How Do Family Courts Deal With Cases About Children Where There Might Be Domestic Abuse?

A guidance note for parents & professionals

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Contents

WHAT THIS NOTE COVERS

This note covers issues of domestic abuse arise in all sorts of family court cases, including

- private law children cases (cases where the court is asked to resolve a dispute between parents or family members about children),
- care proceedings (cases where the court is asked to intervene in a family because of child protection concerns),
- Non-molestation cases (where the family court is asked to make an injunction to protect a person or their home),
- financial remedy cases (where the court is asked to sort out the assets and finances when a couple divorce).

This note focuses on private law children cases, but aspects of it will be relevant to the other types of case. It is about the law in England and Wales.

WHAT IS DOMESTIC ABUSE?

Domestic abuse is more than just physical violence. It might take the form of :

- Verbal or emotional abuse,
- Coercive control (see over and p 26)
- Sexual assaults,
- Financial control,
- Harassment and stalking
- Online or digital abuse
- Other controlling behaviour.

Domestic abuse can be carried out by women and men, and sometimes by both partners in a relationship, although research evidence indicates that most abusers are male, and most victims female. Domestic abuse may occur in different contexts – it may occur or begin at the time of separation only, in the context of a single relationship or it may be a feature of all the abuser's relationships. Sometimes domestic abuse begins during pregnancy. Domestic abuse may be caused or made worse by substance abuse or mental health difficulties.

The definition of domestic abuse used by the Family Court is as follows:

'domestic abuse' includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment;

…

'coercive behaviour' means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;

'controlling behaviour' means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour;

(You can find the full text of this definition, which we've shortened slightly, in PD 12J.)

This matches the Government definition of domestic abuse.

WHO THIS NOTE IS FOR

This guidance note is intended to help a range of people who may be involved in a family court case where issues of domestic abuse are raised. This includes:

- Those who have been the victim of abuse, or who make allegations of abuse
- Those who have perpetrated abuse or are accused of it
- Those who are supporting each of these

HOW THIS NOTE IS WRITTEN

The guidance note is written by The Transparency Project and is not legal advice. It is accurate to the best of our knowledge at the time of publication, and we will do our best to update it, subject to resources.

We have tried to avoid technical legal language, and to explain it where it can't be avoided.

We have tried to make this document reasonably self-contained so you should not have to go and look things up elsewhere.

We've used some abbreviations:

- FPR = Family Procedure Rules (the court rules)
- PD = Practice Direction (more detailed guidance that goes with the main rules)
- Cafcass = Children and Family Court Advisory and Support Service (Cafcass Cymru in Wales)

When we talk about the judge, we also include magistrates (unless we say otherwise).

The rules and Practice Directions we have referred to can be found at www.justice.gov.uk/courts/procedure-rules.

Occasionally we've referred to published cases which give guidance on the law. We've put the references in a footnote in case you want to look them up. The references we have given can be used to find the full judgments on www.bailii.org, but the key information is in this guidance note.

The relevant law is the same in England and Wales. This note does not apply to Scotland.

THE ETHOS OF THIS NOTE

Issues around domestic abuse, difficulties in contact between parents and children, and how the court deals with those issues are highly contentious. Some people hold the view that the family courts are too ready to believe allegations of domestic abuse, whilst others hold the view that the family courts do not provide enough protection for victims of abuse. Both these perceptions cause problems because people should feel confident that the courts are making decisions in children's best interests.

This note does not attempt to resolve any of these disputes. It can't. We start from the twin propositions that domestic abuse is harmful both to the person at whom it is directed and to other family members who are exposed to it (for example children), and that stopping contact between a child and parent without a good reason is also harmful.

The kinds of cases which reach the family courts, in which parents are unable to agree arrangements for their children, often involve serious concerns about child welfare, including allegations of domestic abuse. Very often the allegations are denied, and the family court has to work out whether or not the allegations are true and, if so, what the risks are. It is important then to make sure that the person complaining of abuse and any child who may be at risk are protected whilst the family court case is ongoing.

This guidance note is written from the neutral standpoint that (like the judge) we don't know in any given case whether allegations of abuse are true or not, or how people may remember or perceive events differently.

To avoid pre-judging the issues, we avoid words like 'victim' and 'perpetrator' which tend to imply that any person making an allegation IS a victim of abuse, or that any person accused IS a

perpetrator. We therefore use the terminology of 'alleged victim' and 'alleged perpetrator', save in cases where abuse has already been proved or admitted.

Some people take the view that a domestically abusive parent should not be allowed contact with their child, full stop. That however is not the law.

It has been suggested that the family court operates on the basis of "Contact at all costs". That isn't the law either.

Although it is difficult to apply in practice, the law about children's relationships with their parents where there has been domestic abuse is very clear:

- the court must make a decision that is in the best interests of that particular child, taking into account all the circumstances including harm suffered and risk of harm (Section 1 Children Act 1989)
- the court has a duty to promote contact in accordance with the child's right to family life under Article 8 of the European Convention on Human Rights[1]. However, one person's right to family life may be outweighed by the need to protect the rights of others. Article 3 of the European Convention on Human Rights (the prohibition on torture) means that the court also has an absolute duty to protect both children and adults from ill treatment. Under Article 6, everyone has a right to a fair trial.
- there is no presumption either way as to whether or not a child should have contact with a domestically abusive parent.[2]

Section 1(2A) Children Act 1989 sets out a presumption that the involvement of both parents in the life of the child will further the child's welfare. But a presumption is really just a starting point, and this one will not apply if the evidence shows that any involvement by the parent will expose the child to a risk of harm. There isn't a presumption or rule that if domestic abuse is proved or admitted there should be no contact, but the court does have to look carefully at what the level of risk is, how it could be managed and what the possible advantages and disadvantages of contact might be.

[1] *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521; [2011] EWCA Civ 521.
[2] *Re L (Contact: Domestic Violence)* [2001] Fam 260; [2000] 2 FLR 334, CA.

Practice Direction 12J (guidance that accompanies the Family Court rules, known as the Family Procedure Rules 2010), sets out some of the things the court should generally consider where abuse has happened :

- the effect of the domestic abuse on the child and on the arrangements for where the child is living;
- the effect of the domestic abuse on the child and its effect on the child's relationship with the parents;
- whether the (abusive) parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent;
- the likely behaviour during contact of the abusive parent and its effect on the child; and
- the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse.

The court has to look at each individual case and see what is appropriate.

In each case, the court still has to decide what is in the child's best interests, and that will mean deciding whether contact is safe. In some cases involving domestic abuse, the question for the court is: *how* can contact be made safe? In other cases the question is whether contact *can* be made safe at all.

The courts must follow the law. To help them do that they must follow the guidance in Practice Direction 12J (PD12J) (which tells the court how it should approach cases involving allegations of domestic abuse), and Practice Direction 12B (which sets out a process in private children cases called the Child Arrangements Programme).

The aim of this note is to help people who may have to go through a family court process to have realistic expectations of the law and processes that may apply to their family. We know that many litigants will have to navigate the process without a lawyer, and even those who do have lawyers may find that their lawyer has limited time to explain the whole process to them. Both parents are often given (well meaning) information or advice by support agencies (domestic abuse services,

fathers' rights groups etc.) that may include a mixture of what those services *think* the law *is* or *should* be, but which isn't really what is likely to happen at all. Social media can often have an influence too, and it is difficult as a litigant to know where to turn for advice, or who to trust. That can leave litigants confused and upset when they get to court and find things aren't as they expected at all – and it can also mean that litigants aren't able to get the best out of the court process.

This guidance note is intended to help litigants (the people who a court case is about or between) and any person or service who is supporting them to understand the law and processes that will be in place when the case gets to court.

