International Family Law, Policy and Practice

More Cross-Border Influences in the Modernisation of Family Justice in England and Wales

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Editor's Message

This issue, the first of two of 2015, continues to look at modernisation in the Family Court with an article from a criminal specialist relating to the President's initiative for improvements in the taking of evidence from child and other vulnerable witnesses, in connection with which he has pointed to the work long ago done in the criminal context to adapt these processes to improve the otherwise intimidating court experience for these witnesses. Neelam Sakaria, who formerly held a senior policy post at the CPS, takes us through the background in the development of these processes in the Crown Court: and now the Family Court is, like the Crown Court, a national court which sits regionally, the sort of standardisation that has been developed in the criminal context is an obvious signpost for Family Justice processes

Other initiatives in the Family Court are now tending towards avoiding as many hearings as possible and in particular towards attempting to resolve some of the most bitter disputes – such as those about contact where there has been domestic violence – out of court through mediation. This process must now in any event be considered before proceedings can be begun, owing to both the FPR 2010 rule 3 and the accompanying Practice Direction and the statutory force of the Children and Families Act 2014 s 10,. Rachel Knight, although primarily a specialist immigration lawyer and founder of the Knight & Jones Immigration and Asylum practice accredited by the Office of the Immigration Commissioner, has always had an interest in using the law to protect vulnerable people generally, and has now turned her attention to the long running saga of the role of the child's welfare in the interface between historic violence and the desirability of promoting contact with non-resident parents who have such 'form'. Since it is a principle that where there is or has been such violence mediation is usually inappropriate these cases inevitably have to go to court if sensible agreement between parents cannot be agreed: in this context Rachel asks if there ought to be some more explicit reform to the welfare test to take account of this situation, especially as there has already been reform of s1 of the Children Act 1989 to promote the concept of presumption that the involvement of each parent 'in some form' will further the child's welfare 'unless the contrary is shown'. Suggested reform of s 31(2) in relation to the 'likelihood of harm' has already been unsuccessful despite academic comment recording concern in the case of possible perpetrators: however it is unfortunately probably safe to say that we have not yet heard the last word on the subject of this interface between violence and contact.

Sarah Camplin next reports on a lecture given, in association with the Centre, at the University of Westminster, of the Canadian Family judge, Justice Williams from Nova Scotia, who during his visit to England has also spoken at the FLBA's annual Cumberland Lodge weekend about the respectively informal style of his court in that province of Canada and foreshadowed the more interventionist style of administering Family Justice that may well be expected in England and Wales in the process of the ongoing modernisation of systems in the Family Court which is promised more fundamental reform.

Finally, looking forward to the Centre's 3rd triennial International Conference in July 2016, where the author is speaking on another international aspect of Romanian law, we have an account of marriage under the Civil Code in the new EU member state of Romania. Interestingly, this deals in detail with the legal consequences of both marriages between Romanian nationals and between Romanians and foreigners. This shows some striking differences from English Law, in the first place for the very qualification for marriage. Not only are bigamists unsurprisingly denied this formal status, but it seems the parties, whether Romanian or foreign, must have exchanged health disclosure and not be suffering from any genetic defect that would mean the

risk of passing it on in the future population if they had children. There is also apparently an interesting divergence between the result in law if there turns out to be any impediment to matrimony depending on whether the parties are both Romanian nationals or whether one is a foreigner to Romania. This is certainly a complex piece of legislation which makes any argument against the wisdom of introduction of No Fault Divorce in English Law seem relatively simple, despite the fact that some apparently do not think it any more advisable than in 1996, although with the introduction of the new administrative process for undefended divorce, No Fault Divorce, which practically every other jurisdiction already has, would seem to be a practical way forward.

The Centre is currently discussing holding a joint conference with the Romanian Parliament in late 2017.

The theme of modernisation in the Family Court continues in the next issue.

Frances Burton

Frances Burton, Editor

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Special Measures for the Family Court

Neelam Sakaria*

The vulnerable witness protection initiatives in the Family Court have clearly been much overdue and, in comparison with the work long done in the criminal context, seem like the dawn of a new age, even in the ongoing modernisation of Family Justice which has been in progress since the establishment of the new unified court in April 2014.

Attending court as a witness to give evidence can be an overwhelming and frightening experience. For children and other vulnerable people the stress associated with giving evidence is more so, whether in the criminal courts or the family courts, as they enter an unfamiliar environment with a range of different players (including strangers). 'Special Measures' are a series of provisions that help vulnerable and intimidated witnesses to give their best evidence in a criminal court and help to relieve some of the stress associated with giving evidence. Special Measures apply to prosecution and defence witnesses. While the Youth Justice and Criminal Evidence Act 1999 does exclude defendants, there is limited provision for live link use. Another provision providing defendants with the assistance of an intermediary has not been implemented.

There has, however, been no equivalent legislative provision for Special Measures to assist vulnerable and intimidated witnesses to give their best evidence in the family courts, so as to place them in a similar position to the provisions within the Criminal Courts. The President of the Family Division, Sir James Munby, has acknowledged that the family courts and the advocates who appear in those courts have lagged behind the criminal justice system both in their approach to, and provision for, vulnerable witnesses. Procedure and practice across the family justice system to provide for a fair hearing is required to mark the dawning of the new age that has been welcomed in the case of other initiatives in the new Family Court where a Working Group set up by the President competed its final report in the spring of 2015.[1] This made many obvious recommendations to bring the two contexts into line.[2] This will allow those who are parties, both children and adults, to be able to participate in the hearing in a manner that best meets their needs by ensuring that the evidence they give is the best evidence achievable.

There is much that the family courts can learn from the criminal courts, particularly the manner in which the voices of children[3], young people, vulnerable and / or intimidated witnesses, could be brought to the fore. Special measures in the criminal courts enable this to happen. This paper discusses the benefits of special measures and the recent developments in family justice which herald the alignment of the family courts and criminal courts in the handling of vulnerable and intimidated witnesses.

The final report of the Children and Vulnerable Witnesses Working Group, published on 31 March 2015, has been a significant development in delivering the step change required to bring the operation of the family courts into line with the criminal courts.

Special measures in the criminal courts

Legislation for special measures may be traced back to an Advisory Group chaired by His Honour Judge Pigot.[4] The Youth Justice and Criminal Evidence Act Part II 1999 Act introduced a range of special measures. Changes have since been made by the Coroners and Justice Act 2009 sections 98 to 103 which came into force on 27 June 2011.[5]

Special Measures exist in the criminal courts to assist vulnerable and intimidated witnesses to give their best evidence in court by relieving some of the stress associated with giving evidence. Many witnesses experience stress and fear during the investigation of a crime and subsequently when attending court and giving evidence. Stress can affect the quantity and quality of communication with, and by, witnesses of all ages. Some witnesses may have particular difficulties attending court and giving evidence due to their age, personal circumstances, fear of intimidation or because of their particular needs.

Special Measures are witness specific. Witness eligibility for special measures, regardless of the offence, are subject to the discretion of the court, which does not mean that the court will automatically grant them. The court has to satisfy itself that the special measure or combination of special measures are likely to maximise the quality of the witness's evidence before granting an application.

College of Policing (COP) Guidance[6] stipulates that 'Investigation is a core duty of policing. Interviewing

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[1] Report of the Vulnerable Witnesses and Children Working Group, headed by Rayden and Russell, JJ, completed February 2015, www.judiciary.gov.uk. The Working Group was set up by the President, Sir James Munby, following the aim set out in his Twelfth View from the President's Chambers, 4 June 2014, to review the 2011 Guidance on children giving evidence and at the same time to address the wider issue of vulnerable witnesses giving evidence.

[2] Aligning approaches in the two courts is not an illogical step since the Family Court, like the Crown Court, is a national court which sits regionally, thus requiring consistency already addressed in the Public and Private Law Outlines in the FPR 2010 as amended for the introduction of the Family Court in April 2014..

[3] Such initiatives in respect of children in any case chime with much concurrent academic and practitioner work on the methodology for hearing the voice of the child in Family law, which is outside the scope of this article.

[4] Report of the Advisory Group on Video Evidence, Home Office, 1989.

[5] See Ministry of Justice Circular 2011/04.

[6] College of Policing (2013): *Investigative interviewing*, https://www.app.college.police.uk/app-content/investigations/investigative-interviewing/ [Accessed 17 May 2015]

victims, witnesses and suspects is central to the success of an investigation and the highest standards need to be upheld'.

The manner of how interviews are conducted and the quality and quantity of evidence achieved is also core to the subsequent prosecution decisions leading to criminal proceedings. Such evidence achieved in this way can also be used appropriately within the family courts.

All police officers have a basic awareness of interview techniques:[7] however police forces throughout the UK maintain a cadre of skilled interviewers and interview advisors who conduct or advise on interviews in relation to witnesses or suspects involved in serious crimes.

Of course, interviews are not solely about obtaining evidence or information about an investigation. The COP Authorised Professional Practice Guideline[8] states that interview may also be used to provide witnesses and victims with important information, for example, about court proceedings, protection of identity, special measures, disclosure, intermediaries and witness protection.

There are four principal benefits of the professional structure for investigative interviewing:

(1) Public confidence

(2) Consistent performance

(3) Support for victims and witnesses – Victims and witnesses may be upset, scared, embarrassed or suspicious. Good investigative interview techniques will help to calm or reassure them so that they can provide an accurate account.

(4) Dealing with suspects.

The Youth Justice and Criminal Evidence Act (YJCEA) 1999 Part II

The YJCEA Part II introduced a range of measures that can be used to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses. The Family Court would clearly benefit from the introduction of analogous provisions, and the President has acknowledged the value to Family Justice of building on much existing work on improving standards of advocacy by the Criminal Bar.[9]

While the YJCEA distinguishes between vulnerable and intimidated witnesses in respect of the criteria for their eligibility for special measures, it is important to remember that:

- some witnesses may be vulnerable as well as intimidated;
- other witnesses may be vulnerable but not subject to intimidation;
- and others may not be vulnerable but may be subject to intimidation.

It is important not to attempt to categorise witnesses too rigidly.

Vulnerable witnesses are defined by section 16 YJCEA as:

- All child witnesses (under 18); and
- Any witness whose quality of evidence is likely to be diminished because they:
  - o are suffering from a mental disorder (as defined by the Mental Health Act 1983);
  - o have a significant impairment of intelligence and social functioning; or
  - o have a physical disability or are suffering from a physical disorder.

Intimidated witnesses are defined by section 17 YJCEA as those suffering from fear or distress in relation to testifying in the case. Complainants in sexual offences are defined by section 17(4) as automatically falling into this category unless they wish to opt out.

Witnesses to certain offences involving guns and knives are similarly defined as automatically falling into this category unless they wish to opt out.

Victims of domestic violence, racially motivated crime and repeat victimisation, the families of homicide victims, witnesses who self-neglect/self-harm or who are elderly and/or frail might also be regarded as intimidated.

The special measures available to vulnerable and intimidated witnesses, with the agreement of the court, include:

- screens (available for vulnerable and intimidated witnesses): screens may be made available to shield the witness from the defendant (section 23);
- live link (available for vulnerable and intimidated witnesses): a live link enables the witness to give evidence during the trial from outside the court through a televised link to the courtroom. The witness may be accommodated either within the court building or in a suitable location outside the court (section 24);
- evidence given in private, (available for some vulnerable and intimidated witnesses): exclusion from the court of members of the public and the press (except for one named person to represent the press) in cases involving sexual offences or intimidation by someone other than the accused (section 25);
- removal of wigs and gowns, (available for vulnerable and intimidated witnesses at the Crown Court): removal of wigs and gowns by judges and barristers (section 26);
- video-recorded interview, (available for vulnerable and intimidated witnesses): a video-

[7] See Nicole Tytler's Background Note on the importance of police interviewing in this context, (2014) 2 ICFLPP 1 at p. p53.

[8] www.college.police.uk.

[9] See e.g. Report of HH Judge Geoffrey Rivlin, QC, Criminal Justice, Advocacy and the Bar, www.barcouncil.org.uk, March 2015.

recorded interview with a vulnerable or intimidated witness before the trial may be admitted by the court as the witness's evidence-in-chief. For adult complainants in sexual offence trials in the Crown Court a video recorded interview will be automatically admissible upon application unless this would not be in the interests of justice or would not maximise the quality of the complainant's evidence. Section 103 of the Coroners and Justice Act 2009 relaxes the restrictions on a witness giving additional evidence in chief after the witness's video-recorded interview has been admitted;

- examination of the witness through an intermediary (available for vulnerable witnesses): an intermediary may be appointed by the court to assist witnesses to give their evidence at court. Intermediaries can also provide communication assistance in the investigation stage, approval for admission of evidence so taken is then sought retrospectively. The intermediary is allowed to explain questions or answers as far as is necessary to enable them to be understood by the witness or the questioner, but without changing the substance of the evidence (Section 27);
- aids to communication, (available for vulnerable witnesses): aids to communication may be permitted to enable a witness to give best evidence whether through a communicator or interpreter, or through a communication aid or technique, provided that the communication can be independently verified and understood by the court (Section 30).

Video-recorded cross examination (section 28) is currently being tested.[10]

In addition to special measures, the YJCEA 1999 also contains the following provisions intended to enable vulnerable or intimidated witnesses to give their best evidence:

- mandatory protection of witness from cross-examination by the accused in person: a prohibition on an unrepresented defendant from cross-examining vulnerable child and adult victims in certain classes of cases involving sexual offences;
- discretionary protection of witness from cross-examination by the accused in person: in other types of offence, the court has a discretion to prohibit an unrepresented defendant from cross-examining the victim in person;
- restrictions on evidence and questions about complainant's sexual behaviour: the Act restricts the circumstances in which the defence can bring evidence about the sexual behaviour of a complainant in cases of rape and other sexual offences;
- reporting restrictions: the Act provides for restrictions on the reporting by the media of information likely to lead to the identification of certain adult witnesses in criminal proceedings.

Of all the legislative special measures intended to assist vulnerable witnesses, intermediaries have the greatest potential to help those with a communication need to give their best evidence.[11]

The intermediary is one of a package of special measures in the Youth Justice and Criminal Evidence Act 1999 designed to assist vulnerable witnesses. It provides for examination of eligible witnesses to be conducted through an intermediary whose function is to communicate 'questions put to the witness, and to any persons asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers as far as necessary to enable them to be understood by the witness or person in question': section 29(2). The wording of section 29 would allow the intermediary to relay questions and answers as interlocutor, as envisaged by Williams, Pigot and Sanders.[12] In practice, this aspect of the role has developed more restrictively, with intermediaries advising on how best to communicate with the witness, monitoring questioning and alerting questioners when miscommunication occurs or is likely. However, intermediaries are used in many other ways not envisaged by section 29, as Plotnikoff and Wilson outline.

Applications for Special Measures in Criminal Cases

The process for the application of special measures is clear and well-rehearsed. There is much that the family court can learn from the early identification of those cases requiring special measures from the criminal courts.

