domestic violence has occurred, direct contact should occur between child and perpetrator. Per Butler-Sloss P at pp 339-340:

> "Dr Sturge and Dr Glaser considered the question in what circumstances should the court give consideration to a child having no direct contact with the non-resident parent. In their view there should be no automatic assumption that contact to a previously or currently violent parent was in the child's interests, if anything the assumption should be in the opposite direction and he should prove why he can offer something of benefit to the child and to the child's situation. They said ([2000] Fam Law 615, 623–624):
>
> 'Domestic violence involves a very serious and significant failure in parenting – failure to protect the child's carer and failure to protect the child emotionally (and in some cases physically – which meets any definition of child abuse).
>
> Without the following we would see the balance of advantage and disadvantage as tipping against contact:
> (a) some (preferably full) acknowledgment of the violence;
> (b) some acceptance (preferably full if appropriate, ie the sole instigator of

violence) of responsibility for that violence;
(c) full acceptance of the inappropriateness of the violence particularly in respect of the domestic and parenting context and of the likely ill-effects on the child;
(d) a genuine interest in the child's welfare and full commitment to the child, ie a wish for contact in which he is not making the conditions;
(e) a wish to make reparation to the child and work towards the child recognising the inappropriateness of the violence and the attitude to and treatment of the mother and helping the child to develop appropriate values and attitudes;
(f) an expression of regret and the showing of some understanding of the impact of their behaviour on their ex-partner in the past and currently;
(g)indications that the parent seeking contact can reliably sustain contact in all senses.'

They suggested that without (a)–(f) above they could not see how the non-resident parent could fully support the child and play a part in undoing the harm caused to the child and support the child's current situation and need to move on and develop healthily. There would be a significant risk to the child's general well-being and his emotional development ([2000] Fam Law 615, 624):

'Without these we also see contact as potentially raising the likelihood of the most serious of the sequelae of children's exposure, directly or indirectly, to domestic violence, namely the increased risk of aggression and violence in the child generally, the increased risk of the child becoming the perpetrator of domestic violence or becoming involved in domestically violent relationships and of increased risk of having disturbed inter-personal relationships themselves.'"

3. The tension arises because, whilst, in most respects, they endorsed that expert evidence, the Court of Appeal did not go as far as Drs Sturge and Glaser did. Most noticeably, the Court of Appeal, at p 341, was clear:

> "There is not … nor should there be, any presumption that, on proof of domestic violence, the offending parent has to surmount a prima facie barrier of no contact. As a matter of principle, domestic violence of itself cannot constitute a bar to contact. It is one factor in the difficult and delicate balancing exercise of discretion."

4. And whilst ***Re L*** marked a sea-change in how domestic violence cases were approached, that tension has never gone away. In practice, there have since been plenty of cases where a strict following of the Sturge-Glaser criteria would point to no direct contact and yet courts have exercised their welfare discretion to order direct contact. Private law

orders refusing direct contact remain rare - a testament to the 'contact wherever possible' approach long writ large in the courts' psyche, which now finds statutory expression in the 2014 amendments to section 1 Children Act 1989, the effect of which is as follows:

(a) that a court, whenever determining contested applications for or for the variation or discharge of a section 8 order or when considering the award or removal of parental responsibility, is "to presume, unless the contrary is shown" that involvement (as defined) of each of the relevant child's parents (as defined) in his or her life "will further the child's welfare" (new section 1(2A)); *but*

(b) a parent only comes within new section 1(2A) "if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm; and is to be [so treated] unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement" (new section 1(6)); *and*

(c) "involvement" in new subsection (2A) means "involvement of some kind, either direct or indirect, but not any particular division of a child's time" (new section 1(2B)).

5. Despite a whole range of multi-disciplinary initiatives over the last two decades and a bespoke Practice Direction in place since 2008, there remains significant concern that too many courts are struggling to get the balance right between on the one hand facilitating contact wherever possible and on the hand ensuring that both child and primary carer are protected, because in practice there are many cases where those distinct ambitions are in plain conflict.

The Cobb report

6. The report, reviewing Practice Direction 12J, prepared by Mr Justice Cobb, and dated 18 November 2016, was commissioned by the President against the backdrop of the work undertaken by the All Party Parliamentary Group on Domestic Violence (APPG), following the publication in January 2016 of the influential Women's Aid report, *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts?*

7. Having originated in 2008 Practice Direction 12J had been revised in 2014, following further research undertaken on behalf of the Family Justice Council about the patchy way the Practice Direction was being implemented by the courts and in particular the approach to fact-finding hearings. The revised Practice Direction saw the definition of domestic abuse substantially changed to bring it in line with the revised cross-government definition, the inclusion of a statement of general principles, the prescription of clearer expectations in relation to fact-finding hearings and a tightening of the provisions for the making of interim child arrangements orders.

8. However, whatever the hopes may have been for the new, revised PD 12J, they have not been fully realised. One cannot read the Cobb report without reaching the conclusion that what may sound good on paper is not being universally translated into practice – that some courts are just not taking the Practice Direction seriously enough and that in many its implementation has been ineffective and inconsistent.

9. The review undertaken by Mr Justice Cobb was wide-ranging and multi-disciplinary. His report emphasises, consistent with recent

decisions of the Court of Appeal, that provisions of the Practice Direction are obligatory; it highlights the importance of specialist training on domestic violence to judges of the family court; and it resulted in a number of recommendations being made for revisions to Practice Direction 12J.