WHY IS DOMESTIC ABUSE RELEVANT IN THE FAMILY COURT?

Sometimes people who have been in an abusive relationship struggle to see why it should affect arrangements for the children once the relationship is over.

The CAFCASS Domestic Abuse Pathway (now part of its Child Impact Assessment Framework) gives a useful summary of the questions the judge is going to have to answer in a case which might involve domestic abuse, before making final decisions about what orders should be made:

- What has been happening? – History
- What is happening now? – Current
- What might happen? – Future
- How likely is it to be repeated? – Risk
- How serious would it be? - Impact on the child

The family court needs to protect against the following risks:

- Adults and children may be at continuing direct risk of harm if there are further incidents of violence or abuse, at handover or at other times

- If there are further physically abusive incidents there is a risk that children will be caught in the crossfire and physically injured even though any violence or angry behaviour was

not aimed at them

- Even if children are not directly physically injured it is important for children to be protected from the harmful impact of hearing or seeing domestic abuse. Even if there is no physical abuse, a parent's abusive or controlling behaviour may be witnessed by the children and may amount to a continuing harm

- Children may have a continuing fear of the abusive parent, or have post-traumatic anxieties or symptoms which are exacerbated by continuing contact with the abusive parent

- Children who are exposed to domestic abuse may be significantly affected, and may struggle immediately or later on with behavioural issues, mental health and with forming and maintaining healthy relationships. These impacts may continue even after the abuse has stopped.

- A child whose parent is suffering ongoing abuse or undue stress from continued contact with the other parent may be affected by seeing the effect on their parent, or if that parent's ability to care for the child is affected (for example because continuing contact with the abusive parent triggers a mental health decline or anxiety symptoms).

- In cases that don't involve children, the effect of coming into contact with an abusive ex-partner or having to deal with litigation relating to the finances can make it difficult for a victim of abuse to manage financial remedy proceedings (the money bit of a divorce). A victim of domestic abuse may have a particular wish and need for a split of the assets that allows them financial independence, or they may have been left so vulnerable that they have a continuing need for maintenance where it might otherwise have been reasonable to expect them to support themselves through working. If the children of a relationship have been adversely affected by their experiences their care needs may impact upon the ability of the caring parent to return to work.

WHAT SHOULD I DO IF I NEED THE COURT TO KNOW ABOUT ABUSE?

If you have any concerns about harm or abuse that have affected or might affect you or your children, you should complete a supplementary court form numbered C1A, 'Allegations of harm and domestic violence'. Send this in with your application form or your response to an application by another party. If you are responding to an application and do not receive a blank copy of this when the application is sent to you, it can be downloaded from the gov.uk website.

This form provides space for you to explain what support and protection you think you will need in court.

Before you go to the first court hearing, Cafcass will make safeguarding checks about the potential risks of harm to you and your children.

The first type of court hearing you will attend is called a First Hearing for Dispute Resolution Appointment (FHDRA). At this hearing, you will probably meet a Cafcass officer (a Family Court Adviser) and directions will be made by the court about whether further information is required, including whether a fact finding hearing is needed (See below at p 14 for what a fact finding hearing is). The FHDRA does not look at evidence in detail but just at what the next steps should be to process the application. The court will not make any contact order if it does not have the safeguarding checks, and will usually only make an order for contact at this hearing unless it is agreed.

I'M FRIGHTENED OF COMING TO COURT AND SEEING MY EX-PARTNER

It is important that applicants or respondents who are worried about this complete form C1A (see above) so that the court can put arrangements in place to ensure that people coming to court feel safe in the building and in the courtroom itself, and to avoid them feeling intimidated. These arrangements might be needed at the FHDRA (see above) and /or at a fact finding hearing, and or at a final hearing where the order is being considered.

We explain safety in the court and special measures below at p 29.

WILL I BE BELIEVED?

(The difference between allegations, convictions and proving something in family court)

There are lots of people whose job it is to support victims of domestic abuse, and to help them to rebuild and get on with their lives. Fathers seeking contact with their children through the family court may also be assisted by support services for men. Those types of agencies usually adopt an approach of believing the person they are set up to help. The family court and the lawyers who work in it are in a slightly different position, as an important part of the court's job is to work out whether or not one parent's description of the relationship as an abusive or non-abusive one is accurate or not. Because the court has a duty to both parents AND to the children in each case, the court has to keep an open mind about what happened – until it has gathered all the evidence, listened to what everybody has to say and explained its decision.

This neutral approach is often difficult for individual parties to adjust to, because those complaining of abuse have often been told 'we believe you' right from the moment they first sought help. But the court keeping an open mind is not the same as being disbelieved. Judges and lawyers are trained to hold in mind that an account given by one party might be true, might be exaggerated or may be mistaken or false – until all the evidence has been gathered and tested.

Domestic abuse agencies and parents' rights organisations that understand the court process should support their clients by preparing them for the different 'neutral' approach that the court has to adopt.

Don't forget that often it is only those involved in the relationship (and perhaps the children) who really know what happened – the judge does not know. Judges are also experienced enough to know that even when somebody believes their account is truthful and accurate the human memory is not perfect and people get things muddled or exaggerated over time, even when they don't mean to. So it is important for a judge to take care and not jump to conclusions – either by believing or disbelieving an allegation.

WHO DECIDES WHETHER I AM TELLING THE TRUTH?
(AND WHAT IS A FACT FINDING HEARING?)

When the family court has to make decisions about children's welfare, or about orders to protect people from domestic abuse, the judge needs to know or to decide what happened in the past. If a criminal court has already decided something has happened (if there is a conviction) or if the person who was abusive has admitted the abuse (through accepting a caution or telling the family court they accept the abuse) the family court won't have to hold a hearing to make those decisions, and it will just accept the conviction, caution or admission. Where the judge has to first make a decision on whether alleged facts are or are not true, this is known as 'fact finding' and should take place in a separate court hearing before the judge orders Cafcass welfare reports.

It ISN'T the job of social workers or Cafcass officers or anybody else to make decisions about who is telling the truth, but they can tell the judge what they have seen and been told, and their impression of the people involved – and those things might be part of the information that will help the judge decide who is and is not telling the truth and what really happened. The main role of social workers and Cafcass in cases involving domestic abuse is to pass information to the court and, once the court has decided what actually happened, to assess the risks based upon the decisions the court has made. Social work professionals should be respectful of the different positions and accounts of each party without expressing a view as to whether one or the other is telling the truth.

CAFCASS use a Domestic Abuse Practice Pathway, which is part of their Child Impact Assessment Framework, to guide their officers through working on a case involving allegations of domestic abuse. This Framework was introduced in October 2018, but the Pathway has been in use for a longer period.

Calls are sometimes made by campaign groups for better or specialised training about domestic abuse for judges, lawyers and Cafcass officers. However, Cafcass officers and judges do undergo some specific training in dealing with family court cases and domestic abuse. Currently, lawyers dealing with cases involving allegations of domestic abuse are not required to undergo specific training but, in practice, many will have undertaken courses on the topic as part of their annual

training requirements. If you are thinking of instructing a lawyer, it is always a good idea to ask them what experience and training they have in the area.

WHY DOES THE FAMILY COURT NEED TO HOLD A FACT FINDING HEARING? ISN'T A RISK ENOUGH?

As far as possible, the court needs to know what happened before deciding what future orders should be made. For example:

- The court could order contact when it isn't safe, and a child could be physically harmed or be exposed to abusive behaviour.

- The court could stop contact when it doesn't need to be stopped and a child could be denied a relationship with a safe loving parent and given a distorted view of their parents.

HOW DOES THE COURT DECIDE WHICH CASES NEED A FACT FINDING HEARING?