The first contact with victims and witnesses is through the Police Service. The College of Policing Guidance to police investigators states 'investigators should consider *Ministry of Justice Code of Practice for Victims of Crime* (2013)[13] when setting the victim and witness strategy. Three interdependent strategies make up the victim and witness strategy in an investigation namely the witness identification strategy, initial contact strategy and the witness interview strategy.'

The investigator is required to make an initial assessment of the witness prior to conducting an interview. This assessment is necessary to determine whether the

[10] The pre-recording of cross examination is being tested at Leeds, Liverpool and Kingston Crown Courts.

[11] Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System*, Policy Press, University of Bristol, June 2015, reviewed in Counsel, June 2015, www.counselmagazine.co.uk.

[12] Glanville Williams, *Criminal Law*, 1987: Pigot, n4; Sanders et al, Witnesses With Disabilities, Oxford University for Criminological Research, occasional paper No 17, 1997.

[13] https://www.gov.uk.

category of vulnerable or intimidated witness applies.

The *Ministry of Justice Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (2011)[14] provides investigators with advice on conducting a witness assessment, which should include the witness' availability to attend court, the need for specific assistance and the need for support as a vulnerable or intimidated witness.

In addition, the assessment should include details of any information provided to the witness under local agreements.

When is an application made? Prosecutors must apply for special measures in writing to the court using the designated form.[15] The application should be made as soon as reasonably practicable, and in any event not more than 28 days after the defendant pleads not guilty in a magistrates' court or 14 days after the defendant pleads not guilty in the Crown Court. The application must be served on the court and the defence. The time limit can be extended upon application to the court providing an explanation is given. The court will decide which, if any, of the special measures will be available for the witness.

What considerations are made prior to making an application? Before any such application is made the prosecutor must have sufficient information about the witness and the wishes of the witness, particularly whether the witness actually wants to give evidence using special measures - some witnesses may prefer to give evidence without special measures.[16] The court will need to be told about any views expressed by the witness generally, and the specific views of the witness when determining who should accompany the witness if s/he gives evidence by live link.

With regard to intimidated witnesses, the YJCEA lists a number of factors that the court must, or should, take into account when assessing whether the witness qualifies for any of the special measures. The factors include:

- The nature and alleged circumstances of the offence;
- The age of the witness;
- The social and cultural background and ethnic origins of the witness;
- Any religious beliefs or political opinions of the witness;
- The domestic and employment circumstances of the witness; and
- Any behaviour towards the witness on the part of the accused, their family or associates, or any other witness or co-accused (this may be particularly relevant in cases of domestic violence).

An early special measures discussion between the police and the prosecutor is an opportunity to discuss the needs of a vulnerable or intimidated witness. There may be cases in which the witness requests a meeting with the prosecutor to discuss the decisions made concerning special measures.

Where the meeting is held prior to the prosecutor applying to the court for the special measures direction, this is a good opportunity to confirm the views of the witness as to which of the special measures should be applied for.

Where the meeting is held after the application for a special measures direction has been granted, the purpose of the meeting will be to inform the witness of the special measures granted and the binding effect of the court's direction.

Can the Special Measures direction be altered or discharged? Special measures directions are binding until the end of the trial, although courts can alter or discharge a direction if it seems to be in the interests of justice to do so. The prosecution or the defence can apply for the direction to be altered or discharged (or the court may do so of its own motion), but must show that there has been a significant change of circumstances since the court made the direction or since an application for it to be altered was last made.

In addition to the statutory special measures prosecutors may consider whether the witness would benefit from more informal arrangements such as pre-trial visits and having regular breaks while giving their evidence.

Child witnesses in criminal cases

The original distinction in criminal cases between child witnesses in need of special protection and children giving evidence in all other types of cases no longer applies: section 101 of the Coroners and Justice Act 2009 amending section 21 of YJCEA. The effect of this change is to place all child witnesses in the same position regardless of offence.

For all child witnesses there is a presumption that they will give their evidence in chief by video recorded interview and any further evidence by live link unless the court is satisfied that this will not improve the quality of the child's evidence.

However a child witness may opt out of giving their evidence by either video recorded interview or by live link or both, subject to the agreement of the court. If the child witness opts out then there is a presumption that they will give their evidence in court from behind a screen. Should the child witness not wish to use a screen they may also be allowed to opt out of using it, again subject to the agreement of the court.

In deciding whether or not to agree to the wish of the child witness the court must be satisfied that the quality of the child's evidence will not be diminished.

Where a video recorded interview is made before a child witness's 18th birthday, the witness is eligible for video

[14] https://www.cps.gov.uk.
[15] CrimPR Part 29 - Rules 29.3, 29.10, Application for a Special Measures Direction.
[16] CPS Legal Guidance Special Measures, www.cps.gov.uk.

recorded evidence in chief and live link special measures directions after his/her 18th birthday.

It is the presumption that child witnesses will give their evidence in chief via a pre-recorded Achieving Best Evidence interview unless the child opts out of this. A child is defined as someone under 18 years at the date of the Achieving Best Evidence interview. The latest edition of Achieving Best Evidence: Guidance on interviewing Victims and Witnesses, and Guidance on Special Measures (3rd edition) was published on 21 March 2011.[17] It is to be read in conjunction with ACPO (2013) Advice on the Structure of Visually Recorded Witness Interviews (Second Edition).[18] The College of Policing guidance states that video-recording of key or significant witness interviews should be considered in cases of murder, manslaughter, road death, serious physical assault, sexual assault, kidnap, robberies in which firearms are involved and any criminal attempts or conspiracies in relation to the above listed offences.

Considerations in the Family Court – the historical development

In recent years judges have applied their discretion in deciding whether to order a child to attend to give evidence in family proceedings and case law has sought to establish the principles of application. The introduction of the new Family Procedure Rules[19] marked the first steps to deliver a sea change in the management of cases in the family courts.

a. W (Children) [2010] UKSC 12

The Supreme Court in W (Children) considered the principles guiding the exercise of the court's discretion in deciding whether to order a child to attend to give evidence in family proceedings following an appeal by the father.[20] In this judgment the Supreme Court reformulates the approach a family court should take when exercising its discretion to decide whether to order a child to give live evidence in family proceedings. In so doing it removes the presumption or starting point of the current test, which is rarely if ever rebutted, that it is only in the exceptional case that a child should be so called. The Supreme Court unanimously allowed the appeal and remitted the question of whether the child should give evidence, and if so in what way, to Her Honour Judge Marshall to be determined at the fact finding hearing in light of the principles set down in this judgment.

The case considered the care of five children. The mother and father at the relevant time were in a relationship and the father was the biological parent of the four youngest children. A sixth child was due to be born to the couple too. The proceedings began in June 2009 when the eldest child, a 14 year old girl, alleged that her de facto stepfather had seriously sexually abused her. All the children were taken into foster care and the four younger children were having supervised contact with both parents. The father was then charged with 13 criminal offences and was on bail awaiting trial.

In the family proceedings the parties originally agreed that there would be a fact finding hearing in which the 14 year old girl would give evidence via a video link. The judge however asked for further argument on whether she should do so. The local authority, having had time to consider the material received from the police, decided that they no longer wished to call the girl as a witness. In November 2009 the judge decided to refuse the father's application for her to be called. Instead, she would rely on the other evidence, including a video-recorded interview with the child.

The following principles were set down:

1. The court agreed with counsel for the local authority that there were very real risks to the welfare of children which the court must take into account in any reformulation of the approach [17 to 21]. However the current law, which erects a presumption against a child giving live evidence in family proceedings, cannot be reconciled with the approach of the European Court of Human Rights, which aims to strike a fair balance between competing Convention rights. In care proceedings there must be a balance struck between the article 6 requirement of fairness, which normally entails the opportunity to challenge evidence, and the article 8 right to respect for private and family life of all the people directly and indirectly involved. No one right should have precedence over the other. Striking the balance may well mean that a child should not be called to give evidence in a great majority of cases, but this is a result and not a presumption nor even a starting point [22, 23].
2. Accordingly, when considering whether a particular child should be called as a witness in family proceedings, the court must weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child [24]. The court sets out a number of factors that a family court should consider when conducting this balancing exercise. An unwilling child should rarely, if ever, be obliged to give evidence. The risk of harm to the child if he or she is called to give evidence remains an ever-present factor to which the court must give great weight. The risk, and therefore the weight, will vary from case to

[17] https://www.cps.gov.uk.
[18] library.college.police.uk/.
[19] Family Procedure Rules 2010, introduced in 2011.
[20] The Court of Appeal dismissed the father's appeal (see [2010] EWCA Civ 57). They did, however, express some concern about the test laid down in previous decisions of that court and suggested that the matter might be considered by the Family Justice Council.

case, but it must always be taken into account [25, 26]. At both stages of the test the court must also factor in any steps which can be taken to improve the quality of the child's evidence, and at the same time decrease the risk of harm to the child [27, 28].

3. The essential test is whether justice can be done to all the parties without further questioning of the child. The relevant factors are simply an amplification of the existing approach. What the court has done however is remove the presumption or starting point; that a child is rarely called to give evidence will now be a consequence of conducting a balancing exercise and not the threshold test [30].
4. In this case the trial judge had approached her decision from that starting point. The Supreme Court could not be confident that the judge would have reached the same result had she approached the issue without this starting point, although she might well have done so. Nor did the court consider it appropriate to exercise its own discretion, given that all of the relevant material was not before the court. The question is remitted to the trial judge to decide at the fact finding hearing scheduled for next week. Taking account of the detriment which delay would undoubtedly cause to all of the children concerned, including the unborn baby, there should be no question of adjourning that hearing [31 to 35]

This Supreme Court decision resulted in the setting up of the Family Justice Council Working Party on Children Giving Evidence which is discussed below.

b. Family Procedure Rules

The Family Procedure Rules 2010 ('the FPR 2010') came into force on 6th April 2011 and set out a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

c. Guidelines on Children Giving Evidence in Family Cases

The Family Justice Council Working Party on Children Giving Evidence, chaired by Lord Justice Thorpe produced Guidelines (December 2011[21] in relation to children giving evidence in family proceedings and made direct reference to the use of 'Special Measures'. These guidelines however did not deliver the widespread change to children giving evidence in family proceedings.

The legal considerations detailed in the guidelines[22] state in light of Re W, in deciding whether a child should give evidence, the court's principal objective should be achieving a fair trial. The Guidelines also made clear reference to the use of special measures[23] in terms which are not dissimilar to those applied in criminal cases:

At the earliest opportunity and in any event before the hearing at which child's evidence is taken, the following matters need to be considered:

a. if 'live' cross examination is appropriate, the need for and use of a registered intermediary from the register of intermediaries, subject to their availability, or another communication specialist , so as to facilitate the communication of others with the child or to relay questions directly, if indicated by the needs of the child;

b. the use of other 'special measures' in particular live video link and screens;

c. the full range of special measures in light of the child's wishes and needs;

d. advance judicial approval of any questions proposed to be put to the child;

e. the need for ground rules to be discussed ahead of time by the judge, lawyers (and intermediary if applicable) about the examination;

f. information about the child's communication skills, length of concentration span and level of understanding e.g. from an expert or an intermediary or other communication specialist;

g. the need for breaks;

h. the involvement and identity of a supporter for the child;

i. the timetable for children's evidence to minimise time at court and give them a fresh clear start in the morning;

j. the child's dates to avoid attending court;

k. the length of any ABE recording, the best time for the child and the Court to view it (the best time for the child may not be when the recording is viewed by the court);

l. admissions of as much of the child's evidence as possible in advance; including locations, times, and lay-outs;

m. save in exceptional circumstances, agreement as to i) the proper form and limit of questioning and ii)the identity of the questioner.

Where a child is to give oral evidence at the hearing, the guidelines detail that the following should occur:

a. a familiarisation visit by the child to the court before the hearing with a demonstration of special measures, so that the child can make an informed view about their use;

b. the child should be accompanied and have a known neutral supporter, not directly involved in the case, present during their evidence;

c. the child should see the ABE[24] interview and/or the existing evidence before giving evidence for the purpose of memory refreshing;

d. consideration of the child's secure access to the building and suitability of waiting/eating areas so as to ensure there is no possibility of any confrontation with anyone which might cause distress to the child (where facilities are inadequate, use of a remote link from another court or non-court location);

e. identification of where the child will be located at court and the need for privacy.

Where possible the children's solicitor/Cafcass should be deputed

[21] https://wwe.judiciary.gov.uk.
[22] Paragraph 8 Guidelines on Children Giving Evidence in Family Cases
[23] Paragraph 14 Guidelines on Children Giving Evidence in Family Cases
[24] Achieving Best Evidence.

to organise these matters.

A child should never be questioned directly by a litigant in person who is an alleged perpetrator.

Practical considerations at the hearing

If the decision has been made that the child should give oral evidence at the hearing the following should occur:

a. advocates should introduce themselves to the child;

b. judges and magistrates should ask if the child would like to meet them, to help to establish rapport and reinforce advice;

c. children should be encouraged to let the court know if they have a problem or want a break but cannot be relied upon to do so;

d. professionals should be vigilant to identify potential miscommunication;

e. the child should be told how the live video link works and who can see who;

f. a check should be made (before the child is seated in the TV link room) to ensure that the equipment is working, recordings can be played and that camera angles will not permit the witness to see the Respondents;

g. the parties should agree which documents the child will be referred to and ensure they are in the room where the child is situated for ease of access.

The guidelines detail the considerations the Court and the parties should take into account should the child give oral evidence namely the *Good Practice Guidance in Managing Young Witness Cases and Questioning Children*,[25] and the subsequent Progress Report, which Guidance has been endorsed by the Judicial Studies Board, the Director of Public Prosecutions, the Criminal Bar Association and the Law Society.[26]

Specific reference is also made[27] to the Court of Appeal judgment in *R v Barker*[28] in 2010, which called for the advocacy to be adapted 'to enable the child to give the best evidence of which he or she is capable' and in which questioning should be at the child's pace and consistent with their understanding; should use simple common words and phrases; repeat names and places frequently; ask one short question (one idea) at a time; let the child know the subject of the question; follow a structured approach, signposting the subject; avoid negatives; avoid repetition; avoid suggestion or leading, including 'tag' questions; avoid a criminal or 'Old Bailey' style cross-examination; avoid 'do you remember' questions; avoid restricted choice questions; be slow and allow enough time to answer; check child's understanding; test the evidence not trick the witness; take into account and check the child's level of understanding; not assume the child understands; be alert to literal interpretation; take care with times, numbers and frequency; and avoid asking the child to demonstrate intimate touching on his or her own body (if such a question is essential, an alternative method, such as pointing to a body outline, should be agreed beforehand).

Recent Family Justice Developments

The early work of the Family Justice Council Working Party on Children Giving Evidence has provided a strong foundation for recent developments which herald a new age in family proceedings. The final report of the Children and Vulnerable Witnesses Working Group sets out a number of key recommendations to align the Family Court with the criminal courts, and follows the interim report released in August 2014. The Working Group, when set up by Sir James Munby, President of the Family Division had the following specific aim:

"The Working Party will need to build on the experiences of judges in the Family Division and the Family Court who have had to deal with these issues, particularly in the more recent past. But it is also vital that the Working Party taps into and incorporates in its thinking both the highly relevant and thought-provoking views of the Family Justice Young People's Board and the inter-disciplinary expertise of the Family Justice Council."

