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**BOTH PARENTS MATTER  
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**JOINT REVIEW OF DRAFT PRACTICE DIRECTION 12J**

**January 2017**

1. We have read the statement set out in the 16<sup>th</sup> View from the President's Chamber together with the recommendations from Cobb J and the draft itself of an amended Practice Direction 12J.
2. We also had the opportunity to briefly raise the concerns that we have around the issues of the treatment of Domestic Violence and Abuse together with access to Legal Aid with the Minister of State Sir Oliver Heald QC MP following the APPG on Legal Aid meeting in the Houses of Parliament on Tuesday 17<sup>th</sup> January.

**Review by Cobb J**

3. We are gravely concerned that this review has been entirely one sided, failing completely to consider any view other than that put forward by Women's Aid. We accept that Women's Aid provide excellent support together with campaigning and lobbying efforts to help women who are victims of violence and abuse. It is clear that they consider Domestic Violence and Abuse is a 'gendered phenomenon'. In their 'Child First' campaign they state:

*'We are calling on the Government, all family courts professionals, and involved agencies to make the family court process safer for **women and children** survivors of domestic abuse.'*

4. They have provided powerful testimony of the difficulties faced by women who face violence and abuse. We understand that they assert that 25% of women face cross examination in the Family Court from the perpetrator of abuse against them. This statement has been repeated by the Minister of State Sir Oliver Heald QC MP. The assessment of the scale of the issue has no grounding in objective data however. Cobb J further compounds the statistical analysis by reporting that

*'39% were physically abused by their former partner in the family court.'*<sup>i</sup>

an assertion made by Women's Aid – and also reported through the APPG on Domestic Violence which has clearly been taken as entirely factual without checking its veracity.

5. We understand from questions addressed to Women's Aid by the Chair of the Transparency Project Lucy Reed that this figure and others included in their lobbying document have been compiled from

a survey produced by Women's Aid themselves with a total sample size of 90 participants. <sup>ii</sup>

Women's Aid responded as follows:

*'Regarding the survey we undertook with survivors, this was a self-selected group of women who were offered the opportunity to participate in our survey via the Women's Aid's online peer-to-peer support platform. We do not ask women to qualify their experiences of domestic abuse in order to participate in our research.'*

Cobb J's review of the evidence in reaction to Practice Direction 12J appears to have been entirely one sided with consideration being given neither to the experience of male victims nor to those men who are falsely accused.

6. We note with grave concern the proposals made by Cobb J in relation to training and the role of the Judicial College. Our concern in this area stems not from the clear need to provide training but from the dangers posed by a one-sided perspective offered by Women's Aid: who we suspect would be engaged as the providers of such training. It is imperative that any work in this area must ensure that proper recognition is given to the experience of male victims of abuse and also addresses the widespread use of false or spurious allegations – including specific guidance on the powers available to the Court when dealing with such criminal matters as perjury and perverting the course of justice.
7. We contend that the recommendations are inherently unsafe and should not be acted upon until a much wider consultation has been undertaken where we would hope to be instrumental in drawing together evidence of the extent to which false and spurious allegations are routinely presented in the Family Court as well as providing evidence of male victims of abuse (using the Cross Governmental definition).

### **Child First Campaign**

8. The evidence produced by Women's Aid is a powerful statement of the reality of 12 tragic cases involving 19 child deaths. For those children domestic abuse was a life ending reality. We in no way wish to trivialise these cases. However the ones chosen by Women's Aid present one side of the reality of experience. We know that you are already aware of the research document '**330 Child Homicides**' that examined a vastly wider corpus of cases subjected to Serious Case Review between 2009 and 2015. <sup>iii</sup> The evidence indicates a very different picture to the one set out by Women's Aid. In the first section of the Report the author draws this conclusion:

*'The key fact, which will be demonstrated below, is that more mothers are responsible for the deaths of children than are fathers and other male partners combined.'*

9. That crucially important fact is central to understanding how to protect children. Rather than the bulk of child contact cases being characterised by a female victim seeking to protect her children from a violent abuser we contend that the data shows that a 'typical' Private Law case is characterised by a mothers unreasonable and unlawful restriction of the child's right to 'maintain direct contact and a meaningful relationship' under Article 9.3 of the UNCRC, of a fathers ECHR Article 8 right to a family life and by the making of spurious or false allegations to the Court (including Cafcass/ Cafcass Cymru).