When a case is first brought to court, the application triggers a process where Cafcass carry out basic safeguarding checks to see if the family are known to police or social services or if they have any relevant convictions or pending prosecutions. They will also attempt to speak to each parent on the phone before the first court hearing to check whether they think there are any safety issues. If you think there are safety issues it is important to raise these with Cafcass at this stage even if you have not mentioned them before in your paperwork. Cafcass will write a safeguarding letter setting out what they have found out and at this stage may recommend that a fact finding hearing is necessary.

In some cases, Cafcass will say a fact finding hearing is not necessary because the allegations of abuse are broadly accepted (or proved by a conviction), or because the report writer thinks the situation has significantly changed since the date of the abuse. In other cases, Cafcass will say that the court needs more information before deciding if a fact finding hearing is necessary. If you do not agree with what Cafcass say about this in the safeguarding letter or at the first hearing, you can ask the court to do something different.

The decision about whether to hold a fact finding hearing is down to the court - not CAFCASS. At the first hearing the court has to consider the important piece of guidance in Practice Direction 12J (PD12J), which tells the court how it should approach cases involving allegations of domestic abuse.

The general idea of PD12J is that if disputed allegations would be potentially relevant to the decisions the court is going to have to make about the child, i.e. they might make a difference to what orders are eventually made, then the court should determine the dispute (decide whether the things really happened or not).

These decisions about whether or not to hold a fact finding hearing should generally be taken early on to avoid delay. However, they do sometimes come up later on in a case, either because somebody didn't raise an allegation at the beginning (perhaps because they were frightened to do so) or because everybody had thought that a fact finding hearing wouldn't be necessary (for example because everybody initially agreed contact could and should continue in spite of the history).

It could later turn out that a fact finding hearing is needed after all (most often because one party changes their mind or keeps bringing up allegations that aren't accepted).

I'VE BEEN TOLD THE DOMESTIC ABUSE IS HISTORIC, SO WE DON'T NEED A FACT FINDING HEARING. IS THAT RIGHT?

AND

I'VE BEEN TOLD THAT BECAUSE OVERNIGHT CONTACT HAS HAPPENED SINCE THE LAST INCIDENT OF ABUSE WE DON'T NEED A FACT FINDING HEARING. IS THAT RIGHT?

Not necessarily, no.

There are lots of reasons why cases only come to court several years after the last incident of (alleged) abuse has taken place, and just because the last incident was a long time ago doesn't mean it hasn't continued to affect the victim and children.

Sometimes contact has continued even though the issues around domestic abuse haven't really gone away.

For example:

- Sometimes an alleged victim has fled an abusive relationship with the children, and it is only after a period of time that the alleged abusive parent has located them and started a court case. Starting up contact after a long time might not be straightforward. The victim may still be very fearful.

- Sometimes physical abuse ends with the relationship but the perpetrator of abuse continues to attempt to exercise control through contact arrangements. The victim of abuse may have felt that the best way to keep themselves safe was to take the line of least resistance and to agree contact. Once the matter is in court however, they may feel able to voice their experiences and fear and may object to contact. And sometimes a further apparently insignificant incident of abuse has triggered a breakdown in contact and that is why the case has come to court. In this scenario the abuse isn't truly historic at all.

THE COURT HAS DECIDED IT NEEDS TO KNOW WHETHER THE ALLEGATIONS ARE TRUE - WHAT WILL HAPPEN IN THE MEANTIME?

Until the court has decided whether the allegations are true it will work on the basis that they might be true and will put safe arrangements in place. This might mean no contact or supervised contact. If contact has stopped, it is unlikely to start up again while all this is being worked out. But it does depend on the circumstances. In some cases the allegations might not be serious enough to mean contact has to stop completely. However, PD12J gives very clear warnings about making orders for contact when there are allegations of domestic abuse that have not yet been verified. If the court does make an order for contact before the truth of the allegations has been decided, it must explain clearly why that is in the order.

Unless the court has received safeguarding checks back from Cafcass it shouldn't usually make any order for contact at all. The recommendation of Cafcass in the safeguarding letter will be important in helping the court to decide if contact should be ordered in the meantime.

On the other hand, sometimes there has been contact, by agreement, since abuse took place. It can be difficult to persuade a court to stop contact at that stage, or, if it has stopped briefly, to say it shouldn't start up again. In a situation like this, it will help the court to explain why.

For example, sometimes contact has been allowed because although there has been abuse the parent who has suffered, it still thinks it is more important to ensure their child has a relationship with another parent and has found a way to keep it going without feeling unsafe. But sometimes it has been allowed because the victim has felt unable to say No, or has been frightened about what might happen if they did – or because they didn't really realise what the risks were to their child.

IF THE PERSON AGAINST ACCUSED OF ABUSE ISN'T CHARGED BY THE POLICE, IF THE CHARGES ARE DROPPED, OR THE ACCUSED PERSON IS ACQUITTED IN THE CRIMINAL COURT - ISN'T THAT THE END OF IT?

No. The family court and the criminal court perform different functions.

The criminal court has to decide if a person is guilty of a criminal offence and if so what their punishment should be. This is to protect the public generally, as well as to protect the victim.

The family court has to work out what to do to protect and promote the welfare of a particular child – and in some cases to protect an adult who is at risk.

In the criminal court you are only 'guilty' of a crime if the jury (or magistrates) are satisfied so they are 'sure' (or 'beyond reasonable doubt') that the crime has been committed.

In some cases there is a lot of evidence that somebody has done something that has harmed a child or that might expose a child to harm but not enough to convict them of a crime. In order to make sure that the family court can do its job of protecting children properly the family court

works to a lower standard of proof – this means that it treats an event as having happened if it is 'more likely than not' rather than 'beyond reasonable doubt'.

In essence, just because a jury has not been satisfied so it was 'sure' that the person committed a crime, doesn't mean that a child is not at risk. Unless there is a conviction the family court still has to make a decision about whether the abuse happened before it can make good decisions about what should happen in the future.

Although the family court is likely to put a holding position in place that might feel to the alleged perpetrator of abuse that they are presumed guilty, the presumption of innocence still applies in family court.

The person who makes an allegation has to prove that what they say is true (more likely than not). If they cannot show that the allegations are more likely than not to be true the family court will work on the basis that the alleged behaviour did not happen.

As mentioned at above (p 14), the family court will often separate out the case into two stages – a 'fact finding hearing' to decide what happened in the past – and a welfare hearing to decide what should happen in the future. These are often (but not always) separate hearings, because once the findings have been made there may need to be a risk assessment before the second stage can be completed.

IF THE PERSON IS CONVICTED BEORE THE FACT FINDING HEARING DO WE STILL NEED THE FACT FINDING HEARING?

Probably not. The fact finding hearing would only be necessary if the allegations are much wider or serious than the conviction, and there is a dispute about those allegations. You should update the court about a conviction so that the judge can decide whether the fact finding hearing really needs to go ahead.

HOW CAN I PROVE DOMESTIC ABUSE HAPPENED? IT'S MY WORD AGAINST THEIRS

Those who have suffered abuse are often worried that they will not be able to prove that the abuse happened because they didn't report it at the time and don't have any 'proof'.
Those who are accused are often worried that 'what she/he says goes' and that the family court will just believe the allegations.

In fact, the family court can and does take into account a wide range of evidence before deciding what happened. The rules in the family court are flexible and evidence can be allowed into the case that would not be allowed in the criminal court.

Types of evidence include:

- Witness evidence. A written witness statement from someone directly involved or who saw or heard something. A witness who gives a statement will usually give oral (spoken) evidence at the fact finding hearing to confirm their witness statement is true and to answer questions. The witness evidence of a person who says they are a victim of abuse (and the witness evidence of the person who denies it) are both 'evidence' and the court will listen carefully to both and weigh up what they say and their credibility alongside the other sorts of evidence that are available.