The President detailed the aims of the review in his Twelfth View from the President's Chambers of 4th June 2014:

'First, it is time to review the Family Justice Council's April 2010 Guidelines for Judges Meeting Children who are Subject to Family Proceedings [2010] 2 FLR 1872, particularly in the light of the Court of Appeal's recent decision in Re KP (Abduction: Child's Objections) [2014] EWCA Civ 554, [2014] 2 FLR (reported at [2014] Fam Law 945).

Secondly, it is time to review the Family Justice Council's Working Party's December 2011Guidelines in Relation to Children Giving Evidence in Family Proceedings [2012] Fam Law 79. Those Guidelines were prepared following the decision of the Supreme Court in Re W (Children) (Abuse: Oral Evidence) [2010] UKSC 12, [2010] 1 FLR 1485. Since then we have had the decision of the Supreme Court in Re LC (Reunite: International Child Abduction Centre Intervening) [2014] UKSC 1, [2014] 1 FLR 1486.

Thirdly, there is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system. This includes the inadequacy of our procedures for taking evidence from alleged victims, a matter to which Roderic Wood J drew attention as long ago as 2006: H v L and R [2006] EWHC 3099 (Fam), [2007] 2 FLR 162. As HHJ Wildblood QC observed in D v K and B (By Her Guardian) [2014] EWHC 700 (Fam), [2014] Fam Law 1094, para 6(ii), processes which we still tolerate in the Family Court are prohibited by statute in the Crown Court. We must be cautious before we rush forward to reinvent the wheel. A vast amount of thought has gone into crafting the arrangements now in place in the criminal courts: see for example, in addition to the Criminal Procedure Rules, the Criminal Practice

[25] Part of the NSPCC/ Nuffield Foundation research 'Measuring Up', by Joyce Plotnikoff and Richard Woolfson, July 2009.
[26] http://www.nspcc.org.uk/Inform/research/findings/measuring_up_guidance_wdf66581.pdf
[27] Paragraph 20 Guidelines.
[28] [2010] EWCA Crim 4, para 42.

Directions [2013] EWCA Crim 1631, CPD 3D-3G, the Judicial College's Equal Treatment Bench Book, Lord Judge's Bar Council Annual Law Reform Lecture 2013, The Evidence of Child Victims: the Next Stage , the Criminal Bar Association's DVD, A Question of Practice, and the relevant 'toolkits' on 'The Advocate's Gateway', funded and promoted by the Advocacy Training Council: www.theadvocatesgateway.org/toolkits. We need to consider the extent to which this excellent work can be adapted for use in the Family Division and the Family Court.'

The final report of the Children and Vulnerable Witnesses Working Group

This report acknowledged that the Family Court had fallen behind the criminal courts in its approach to their evidence, and contains a number of key recommendations in respect of the evidence of children and young people including:

a. The introduction of a new mandatory rule in respect of Vulnerable and Intimidated Witnesses/ Parties and Children supplemented by practice directions and guidance approved by the President marks the dawning of the new age. The right of the child to be heard (so as to ensure that the child's evidence is heard directly where the child/young person is not going to give evidence) is clearly stated and supported by the numerous international conventions including the UN Convention on the Rights of the Child (now part of Welsh Law).[29]
b. The extension of the criminal term for vulnerable and intimidated witness to cover the parties as well as witnesses bringing consistency of approach between the two jurisdictions;
c. Key changes to the Family Procedure Rules to deliver the culture change required in the family jurisdiction, including that new rule/s are to be inserted in the Family Procedure Rules 2010 (as amended) as rule 3B after the existing rule 3 and 3A to give prominence and emphasis to the treatment of children and parties in family proceedings; to emphasise the importance of the role of the child and the need to identify the necessary support /special measures for vulnerable witnesses and/or parties from the outset of any proceedings, or at the earliest opportunity;
d. A new PD 3C (replacing the 2010 Guidelines) for children seeing judges in the Family Court and Family Division was recommended reflecting the Court of Appeal's decision *Re KP* (2014),[30] to include provisions setting out in clear terms the status of the communication between judge and child; including at what point during the proceedings any meeting should take place; the persons who should be present and the purpose of any meeting, plus guidance for the manner in which the court's decision was to be communicated to the child/young person;
e. With regard to special measures the Working Group recommended that the procedure, practice and guidance for provision of special measures, support and/or assistance for vulnerable parties or witnesses (including children) to give their best evidence should form part of the existing Practice Directions where possible[31] and that the rule and practice direction were to be drafted with reference to the existing Special Measures Directions In the Case of Vulnerable and Intimidated Witnesses and the Criminal Procedure Rules for ground rules hearings published in April 2015, so as to make the best use of the procedure and practice that have developed in the criminal courts pursuant to the 1999 Act, and of the work of the Advocates Training Council. It was also recommended that the Practice Directions should explicitly reference and approve the Advocate's Gateway (TAG) following the procedure in the Criminal Practice Directions 2013.

Further ongoing work is likely to be required to modernise the way in which the evidence of children and young people is gathered and put before the family courts. Further recommendations are expected on how this may be put in place after further consideration and wider consultation and further reports are expected.

The future

The new age in family law has arrived as consistent definitions and practices are adopted across both jurisdictions bringing with them the much needed culture change to provide child an young witnesses with the support they require to give their best evidence.

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[29] See also Council of Europe (2010) Guidelines on Child Friendly Justice; The European Convention on the Exercise of Children's Rights, www.coe.int/en/web.
[30] [2014] EWCA Civ 554.
[31] Recommendation xiv.

Domestic Violence and the Child's Welfare in Contact

Rachel Knight*

Introduction

In the UK, we have been wrestling with this problem and solutions to it for a very long time and with very mixed success.
– Sir Paul Coleridge[1]

Why are we still struggling with this?

Within the context of the dynamically changing structure and formation of the British family unit over the past four decades,[2] and with 'ever-increasing workloads and at a time of unprecedented financial squeeze',[3] family law decision-makers are tasked with the jurisprudential objectives of 'strengthening individuals and families and enhancing their functioning.'[4]

Of all the disputes which these decision-makers must determine, '...those between separated parents over contact with their children are amongst the most difficult and sensitive...'[5] and courts are finding it increasingly difficult to resolve to the 'myriad of diverse and complex cases before them.'[6] Despite governmental efforts to promote mediation as an alternative to litigation,[7] the numbers of contact order applications have risen over the past 15 years,[8] cases are taking longer,[9] and both fathers' and women's rights activists have become increasingly vocal in their campaigns against perceived bias and risks within proceedings.[10] Accordingly a backward look over Coleridge's 'very long time' might be useful.

If it were clear that the children's 'welfare'[11] was being adequately promoted by courts, then perhaps some comfort might be found in this, but aside from the fact that children are complaining that they are not being listened to,[12] a growing body of academic commentary is doubtful that the current framework is adequately serving children's best interests[13] and this argument is supported by a range of recent, empirical research.[14] There have also been significant academic concerns expressed following cases such as *Re J* (2013)[15] in particular by Gilmore and Hayes[16] who have been particularly concerned that the current s 31 of the Children Act does not adequately protect children in a new family unit comprising a former possible abuser.

This article focuses on cases where the applicant is a perpetrator of domestic violence for two reasons. Firstly, this is by far the most frequently cited welfare concern within contact cases[17] and so is responsible for consuming a disproportionate amount of current resources, but secondly because the consequences for children where the system gets it wrong can be so severe. Women's Aid has produced a compelling report identifying 29 children within a ten year period who were killed by their violent fathers during contact sessions[18] and a recent study commissioned by Rights of Women found women and children were still being put at significant risk of harm within child-contact proceedings.[19] It is submitted that we cannot afford to get this wrong, neither for individual children nor for the wider society in which they operate.

This article makes no apology for devoting the first section entirely to the understanding of what domestic violence is and what its effects might be for children who have been exposed to it. This is deemed essential to

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[1] Formerly Mr Justice Coleridge, 'Let's hear it for the child' [2010] (Keynote address to ALC Conference 27 November 2010). See: http://www.alc.org.uk/news_and_press/news_items/ address_by_mr_justice_coleridge_to_alc_conference_2010/ accessed: 18/4/13.

[2] Blain S, 'Alternative families and changing perceptions of parenthood' [2011] Fam Law 41 289.

[3] Mr Justice Coleridge, 'Let's hear it for the child': ibid.

[4] Babb B, 'An interdisciplinary approach to family law jurisprudence.' ILJ 72 3.

[5] Per Wall J, *Re O (a child) (Contact: Withdrawal of application)* [2004] 1 FLR 1258 para 6.

[6] Wilson J, 'Assessing Impact' [2011] FLJ 123.

[7] See for example: https://www.gov.uk/government/speeches/family-mediation-council-s- professional-practice-consultants-conference-2013 accessed:10/4/13.

[8] Lader D, 'Non-resident parental contact 2007/8'. *Office of National Statistics: Omnibus survey report 2008*. 38, p16.

[9] Giovanini, E, *Outcomes of Family Justice Children's Proceedings: a Review of the Evidence'* (Ministry of Justice: research summary June 2011) 6/11.

[10] Both 'Women's Aid' and' Fathers for Justice' pressure groups have been, and are still, actively campaigning on the topic of child contact law.

[11] Children Act 1989 s1 (1) provides that the 'welfare' of the child must be 'paramount' in contact decisions.

[12] O'Quigley A, *'Listening to Children's Views: The findings and recommendations of recent research'* (Joseph Rowntree Report: research and innovation 2000).

[13] Examples include: Reece H, 'UK Womens' Groups, child contact campaign: "so long as it is safe."' [2006] CFLQ 18 (4), Bailey-Harris R, 'Contact: domestic violence[2012] Fam Law 42, & Mills O, 'Effects of domestic violence on children' [2008] Fam Law 165.

[14] Examples include: Coy M et al, *Picking up the pieces* (Rights of Women and CWASU research report, Nov 2012) 91 & Thiara R and Gill A, *Domestic violence, child contact and post-separation violence* (Report of research findings: NSPCC 2012).

[15] *Re J (Care Proceedings) Possible Perpetrators* [2013] UKSC9.

[16] *Re J (Care Proceedings) Past Possible Perpetrators in a New Family Unit* [2013] UKSC9: 'Bulwarks and logic – the blood that runs through the veins of law – but how much will be spilled in future?' [2013] CFLQ 15; Hayes, M 'Re J (Children)' (2013) Family Law 1015.

[17] Hunt J and Macleod A, *Outcomes to application to court of contact orders after parental separation or divorce* (London MOJ 2008) 31.

[18] Saunders H, 29 *Homicides: lessons still to be learned on domestic violence and child protection.* (Research report: Women's Aid 2004) 8.

[19] Coy M et al, *Picking up the pieces* (Rights of Women and CWASU research report, Nov 2012) 91.

understanding which legal structure might improve outcomes for children.

The second and third sections explore the current legal framework for determining child-contact applications, namely the 'welfare principle' and human rights conventions. Contemporary criticisms of these are considered alongside unexplored legal arguments, with particular reference to domestic violence cases. The fourth, final section, outlines and critiques four suggestions for reform advanced by prominent academic commentators.

Finally the conclusion offers the thesis of this article, which is that a rights-based approach to contact cases is better equipped than the welfare principle, not only to accord with the UK's human rights obligations, but also to augment the objective of 'welfarism'[20] within a more transparent, realistic and individualised model. It is argued that this would be particularly useful where the rights and freedoms of members of a family are already imbalanced, such as those living with domestic violence.

Domestic Violence

Without knowledge about the dynamics of domestic violence, the actions of those concerned and the behaviour of children can be difficult to understand.

Marianne Hester [21]

What is domestic violence?

Despite some academic criticism of its implications,[22] this article uses the term 'domestic violence,' because it has become the most commonly accepted umbrella heading, which in light of recent amendments,[23] the government now describes as:

> *any incident or pattern of incidents of controlling, coercive, 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. The abuse can encompass, but is not limited to: psychological, physical, sexual, financial and emotional means.*[24]

Psychologists have sought to sub-divide this broad definition into categories, *inter alia* in order better to understand the effects of the abuse on women and children,[25] but critics voiced concerns about the marginalisation of individual victims' experiences through such categorisation[26] and within English and Welsh contact proceedings, 'types' of violence are rarely referred to. There is also no overarching legal definition of domestic violence. Instead courts prefer to 'consider each case on its own merits'.[27] Criticisms that in practice this still involves generalisations about the benefits of conservative ideals of post-separation family roles are explored in more detail below.

Research suggests that domestic violence is 'a gender issue' in that is predominantly perpetrated by men towards women[28] and is used as an example of the residue of former patriarchal societal structures,[29] although this has been contested by a small number of American studies which have suggested that it is the impact of the violence, rather than the act itself which is most prominently felt by women.[30] Child contact case law takes a *prima facie* gender neutral approach to domestic violence,[31] although this is contested by some pressure groups.[32]

What is clear and common to all domestic violence cases is the existence of a marked power imbalance, to the detriment of one party.[33] The degree and nature of the negative impact felt by the vulnerable party is subject to not only the actions of the perpetrator, but the victim's individual circumstances.[34] It should be noted that in its extremist form, domestic violence may induce severe psychological syndromes for the victim[35] or even death.[36] Nevertheless, recent research has highlighted the courts' tendency within child contact proceedings to marginalise domestic violence.[37]

The impact of domestic violence on children

There is no uniform response from children who have lived with domestic violence.[38] Even children from the same family respond differently to their experiences.[39] Every child who comes before the court presents its own set of unique

[20] This term was first used by Eekelaar and is explored further below. See: Eekelaar, J, 'Beyond the Welfare Principle' [2002] CFLQ 14 (3).
[21] Hester M, *Making an impact: Children and domestic violence* (2007, 2nd edn) JK Publishing P17, para 1.
[22] For example: Allen J and Walby S, *Domestic violence, sexual assault and stalking: findings from the British crime survey* (Home office: Research study March 2004) 276.
[23] The Home Office amended this definition of domestic violence in March 2013 to include 16 and 17 year olds and the 'coercive control' element. (Since made statutory by the Serious Crime Act 2015. Editor).
[24] https://www.gov.uk/domestic-violence-and-abuse.
[25] See for example: Steegh, N, 'Differentiating types of domestic violence: Implications for child custody, 2005, Mitchell Open Access.
[26] Humphreys C and Joseph S, 'Domestic violence and the politics of trauma' [2004] WSIF 2756 .
[27] Butler-Sloss P, *Re L,V,M,H(children:contact)(domesticviolence)*[2000]4 All ER 609.
[28] Gilmore S,'The assumption that contact is beneficial: challenging the secure foundation'[2008] Fam Law 1226.
[29] Alonso, M, 'Rationalising patriarchy:gender and domestic violence'[1996] GSCP.
[30] Russel B, Perceptions of female offenders(1st edn,Springer, 2013) p153.
[31] Per Dame Elizabeth Butler-Sloss, *Re S(a child)* [2004] EWCA Civ 18 para16.
[32] Davis W, 'Gender bias, fathers' rights, domestic violence and the Family court' [2004] FLJ 299.
[33] Hester, M and Westmarland, N, *Tackling domestic violence: effective interventions and approaches*, 2005, Home Office research study, 290.
[34] Dobash P and Dobash R, *Women, violence and social change* (1st edn, Routledge1992)
[35] For example 'battered wife syndrome' or 'post traumatic stress disorder'. See: Hester, *Making an impact: Children and domestic violence* (2nd edn, JKP 2007) p 84.
[36] For statistics on intimate partner deaths,see: http://www.womensaid.org.uk/domestic_violence_topic.asp?section=0001000100220036.
[37] Coy, M et al, *Picking up the pieces* (Rights of Women and CWASU: Research report Nov 2012).
[38] Harwin, N, Hester, M and Pearson C, *Making an Impact: children and domestic violence*, 2nd edn, JKP, 2007, p 63, para1.
[39] Ibid para 3.

experiences and reactions.[40] However, a broad range of studies into the experiences of children who have lived within the context of domestic violence have concluded (to differing degrees) notable, detrimental, impacts upon subjects of all ages, ranging from bed-wetting to severe developmental delays.[41]

Until the mid-1980s, negative effects on children of domestic violence were thought to be mild or transient,[42] but such ideas have been superseded by more recent findings, which suggest that different types of exposure will cause long-lasting harm, dependant on a number of factors, including the child's age, race, gender and socio-economic status, but also the resident parent's ability to recover and provide a more stable future for them.[43]

Child contact proceedings have been slow to incorporate findings of psychological research findings into judicial decision making and the leading authority of *Re L, V, M, H (children) (domestic violence)*[44] marked the beginning of such evidence really impacting upon constructions of children's welfare:[45] this can be traced to broad acceptance of the findings of a psychological report by Sturge and Glaser,[46] which advocated *inter alia* that the quality of contact offered by the perpetrator ought to be considered.