10. Fathers, and 'Non-Resident Parents' are generally a protective factor for children rather than a danger to them. The examination of the Baby P case confirms this reality, with the natural father effectively being side-lined and ignored by professionals who chose instead to engage exclusively with the mother. Fathers naturally seek to act to protect their children yet are routinely 'demonised' and undermined by many statutory services.<sup>iv</sup> One further example of this marginalisation is detailed in the report of the Rotherham Child Abuse Inquiry in which stories of fathers being arrested by Police when seeking to remove their own children from violent abusers are set out<sup>v</sup>

*'In two of the cases we read, fathers tracked down their daughters and tried to remove them from houses where they were being abused, only to be arrested themselves when the Police were called to the scene' - Section 5.9*

11. The danger is by introducing further barriers to the maintenance of a father-child relationship post separation the Family Courts become culpable in promoting child abuse rather than preventing it.
12. It is important for the Samira Lupidi case to be examined in the context of the Child First campaign in the interests of balance. The case does not involve killing whilst 'on contact', but it does involve a mother killing her children during a break-up from the children's father. Lupidi stabbed to death her daughters, 17-month-old Jasmine and three-year-old Evelyn. These murders took place whilst Lupidi was resident in a women's refuge in Bradford. She was found guilty of murder and sentenced to 24 years. In the criminal trial it emerged that Lupidi was suffering from "a complete misinterpretation of reality", having falsely accused her 31-year-old partner of domestic violence. One week after killing their children, Lupidi was reported as telling the prison medical staff that the most important thing was that Carl Weaver (her ex) was suffering.
13. We are calling for an official analysis of the data applying to children culpably killed in the UK whose deaths have been subject to Serious Case Reviews, as a basis for establishing the empirical factors which might place a child at risk. We appreciate that this is beyond the remit of the President's office but we trust that you will publicly support such a proposal.

### **Draft Practice Direction**

14. We are profoundly concerned that the draft if adopted will represent a charter to controlling and coercive parents to continue their abuse of the rights of children and of fathers by preventing contact using false claims of abuse. We have already seen a dramatic rise in the allegations of abuse being made by controlling parents seeking to prevent contact. The likely effect of the Practice Direction is to turn virtually every case in Private Law into a Domestic Abuse case.
15. In relation to the specifics sections of the Draft Guidelines we make the following observations and comments.
16. Paragraph 3. We are pleased to see that the definitions of Coercive and Controlling Behaviour from the Serious Crimes Act 2015 have been included. Training will need to be arranged to enable all levels of the judiciary to understand that preventing or limiting the child's UNCRC Article 9 rights is an example of Coercive and Controlling behaviour by a 'Resident Parent' in relation to a 'Non

- Resident Parent'. This reality faces the overwhelming majority of applications to the Family Court where individuals are seeking redress to enable their children to enjoy a relationship with them.
17. Paragraph 4. General Principles – we are surprised that the Judiciary has the power to suspend the specific provisions of S11 (2) (1) of the Children and Families Act 2014 enacted through the will of Parliament. We are concerned that as drafted the rights of parents will trump those of the child that we consider contrary to the overriding principle of The Children Act 1989 that the child's interests shall be paramount. We conceive of many cases where a controlling parent will claim that the involvement of the other parent in the life of the child will cause that controlling parent emotional harm. As drafted that would appear sufficient to overrule the presumption provided for in s11 (2) of the 2014 Act. This 'presumption' of involvement is in any event very weak and already contains sufficient caveats stating that the presumption applies unless the contrary can be shown. It is entirely reasonable to act on that 'presumption' and for the controlling parent who seeks to interfere with the right of the child to evidence that the presumption should not apply. What is proposed in this Draft Practice Direction is that the will of Parliament would be overturned if a controlling parent can claim to be at risk of suffering emotional, psychological or even financial 'harm' from allowing contact to take place.
  18. Paragraph 5. Whilst we welcome the literal interpretation of this paragraph we are concerned that this will be interpreted by the Courts only in relation to the impairment of the parenting capacity of the controlling parent. Clearly most applicants are seeking the help of the Court to allow them to maintain a relationship with their children. They and their children are victims of emotional and psychological abuse by being prevented from having that relationship. The unilateral exclusion of them by the controlling parent means that the violence and abuse that they suffer 'impairs the parenting capacity' of the excluded parent.
  19. Paragraph 6 - We are surprised that the provisions of the 4<sup>th</sup> bullet point apply to the child and ONLY the parent with whom the child lives. In many cases that we see a controlling parent has secured an advantage in proceedings by taking the children into their care and establishing a false 'status quo' as the 'primary carer'. Apart from the obvious detriment to a child's best interests, it would appear that in doing so and infringing the right of the child to involvement with the other parent the controlling parent will be further rewarded for their unlawful actions. We do not see how this conforms to the Paramountcy Principle.
  20. We are also concerned about the way in which bullet point 6 is likely to be interpreted by the Courts. We understand that Women's Aid has consistently asserted that men use the Family Court process to continue their abuse of women and this provision is clearly a direct response to that assertion. We believe that those controlling parents who refuse mediation for example are creating the conditions for 'the Court process to be used as a means to perpetuate coercion, control or harassment by an abusive parent'. However we are concerned that the wording as currently drafted will simply be used against applicants seeking to secure a relationship with them for their child and redress the injustice they face.
  21. Paragraph 16. It seems somewhat inconsistent that so many of the sections of the draft require compulsory actions by the Courts yet the question of whether or not to hold a Fact Finding hearing regarding alleged abuse appears to be unclear and left to individual discretion. We believe this is wholly inconsistent and that the paragraph should **require** a Fact Finding Hearing where allegations

of abuse are made unless there is an explicit rejection by the Court of such allegations.