- A witness who was told about (but did not see) something is a 'hearsay' witness – this sort of evidence is allowed in the family court, but it might be given less weight than direct evidence.

- Contemporaneous records (records made at the time a thing happened). This might include:

    - GP or hospital records showing that a person has sought medical help or advice – they might record injuries, a complaint of domestic abuse or it might record an excuse for an injury that a fearful victim has made up. Sometimes these sorts of records will directly contradict an allegation that has been made by someone.

- Police records – there may be call outs by one of the parties or by a neighbour or someone else present during an assault or argument. The police records may include witness statements from the officers about what they saw and what the people in the property said when they attended, police notebooks, risk assessments (police often use something called a DASH questionnaire to identify how risky a situation is), photographs of injuries, bodycam footage, arrest records, 999 call logs, incident logs, witness statements from those involved or who witnessed the incident.

- Sometimes a person who has been injured takes photos of their injuries at the time or keeps a diary of what happened.

- Things like health visitor records are sometimes relevant - perhaps where a health visitor has recorded unexplained bruising or a conversation about relationship difficulties, or a request for information about a refuge.

Often nobody reports an incident of abuse, nobody sees it, and nobody makes a record of it. This will mean that there is no independent evidence. The court will then have to rely upon what the parties themselves say about what happened.

Inconsistencies Are To Be Expected

It is not uncommon for someone who has suffered abuse to get confused over dates or details, or to muddle up separate incidents. Some inconsistency is normal, because human memory is imperfect, and people perceive things in different ways.

The fact that there are inconsistencies doesn't necessarily mean the person who says they have been abused won't be believed, but they are relevant. The judge will have to decide whether any inconsistencies in accounts over time are a result of the impact of the abuse or a failure in memory or if they are because the allegations are not true.

Police And Other Contemporaneous Evidence

Contemporaneous records (records made at the time) are important because they tell the court what people were doing and saying at the time, often before they had separated or thought about separating – and before they had any obvious motivation to make things up. Contemporaneous records are more likely to be accurate because they were made when things were fresh in the mind of the person who made the record. Therefore this type of evidence can be really important.

The police will often hold information that is relevant to allegations of domestic abuse, although this is not necessarily so because it is not uncommon for a victim of abuse to be frightened of calling the police at the time.

It is common for the family court to make an order for disclosure by the police of all relevant records. This might include call logs or incident logs, 999 records, witness statements, body camera footage, 'DASH' risk assessments, police officer's notebooks, interview records, and sometimes medical or photographic material (and possibly documents the police have gathered such as diaries, or bank statements in cases of financial abuse) etc.

The court will usually make an order for the material to be provided to one of the lawyers involved in the case, and that lawyer will be responsible for making sure everyone has a copy once the material is received. It usually takes about a month to get hold of this material and there is a small cost which is often shared between the parties to the case. If there is no lawyer, the court may order the police to send the material to the court in the first instance. It is important to ask that order lists specific documents that you know exist and which might be important, so that you get all the relevant documents first time around and don't have to go back for missing things.

Medical Or Photographic Evidence

Very often there is no photographic or medical evidence because the person who was assaulted did not complain at the time, through fear.

Sometimes medical evidence such as GP records will show that the person came to the surgery with an injury on a particular date, but that the patient did not complain of an assault at the time,

and instead gave another explanation. The court will have to decide whether the complainant made up a cover story at the time out of fear or whether they have made up a story of assault later.

In some cases there will be photographic evidence or medical evidence showing injuries sustained in a domestic assault. Such evidence will be important, but the court will still have to take into account all the evidence available because documented injuries do not always give a complete picture as to who was the aggressor (often there are conflicting accounts and sometimes both parties present with injuries which might be defensive).

Detail And Context

Because there is often no independent witness or contemporaneous record of abuse that has happened in private there will be many cases where the family court judge has to decide what really happened based only on what the two parties involved can tell them. The level of detail and background context that a witness is able to give can be important for a judge trying to assess what really happened.

HOW CAN I PROVE DOMESTIC ABUSE DIDN'T HAPPEN? HOW CAN I PROVE A NEGATIVE?

The first thing to say is that you don't have to prove anything – the person making the allegations has to prove that the things they say are true. That said, if someone has made accusations against you it is important that the court understands what you are saying happened and that you produce any evidence you have that supports your version of events. Sometimes a person will say that there is 'no evidence' of abuse, but the account of a witness who says they have been abused does count as evidence that the court can rely on if appropriate, and it is possible to prove an allegation even without independent evidence.

You will have an opportunity to highlight the gaps, weaknesses or inconsistencies in any evidence produced against you, through asking questions of witnesses and telling the judge (making 'submissions') about these things. However, the judge will not necessarily believe your evidence over that of your ex-partner just because there are inconsistencies or a lack of independent evidence – the likelihood is that both of your evidence will contain some inconsistencies because

people's memories are not perfect. The judge will read and listen to all the evidence from each of you before deciding which account is more likely to be accurate.

There often isn't really any evidence you can produce to show you didn't do something, but sometimes you will be able to produce a document or image to show that you were elsewhere when the incident happened, that injuries were caused innocently, or that what is now being said is inconsistent with what was said at the time.

The list of types of evidence above (p 20) may also be as relevant to proving the innocence of someone wrongly accused as it is to prove abuse that actually happened.

PREPARING FOR A FACT FINDING HEARING

If the court decides that there needs to be a fact finding hearing it will make directions to get the case ready for a hearing. Typically this will involve:

- Disclosure
- Statements and schedules
- Listing
- Special measures
- Procedures for questioning at the hearing

Disclosure

When we talk about 'disclosure' we mean showing documents and evidence to the other parties in the case.

Disclosure of records will typically be dealt with by the court making an order for the police to disclose all relevant material to both parties and the court – for example call out records, incident logs, witness statements, bodycam footage, police notebooks, photographs, risk assessment questionnaires, interview recordings or transcripts. It is important to be clear about what is

required as generally the police will not disclose things like witness statements, interviews and photographs unless specifically requested.

Depending on the circumstances the court might also request disclosure of records from other agencies such as GP, Health Visitor or hospital.

Usually, this sort of material is disclosed to one party's lawyer (if there is one) and this can then be circulated by them to the other party (or parties) so that everyone has seen it. There is usually a charge for the cost of disclosure which is typically shared between the parties (if you have legal aid this won't affect you). If lawyers are not involved, the court may ask for disclosure to be sent to the court.

Generally speaking disclosure should happen before either party has to prepare a full witness statement, but sometimes this is not practical.

Witness Statements And Schedules

Each party must prepare a witness statement. Usually the person making the allegations goes first. They may be asked to produce a schedule of allegations which sets out each allegation or incident in a table format, giving each a number and a date (or approximate date), and a short summary of what is alleged.

Sometimes the court will place a limit on the number of allegations that should be included in the schedule of allegations to ensure that the case is manageable and the fact finding hearing is focused on the most relevant issues. Where there have been a high number of similar incidents of alleged physical violence it probably isn't necessary or helpful for the court to go through each and every one. Typically, the court might say the allegations should be limited to allegations after a certain date (after the birth of the children for example), should be no more than a certain number of pages, or should be no more than 6 or 10 allegations, or should be the 6 most serious incidents.

There will be cases where it is necessary to refer back to before the birth of a child, or to include more than a certain number of allegations. However, this is something that will probably need to

be explained to the court if it applies, so that the judge can understand why it is necessary to spend time dealing with older allegations in this particular case. For example, physically abusive behaviour in the past can mean that behaviour that looks acceptable to an outsider is still having an impact on the receiver of that behaviour many years later.