The significance of maternal stress to the well-being of a child has been explored in a number of studies and has been found to be a key negative factor in the healthy development of children. In particular, it can compound behavioural problems in a child[47] and increase the likelihood of mothers emotionally distancing themselves from their children.[48]

This has proved problematic for the courts, who must consider the welfare of the child as 'paramount' and supreme over any adult interests, and whilst judges have emphasised that parental interests are material 'only in so far as they bear on the welfare of the child',[49] there are many examples where the courts have found a mutuality of interests between parent and child.[50] Fathers' campaign groups have complained that mothers' interests are often furthered under the guise of children's and that this provides bias within proceedings.[51]

Domestic violence perpetrators as parents

In spite of potential detrimental impacts, perpetrating domestic violence is not 'a bar to child contact'[52] and courts still place enormous weight within proceedings on the benefits of contact, in the absence of a compelling reason not to grant it.[53] Furthermore the legislature has refused to introduce any presumption against contact for established perpetrators and indeed, current policy has resulted in legislative introduction of a presumption of the benefits of involvement of both parents in a child's life.[54]

The courts' pro-contact orthodoxy is seldom justified in court judgments and instead it is tritely accepted that ordinarily contact is in a child's interests.[55] Its justification however, can be found in both human rights obligations to preserve rights to contact[56] and a wide acceptance of the merits of early 'attachment theories'[57] and other research which has highlighted the benefits of the parent-child relationship. Even fathers who have perpetrated domestic violence against their spouses have been found to develop significant attachments with their children[58] and indeed this may be the strongest attachment they have in cases, for example, where a mother's emotional availability has been limited. Research shows that some children identify with their perpetrating parent in an attempt to feel secure,[59] or that others feel protective towards the perpetrator especially where their vulnerability has become apparent to the child,[60] does not appear to have any material influence on child contact cases.

It should be noted that experts currently regard the perpetration of domestic violence 'as a serious failure in

[40] Reece, H, "UK Womens' Groups, child contact campaign: 'so long as it is safe'" [2006] CFLQ 18 (4).
[41] For examples see: Levine M,'Interpersonal violence and its effects on the children A study of fifty families in general practice' [1975] MSL 15; Ware H, Husbands' marital violence and the adjustment problems of clinic-referred children ' [2000] BTJ 38.
[42] Harris-Hendriks et al, *When father kills mother: guiding children through trauma and grief* (1st edn, Routledge, 2002, 113)
[43] Hester, M, and Radford, L, *Mothering through domestic violence*, 1st edn,JKP. 2006.
[44] *Re L,V,M,H, (children) (domestic violence)* [2000]2 FLR 334.
[45] Burton, F, *Family Law*, 1st edn, Routledge 2012) p 144.
[46] Glaser, D, and Sturge, C, *'Contact and domestic violence – the experts' court report'* (Report at the request of the Official Solicitor for the case: *Re L, V, M, H (children)(domestic violence)* [2000] 2 FLR 334).
[47] Wolfe, D, et al, 'The effects of children's exposure to domestic violence: A meta-analysis and critique' [2003] CCFPR 6 (3).
[48] Hester, M. and Radford, L, *Mothering through domestic violence*, 1st edn, 2006. JKP, p 81.
[49] Per Bingham MR, *Re O (Contact:imposition of conditions)* [1995] 2 FLR 124 para 16
[50] The most frequently used example of this is *Payne v Payne* [2001]EWCA Civ166. This was a relocation case determined on the basis of mutuality of mother and child's interests.
[51] Davis, W,'Genderbias, fathers'rights, domestic violence and the Family court'[2004] FLJ 299.
[52] *Re L,V,M,H,(children)(domesticviolence)* [2000] 2 FLR 334.
[53] *Re A (Contact: Separate Representation)* [2001] 1 FLR 715.
[54] See the Hansard debates on clause 11 of the Children and Families Bill, now Children and Families Act 2014, amending s 1 of the Children Act 1989, www.familylawweek.co.uk, 19.3.14.
[55] Gilmore S,'The assumption that contact is beneficial: challenging the secure foundation [2008] FLR 1226.
[56] For example in Article 8, European Convention on Human Rights and Fundamental Freedoms, incorporated into domestic law by the Human Rights Act 1998.
[57] Ainsworth M, *Attachments and other affectional bonds across the life-cycle*, 1st edn, Routledge, 1991.
[58] For example: Bowlby, J, *Attachment. Attachment and loss*, 1st edn, NYBB, 1969.
[59] Hester, M et al, *Making an impact: children and domestic violence*, 2nd edn, JKP, 2007, p81, para3.
[60] Ibid p82 para1.

parenting.'[61] Domestic violence is the most common context for child abuse[62] and that the more severe the domestic violence, the more extreme the abuse of children in the same context.[63] Furthermore, violence rarely ends when the relationship does[64] and more recent research has identified a number of perpetrators, using child contact proceedings to continue the cycle of abuse against their former partner.[65]

The 'welfare principle'

When a court determines any question with respect to (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.'
S1(1) Children Act 1989

A brief history of the 'welfare principle'

The 'welfare principle, which governs child-contact proceedings within England and Wales, with its child-centred rhetoric, was not always the approach the courts adopted. Rather, pre-18th century, children were institutionally perceived as instruments for the promotion of interests of others. Family law scholars have referred to this era as 'instrumentalism'[66] but what this fails to identify is that children were, in particular, personal chattels of their father, who was judged to be biologically responsible for their being, within a patriarchal framework, which preferred that '....the law should not, except in very extreme cases, interfere with the discretion of the father...'[67]

The growing influence of the period of 'enlightenment' however, with its intellectual challenges to accepted norms, is credited with developing the series of 'poor laws'[68] which provided for the destitute, into those which provided for children. By the late 19th century this included the right to take on the powers and duties of a parent and within the Matrimonial Causes Act 1857, for the first time, courts could override the rights of fathers over their children. In 1925, the principle of equality of rights between mothers and fathers was enshrined in law,[69] with the welfare of the child paramount, a modified version of which appears above, drawn from the more recent, Children Act 1989.[70]

The modern position of 'welfarism'[71] where the carers of children are expected to use their position to develop children's interests rather than their own, and the notion that the welfare principle is the means to achieve it has become deeply embedded within English and Welsh law. The wider concept of 'welfarism' has found broad-scale jurisprudential acceptance as a means of improving families,[72] but the principle itself, has more recently been criticised by a number of leading academics.

Contemporary criticisms of the welfare principle

Despite its necessary 'paramountcy'[73] within relevant proceedings, there is no definition of 'welfare' within the Children Act. Instead a list of factors[74] which courts must 'have regard to'[75] is provided. Since there is no strict precedent system to be applied in child contact cases, this leaves a great deal of discretion in the hands of individual judges, to determine 'intractable cases'[76] according to an arguably rather ill-defined concept. Academic criticism of the principle can broadly be split into two categories.

The first of these categories is may be described as the 'transparency objection.' It has been argued that within the principle's practical application and broad judicial discretion, there is a lack of clarity as to what is in fact, driving determinations.[77] Pursuing the welfare of the child, has become sufficient justification for a decision without a clear explanation as to why a particular decision is in a child's best interests and accordingly, it has been suggested that outcomes are driven by 'untested judicial determinations about what is good for children.'[78] Other transparency objections are that the rhetoric is concealing the fact that it is often adult interests, rather than children's, which dominate judicial considerations.[79]

Family law decision-making necessitates the use of normative rather than objective standards, since without certain accepted 'truths,' resolving cases would be quite impracticable.[80] It is however, the notion that 'they tend to reflect conservative ideals and traditional concepts of family roles, relationships and structures,[81] which might prove

[61] Glaser D and Sturge C, *'Contact and domestic violence – the experts' court report'* (Report for case: *Re L, V, M, H (children)(domestic violence)* [2000] 2 FLR 334).
[62] Hester,M, et al, *Making an impact: children and domestic violence* (2nd edn, JKP, 2007) p42, para 6.
[63] Ibid, p43, para1.
[64] Bagshaw, D et al,'The effect of family violence on post-separation parenting arrangements'[2011] FML 86.
[65] Hester M and Radford L, *Mothering through domestic violence*, 1st edn, JKP, 2006, p82.
[66] See Eekelar, J,'Beyond the Welfare Principle'[2002] CFLQ 14(3).
[67] *Re Agar-Ellis* (1883) Ch D 317 para 16.
[68] Early welfare related 'poor laws'developed from the 16th Century onwards.
[69] Guardianship of Infants Act 1925.
[70] The seminal statute in the operation of the modern child law welfare principle.
[71] Eekelar J,'Beyond the Welfare Principle'[2002] CFLQ14(3).
[72] Babb, B,'An interdisciplinary approach to family law jurisprudence.' (1997) ILJ vol 72 issue 3 article 5.
[73] The welfare of the child must be the court's 'paramount' consideration: s1(1)ChildrenAct1989.
[74] s1(3) ChildrenAct1989.
[75] Ibid.
[76] Brissenden, C,'Changing residence:A judgement of Solomon'[2010]FLW89.
[77] Eekelar, J,'Beyond the. Welfare Principle'[2002] CFLQ 14(3).
[78] Scathingly criticized by Reece,H 'Consensus or Construct'[1996]OLJ49(1).
[79] See Fineman M, 'Dominant discourse, professional language and change in child custody decision- making' [1988] *Harvard LR* 977.
[80] Garfinkel I, 'The use of normative standards in family law decisions' [1990] FLQ 24 2
[81] KaganasF,'Contactdisputes:Narrative constructions of'good parents"[2004]FLS12(1)p6, para 1..

problematic for children who have lived with domestic violence, where the family's social reality does not easily accord.

Research involving Foucauldian[82] discourse analysis has proven a popular means of exposing dominant discourse within contact proceedings and has been largely supportive of 'transparency objections' to the welfare principle.

Discourse analysis carried out by Kaganas,[83] has perhaps unsurprisingly, highlighted a dominant 'welfare discourse' within proceedings, but more interestingly identified that the means to achieve it is centred on promoting parental-contact and co-operative parenting. In light of aforementioned research, this is clearly not a baseless approach to children's best interests and may be successful in many instances. It may not however, work for troubled children and families, for example, where 'co-operative parenting' or 'contact' is simply not a viable option. Non-compliant, resident parents thus start out in the assumed position of 'bad parent,' with the potential effect within violent families, of tipping already imbalanced power dynamics, rather too far in the perpetrator's favour.[84]

Other dominant discourses within such analysis centre on gendered assumptions about post-separation family roles[85] and the marginalisation of domestic violence within proceedings with the effect of putting children at risk.[86] The gendered issue is pertinent to domestic violence families for whom it is far more likely that the victim will be a woman.

There is however a second objection to the principle, which has found favour with a number of academics. The lack of *prima facie* consideration given to other parties' interests rather than the child's within proceedings has been criticised as not either understanding the interdependent nature of rights and responsibilities, of being unfair to adults[87] or of not representing the child's welfare which necessitates teaching children to defer to others' rights where significant.[88] It has been suggested that 'the paramountcy principle must be abandoned and replaced with a framework which recognizes the child as merely one participant in a process in which the interests of all participants count'.[89]

This 'rights-based' criticism of the welfare principle has gained support in light of the increasing importance of human rights within English and Welsh law. A number of prominent academics have recently sought to demonstrate that the welfare principle simply does not accord with our obligations under the European Convention on Human Rights, especially since its incorporation into domestic law within the Human Rights Act 1998. This argument is explored further within section three.