10. Those recommendations were considered by the President, and readers of his 16th *View from the President's Chambers* (19 January 2017) will know that, bar one they were all endorsed by him. What he did not endorse were the recommendations made in relation to para 28 to deal with the concern about alleged victims being cross-examined by unrepresented alleged perpetrators – not because he disagreed with them but because he felt that was a matter for Parliament rather than a Practice Direction. And one of the unfortunate consequences of this year's snap election was that the Prison and Courts Bill 2017 did not complete its passage through Parliament before the end of the last Parliamentary term, so that issue is now on the back-burner.

11. With the endorsement of the President, one might have expected a new, revised Practice Direction (embodying all the other recommendations of Mr Justice Cobb) to have been out by now. But that is not how it has panned out. Following the publication of the Cobb report, the President received a number of consultation responses with regard to the proposed revisions to the Practice Direction; further amendments have been suggested and some have now been accepted; a revised draft of the Practice Direction has been submitted to the President for his approval and he has in turn forwarded it to the Rules Committee which will consider the same at its Rules Committee in mid-July.

12. So the track-changed version of the Practice Direction, to be found at the back of the Cobb report, cannot be considered complete or definitive, though, one suspects, it remains largely indicative of the proposed direction of travel.

Originally proposed revisions to PD12J

13. Putting to one side the main proposed change to para 28 for the reasons above, the revisions effectively fall into three categories, albeit often with some overlap: revisions for clarification, revisions for emphasis and revisions of substance:

    Para 2 – substance – makes clear that the Family Court is "required to" follow the Practice Direction.

    Para 3 – clarification – harm is 'defined' in accordance with Children Act 1989 s 31(9).

    Para 4 – substance – makes abundantly clear that the statutory presumption of parental involvement in the life of a child is explicitly displaced "where the involvement of a parent in a child's life would put the child or other parent at risk of suffering harm from domestic violence or abuse".

    Para 6 – part clarification (one section moved to another, with harm defined as arising from domestic violence or abuse)/part substance – the introduction of the "requirement for the court to ensure that the court process is not being used as a means in itself to perpetuate coercion, control or harassment by an abusive parent" is significant.

Para 7 – part emphasis/part clarification.

Para 8 – part substance/part emphasis.

Para 9 – emphasis.

Para 10 – substance – requiring the courts to consider more carefully the waiting arrangements at court prior to the hearing, and arrangements for entering and existing the court building.

Para 12 – clarification/emphasis.

Para 13 – clarification/emphasis.

Para 14 – clarification/emphasis.

Para 19(f) – substance – including "domestic violence organisations" among the list of third parties whose documents may be required to be produced at a fact-finding hearing.

Para 25 – substance – the decision whether or not to make any interim child arrangements order pending fact-finding can be one of the toughest a court has to make, as there are clearly risks both ways – a denial of contact in circumstances where the allegations are false is harmful to the child, but the ordering of contact in circumstances where serious allegations are true self-evidently can carry very great risks – this amendment involves a substantial beefing up of the provision dealing with just this situation, plainly weighting the balance against the making of such orders, effectively placing the onus on the parent facing

the allegations to satisfy the court that such an order would not expose child and/or carer to a risk of harm, and broadening the considerations when assessing whether that risk exists.

Para 26 – clarification/emphasis.

Para 28 – substance – making clear the provisions of this para apply to any hearing where allegations of domestic abuse are being determined.

Para 32 – substance – inclusion of "local domestic abuse support services" among relevant facilities available locally from whom information is to be obtained, where domestic violence or abuse has occurred.

Para 33 – substance – at (a) a completely new and welcome provision that requires the court (where domestic violence or abuse has occurred) to "obtain a safety and risk assessment conducted by a specialist domestic abuse practitioner working for an appropriately accredited agency" – (b) has been lifted from para 30, save that noticeably, given the specific provision in (a) as to who should provide "a safety and risk assessment", the previous, more general reference to the court possibly commissioning "an expert risk assessment" has gone – (c) the amendments at (c) follow on from (a).

Para 35 – substance – seemingly a higher hurdle for the perpetrator seeking contact to jump.

Para 36 – clarification.

Para 37 – part clarification/part substance (requiring the court to consider the impact on the child of the conduct of both parents).

Para 38 – substance – not only in marking up the need for the court to consider the risk assessment provided pursuant to para 33 when considering whether direct contact is safe and beneficial for the child (and on a strict reading this would mean no direct contact pending such assessment), but in specifically providing that "where a risk assessment has concluded that a parent poses a risk to a child or to the other parent, contact via a supported contact centre, or contact supervised by a parent or relative is not appropriate – an obligatory provision where previously the decision was a discretionary one.

Para 40 – clarification/emphasis.

Conclusion

14. Were the above proposed revisions to be indicative of the final new Practice Direction 12J, then what we would see is the pendulum swinging further to the Sturge-Glaser expert view as set out in ***Re L***, with the safety of child and primary carer accorded greater prominence in the balancing exercise that has 'contact wherever possible' as its counterweight. What it would also reflect is the greater understanding that there now is of domestic violence, of the forms it takes, how it should be assessed, and how it should be guarded against. Such changes, it is respectfully suggested, would be significant and positive.

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