Schedules Of Allegations In Coercive Control Cases

In cases where the allegations include coercive and controlling behaviour, it can be more difficult to condense the abuse into a schedule of numbered allegations than in a case involving specific, easily identifiable incidents of domestic abuse like a physical assault. What's more, it can be difficult to demonstrate the impact of chronic coercive control by identifying just a few examples, which seem trivial when looked at in isolation. It is often necessary to group the behaviours into types (for example name calling or withholding money), and list the examples of each in the schedule, so that the number and repetitive nature of the behaviour can be seen.

It may be necessary to explain to the court that this is a case which is not really 'incident' based, and where the abuse lies in the 'drip drip' effect of repeated small behaviours, and to ask the court to make directions that allow this to be properly dealt with.

The person who is being accused of coercive and controlling behaviour is entitled to know and understand what it is they are said to have done, so it is important that schedules are clear and specific and that there are at least some examples given.

Responding To Allegations In Statements And Schedules

The party who is accused of abusive behaviour will then have an opportunity to respond in a witness statement of their own, and they will be expected to fill in a blank column in the schedule of allegations setting out whether they admit, deny or give another version of each allegation.

If both parties are making allegations (cross allegations) the other party will add their own allegations and the first party will then be entitled to respond in the same way.

Occasionally there will be eye witnesses, or people who were told about an incident or who saw injuries at the time. The person who wants to rely upon those witnesses would need to make arrangements for them to provide a witness statement (unless they have already given a statement to the police) and for them to be called to court at the hearing. A party will generally be expected to give an indication early on about whether they are likely to have additional witnesses, how many and what they are able to give evidence about, so that the court can plan the hearing properly (see listing).

Sometimes the police disclosure will contain witness statements from neighbours or police officers who have seen an incident or the aftermath. If a party wants to rely on those witness statements they need to make this clear because if that evidence is not accepted by the other party it will be necessary to try and get those witnesses to court on the day of the hearing. The court cannot just accept paper evidence at face value if it is challenged – the witness needs to come to court and be asked questions or the paper evidence will probably have very little weight.

Listing (Getting A Date For A Hearing)

Because courts are very busy, parties may need to wait quite a long time for a free slot to deal with fact finding. Hearings are often quite far in advance, depending on how long a slot is needed. For this reason the court will most likely try and get a sense early on about how long the fact finding hearing will need, and will try to fix the date in the diary then so that no time is lost. This is why it is important to have a rough idea of what the issues are; things like how many allegations are disputed, how many witnesses there are likely to be, and so on. If the court doesn't allow enough time in the court diary for the hearing to be completed the case may have to be adjourned (to be put off or continued on another date) and that will cause delay.

To give you a rough idea of how long hearings might take we would suggest that typically:

- A hearing just involving two parents giving evidence and without any complicating factors like frequent breaks and video links or interpreters could probably be completed in a day.

- A hearing just involving two parents giving evidence without any complicating factors but very serious or numerous allegations might need more than a day.

- A hearing involving both parents and (say) two extra witnesses would probably take more than a day, so might be listed for 2 days.

- If there is a lot of material for the judge to read (especially if it's a judge that hasn't been involved before) or video interviews to watch, then extra time may be allowed.

Parents are often surprised that hearing their case will take a whole day or a number of days, but remember that court hours are usually 10am-1pm and 2pm-4.30pm, and for any hearing of contested issues the court will need time for:

- Reading the papers

- Making sure the case is ready and all the practical arrangements are in place

- Hearing each witness (which involves them confirming their statement, and answering questions)

- Hearing submissions at the end of all the evidence (the parties' or their lawyer's speeches about what the judge should make of the evidence that she has heard)

- Thinking about the evidence and preparing a judgment.

- Generally, the court will allow extra time for a case being dealt with by magistrates because there are three of them and they need time to confer about the evidence and agree their decision and reasons.

- Breaks are needed for both the judge/magistrates and the parties.

- Interpreters, intermediaries, signers and lip speakers will also need breaks and their involvement will slow down the process of giving evidence as information is relayed between witness and court. Video links slow things down.

SPECIAL MEASURES AND GIVING EVIDENCE

As we have mentioned above (p 12), a party who is worried about abuse may need arrangements to feel safe at court.

Rule 3A and practice direction 3AA deal with vulnerable people and how they can be helped to take part in the case and to give evidence. The court can make 'participation directions' (sometimes called special measures), to help a witness or party to take part.

The court has to think about whether the quality of a witness's evidence is likely to be reduced because they are vulnerable. Vulnerability includes the impact of intimidation (real or perceived) on the person or their family.

The court should consider the ability of the party or witness to-

a) understand the proceedings, and their role in them, when in court;
b) put their views to the court;
c) instruct their lawyer before, during and after the hearing; and
d) attend the hearing without significant distress.

The sorts of things the court can order as a participation direction include:

- The court may hold a ground rules hearing to consider how a vulnerable person should give evidence (see over)
- Should the witness be in the same room as the other parties or should it be by video link? Should there be a screen?
- How should questioning be dealt with?
- The court must think about whether to direct that-
    - one lawyer – or sometimes the judge - should ask all the questions, or that different lawyers can't repeat questions that have already been asked;
    - questions or topics to be asked should be agreed before the hearing;
    - evidence should be managed in any other way.
- There are guidelines about the sorts of questions lawyers are allowed to ask (called the Advocates Toolkits).

- The court may decide to make directions about things like the structure and the timing of the hearing, the formality of language to be used in the court and whether (if practical) the parties should be able to enter the court building through different routes and use different waiting areas.

In domestic abuse cases the key issue for the court to think about when making participation directions is likely to be intimidation, so we've included the sorts of participation directions above that are most likely to be helpful in those cases. Other sorts of participation directions may be needed where a witness or party has a communication or learning difficulty or a mental disorder.

Sometimes the court will need to hold a special 'ground rules hearing' to think about some of these issues and to plan how the hearing will work. The purpose of these hearings is to establish how someone who has communication needs, or is otherwise a vulnerable person, should be helped to give their best evidence or otherwise participate in the trial.[3]

Even if someone is able to manage a short hearing without special adjustments they might require some adjustments when giving evidence at the fact finding hearing. As well as feeling intimidated by the other party, feelings of stress may be made worse because of learning difficulty, problems with communication or language difficulty, or physical impairment. Witnesses with these types of needs are described in this context as 'vulnerable' witnesses.

[3] https://www.theadvocatesgateway.org/images/toolkits/13-vulnerable-witnesses-and-parties-in-the-family-courts-2014.pdf.

WHAT IF THE PERSON ACCUSED OF ABUSE DOESN'T HAVE A LAWYER – WHO ASKS THE QUESTIONS WHEN THE PERSON COMPLAINING IS GIVING EVIDENCE?

In criminal cases involving allegations of sexual assault, the defendant is not allowed personally to ask questions of the complainant because this might prevent the complainant from giving their best evidence. If a defendant doesn't have their own lawyer, the court will appoint a lawyer to ask questions on their behalf and that lawyer will be paid through legal aid.

Unfortunately, there is no equivalent system in the family court, although many lawyers, judges and campaigners have asked for this to be urgently changed. Legislation was due to be brought into force to create a scheme along similar lines to the criminal one, but this fell through at the last general election. Although the Government has agreed in principle to bring this law into force, it has not yet found Parliamentary time to do this.

As a result of the fact that many alleged perpetrators of abuse are now unrepresented, the Family Court sometimes has to decide how they can be enabled to challenge the evidence of the complainant without potentially intimidating or further abusing them. The process needs to be fair for both parties, remembering that at the time of the fact finding hearing the judge doesn't know who is telling the truth, but that if the allegations are true, the victim might find it very difficult to answer questions asked directly by their ex-partner about sexual matters or other forms of abuse.