The human rights of mothers, fathers and children

Resistance to the Human Rights Act is strongly marked within many areas of law, but that resistance is especially and increasingly apparent in the field of family law, particularly in relation to disputes involving children.
Choudhry S and Fenwick H[90]

Article 8, ECHR, victims of domestic violence and the rise of the 'suffragents'[91]

By virtue of s6 of the Human Rights Act 1998, it is unlawful for the courts to act in a way which is incompatible with rights guaranteed within the ECHR[92] and it is well established within the case law of the ECtHR,[93] that the right to respect for private and family life enshrined within Article 8, includes the 'mutual enjoyment by parent and child of each other's company'[94] and this includes potential relationships between parents and children.[95]

With more women going out to work and the traditional role of the father's responsibilities changing, the past thirty years has seen 'a new politics of fatherhood'.[96] Whilst many reject suggestions of bias within domestic contact proceedings advanced by increasingly active fathers' rights groups,[97] cases of mothers refusing contact due to 'implacable hostility' are recognised by the courts where there is no established violence,[98] it is suggested that the changing role of fathers may be seen as justification for the changes within expectation of rights, since rights and responsibilities are so closely intertwined. A number of fathers across Europe have used the mechanism of the ECHR to challenge state protection of their rights as a father,[99] and accordingly

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[82] With reference to the French philosopher Michel Foucault(1926-1984).
[83] Kaganas, F,'Contact disputes:Narrative constructions of'goodparents"[2004]FLS12(1).
[84] Further highlighted in: Coy, M, et al *'Picking up the pieces: child contact and domestic violence'* (Research report: Rights of Women and CWSU, Nov 2012) 91.
[85] Shea-Hart, A,'Child contact and domestic violence: inwhose best interests?'[2010]AFLJ82(3).
[86] Radford L,' Child contact and domestic violence: dominant discourses' [2002] HLR 29.
[87] Fineman, H,'Dominant discourse,professional language and change in child custody decision-making' [1988] Harvard LR 977.
[88] Herring, J, *FamilyLaw*, 4th edn, Harlow, Longman, 2011, p434.
[89] Reece,H, 'Consensus or Construct'[1996] OLJ49(1) p24 para 2.
[90] Choudhry, S and Fenwick, H,'Taking the rights of parents and children seriously:confronting the welfare principle under the Human Rights Act' [2005] OJLS 253 para 1.
[91] The term used to describe Fathers for Justice member: MartinDavis. See: http://men.typepad.com/f4j/2004/12/martin_matthews.html.
[92] European Convention on Human Rights and Fundamental Freedoms1950.
[93] European Court of Human Rights, Strasbourg.
[94] *JohansenvNorway*[1997]EHRR 33 para 52.
[95] *Fawad and Zia Ahmadi vSecretary of State for the Home Department* [2005] EWCA Civ1721, para 18.
[96] Collier, R,'Fathers4Justice,law and the new politics of fatherhood'[2005] CLFQ 174.
[97] Ibid, especially para 6.
[98] *ReB(AMinor)(Access)*[1984] FLR 648.
[99] For example: *Esholz v Germany*[2000]2FLR486,*McMichaelvUK*[1995]20EHRR205,*Hendriksv Netherlands* [1982] EHRR 5, 223.

a principled approach is beginning to emerge from Strasbourg, which domestic courts have little choice but to acknowledge.[100]

It is clear that the UK is obliged not only to take such measures as to 'not hinder the parent child relationship',[101] but also to take positive measures to promote this aspect of 'family life',[102] but it must be noted that Article 8 provides only a qualified right. That is to say that it may be interfered with by the state, inter alia, for 'the protection of children's interests'[103] or more generally 'for the protection of rights or freedoms of others'.[104] Therefore the rights of a non-resident parent will be subject to any greater rights deemed to be held by the child, the resident parent and any other relevant competing interests.[105]

Whilst the right to parent-child contact is rather more developed within the jurisprudence of the Convention, Choudhry[106] has suggested that in a rights-based approach, this may be balanced with a resident parent's rights under Article 8 and that this is especially relevant within the context of domestic violence.[107] The right to respect for private life enshrined within Article 8 is a wide ranging right,[108] which includes that of physical and moral integrity[109] as well as psychological integrity.[110] The potential, for a resident parent and victim of domestic violence to invoke Article 8 rights to protect personal autonomy is yet to be developed within Strasbourg although the very nature of the condition might make victims rather less likely than their perpetrators to instigate the litigation which might usefully develop such principles.

Article 3 and 'absolutely' no inhuman or degrading treatment

Advocates of a rights-based approach to contact decisions[111] have suggested that Article 3 of the Convention may also be invoked within contact proceedings, for example, where a victim of domestic violence is at risk of the more serious 'inhuman or degrading treatment'.[112] If established, any Article 3 rights under the Convention would supersede those within Article 8 and therefore the state would be permitted to interfere with contact applications where a resident parent was at risk of such treatment.

A minimum level of severity is required to constitute 'inhuman or degrading treatment'[113] and this will not apply where suffering is considered 'trivial'.[114] It has however, been established that actual bodily injury or 'intense mental suffering'[115] would suffice as the requisite 'ill- treatment'[116] and that treatment which '...humiliates or debases an individual and diminishes human dignity arousing feelings of inferiority capable of breaking an individual's moral or physical resistance...'[117] is also sufficiently degrading to invoke Article 3. The severity of conditions such as 'battered wives syndrome' may fall within this remit.

Furthermore, the state is recognised as having a positive obligation to protect private individuals from one another in this context.[118] One might hope that court decisions whereby a victim suffering from such a syndrome is ordered to facilitate contact arrangements which subject her to such conditions, might not occur, but Women's groups have suggested that proceedings are often facilitating the continuation of abuse and that sometimes this is severe.[119]

Children's Rights and paternalism versus autonomy

The broad-scale acceptance of 'welfarism' has brought with it increasing calls for children to have rights of their own[120] and these are now protected by a variety of international instruments, of which the United Nations Convention on the Rights of the Child (UNCRC)[121] is the most comprehensive and widely ratified.

Although not incorporated in domestic legislation, the UK is answerable to the UN Committee on the Rights of the Child, if its institutional framework does not accord with the CRC. In relation to child-contact disputes, this

[100] Choudhry, S, and Herring J,'Domestic violence and the Human Rights Act:a new means of legal intervention? [2005] PL 752.
[101] *JohansenvNorway*[1997]23E.H.R.R.33.
[102] *X and Y v Netherlands* [1986] 8 E.H.R.R. 235.
[103] It is established that'legitimate aim'within Article8(2),includes preserving rights and interests of children: *R v UK* [1988] 2 FLR 45.
[104] Art8(2)European Convention on Human Rights and Fundamental Freedoms.
[105] See for example:*Yousef v Netherlands* [2003]1FLR210.
[106] Choudhry S, 'Contact, domestic violence and the ECHR' [2011] WJCLS 12.
[107] Ibid.
[108] Herring, J, *Family Law*, 4th edn, Harlow,Longman2011, p428.
[109] *X and Y v Netherlands* [2005] EHRR 8 235.
[110] *R(Bernard)vEnfield London Borough Council*[2003]EWCA Civ 23.
[111] For example *A v UK* (1999) 27 EHRR 27? This, although the best known, is not the only reported case of physical chastisement of a child by a family member.
[112] Article 3 European Convention on Human Right prohibits 'torture or inhuman or degrading treatment or punishment.'
[113] Article 3, European Convention on Human Rights and Fundamental Freedoms.
[114] *Ireland v UK* [1979] 2 EHRR 25 para 162.
[115] Ibid.
[116] See *Pretty v UK* [2002] 1 EHRR 129.
[117] *Price v UK* [2002] 34 EHRR 53 para 24-30.
[118] Choudhry S, 'Taking the rights of parents and children seriously: confronting the welfare principle under the Human Rights Act' [2005] OJLS 25 3.
[119] For example: Coy, M et al, *'Picking up the pieces'* (Research report: Rights of Women and CWSU Nov. 2012) 91.
[120] Freeman M, Hamlyn Lectures 2015, 'Are Children Human?' (Leeds Universityl), 'Even Lawyers Were Children Once' (Nottingham Law School); 'A "Magna Carta" for Children' (University College London) : and many earlier works, e.g. The Rights and Wrongs of Children, 1983; Children, Their Families and the Law, 1992; The Moral Status of Children, 1997; The Best Interests of the Child, 2007.
[121] United Nations Convention on the Rights of the Child 1989.

necessitates that the courts consider the interests of the child as 'primary'.[122]

Academics have distinguished between the welfare principle, which necessitates the interests of children being 'paramount' and to supersede any other competing interests, and the CRC approach, which requires interests to be 'primary' and that of the ECHR, which traditionally has considered children's interests to be considered of 'special significance,'[123] although the ECHR is increasingly using the terminology of the CRC when addressing cases concerning children.[124]

Lord Oliver considered differences between the systems in *Re KD (A minor) (Ward: Termination of Access)*[125] and opined that any apparent conflict was 'merely semantic'[126]. However a direct challenge to the UK 'paramountcy principle' in *A and Byrne v UK*[127] found that it was for the national authorities to 'strike a fair balance between the relevant and competing interests'.[128] In light of the differing starting-out points of the two systems, potentially differing outcomes and narrower margin of appreciation afforded to such cases, academics have argued that the differing approaches simply do not accord.[129]

However, the increasing integration of CRC principles and terms into ECHR jurisprudence has opened up new potentials for children who have lived with domestic violence, to invoke rights independently. Children have already found success in their complaints where the state has failed to protect them from 'degrading treatment'[130] and the state must afford them 'special protection'[131] in the form of deterrence against 'serious breaches of personal integrity',[132] such as allowing a known abuser close contact with children.[133] Courts must be mindful of their ECHR obligations when granting contact to known violent abusers to prevent violations of Article 3.

Furthermore, it has been established that Article 8 includes, *inter alia*, the right to 'develop individual personality.' An individual child wishing to contest contact with an abusive, non-resident parent may bring an action in his own right[134] and argue against the state for a framework which prevents him from doing so or indeed fails to respect his physical, moral of psychological integrity.

A final point worthy of consideration is whether it is the parent-child contact itself which is protected within Article 8 or whether it is the right to choose whether or not to have this contact. Pretty[135] was unsuccessful in her argument that the right to die was 'not the antithesis of the right to life but the corollary of it',[136] but this concerned an absolute right. The qualified right to join an association[137] has been interpreted as conferring a corresponding right not to join an association[138] and article 9 embraces a freedom from any compulsion to express thoughts.[139] The question of whether a child who does not want to have contact with a previously violent parent, ought to have this right protected, remains to be seen. Certainly, it would be difficult to compel absent parents to have contact with children where they did not want to and therefore it might be argued rather unfair that the child may be compelled by the court to have an equally unwanted contact.

Children are not afforded quite the same rights as their parents under the ECHR and they cannot for example, invoke the right to vote. They are instead offered a qualified deontological version of rights, but where they are subject to contact proceedings after already being exposed to domestic violence, it is submitted that it is within the 'living instrument' of the recently incorporated ECHR, they may find the most hope of a less paternal approach than the welfare principle and grasp a little autonomy.

Reforming the current legal system

The reformulation of the welfare principle, would be difficult, but not impossible, and could be attractive.

John Eekelaar[140]

Bainham's model of primary and secondary interests

A developed model has been advanced by Bainham,[141] which proposed an alternative to the welfare principle, where

[122] United Nations Convention on the Rights of the Child 1989 Art 3(1).
[123] *EvUK* [2002]4 EHRR19.
[124] Herring, J, *Family Law*, 4th edn, Harlow, Longman, 2011, p437, para2.
[125] *Re KD (Aminor)(Ward:termination of access)*[1988]1All ER 577.
[126] Ibid, para16.
[127] *A and Byrne and twenty twenty television v UK* [1998] 25 CD 159.
[128] n123, para 60.
[129] Choudhry, S,'Taking the rights of parents and children seriously: confronting the welfare principle under the Human Rights Act [2015] OJLS 25(3),
[130] For example: *AvUK* [1999]27 EHRR 611,
[131] *E v UK* [2002] 4 EHRR 19.
[132] *AvUK*[1999] 27 EHRR 611, para22
[133] *E v UK* [2002] 4 EHRR 19.
[134] See for example: *A v UK* [1997] 27 EHRR 611.
[135] *Pretty v UK* [2002] 35 EHRR 1.
[136] Ibid, para24
[137] Article 11 ECHR confers a right to 'freedom of assembly and association.'
[138] *Young,James andWebster v UK* [1981] 4 EHRR 38.
[139] Clayton and Tomlinson,*The law of human rights*, 2nd edn, Oxford, OUP, 2009, p913, para13.
[140] EekelaarJ,'Beyond the welfare principle'[2002]CFLQ14(3) para1. Some reform has already been effected by the Children and Families Act 2014, but only to raise a presumption that both parents' involvement 'in some way' is beneficial, unless it is harmful.
[141] Bainham A,'Changing families and changing concepts:reforming the languageof familylaw [1998] CFLQ 10(1).

parents' and children's interests would be categorised as either primary or secondary interests.[142] In this event, a child's secondary interests would have to give way to a parent's primary interests and vice versa, but also that 'collective family interests' would also be taken into account within the balancing exercise carried out by the court.

What this model does allow for is a more transparent consideration of individual needs and recognises their interdependence with the family unit as a whole. The balancing exercise would also meet the requirements of the rights-based approach advocated within the jurisprudence of the ECHR, but there is no specific reference to domestic violence within this model and how the needs of the primary victim and child might be determined, despite its being raised as a welfare issue by approximately 56% of contact disputes.[143] Without guidance as to how these needs might be understood by judges, there remains the same judicial discretion which arguably allows room for or the marginalisation of domestic violence within proceedings.

Eekelaar and his least detrimental alternative

A modified suggestion by Eekelaar[144] is that the 'least detrimental alternative'[145] ought to be applied. That is to say that 'the best option is to adopt the course of action that avoids inflicting the most damage on the well-being of any interested individual'.[146] He suggests that 'if the choice was between a solution that advanced a child's well-being a great deal, but also damaged the interests of a parent a great deal, and a different solution under which the child's well-being was diminished, but damaged the parent to a far lesser degree, one should choose the second option, even though it was not the least detrimental for the child'.[147] This test is qualified by the fact that under this model, no solution may be adopted where the detriments outweigh the benefits to the child.

Again, no reference is made within Eekelaar's model to the most frequently cited welfare concern within proceedings, but under this test, the detriment to a child of no-contact with a parent would be weighed against the detriment to the victim of on-going contactarrangements. Under the current welfare principle, the court might order a victim to face her perpetrator in order to facilitate contact arrangements deemed in the child's best interests. Under Eekelaar's model some consideration would need to be given to the detriment caused to the victim, by continually having to face her perpetrator. There does however remain a significant degree of judicial discretion within this test to determine what might constitute detriment. Since much of the contemporary research suggests that much of the problem for children who have lived with domestic violence is centred on judicial constructions of welfare, it might be argued that there would be an identical problem with determining detriment.

Perry's presumption against contact

Perry[148] has argued that there ought to be a legislative presumption against contact with an established perpetrator.[149] This argument is centred on the quality of contact perpetrators are able to offer, highlighting that the risk of harm referred to in the welfare 'checklist'[150] is always high, in light of findings that children living in an atmosphere of domestic violence, and those who witness such violence, suffer harm,[151] and of the statistical links between child abuse and spousal abuse and the numbers of children abused, or even killed, after contact has been ordered.

This is a compelling argument for reducing the risks to children posed by contact proceedings. Research into the success of the implementation of such a presumption into New Zealand law has certainly found such a presumption to reduce risk, although not eliminate it.[152] This is however, a paternal approach which does nothing to recognise children's autonomy in making decisions about whether they feel comfortable and benefitted by contact or not and also does little to address concerns about the welfare principle's non-compliance with international human rights obligations.

Herring's relationship-based welfare theory

Finally, Herring[153] has proposed a 'relationship-based welfare theory'.[154] This argument suggests that society in general is based on mutual co-operation and support and so children must be encouraged to adopt a social obligation and that they are not to expect parents to make excessive sacrifices for their minimal benefits. He argues that 'a relationship based on unacceptable demands on a parent is not furthering a child's welfare'[155] and that supporting a child's primary caregiver means supporting the child.