22. We are aware of the percentage of cases where domestic violence and abuse is recorded by Cafcass Cymru. We suspect that a similar data set is available in respect of England. Both such sets are available to you. We believe that the extent to which DV allegations are made in Private Law cases needs to be in the public domain. All such cases require the holding of a Fact Finding Hearing if they are confirmed by one or other of the parties at the FHDRA.
23. We also wish to point out that DVPP programmes are almost exclusively focussed on a male perpetrator / female victim paradigm which means that where women are found to be perpetrators there will be a significant increase in the existing difficulties in obtaining support for abusive women.
24. Paragraph 25 – the wording here underpins the need to make the holding of Fact Finding Hearings compulsory where allegations are disputed. The effect of the wording as drafted would be to place a further barrier to contact being ordered. We believe that this is likely to see even greater numbers of false and spurious allegations of abuse being made in the Family Court.
25. Paragraph 28 – we accept the difficulty of dealing with cross examinations between parties where domestic violence and abuse is alleged. We acknowledge that requiring the Judge (at whatever level) to undertake the cross examination is a pathway that presents the least worst outcomes at present. We have called on the UK Government to provide for compulsory non means tested Legal Aid funding for anyone accused of abuse to engage counsel at any substantive hearing such as a Fact Finding Hearing. We appreciate that this is beyond the remit of the President. Our position is that a party accused of domestic violence prevented from cross-examining his accuser is denied his right to a fair hearing enshrined in Article 6 of the ECHR and transposed into our own Human Rights Act.
26. Paragraph 33 – We are concerned about the likely impact of section (a) of this paragraph. The resources available to men who are victims of domestic violence and abuse are so weak in comparison to the services available for women that the wording as currently drafted will result in a report being commissioned from a ‘Women’s Aid’ agency where objectivity and balance may be even more difficult to ensure. Much work will need to be done in terms of increasing resources to specialist domestic abuse services for men if this provision is to be equitable.
27. Paragraph 36 – This is poorly worded and falls once more into the inconsistency of approach towards each parent when dealing with DV allegations. It seems unreasonable that the protection extends only to the parent with whom the child lives rather than to both parents. This has the danger of pre-judging cases on the basis of ‘possession is 9/10<sup>th</sup> of the law’.
28. We are particularly concerned by the use of the phrase – ‘or where domestic abuse is otherwise established’. This phrase is repeated elsewhere. We are concerned that this will mean that so-called ‘expert assessments’ from Women’s Aid organisations will be used to interfere with the right of the child under Article 9 of the UNCRC, the right of the father under Article 6 of the ECHR and will be contrary to s11 of the Children and Families Act 2014.

29. Paragraph 37 - We are gravely concerned that the consistency in the subsections of this paragraph is inconsistent at subsection (c). It appears that the presumption is made that only the 'applicant' parent's motives need to be examined to determine whether they are in the best interests of the child or are motivated by coercive control.
30. Paragraph 38 – we repeat our concerns about the independence of any expert risk assessment produced from a gendered perspective. This is particularly significant at subsection (d) where it appears that such assessment will be able to force excluded parents into Supervised Contact at great cost to that parent with little or no support from the other parent or the state. We consider it essential that any expert input must come from an independent, objective source.
31. Paragraph 40 – we recognise that this section is likely to significantly undermine the UNCRC Article 9 right of the child. Almost by definition if a case is open in the Family Court there is conflict between the parties which either or both may regard as an emotional abuse. In these circumstances we anticipate that contact will be hard to justify if a test of 'risk of harm' will be applied as the controlling parent can simply continue to thwart contact and create the 'risk of harm'.

Paul Apreda –  
National Manager FNF Both Parents Matter Cymru / Trustee - Families Need Fathers  
On behalf of Families Need Fathers & FNF Both Parents Matter Cymru

25<sup>th</sup> January 2017

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<sup>i</sup> Paragraph 12 c – Cobb J Review dated 18<sup>th</sup> November 2016

<sup>ii</sup> <http://www.transparencyproject.org.uk/womens-aid-answer-our-queries-about-their-evidence-base/>

<sup>iii</sup> <http://mra-uk.co.uk/?p=1281>

<sup>iv</sup> [https://www.fnf-bpm.org.uk/image/upload/branch/cymru/WELSH\\_DADS\\_SURVEY\\_2016\\_report\\_FINAL.pdf](https://www.fnf-bpm.org.uk/image/upload/branch/cymru/WELSH_DADS_SURVEY_2016_report_FINAL.pdf)

<sup>v</sup> [http://www.rotherham.gov.uk/downloads/file/1407/independent\\_inquiry\\_cse\\_in\\_rotherham](http://www.rotherham.gov.uk/downloads/file/1407/independent_inquiry_cse_in_rotherham) p 36