In most cases involving allegations of abuse, particularly sexual allegations, the court will find a 'work around' to avoid direct questioning:

- The court will often ask the alleged perpetrator to prepare written questions in advance so that those questions can be checked for appropriateness before being asked

- The judge might decide that someone else should ask the questions for example the judge, a legal adviser or, if the child has their own representation, the child's lawyer should ask the questions.

Judges generally prefer to avoid asking questions themselves because it is difficult to remain neutral and to conduct the fact finding hearing if they are busy asking questions – and because it can feel very unfair to everyone involved.

In a recent case the court suggested that it would generally be better for the court to make the child a party so that their lawyer can then ask the question rather than the judge.[4] Sometimes this is done by the child's lawyer asking the questions they think are appropriate to test the evidence from a neutral perspective (i.e. to ask questions designed to see if the allegations are true rather than to try and show they are or aren't), and then to see if the alleged perpetrator still has anything additional to ask. Any remaining questions can then be asked for them by the child's solicitor. Sometimes the child's solicitor will just read the alleged perpetrator's questions out, and then ask some of their own questions afterwards. In previous cases the Court of Appeal has also suggested in that the judge conducting the questioning will often be the least worst option – the judge will have to decide how it is best to handle things, on a case by case basis.

It is important to note, however, that whilst the judge can control how questions to an alleged victim are to be asked by or on behalf of a person accused of abuse (for example by saying that someone else has to ask the questions), the court does have to find some way of allowing the person accused to challenge the allegations, and to balance the needs of both parties to be able to give their evidence well and to challenge the evidence of the other. The judge cannot simply prevent all questioning.

Similar considerations may also apply if an alleged victim is in the position of having to ask questions of the alleged perpetrator.

[4] *PS v BP* [2018] EWHC 1987 (Fam) (27 July 2018).

HOW THE FACT FINDING HEARING WILL WORK

The general format of a fact finding hearing will be as follows:

- The person making allegations of abuse (and their witnesses) will give evidence first. They will confirm (or correct) their witness statement and may then be asked questions by or on behalf of the other party / parties. Sometimes the judge will ask a few questions either as things go along or at the end.

- The same process then happens for the person who is accused of abuse and any witnesses they have brought to court.

- The parties (or their lawyers if they have them) will then be able to make submissions, speeches to tell the judge what they say are the important parts of the evidence and what decision they should make.

- The judge will announce the decision and give reasons.

This process might be adapted if one or both parties has no lawyer and the court makes special arrangements because of that. For example, the child's lawyer might ask questions first, or might ask the accused person's questions for them.

If there are witnesses who are vulnerable or who require adjustments to be made to enable them to give evidence (interpreters, video links, regular breaks etc.) the process may be adjusted and the hearing may take longer.

WHAT HAPPENS IF THE COURT DOESN'T MAKE FINDINGS (THE ABUSE ISN'T PROVED)?

If an incident of abuse is not proved the court will go forward on the basis that the incident didn't happen. Although the court holds in mind the different possibilities until the fact finding hearing has concluded, a finding of fact is binary – i.e. there are two possible outcomes: either it happened or it didn't. Once findings have been made they are final - there is no maybe - and the parties will have to come to terms with the findings made.

Unless a fact finding decision is successfully appealed, the findings will be the basis upon which all future decisions are based.

Often the court will allow a period of time for the disappointed party to reflect on the fact that the court has not accepted their version of events, and to decide what their position will be going forwards – some people will accept the findings and work with them, whilst others will continue to say the court is wrong, and others will take another position of saying 'I don't accept the court has it right but I do accept that these are the findings and I will have to work with them'.

THE ABUSE HASN'T BEEN PROVED – SHOULDN'T THE PERSON WHO MADE THE UNPROVED ALLEGATION BE PUNISHED FOR LYING?

Although the system is binary, there are a number of reasons why a court might reach the conclusion an allegation isn't proved. Not all of them involve intentional dishonesty.

- Sometimes the court will simply decide it is impossible to say what happened.
- Sometimes the court will say that the events took place but they have been misremembered or unintentionally distorted or exaggerated over time, with retelling.
- Sometimes the court will say that the truth lies somewhere between the two parties' accounts.
- Sometimes the court will go further than saying that the allegations are not proved and will say that they have been deliberately fabricated or exaggerated to achieve a particular outcome (to hurt the other person or to stop contact).

If a parent is found to have fabricated allegations, this is something that the court will have to give some thought to in making plans for the child's future. Can that parent be trusted in future to promote the child's relationship with the other parent (who the court has now found to be a safe and blameless parent)? Have they caused emotional harm to the child, for example through telling them the other parent has been abusive when they have not? Can they safely continue to care for

the child or will the child be at risk of (further) emotional harm? As with the risks arising from a history of proven domestic abuse, these are issues to be given serious consideration before a decision is made – but there is no automatic outcome.

WHAT HAPPENS IF THE COURT MAKES FINDINGS (THE ABUSE IS PROVED)?

If an incident of abuse is proved the court will go forward on the basis that the incident happened. Although the court holds in mind the different possibilities until fact finding hearing has concluded, a finding of fact is binary – i.e. there are two possible outcomes: either it happened or it didn't.

Once findings have been made they are final - there is no 'maybe' - and the parties will have to come to terms with the findings made.

Unless a fact finding decision is successfully appealed, the findings will be the basis upon which all future decisions are based.

Often the court will allow a period of time for the disappointed party to reflect on the fact that the court has not accepted their version of events, and to decide what their position will be going forwards – some people will accept the findings and work with them, whilst others will continue to say the court is wrong, and others will take the more nuanced position of saying 'I don't accept the court has it right but I do accept that these are the findings and I will have to work with them'.

Parents who have been found to have been domestically abusive, but who do not accept findings of domestic abuse, can find it hard to make progress with their contact applications. This may be because they are unlikely to be accepted on any domestic abuse perpetrators programme without a genuine acceptance of their abusive behaviour. A parent who understands that the findings have been made, but who continues to say these are wrong, is unlikely to be given a place on a course, and a parent who says they have accepted the findings but who is just saying the 'right words' is unlikely to successfully complete the programme.

IF DOMESTIC ABUSE IS PROVED IS THAT THE END OF IT?

No. Not in most cases.

Deciding what has happened in the past is only the first stage. Even if the court finds that there has been domestic abuse, the law still requires the court to consider whether contact between the child and both parents is in his or her best interests. This is known as the welfare decision. Sometimes domestic abuse findings will mean that contact is not safe and not in the best interests of a child, but in other cases, contact can be safely managed (for example through supervision or planned handovers) and would be in the best interest of the child.

The law is very clear that the court has to give very serious thought to all the circumstances before making an order that cuts off contact between a child and their parent, even if they are a parent with serious flaws. The court has to balance the pros and cons, and whilst some safeguards around contact are often necessary to allow a relationship between child and parent to continue, there is no automatic bar on contact just because there has been domestic abuse. The court will base its decision on what harm has been caused, and what the risks and benefits are to the child (including through any impact on the parent who has been the victim of abuse).

CAN I APPEAL THE FINDINGS?

Either party can appeal the fact finding decision but only if they have legal grounds to say the decision was wrong (just disagreeing isn't enough). Fact finding decisions are particularly difficult types of decisions to appeal because the appeal court will usually take the view that the judge who saw and heard the live evidence of witnesses is far better placed to make decisions than the appeal court. To make a successful appeal, you would usually have to show that there has been some serious procedural mistake or that the judge has gone wrong in how she has considered the evidence.

If the reasons are not clear enough or full enough to allow you to understand why the decision has been made you should first ask for clarification from the judge before deciding whether to appeal.