In a sense, Herring is not changing the welfare model

142 Ibid,
143 Buchanan et al, Families in conflict, perspectives of children and parents, Policy Press,[2001]
144 Eekelaar, J,'Beyond the welfare principle'[2002]CFLQ143
145 Ibid,para 1.
146 Ibid, para201.
147 Ibid, para243-45.
148 Perry A,'Safety first? Contact and family violence in New Zealand: An evaluation of the presumption against unsupervised contact' [2011] CFLQ 181
149 Ibid para 8.
150 The term 'checklist is not actually used, but a list of factors the courts must have regard to is contained within s1(3) Children Act 1989.
151 The definition of 'harm' within the Children Act 1989 has been amended to include witnessing harm to others.
152 Perry, A 'Safety first? Contact and family violence in New Zealand: An evaluation of the presumption against unsupervised contact' [2011] CFLQ 181.
153 Herring, J, *Family Law,* 4th edn, Harlow, Longman 2011,p 424 para 6.
154 Ibid.
155 Ibid, p 426, para 1.

itself, but is reinventing current interpretations of what welfare actually means for a child, but his interpretation of a child's welfare is by no means baseless. One of the aforementioned factors determining children's ability to recover from domestic violence has been found to be the ability of the victim (usually the primary caregiver) to recover.[156] Further research has highlighted that the examples set by a child's family relationships will influence and to some extent determine the child's future relationships,[157] which obviously may have a tremendous impact upon his future welfare. Again Herring's theory makes no reference to the human rights objections to the welfare principle, but there would appear to be some merit in his reasoning for families recovering from domestic violence.

Conclusion

It is submitted that it is necessary to create an institutional framework which discourages the degrading and debasing of individuals and that particular attention must be paid to women and children in light of the patriarchal framework from which contemporary society has evolved. However, the broad definition of domestic violence also poses a number of problems for family law decision-makers.

The umbrella heading of domestic violence may include a man who becomes terrifyingly but quite unconsciously violent when he is drunk, or one who sets out consciously to strip his partner of her every autonomy through a series of planned, violent and sexual assaults. Both experiences will have devastating effects on the victims, including any children, but these may be very different, and accordingly the type of protection and the response of family decision-makers, must be able to account for this.

The welfare principle has the noble objective of ensuring the child's welfare is paramount and in a society which recognises the need to protect the interests of the vulnerable, this is surely commendable. It does however lack the flexibility to manage the complicated competing needs within domestic violence cases and it is disappointing that there are currently no government statistics to monitor the outcomes of contact orders.[158]

The time and resource constraints placed upon Family courts, necessitate a normative approach to judicial determinations of a child's welfare, which tends to single out certain groups for disadvantage.[159] The fact that children have been identified as having been killed by the very person the court has deemed contact to be in their best interests, really ought to be enough to consider that there is a problem worthy of further consideration.

Children do not exist outside their individual context and their future is dependent, not only on their capabilities and physical environment, but also their relationships and those to whom they have formed attachments. What is common and unique to domestic violence families is the extent to which these are broken. They become part of a unit where one or more members of their family have their basic rights and freedoms stripped from them and this is what shapes their notions of themselves and others around them as they develop.

Human rights obligations upon the Family courts are increasingly better understood and it is clear that an approach to proceedings where the interests of all parties are balanced, affording 'special protection' to children is the preferred approach of Strasbourg. The welfare principle however, is embedded within English and Welsh law and the legislature and judiciary will be slow to implement a framework which affords a *prima facie* lower standard of protection to children.

However, in light of the above, it is time to consider whether the welfare principle really does mean 'welfarism'. The alternative of an approach which is able expressly to recognise and balance the unequally distributed rights and freedoms within families living with domestic violence, might provide better protection for such children. Furthermore the transparency of proceedings which would better expose any bias and accord with obligations under the Human Rights Act might also better serve all children.

Within a 'rights-based' approach to contact decisions, the specific needs of families living with domestic violence would still need to be addressed and indeed a presumption against contact for perpetrators would probably still comply under Article 8(2), but a mother would be able to argue independently of her child, that her needs deserved consideration. So would a non-resident father. Surely, being raised in a family whereby the basic human rights of all parties are recognised and balanced, with a special protection given to those who are vulnerable, is in a child's best interests.

This rights-based approach is a more transparent, honest and individualised version of 'welfarism' which is better equipped to deal with such disputes and particularly those where domestic violence is an issue. It is time to re-conceptualise children's welfare and move towards an approach to child contact decisions, where children are given some autonomy and where they are part of a structure which gives due weight to all parties' interests, which is especially important for those who have come from families characterised by significant power imbalances.

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[156] See section 1.

[157] See Section 1.

[158] For example: Gilmore S, 'The assumption that contact is beneficial: challenging the secure foundation' [2008] Fam Law 1226.

[159] Choudhry, S, 'Taking the rights of parents and children seriously: challenging the welfare principle under the Human Rights Act' [2005] OJLS 25 3, para 2.

Judging, Family Law and Family Law Reform

Hannah Camplin*

Changing judicial roles and the need for a bold internal response to external pressures on the family justice system was the theme of a speech given on 30 April 2015 by Justice R. James Williams, of the Supreme Court of Nova Scotia, Family Division, and 2015 recipient of the Institute of Advanced Legal Studies Inns of Court Judicial Fellowship.[1]

Justice Williams was speaking at the "Judging, Family Law and Family Law Reform" event organised by the International Centre for Family Law Policy and Practice (ICFLPP), the Centre's first collaborative event with the University of Westminster Law School, and held in the University's West End lecture theatre in Little Titchfield Street. Professor Marilyn Freeman, co-director of ICFLPP and Principal Research Fellow, Westminster Law School, introduced the evening, emphasising the continuing internationalisation of Family Law and the value of such opportunities to share information and experiences in this way.

An audience of specialist Family Law practitioners, judges, mediators, academics and students heard Justice Williams liken the challenges faced by the family justice system in England and Wales to the challenges of the Canadian equivalent. He also discussed the particular challenge of the rise of the litigant in person in both jurisdictions, and what it meant for the judiciary and the system itself.

An unhelpful adversarial system

Advocating the need for change, Justice Williams identified the current family justice system in both Canada and England and Wales as primarily adversarial in nature, and that, despite an increasing focus on negotiation, the system was designed ultimately to resolve an issue by way of a final hearing where parties presented evidence and were cross examined by their legal representatives. He emphasised that the traditional judicial role within this system was "isolating" and "passive" – a role of receiving evidence.

Justice Williams suggested that there were unhelpful myths surrounding the family justice system, including the myth that family proceedings were accessible, based on principled rules of evidence and ultimately fair, fulfilling a fact or truth seeking role. He discussed how, for most litigants in person, the process was time consuming, expensive and confusing, and that the culmination of the adversarial system, the final hearing with evidence given and cross examination, often led to a false impression rather than a judgment based on 'truth'. Justice Williams explained that in his view decisions on evidence provided "aren't based on truth" because, particularly in the intimate nature of family experiences, perceptions of what is the truth can legitimately differ between the parties.

Justice Williams used this position to suggest changes to the functioning of the family justice system and to the family judiciary in both jurisdictions. Justice Williams began, not with the many reports on reformation, but with what he would want as a litigant in person, namely a process that recognised the importance of his family relationships, was timely, accessible, private and not fundamentally divisive.

"Problem solving with adjudication at the end of the process"

Approving recommendations in the Final Report of the Family Justice Review (England and Wales, 2011)[2] and the Access to Civil Justice Report (Canada, 2013)[3] Justice Williams emphasised changing the narrative of the system, and for this new narrative to be one of family problem solving. He suggested changing the rules on evidence – parties should file what they need to settle the matter and not with a focus on litigation. Evidence for litigation should

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[1] Justice Williams also spoke while in England at the annual FLBA Cumberland Lodge weekend..

[2] https://www.gov.uk/government/uploads/.../family-justice-review-final-report.pdf.

[3] www.cfcj-fcjc.org/clearinghouse/access-justice.

only be considered when "we get to it". The way the courts received evidence should also change to ensure accessibility. Whether these changes were "within the system or of the system" Justice Williams did not provide a definitive answer, but he emphasised that change in some form was needed.

A formula or framework for negotiation and settlement

Justice Williams recommended that serious thought be given to the creation of a "formula, reference point or frame for negotiation", suggesting that rules or presumptions for negotiating parties would be of real use for those trying to settle matters within or outside of court proceedings.

When challenged on this point - that it would be extremely difficult to produce a set of overarching presumptions for what should happen to children, for example, Justice Williams replied that a set of presumptions could address the "little things" as well as generate a discussion about wider issues. This could include a set of presumptions about the responsibilities of those caring for a child. Using examples from Canada, Justice Williams suggested that there could be, for instance, a presumption the primary carer should send information from the children's school to the other parent. This and similar presumptions could act as an aid for the early settlement of many potential conflicts.

Changing judicial roles

Drawing from his experience, Justice Williams promoted the idea of the more active judge – educating parties and the public, continuously learning, gatekeeping, managing, and actively involved in facilitating settlement. This would involve a judiciary who were not only experienced with managing the legal court process, but learned in family psychology and prepared to get very involved with dispute resolution. He discussed strategies adopted in Canada such as dispute resolution and binding settlement conferences, led by judges "going from off to on the record".

In terms of education, it was suggested the role of the judiciary was to educate not only those in the law but those potentially accessing the system. Justice Williams used as an example parent information sessions attended by parties in Canada who have made an application to the court regarding children. Judges speaking at these sessions try to create realistic expectations of the process and dispel the 'myths' relied on, as well as encouraging settlement.

According to Justice Williams, the active judge should be a leading judge, a figure instigating change in the narrative of the court, who supports the progression of family law itself and the value of the legal professionals within it.

The overarching ideas of change for the family justice system and the role of the judiciary put forward by Justice Williams were not new, but the suggestions for real and practical change drawn from his experience were thought provoking for all in the diverse audience - as evidenced by the lively question and answer session that followed, chaired by Professor Lisa Webley of the University of Westminster Law School.

The themes of Justice Williams' presentation continued to occupy the thoughts of those attending the event reception, where more detailed discussion followed over some excellent wine and canapes. Whilst not all who attended agreed with Justice Williams' assessment of the optimum family justice system, his ideas and the discussions provoked by his presentation certainly fulfilled his own mandate of "thinking positively about what can be done".

Applicable Law for Marriage Under the Romanian Civil Code ?

Nadia-Cerasela Anitei *

Abstract:

Given that from October 1, 2011 the new Civil Code came into force, on the basis of which lies the monistic concept regulating private law relations into a single code - thus changing not only the institutions of family law but also the other aspects of private law - it is necessary to take a new view of family law in Romania.

The New Civil Code on family relations in Romanian private international law is found in Chapter II entitled Family (Article 2585- Article 2612) which in turn is divided into sections, paragraphs and articles of the 7th Book called *Private international law provisions*.

Section (1) entitled The Marriage, in the 7th Book entitled *Private international law provisions*. contains Article 2586 of the Civil Code, with the marginal note *The law applicable to the substantive conditions of marriage. This article states: "The substantive conditions required for the conclusion of marriage are determined by the national law of each of the future spouses at the time of the marriage ceremony, (paragraph 1.) If one of the foreign laws so determined provides an impediment to marriage which, according to Romanian law is incompatible with the freedom to conclude a marriage, that impediment will be removed as inapplicable where one of the future spouses is a Romanian citizen and marriage is concluded in Romania, (paragraph 2).*

Under Article 2586 of the Civil Code are presented the substantive conditions necessary for the conclusion of marriage where one of the spouses is a Romanian citizen and the other a foreign national.

Keywords: *Romanian Civil Code, Romanian private international law, the law applicable to the substantive conditions of marriage, future spouses.*

1. The law applicable to the substantive conditions necessary to contract marriage according to the Civil Code

Under the provisions of Article 2586 paragraph (1) of the Civil Code, for a valid marriage it is necessary to meet the substantive conditions established by national law of each of the spouses at the time of the marriage ceremony. Thus, whatever the situation:

a. If prospective foreign spouses of the same nationality want to enter into marriage on Romanian territory, they must meet the substantive requirements laid down by the national law of each one. For example, two future spouses who are British citizens wanting to enter into marriage on Romanian territory will have to comply with the substantive requirements imposed by English legal standards.

b. If the future spouses have different foreign citizenships, and they want to conclude a marriage on Romanian territory, they must meet the substantive requirements established by the national law of each of them. For example, if one of the future spouses is English and the other is Italian, they must meet the substantive requirements established by the national law of each state, that is respectively English and Italian law.

c. If the future spouses are of different nationalities, and one is a Romanian national and the other is English, and they want to contract a marriage on Romanian territory, they must meet the substantive requirements established by the national law of each of them.

It should be noted that the provisions of Article 2586 paragraph (1) of the Civil Code relating to the subsistence of marriage from the perspective of Romanian private international law, do not specify what happens if the substantive conditions of the national law of the future spouses are breached.

From the *per a contrario* interpretation of the provisions of Article 2586 paragraph (1) of the Civil Code it is considered that the domestic law of each of the future spouses is the law that provides what happens where this law is violated.

From the provisions of Article 2586 paragraph (2) of the Civil Code it should, however, be noted that there is an exception where there is *an impediment to marriage which, according to Romanian law is incompatible with the freedom to contract a marriage provided by one of the foreign laws, and the marriage will be validly concluded in terms of the substantive conditions where one of the future spouses is a Romanian citizen and the marriage is concluded in Romania.*

In this context we have the following possible situations:

Applying these provisions there is the risk for a marriage concluded *in Romania* by a future foreign spouse with a future Romanian citizen spouse *to be null in the country the nationality of which the other future foreign spouse has*; or

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A marriage concluded with the observance of the substantive conditions in accordance with the provisions of national law of each spouse must meet the provisions concerning the impediments to marriage from their national law, even if it is concluded in Romania and one of the spouses is a Romanian citizen.

The better view on Romanian law, as *lex ferenda,* appears to be that this paragraph should be reconsidered on the basis of the impediments to marriage established by the national law of each of the future spouses: namely for the future Romanian spouse to take account of impediments to marriage established by the Romanian law and for the future foreign spouse citizen to have in mind the impediments to marriage established by his or her own national law, even if the marriage is concluded in Romania.

2. What are the substantive conditions for contracting marriage for Romanian spouses under the provisions of the Romanian Civil Code?

2.1. Prior notes

The conclusion of a valid[2] marriage presupposes the existence of three conditions:

1. substantive requirementss;
2. absence of impediments;
3. formal conditions.

The **substantive requirements**[3] are those circumstances which must exist at the time the marriage is contracted for this to be valid.

The substantive requirements at the time of the marriage being contracted are classified[4] according to the following criteria:

1. Depending on their *legislative format:*
a. *express substantive conditions*, namely expressly provided for in the Civil Code;
b. *virtual substantive conditions*, provided by law, but implicitly resulting from the intention intended by the legislature.

2. Depending on *the sanction that occurs in case they are not observed*:
a. the *nullifying substantive conditions* the non-fulfilment of which attracts nullity of marriage and which are established by mandatory rules:
b. the *prohibitive substantive conditions*, the non-fulfilment of which does not result in nullity of marriage, but preserves the marriage as valid, but which attract disciplinary sanctions of the civil status officer, which are established by mandatory rules.

3. Conditions are also classified as follows:
a. the *physical conditions* are: differentiation by sex, age, marital age and reciprocal communication of the health status of future spouses;
b. the *psychiatric conditions* are: the existence of the consent of intending spouses and free expression of that;
c. the *moral conditions* are: preventing the conclusion of a marriage between close relatives or between people who have relations which have resulted from the adoption or guardianship.