Unless the decision is by magistrates the person who wants to appeal will need to get permission to appeal either from the judge who made the decision (this will usually be a Circuit Judge or a High Court Judge) or from the appeal court.

The time limit for appeal is usually 21 days unless the judge has said something different, although it can be extended if there are good reasons.

CHILDREN'S VIEWS, WISHES AND FEELINGS

Children who are subject to family court applications, where issues about domestic abuse between adults are being decided, may express their own views to their parents or to a Cafcass officer about whether they do or do not want contact with their non-resident parent. This will be particularly relevant at two stages.

First, when a child is resisting or refusing contact, and the reason isn't clear, the non-resident parent might accuse the resident parent of deliberately alienating the child, or 'putting words into their mouth' for no justifiable reason.

Second, when facts about abuse have been established (either way), the court will take the child's wishes and feelings, according to their age, into account, through the Cafcass officer's report, when reaching a decision on what order, if any, is in their best interests.

Where children refuse contact with a parent this may be because they are frightened by negative experiences in that parent's care, or it may be because of the negative influence (intentional or otherwise) of the parent they live with. In some cases, there is a mix of these two things going on and the resident parent is not willing or able to help a child move on from a reluctance to go to contact even where this is now safe.

Sometimes a child's continuing reluctance is cemented by a parent's inability to acknowledge that they have exposed the child to distress in the past and to reassure the child it won't happen again. The court may need to better understand what has happened in the past, so it can understand whether the child is reluctant to go because of their memories and experiences or because of negative influences (or a combination).

In exceptionally complex cases, the court can appoint a Cafcass officer to separately represent a child, when they are known as a 'children's guardian' under the FPR rule 16.4.

SEXUAL OR OTHER ABUSE OF CHILDREN

The main focus of this guidance note is on domestic abuse, but we briefly mention here allegations of sexual or other abuse of children, which do sometimes crop up in the same cases where there are allegations of domestic abuse.

It is important to say that when a parent becomes suspicious of abuse by the other parent they often make attempts to gather or record evidence themselves, which can be emotionally harmful and can actually make it more difficult to prove abuse. Generally speaking it is better to alert the police or social services to any concerns and allow them to carry out investigations and to gather the evidence properly. A child who has been asked inappropriate or suggestive questions may well give misleading answers, trying to give the 'right' answer to a grown up.

Where it is suspected that a child has been the victim of physical or sexual abuse, medical evidence can be obtained in the form of a child protection medical or intimate examination. In respect of sexual abuse such examinations are very invasive and can be distressing to the child. They are often inconclusive and can rarely rule out abuse.

Where a child makes an allegation that they have been harmed or abused they will often be video interviewed by the police (if they are old enough to manage). This video can be played in the family court.

Video interviews are often referred to as 'ABE' interviews. ABE stands for Achieving Best Evidence, which is a reference to Guidelines developed about how to interview children to help them give a clear and reliable account of what has happened to them. The ABE guidelines require the person interviewing the child to be specially trained, and to ask them open questions that are appropriate to their level of age and understanding. The task of getting a child to give a clear account of what has happened without accidentally prompting them to say something that didn't happen but that they think adults want to hear is really tricky. If an interview is not carried out properly or a child is

asked inappropriate or repeated questions that give the message the adult asking thinks something bad has happened any allegation a child makes as a result may be unreliable.

Sometimes when things have gone wrong with an interview or with questions asked by adults before the interview the court will be unable to place much weight upon what the child says, so it's really important to get it right. For this reason it is usually unwise for a parent to attempt to question their own child (and record it) – a botched effort to protect a child can lead to a potentially true account being incapable of belief. Parents who are worried that their child has suffered some form of abuse should involve a professional (make a referral to social services).

Sometimes children will spontaneously say something about an abusive experience and of course that is important information that should be recorded at the time or as soon as possible by the person who has been told. Sometimes they will tell a parent, social worker or a teacher or Cafcass. The evidence and records made by these people may be important even if the child has later been formally ABE interviewed, so they may need to produce their original notes and come and give evidence.

It is not uncommon for a child's accounts of something to change over time, and particularly where there is conflict between parents a small incident may become overly significant in their mind or the child may give accounts of bad things happening which are implausible.

There is no presumption that what a child says is necessarily true or accurate, so it is better to talk about 'things the child has said' rather than 'allegations' (which suggests a level of intention that might not be applicable to a small child who is just telling what happened but doesn't realise it is wrong or might get a grown up into trouble) or 'disclosures' (which suggests that the child must be assumed to be telling the truth).

Children may get things wrong or muddled or make things up for all sorts of reasons. Sometimes children's accounts are very muddled because of their language development or difficulty sequencing events or estimating time, but certain key details they give will make clear they are probably describing something that really happened. When deciding whether to make findings about allegations of abuse made by children the court has to try and work out how reliable the children's account is and whether it has been intentionally or unintentionally influenced.

Children themselves do not often give live evidence in family courts, but this is becoming slightly more common – there is no presumption that a child shouldn't give evidence. Where there are allegations of abuse against a child the court will have to decide whether or not the child should give evidence bearing in mind the likely impact on their welfare and the need for the child's evidence to be fairly challenged to ensure that the process is fair to all involved.

When there is an issue about whether or not a child should be called to give evidence the court will often set up a hearing to decide whether this should be allowed, called a 'Re W' hearing. Re W is a case that was heard in the Supreme Court which gives guidance about when a child should or should not give evidence in the family court, and the sort of factors to think about when deciding.[5]

If a child is allowed to give evidence the court will most likely make 'ground rules' dealing with what sort of questions will be allowed and what the arrangements will be to ensure the child is able to manage the experience of giving evidence and is able to give reliable answers. This might involve the child being able to visit the court or meet the judge before the day of the hearing, the use of a video link, regular breaks or an intermediary for example. The sort of ground rules that are set up will depend on the age and particular characteristics or needs of the child in question. Ground rules will often be set up at a special 'ground rules hearing' before the fact finding hearing itself (p 29).

The same rules about evidence and findings apply in relation to these sorts of allegations as to allegations of domestic abuse – the person making the allegation must prove it is more likely than not etc.

If a person accused of abusing a child has not been able to test the evidence of the child by asking them questions as they might do with an adult, the court will take that into account when weighing up the various bits of evidence. Sometimes points about influence or inappropriate questioning can be dealt with by them being pointed out to the judge and asking questions of the child aren't going to add much.

[5] *Re W* [2010] UKSC 12.

CARE PROCEEDINGS

When domestic abuse is raised in care proceedings it is often raised by social services as one of the reasons they are worried about the children, and it may form part of the reasons for wanting to remove children.

If social services have reached the point of issuing care proceedings because of domestic abuse it is likely that there is a worry that a parent (often a mother) cannot protect her children from domestic abuse in her current relationship, or from a cycle of entering into relationships with abusive partners.

Sometimes the victim recognizes the abusive nature of the relationship and is seeking support to leave it.

Sometimes both partners will be denying that any abuse has taken place, or perhaps claiming that any abuse is now in the past and that it is no longer a problem. That might be because social services have got it wrong and there isn't any abuse, it might be because the victim is frightened of what will happen if they admit abuse (perhaps that the children will be taken or perhaps that they will be abused again), or because the victim has normalized the abuse or is so dependent on their partner that they will do anything to maintain the relationship even though it is abusive.

Parents who are suffering abuse are often frightened of admitting to social workers what is happening, in case they are blamed for failing to protect their children and in case the children are removed. However, where a victim of abuse is able to acknowledge the abuse and its harmful effects on the children and is seeking support to leave an abusive relationship and to make changes, social services should offer support with that. Even if care proceedings have already started, if the parent can demonstrate they are able to protect their children and avoid falling into abusive relationships in future the view of the court and social services is likely to be that the risks of the children remaining in the parent's care are greatly reduced.