It is noted that the latter classification is not absolute and that some conditions may be included in several categories, such as: matrimonial age can be considered both a physical condition but also a mental condition because only after reaching a certain the age the consent at the conclusion of marriage may be validly expressed.

2.2. The legal basis of the provisions relating to the conditions necessary for the conclusion of marriage according to the provisions of the Civil Code

The new Civil Code provides the following substantive conditions:

1. **Gender differentiation** is provided by Article 271 *"Marriage is concluded between man and woman...."*

2. **Matrimonial age** is provided by Article 272 *"Marriage can be concluded if future spouses have reached the age of 18 (paragraph 1). For good reasons, the minor under the age of 16 can marry under a medical opinion, with the consent of its parents or, where appropriate, of the legal guardian, and with the approval of the guardianship court in whose jurisdiction the minor is domiciled. If a*

[2] For details see., C., Anitei. *Dreptul familiei (Family Law)*, Hamangiu Publishing House, Bucharet, 2012, pp. 31-45, A., Bacaci. V., C., Dumitrache. C., C., Hageanu. *Dreptul familiei (Family Law)*, 6th edition, C. H. Beck Publishing House, Bucharest, 2009, p. 17-18; T., Bodoasca. All Beck Publishing House, Bucharest, 2005, p. 59-60; E., Florian. *Dreptul familiei (Family Law)*, 2nd edition, C. H. Beck Publishing House, Bucharest, 2008, p. 22.

[3] Bacaci. V., C., Dumitrache. C., C., Hageanu. *Dreptul familiei (Family Law),* 6th edition, C. H. Beck Publising House, Bucharest, 2009, p. 18.

[4] Bacaci. V., C., Dumitrache. C., C., Hageanu. *Dreptul familiei (Family Law),* 6th edition, C. H. Beck Publishing House, Bucharest, 2009, p. 18 -19; I., Apetrei. Raluca –Oana, Andone. *Dreptul familiei (Family Law).*Lecture support, Casa de Editura Venus, Ia□i, 2005, p. 12.

parent refuses to approve the marriage, the guardianship court decides on these divergences in the best interests of the child (paragraph 2). If one parent is deceased or is unable to manifest their will, the other parent's consent is sufficient (paragraph 3) Also in terms of Article 398 the consent of the parent who exercises parental authority (paragraph 4) is sufficient. If there is no parent or guardian who can approve the marriage the consent of the person or authority who was entitled to exercise parental rights (paragraph 5) is necessary. "

3. **The consent of the intending spouses** is provided by Article 271 *"Marriage is concluded ..... by their free and personal consent."*

4. **Communication of health status** is provided by Article 278 of the Civil Code. Thus, according to paragraph 1 *"Marriage may not be concluded, if future spouses fail to declare that they notified each other on their health status." Paragraph 2 states that "The legal provisions that terminate the marriage of those suffering from certain diseases remain applicable."*

5. ***The substantive conditions necessary for the conclusion of marriage under the provisions of the Civil Code***

The substantive conditions necessary for the conclusion of marriage according to the provisions of law are:

- **Gender differentiation;**
- **Matrimonial age;**
- **The consent of the intending spouses;**
- **Communicating health status.**

1. Gender differentiation is a virtual and nullifying substantive condition, resulting in the interpretation of the provisions of the Civil Code. As a condition we find it regulated in the first part of Article 271 of the Civil Code. The proof of fulfilment results from the birth certificates of the intending spouses certifying the person's gender.

2. Matrimonial age is an express and nullifying condition. The provisions of the Civil Code set the minimum age for the conclusion of marriage to 18 years old. However, exceptionally, for sound reasons (e.g. pregnancy of the female) a minor under the age of 16 can marry pursuant to a medical opinion, with the consent of the minor's parents or, where appropriate, of a guardian. Also, this situation requires the authorization of the General Directorate of Social Assistance and Child Protection in whose jurisdiction the minor is domiciled and according to the provisions of paragraph (2) Article 272 of the Civil Code with the authorization of the guardianship court in whose jurisdiction the minor resides. If one of the parents refuses to approve the marriage, the guardianship court decides on this divergence as well in the best interests of the child.

If one parent is deceased or cannot express permission, the will of the other parent will suffice.

Although paragraph (4) of Article 272 of the Civil Code refers to Article 398 Civil Code we consider that the provisions of paragraph (2) of Article 398 are not applicable because there is a mismatch between the provisions of these two articles. Paragraph (2) Article 398 of the Civil Code expressly provides that where the parental authority is entrusted by the court to one parent the other parent retains even in these circumstances the right to consent to the marriage of the child. These two legislative texts have to be correlated. The easiest way is to remove the mention of marriage from paragraph (2) of Article 398 of the Civil Code.

If there is no parent or guardian who can approve the marriage the consent of the person or of the authority which was entitled to exercise parental rights is necessary.

If the marriage is concluded between Romanian citizens aboard a Romanian ship, but outside the Romanian borders, the age waiver is granted by the ship's captain.

The maximum age up to which a marriage may be contracted is not set, which means that a marriage can be entered into in old age and even *in extremis* before death. In such situations, pre-existing factual situations can be regularised (such as by the legalization of a long and notorious cohabitation relationship). Also, the law sets no maximum age difference between spouses, hence the fact that a marriage can take place regardless of the age difference that exists between the parties.[5]

The consent of the intending spouses is an express condition and its absence a nullifying condition. This is governed by the provisions of Article 271 of the Civil Code and also by the Article section (1) which states that "marriage shall be entered into only with the free and full consent of the intending spouses" in accordance with the Universal Declaration of Human Rights. Also, *UN Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of marriages*[6] in Article 17 section (1) states *that "marriage can be concluded only with the full and free consent of the intending spouses."*

In terms of legal acts in general the notion of consent has a double meaning, referring to both the manifestation of the will of a person with the intent to produce legal effects, and the concurring meeting of wills, agreement of wills, to create between them a legal relationship.[7]

5 Bacaci. V., C., Dumitrache. C., C., Hageanu. *Dreptul familiei (Family Law*), 6th edition, C. H. Beck Publishing House, Bucharest, 2009, p. 20.

6 Adopted by the National Assembly of the UN New York, on December 10, 1962, ratified by Romania by Law no. 330 116/1992 published in Official Gazette of December 24, 1992

7 Gh., Beleiu. Drept civil român. *Introducere în dreptul civil i subiectele dreptului civil, Edi ia a v-a revizuit i ad ugit , (Romanian civil law. Introduction to civil law and civil rights issues, 5th edition revised and completed)* Casa de Editur i Pres „ ansa! S.R.L., Bucharest, 1998, p. 142.

The existence of consent of the intending spouses to the marriage is the fundamental requirement, indispensable to the legal act of marriage, but that alone is not enough because it has to be free, and current.[8]

According to Article 31 paragraph (1) of Law no. 119/1996 *concerning the civil status deeds* the marriage consent is usually manifested through the affirmative answer to the questions of the civil status officer addressed to each of them in the sense that they want to marry each other.

According to Article 32 of Law no. 119/1996 in case of a marriage between a Romanian citizen and a foreigner, or between foreigners, if one or both spouses do not speak Romanian, and when one or both spouses are deaf and dumb, they will take note of their consent through an authorized interpreter, recording this fact.

The prospective spouses must present themselves together at the City Hall to give their consent to the marriage publicly, in the presence of two witnesses, before the civil status officer.

Any person with full legal capacity can witness the conclusion of marriage. The witnesses attest that spouses have expressed their consent to the marriage. Those with incapacity and those who because of mental or physical disabilities are not able to state that they witnessed the marriage are not valid witnesses to the marriage.

To be validly expressed, the **consent** must meet certain **conditions**:[9]

a. to be uncorrupted;
b. to be current;
c. to be given personally and simultaneously by future spouses;
d. be found directly by the civil status officer.

a. ***To be uncorrupted*** namely the consent must be expressed freely (and that the limitations of caste, the racial, religious and legal limitations in terms of free choice between future spouses, were removed). This means at the conclusion of the marriage formalities that the lack of vitiation of consent, namely: error, fraud and violence are avoided.

'Error' is a false representation of the essential circumstances and is a vitiation of consent to the marriage only if it refers to the physical identity of the other spouse (which is possible only in case of sibling twins who might substitute one another at marriage), nullity being the sanction applicable. Error as to the civil identity of the spouse (for example the fact that one of the spouses did not know that the other spouse is divorced or was a child born out of wedlock, or is believed to belong to a particular family is not a vitiation of consent) and does not affect the validity of marriage. Error as to the quality or characteristics of the other spouse does not constitute a vitiation of consent (for example subsequent discovery of the fact that the spouse is violent).

'Fraud' involves the use of cunning means or of fraudulent representations by a spouse in order to induce the other to enter into marriage. In judicial practice the vitiation of consent by fraud has been retained, when pregnancy resulting from intimate relationships before marriage is hidden; when a serious illness was hidden, which is incompatible with the normal family life, when the woman has concealed an inability to have children or when the male has concealed impotence to achieve intercourse. The fraud must refer to some essential qualities of the future spouse, which if the other had known about it would have meant that that other would not have concluded the marriage, since these qualities should be required for a valid marriage (for example, health is a quality necessary for contracting marriage when wealth is not such quality).

Violence ' involves the physical or mental coercion exercised over a spouse for the purposes of marriage. It was decided that if at the conclusion of marriage consent of one of the spouses was vitiated by the violence exerted by his/her father, the marriage will be declared invalid, provided proceedings are brought within the statutory period.

b. ***To be current***. This implies the need to express the consent at the marriage ceremony in public, before the civil status officer.
c. ***To be given simultaneously and personally by future spouses***. The consent is expressed personally by each spouse, the possibility of contracting the marriage by proxy being excluded. Also, consent must be expressed simultaneously, and the future spouses must be present together before the delegate to give their consent to the marriage.
d. ***To be ascertained directly by the civil status officer***. The civil status officer will not declare the marriage concluded until it is established that the

[8] E., Florian. *Dreptul familiei (Family Law)* 2nd edition, C. H. Beck Publishing House, Bucharest, 2008, p. 23.
[9] For details see: T., Bodoa c . All Beck Publishing House, Bucharest, 2005, pp. 59-70; A., Bacaci. V., C., Dumitrache. C., C., Hageanu. *Dreptul familiei (Family Law), 6th edition, C. H. Beck Publishing House, Bucharest, 2009, pp. 20-22; E., Florian. Dreptul familiei (Family Law)*, 2nd edition, C. H. Beck Publishing House, Bucharest, 2008, pp. 23-27; G., C., Fren iu. B. D. Moloman. *Elemente de dreptul familiei i de procedur civil (Elements of family law and civil procedure)* Hamangiu Publishing House, Bucharest, 2008, pp. 53-55; I., Apetrei. Raluca –Oana, Andone. *Dreptul familiei (Family Law)*. Lecture support, Casa de Editura Venus, Ia i, 2005, p. 13-14; I., P., Filipecu . A., I., Filipescu. *Tratat de dreptul familiei (Family Law Treaty)*, 7th edition, All Beck Publishing House, Bucharest, 2002, p.315 .

future spouses freely expressed their consent before him/her or in the place designated by the special law.

According to this doctrine, it is established that the cases where it is considered that consent to marriage is missing are the following:

- one of the spouses or both spouses respond negatively or refuse to answer the question of the delegate of civil status and yet he/she declares the marriage concluded, in which case the marriage is absolutely null and void;
- one of the spouses is mentally incapacitated or ill, in which case the marriage is absolutely null;
- one of the spouses is deprived temporarily of mental faculties (eg: owing to hypnosis, or total drunkenness), in which case, by law, the marriage is absolutely null, but according to the jurisprudence, the marriage can relatively null, so that it may be voidable by the one at issue within 6 months through an action for annulment;
- the situation of fictional marriage where one of the spouses or both spouses pursued at the conclusion of marriage a purpose other than the one to found a family and to obey the legal status of marriage (for example: the marriage was concluded in order to obtain a parish residency or to obtain citizenship), in which case the marriage is absolutely null.

4. **Communication of the health status** is provided by Article 278 of the Civil Code.

When they contemplate marriage the spouses are obliged to declare that they have notified each other of their health. The proof of meeting this condition shall be provided by submitting the prenuptial medical certificates, when submitting the marriage statement and by inserting in the contents of thisdeclarations that the spouses have notified each other of the status of their health. The prenuptial medical certificates are valid 14 days from the date of issue and shall contain the express statement that the person is married or not. Medical examinations (serological, lung and neuro-psychic) are obligatory and confidential (the doctor does not include an explanation of the reasons why marriage could not be concluded).

The reciprocal communication of the health status is performed by submission as an annex to the marriage notice, including the words "we declare that we are aware of our health condition in view of marriage", and of any medical matters, including the outcome of medical examinations that the spouses must make in order to conclude the marriage.

The law does not prohibit in principle the marriage of ill people, provided a mutual notification by future spouses about their health is made. Exceptionally, the law does not allow the marriage of debilitated or mentally ill persons and of persons with transmissible venereal diseases.

The sanctions imposed for non-compliance with this condition are:

- absolute nullity if one of the future spouses suffers from a disease for which marriage is prohibited, regardless if the other spouse knew this or not;
- relative nullity if the future spouse suffers from a serious illness, other than that for which marriage is prohibited and this fact was hidden from the other spouse (fraud by reluctance)
- the marriage remains valid if, at its conclusion, one of the spouse suffers from a minor and curable illness;
- if the disease was acquired during marriage, the other may require its dissolution only through divorce.

Communication of the health status is regulated by the Civil Code as a formal condition.

3. Lack of impediments at the conclusion of marriage

1. Introduction to the absence of impediments at the conclusion of marriage

The impediments to the conclusion of marriage are those circumstances expressly provided by law, the existence of which prevents the conclusion of marriage. These are negative conditions, and only in their absence will the civil status officer to conclude the marriage. Impediments are invoked against future spouses either by those who oppose the marriage or *ex officio* by the civil status delegate.

Research literature classifies the impediments to the conclusion of marriage based on the following criteria:

1. *Depending on the penalty appropriate to a marriage ignoring impediments* we have:

The nullifying impediments are those which while present at the conclusion of marriage result in absolute nullity namely: the existence of an un-dissolved previous marriage; natural kinship in a degree prohibited by law; kinship stemming from adoption; insanity and mental debility or temporary lack of mental faculties;

prohibitive impediments are those that do not entail the nullity of marriage, but only administrative penalties for the official who concluded the marriage despite the legal regulations. These are the prohibitive impediments: adoption; marriage between the adopter's children and the adopted or their children, marriage between children adopted by the same person and the relationship stemming from guardianship.

2. *Depending on the persons between whom there are impediments* we have:

absolute impediments that prevent the conclusion of a marriage of a person with any other person, such as: an already married status, mental incapacity or debility or temporary absence of mental faculties;

relative impediments are those that forbid the marriage of a person only with a specific category of other people, such as: natural kinship, adoption and guardianship.