SELF-INCRIMINATION – CAN WHAT I WRITE OR SAY BE USED AGAINST ME IN A CRIMINAL COURT?

What you and the other party say in the family court, in your written witness statement or when you give evidence, is private. However, if asked the judge can allow the information to be passed to the police or Crown Prosecution Service. You would be asked for your view before that happened.

In care proceedings the law restricts the use that can be made of evidence you have given in family court, which gives you a little bit more protection in relation to most offences except perjury.[6] Essentially the evidence can't be used in court, but it could be something that helps the police decide on what other enquiries to make, or something you are asked questions about in a police interview (for example if you've said different things at different times or admitted something in family court that you have denied to the police). This protection is given to witnesses in care proceedings because they have to give evidence if the judge says they must.

In private law cases you can't be forced to give evidence, so that extra protection does not apply - so if the court allows the evidence to be passed on to the police or CPS there will be no restriction on its use unless the judge specifically says so – they could use it in interview or in court as long as the criminal judge agrees. Sometimes, for example, the judge will allow the information to be passed to the CPS, so they can decide whether to charge or pursue a prosecution, but will say a further application has to be made if the CPS want to actually use the evidence in the criminal court.

The evidence given in a family court might be helpful in showing that a crime was committed or it might be useful in showing that allegations have been made up. There are different rules about what sort of evidence is allowed to be used in criminal cases, and this note does not deal with that.

If a party chooses not to give evidence or answer questions the court will have to work on the basis of the evidence it has, so any witness statement they have made is likely to have less weight because the other party has not been able to test it by asking questions. The court will also be able to decide whether or not the reason the party refused to give evidence was because they had

[6] The law we are referring to is section 98(2) Children Act 1989.

something to hide or their witness statement wasn't true. This is called drawing an adverse inference. Before drawing an adverse inference the court would have to think about whether a person refused to give evidence was because they were frightened or distressed.

LEGAL AID

If you are involved in a court case about your children legal aid is sometimes available, but it is quite restricted. It will depend on your income, the strength of your case – and your position in the case (whether you are a victim of domestic abuse or not).

The only type of family case where you automatically get legal aid regardless of how much money you have is when you are involved in care proceedings about your child (or a child you have parental responsibility for). Care proceedings are cases started by social services when they are worried that children are suffering harm.

There are other limited circumstances where someone can qualify for legal aid in a case about children (to do with child abduction and protecting a child from child abuse), but the rules about that are quite detailed and these are not covered in this document.

For more information about legal aid see the gov.uk website or ask a legal aid lawyer.[7]

I'm Accused Of Domestic Abuse – Can I Get Legal Aid?

Probably not. Since 2013, when the types of cases covered by legal aid were restricted, the person accused of domestic abuse is not usually entitled to legal aid. You would only be able to get legal aid if you can show you qualify for exceptional legal aid (for example, that if you didn't have legal representation your human rights would likely be breached). If your income is above a certain level you won't be eligible for this type of legal aid even if the circumstances are exceptional.

The Public Law Project have produced a guide about getting exceptional legal aid.[8]

[7] See www.gov.uk/check-legal-aid, www.gov.uk/legal-aid/domestic-abuse-or-violence and https://find-legal-advice.justice.gov.uk or www.lawsociety.org.uk/for-the-public/paying-for-legal-services/legal-aid.

[8] https://publiclawproject.org.uk/resources/get-legal-aid-exceptional-case-funding-ecf-family-law/

If the case is a care case (involving social services) you would qualify for legal aid as long as the case concerns your own child (or a child you have parental responsibility for). Someone accused of domestic abuse in a care case who isn't a parent or holder of parental responsibility for the child involved in the case might be invited to intervene in the case (to defend themselves against the allegations) but they wouldn't automatically get legal aid.

I'm A Victim Of Domestic Abuse – Can I Get Legal Aid?

Possibly, yes. It will depend on two things: whether you can produce some basic evidence of domestic abuse, and how much money you have.

Regulations set out a long list of the precise forms of evidence that you need to obtain in order to apply for legal aid. Since the rules have been relaxed and the list of evidence expanded, most people who have experienced domestic abuse should be able to obtain one of the types of evidence on the list, although it can still be difficult to obtain evidence in cases of sexual or non-physical abuse.

If your income or capital is above a certain level, you won't be eligible for legal aid in a case between parents about a child even if you have some evidence of domestic abuse.

The rules around legal aid and income are less strict in applications for domestic violence injunctions (the technical name for these is non-molestation orders and occupation orders. These orders are made by the family court stop someone harassing or threatening another person or stop them coming to their home. They are similar to restraining orders that are sometimes made by criminal courts at the end of a criminal case), and once a domestic violence injunction is made this can be used as evidence to obtain legal aid in relation to a case about the children.

If the case is a care case you would qualify for legal aid as long as the case concerns your child (or a child you have parental responsibility for). People involved in a care case who aren't a parent or holder of parental responsibility for the child the case don't automatically get legal aid.

REPRESENTING YOURSELF

Going to court is stressful with or without a lawyer, but not everybody is able to access legal aid or to afford a lawyer.

Here are a few basic pointers to help you manage the process if you are representing yourself:

- Consider visiting the court before the hearing date so you are familiar with the surroundings

- If you are frightened of coming into contact with the other person involved, you can ask for a separate waiting area – it's a good idea to check the day before that this has been sorted out

- When you get to the fact finding hearing and witnesses giving evidence, you may be expected to challenge the evidence you don't agree with by asking questions to the witness (cross examination). You should prepare some questions in advance. They should be questions designed to show the weaknesses in what the witness is saying. In some cases, the court may make arrangements for your questions to be asked by someone else – as we explain on p 30-31.

- When you give evidence, you will be expected to answer some questions too. Some of the questions might be difficult or uncomfortable, but the judge should stop any questions that are not relevant or which are just inappropriate. If you are frightened of the other person in the case, you can ask the court to make adjustments for you so that you can give evidence without being intimidated (for example a screen or a video link). It is much easier for the judge to get a good sense of you as a witness when you are in the same room, so it is generally better to try to give evidence without a video link, if you are able to do so without it stopping you from giving evidence well.

SUPPORT

If you can't afford a lawyer and don't qualify for legal aid there are various sources of support that might help make things easier.

You can bring a McKenzie friend to court. A McKenzie friend is a supporter who will be allowed into court with you and who can give you moral support, take notes, and quietly assist you for example by reminding you of things you wanted to raise in court. This might be a friend or family member or someone who works for one of the services below. The court will usually allow an unrepresented party the McKenzie Friend of their choice, but if the chosen McKenzie friend is a witness in the case or is very involved in the facts the court may have to decide if they should be allowed into court. If they are disruptive in court, the judge might refuse them entry or remove them. A McKenzie Friend cannot speak on your behalf.

- The Personal Support Unit operate in a number of courts and can provide general support outside and in court. They can't speak on your behalf but they can sit with you for moral support.

- Your domestic violence support worker / IDVA may be allowed into court for support. They cannot speak on your behalf. They may not be allowed into court in this role if they are going to also be a witness.

Alternatively you might be able to access some free advice or representation:

Make enquiries of the Advocate (formerly the Bar Pro Bono Unit) or advice clinics in your local court / area. Advocate matches barristers willing to work for free to advise or represent people involved in family cases. They are very oversubscribed so there is no guarantee they will be able to help, and referrals take at least 3 weeks to process. See www.weareadvocate.org.uk.

Other sources of information and support can be found via www.familycourtinfo.org.uk. AdviceNow guides also useful (see www.advicenow.org.uk).

The Legal Education Foundation

Bloomsbury Professional

Family Law