3. *Depending on the social relations from which some impediments spring*, they are classified into:

biological impediments: natural family relationship prevents the conclusion of marriage due to moral and biological considerations;

moral impediments: guardianship and adoption prevent the conclusion of marriage due to moral considerations;

psychological impediments: mental incapacity or debility, due to biological, psychological and moral considerations.

It should be noted that this latter classification is not absolute and that some conditions may be included in several categories.

1. Lack of impediments at the conclusion of marriage provided in the Civil Code

Article 273 of the Civil Code states: "The conclusion of a new marriage by a person who is married is prohibited."

Article 274 of the Civil Code states: "The conclusion of marriage between relatives in direct line and between those in a collateral line until the fourth degree inclusively is forbidden. (Paragraph 1) For good reasons, marriage between fourth degree relatives in collateral line may be authorized by the guardianship court in the jurisdiction in which the one requiring the permission resides. The court will be able to rule on the basis of a special medical opinion given in this regard. (paragraph 2) The provisions of paragraphs (1) and (2) shall apply in the case of kinship by adoption (paragraph 3). "

Article 275 of the Civil Code states: "Marriage between the tutor and minors who are under his/her tutelage is prohibited."

Article 276 of the Civil Code states: "It is forbidden for the mentally alienated or mentally disabled people to get married"

Article 277 of the Civil Code states: "Marriage between same-sex people (paragraph 1) is prohibited. Same-sex marriages concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in Romania (paragraph 2). Civil partnerships between persons of the opposite sex or of same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in Romania (paragraph 3). The legal provisions on the free movement of citizens of member states of the European Union and European Economic Area remain applicable" (paragraph 4).

2. Presentation of the lack of impediments at the conclusion of marriage

The impediments to marriage are:

1. **The existence of an un-dissolved previous marriage (bigamy);**
2. **Prohibition of marriage between relatives;**
3. **Prohibition of marriage between relatives by adoption;**
4. **Prohibition of marriage between a guardian and the relevant minor;**
5. **Prohibition of marriage of mentally disabled people;**
6. **Prohibition of marriage of persons temporarily deprived of mental faculties;**
7. **Prohibition of marriage between same sex people;**
8. **Prohibition of civil partnerships between persons of the opposite sex or of the same sex.**

1. The existence of a previous un-dissolved marriage (bigamy) is an impediment covered by Article 273 of the Civil Code.

If a person is married he/she cannot conclude a new marriage because it violates the principle of monogamy. Violation of this principle draws two penalties: a civil sanction, absolute nullity of the second marriage, and a criminal penalty for the offence of bigamy.

Bigamy is not committed in the following situations:

If a person already married has remarried, and after that marriage is contracted the first marriage is dissolved, bigamy is not committed because absolute nullity causes retroactive effects; examples

- the spouse of a spouse declared dead by the court remarries and later the one pronounced dead reappears, cancelling the declaratory judgment of death. The first marriage is considered dissolved on the date of conclusion of the new marriage the second marriage remaining valid, provided that the spouses of the second marriage are bona fide, neither knew that the one declared dead was alive;
- if the spouse remarries between the date of the declaration of the death of the other spouse and the date the declaratory judgment of death remains irrevocable, the second marriage is valid.

Dissolution of marriage by divorce does not remove bigamy until the judgment for the dissolution of marriage is final and irrevocable. If one of the spouses gets married before the judgment of the dissolution of marriage remains final and irrevocable the second marriage is sanctioned by absolute nullity.

Violation of this impediment has the effect of absolute nullity of the second marriage.

The evidence of the lack of this impediment is provided by the future spouses mentioning in the marriage statement that this impediment does not exist and by presenting, if it is the case, a document showing that the previous marriage of one of the spouses was annulled or dissolved.

The bigamist spouse is presumed to be in bad faith when his/her non-bigamist spouse is deemed to be in good faith. The burden of proof lies with the bigamist spouse.

2. Prohibition of marriage between relatives. It is an impediment covered by Article 274 paragraphs (1) and (2) of the Civil Code.

Marriage between close relatives is prohibited. This impediment is based on the following arguments:

- *of a biological and medical nature* because unions between close relatives do not ensure healthy descendants;
- *of a moral nature*, because unions between relatives would have a negative impact on family life.

The prohibition of marriage between relatives affect kinship 'in straight line' (direct ascendants and descendants) regardless of kinship degree (eg: father and daughter, mother and son, grandfather and granddaughter, grandmother and grandson) and collateral kinship up to the fourth degree (for example: brother and sister, uncle and niece, aunt and nephew, cousin with cousin) based on the fact that more people have a common ancestor, but only up to the fourth degree, inclusively, namely cousins, without distinction as to whether kinship results from marriage (the same marriage or of different marriages) or outside marriage.

Regarding relatives through wedlock, the prohibitive effect is unmistakably established by law. Kinship out of wedlock is not acknowledged legally (kinship of blood as state of affairs exists, whether or not formally enshrined, for example by voluntary recognition of affiliation) but this constitutes an impediment to marriage in the same way, provided that the existence of kinship in a forbidden degree is proved.

Adoption with full effects ends the legal effects of natural kinship, but not the blood relation to the family of origin, the natural kinship remains relevant as impediment to marriage.[10]

As an exception, according to the provisions of Article 274 paragraph (2) of the Civil Code for justified reasons (for example the pregnancy of the woman) marriage between relatives in the fourth degree may be authorized by the guardianship court in the jurisdiction of which resides the one who requires permission. The court will be able to rule on the basis of a special medical opinion given in this regard.

3. Prohibition of marriage between relatives by adoption is an impediment covered by paragraph (3) of Article 274 of the Civil Code.

Under the provisions of both laws marriage is prohibited between: adopter and the adoptee; adopter's ascendants and adopted; adopter and adoptee's descendants; adopter's ascendants and adoptee's descendants; the children of the adopter and the adopted children; the adopter's children and the adoptee's children and between those adopted by the same person.

As an exception, according to the provisions of Article 274 paragraph (3) of the Civil Code for justified reasons (for example, pregnancy of the woman) marriage between the children of the one who adopts on one hand, and the adopted or his/her children; and between those adopted by the same person for good reasons (eg. pregnancy of the woman) may be authorized by the guardianship court in the jurisdiction of which the one requiring permission resides. The court will be able rule on the basis of a special medical opinion given in this regard.

4. Prohibition of marriage between a guardian and the relevant minor is an impediment governed by Article 8 of the Family Code and Article 275 of the Civil Code.

The legislature intended to stop marriages between a guardian and the minor under his/her tutelage because the prospect of such marriages would harm the minor's morality (because the guardian has to take care of the minor in the same way as a parent) or could even cause material prejudice.[11]

The guardianship ceases as of right at the age of 18 by the person under guardianship.

5. Prohibition of marriage of the mentally disabled people is an impediment covered by Article 276 of the Civil Code.

Mental alienation and debility is an impediment to marriage where it was found by the special procedure of the ban, and if they were not found by such a procedure

[10] E., Florian. *Dreptul familiei (Family Law)*, 2nd edition, C. H. Beck Publishing House, Bucharest, 2008, p. 36.

[11] A., Bacaci. V., C., Dumitrache. C., C., Hageanu. *Dreptul familiei (Family Law)*, 6th edition, C. H. Beck Publishing House, Bucharest, 2009, p. 30.

because the law does not distinguish.[12]

Mental alienation and debility eliminates discernment or in the absence of discernment consent is not possible, and thus consent is not available to marriage. Alongside the legal argument, there is one of general-social interest, that of ensuring and maintaining the health of a population by preventing certain unhealthy lineages, and it explains why the mentally alienated and mentally deficient, regardless of whether they are or are not under judicial interdiction, cannot conclude a marriage validly even in periods of temporary lucidity.[13]

The sanction for the conclusion of marriage by the mentally alienated or mentally deficient is absolute nullity.

If the disease has occurred after marriage, this is a ground for divorce.

6. Prohibition of marriage to people temporarily deprived of mental faculties was in the third sentence of Article 9 of the Family Code which is now repealed.

The temporary lack of mental faculties are a temporary legal obstacle for the conclusion of marriage, namely this prohibition is active only in the range (ranges) of time when the person has no judgment of his/her actions owing to causes such as illness (usually psychological, excluding mental alienation and debility) , drunkenness, hypnosis, etc.[14]

Contracting marriage is possible in periods of remission because consent is presumed to be valid.

The penalty which occurs in case of the conclusion of marriage by a person temporarily deprived of discernment in this way is absolute nullity according to law and relative nullity according to the jurisprudence and doctrine.

If the provision of Article 9 in the final sentence of the Family Code must be understood in conjunction with the free, uncorrupted character of the consent of each of the spouses, therefore, the marriage concluded in a moment of lucidity is valid in terms of the existence of consent, but it may be cancelled by fraud against the other spouse, to whom the obligation of information on the health of the future spouse was not fulfilled.[15]

It should be noted that the provisions of the new Civil Code no longer provide this prohibition at the time when the marriage is contracted.

However the better view is that it is necessary to introduce into the new Civil Code the provisions prohibiting the marriage of persons who are temporarily without discernment.

7. Prohibition of marriage between same sex people is an impediment covered by Article 277 paragraphs (1) and (2) of the Civil Code. If the two future spouses are of the same sex their marriage will not be contracted, being null and void.

It is considered that the marginal title 'Prohibition or equivalence of forms of cohabitation with marriage' of Article 277 of the Civil Code is thus wrong.

In terms of the Romanian language dictionary, *prohibition* means "the action to prevent from doing something" and *equivalence* means "having the same value to something else". So, the two concepts are not the same: thus we can place the disjunctive coordinating conjunction or between them.

Neither the concept of equivalence alone can be used as a marginal designation because in Romania there is no possibility of recognizing civil partnerships between persons of the same sex or of different sex concluded abroad, either by Romanian citizens or by foreign citizens.

The amendment proposed is the modification of the marginal names as *'Prohibition of civil partnerships between persons of the opposite sex or of the same sex."*

The provisions of paragraph 1 of Article 277 of the Civil Code prohibit the marriage between persons of the same sex in Romania.

The provisions of paragraph (2) Article 277 of the Civil Code prohibit the recognition in Romania of same-sex marriages concluded abroad either by Romanian citizens or by foreign citizens.

The opinion of the Romanian legislator is traditionalist and is based on the truths of Christianity and on the definition of marriage given by the Roman jurist Modestinus.

We believe that the designation of "marriage between same-sex people" is incorrect, as most countries that recognize the union of same sex people do not consider it marriage (which is mostly notion reserved for the relationship between people of opposite sex) but call it a civil partnership.[16]

As such we propose the repeal of paragraph (1) and paragraph (2) of Article 277 of the Civil Code.

8. Prohibition of civil partnerships between persons of the opposite sex or of the same sex

This is an impediment covered by Article 277 paragraph (3) of the Civil Code.

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[12] I., P., Filipecu. *Tratat de dreptul familiei (Family Law Treaty)*, All Publishing House, Bucharest, 1996, p. 26.
[13] E., Florian. *Dreptul familiei (Family Law)*, 2nd edition, C. H. Beck Publishing House, Bucharest, 2008, p. 39.
[14] E., Florian. *Dreptul familiei, (Family Law), 2nd edition*, C. H. Beck Publishing House, Bucharest, 2008, p. 39.
[15] E., Florian. *Dreptul familiei (Family Law)*, 2nd edition, C. H. Beck Publshing House, Bucharest, 2008, p. 40.
[16] No longer the case in England and Wales, since the enactment of the Marriage (Same Sex Couples) Act 2013. Editor.

Of the provisions of Article 277 paragraph (3) of the Civil Code in Romania the following are not recognized:

- civil partnerships between foreigners of the opposite sex or of same sex concluded abroad or contracted abroad;
- civil partnerships between Romanian citizens of the opposite sex or of same sex concluded abroad or contracted abroad;
- civil partnerships between a Romanian citizen and a foreigner of the opposite sex or of same sex concluded or contracted abroad.

However in much academic opinion we do not agree with the prohibition of civil partnerships between persons of the opposite sex or of the same sex.

Even the Romans recognized cohabitation as a lower form of marriage between people of the opposite sex.[17]

As for civil partnership between same sex people, the Romanian authorities' refusal to recognize it might create to the same authors the same difficulties in applying the Community rules aimed at the establishment of a single European judicial area.[18]

In Europe at the end of the twentieth century and the beginning of the twenty first century, there has been a significant movement in a number of countries in favour of recognition of civil partnerships between people of the same sex. Thus, the first European country to legalize marriage between same sex people was the Netherlands, followed in 1989 by Denmark. Also, France, Belgium, Germany, Britain and Spain allow the recognition of civil partnerships between persons of the same sex. Sweden has a Registration of Partnership Act.

According to Article 1 of the British Civil Partnership Act "The civil partnership means the relationship between two people of the same sex which meets one of the following conditions:[19]

a. relationship that is formed by registering them as partners to one another or
b. are treated as such by virtue of registration of such partnership abroad since."

Paragraph (4) of Article 277 of the Civil Code refers to the free movement of citizens of member states of the European Union and European Economic Area in Romania and not to the absence of impediments to marriage. As such, this paragraph is pointless in this Article 277 of the Civil Code.

2. The evidence of absence of impediments at the time of contracting the marriage

Future spouses have to specify in the marriage statement that there is no hindrance for the conclusion of marriage. Third persons or the civil status officer may require proof of the existence of such circumstances. If after the checks that the civil status officer is obliged to make establishes the existence of an impediment for the celebration of a marriage, the request to contract that marriage shall be rejected.

Conclusions

The article was devoted to the law applicable to the substantive conditions required for the conclusion of marriage under the provisions of the Romanian Civil Code.

Given that the provisions of Article 2586 paragraph (1) of the Civil Code stipulate: "The substantive conditions required for the conclusion of marriage are determined by the national law of each of the future spouse at the time of the marriage ceremony" the law applicable to the substantive conditions for the conclusion of marriage where one of the spouses is a Romanian citizen were studied.

Given also the fact that paragraph (2) of Article 2586 of the Civil Code refers to the situation where there is an impediment to marriage which, according to Romanian law is incompatible with the freedom to enter into marriage and that the impediment will be removed as inapplicable only if one of the individuals is a Romanian citizen and the marriage is concluded in Romania, the impediments to marriage from the Romanian law perspective were studied.

Based on the study of legislation and research literature, reform must proposed in Romanian law where it is demonstrably necessary.

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[17] M., V., Jakot□ . *Drept roman (Roman Law)*, Editura Funda□ iei „Chemarea", Ia□ i, 1993, pp. 247-249.

[18] See the Stockholm Programme on cooperation in civil matters as presented in the EU Commission Communication COM no. (2009) 262 from June 1, 2009; N., C., Ani□ ei. .

[19] Nigel, V., Lowe. Gillian, Douglas. *Bromley's Family Law*, 10th edtion, Oxford University Press, p. 41.

International Famiy Law, Policy and Practice

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Article 8 of the European Convention for the Protection of Human Rights1950 (European Convention)

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Children Act 1989, Sch 1
Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)
Art 8 of the European Convention

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