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## Presuming the status quo? The impact of the statutory presumption of parental involvement

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### ABSTRACT


The courts' treatment of domestic abuse within private law child arrangements disputes has attracted significant concern for many years, most recently culminating in the call for major reform by the Ministry of Justice's expert review into the courts' practice. The Ministry of Justice has since committed to a follow-up review into the operation of the statutory presumption of parental involvement (Children Act 1989, section 1(2A)). This paper provides timely insight into the impact of this presumption in cases involving domestic abuse, presenting the findings from the first empirical study to explore its impact on the lower courts. Forty-one semi-structured interviews were conducted with judges, barristers, solicitors, Cafcass practitioners and representatives from domestic abuse organisations. It also explores perceptions of whether the statutory presumption ought to be reversed to introduce a presumption against contact in domestic abuse cases. It is argued that whilst the statutory presumption does not appear to be changing the courts' practice, its harm lies in the reinforcement of a dominant narrative that children 'need' contact. Whilst a presumption against contact might not hold the answer to changing this narrative, there remains an urgent need to reappraise the approach taken to the resolution of cases involving domestic abuse.

### KEYWORDS

Child arrangements orders; domestic abuse; presumption of parental involvement; contact; welfare

### Introduction

Family law has always had an uneasy relationship with presumptions, not least because they go against the grain of the established knowledge that each child is different, and that each case needs to be determined on its own merits. Presumptions have particular limitations in contested family proceedings, in which the experiences and needs of the children involved are likely to be more complex than those of children within the population more broadly (Herring and Powell 2013). In part this accounted for the resistance to the introduction of the statutory presumption of parental involvement into the Children Act 1989 through the Children and Families Act 2014. Despite facing significant opposition, this presumption entered the statute book on 22 October 2014. Since then, the courts hearing child arrangements disputes have been directed by statute to 'presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare' (Children Act 1989, s 1(2A)).

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Over the past six years, there has been mounting concern that the statutory presumption is heightening the risk of unsafe contact arrangements being made in cases involving domestic abuse.<sup>1</sup> Concerns about the treatment of domestic abuse allegations within private law proceedings in general (for example Hunter *et al.* 2018), and the impact of the statutory presumption in particular, recently led to the Ministry of Justice commissioning an expert panel ('the expert panel') to review assessments of the risk of harm to children and parents in private law children cases (Ministry of Justice 2020b). Following a public consultation, this review concluded in June 2020 and, on the recommendation of the expert panel, the Ministry of Justice has committed to a review of the presumption, under the leadership of the Family Justice Board (Ministry of Justice 2020a).<sup>2</sup> At the time of writing, the Advisory Board for the review has been assembled, and the Ministry of Justice is conducting a competitive tender process to identify the most appropriate individuals to conduct the evidence review (Gov.uk. 2020).

Analysis has been conducted of the impact of the statutory presumption using the reported case law (Kaganas 2018). The gap in the evidence base resides in how the lower courts are responding to the introduction of the presumption in practice. This paper responds to this gap by presenting the findings from the first empirical study ('the study') to explore the impact of the statutory presumption on the practice of the lower courts. Drawing on the findings from 41 interviews conducted with judges, barristers, solicitors, Cafcass practitioners and representatives from domestic abuse organisations, this paper provides empirical insight into two key questions: first, whether the statutory presumption is changing the practice of the lower courts; and second, whether the statutory presumption should be reversed to become a presumption against contact in domestic abuse cases. In doing so, the study contributes to broader debates about statutory presumptions, both in family law and beyond, and in particular their effectiveness in safeguarding the welfare of children. It also speaks to the influence on policy of the popular perception that child arrangements disputes are stacked against fathers, despite this perception having no empirical foundation in the available evidence base (Newnham and Harding 2016).

To contextualise the findings, the paper first provides an outline of the statutory presumption and charts the path to its introduction. The findings from the reported case law on its impact are then summarised to provide a point of comparison with the findings from the study. The study's findings on both the impact of the presumption on practice and perceptions of whether the presumption should be reversed are then explored. It is argued that whilst the statutory presumption does not appear to be having any major impact, its harm lies in the reinforcement of the dominant narrative that children 'need' contact. Whilst a presumption against contact might not be the most appropriate means to change this dominant narrative, there is, nevertheless, a pressing need to re-evaluate the approach taken by the courts to the resolution of contact disputes involving domestic abuse and the statutory presumption, in its current form, represents a barrier to progress moving forward.

## Methodology

Forty-one semi-structured interviews were conducted, comprising 10 interviews with judges (three magistrates, five district judges and two circuit judges), 10 interviews with solicitors, 10 interviews with Cafcass practitioners, eight interviews with barristers and

three interviews with representatives from domestic abuse organisations.<sup>3</sup> The research took place within one county in England between February 2016 and April 2017. The decision was taken to confine the research to one county to reduce the risk of geographical variations in interviewees' experiences, and thereby to increase the comparability of interviewees' responses.

Permission was obtained to conduct the interviews with the judges and Cafcass practitioners, and every judge and Cafcass practitioner within the research county was invited to participate. The barristers and solicitors were recruited through a call to participate, sent to every barrister and solicitor listed as practising in private family law within four practice directories covering 10 locations within the research county.<sup>4</sup> A form of stratified sampling was used to include interviewees playing different roles in the family justice system and to encompass a range of experiences.<sup>5</sup> Across all practitioner groups, there were no refusals, with every practitioner who responded being interviewed. As a result of the self-selecting nature of the sample and its size, the sample was intended to be indicative rather than representative.

The non-judicial interviewees were asked the same questions on the impact of the statutory presumption and whether there ought to be a presumption against contact. To avoid asking judicial interviewees to comment on questions of policy, they were not asked whether there should be a presumption against contact. Since the interviews were semi-structured, follow-up questions were asked of some interviewees, tailored to the specific responses given. The interviews were audio-recorded, transcribed verbatim and grounded/inductive thematic analysis was conducted using NVivo. In order to protect the interviewees, all interviewees were anonymised, as was the research county.

### **The statutory presumption – an outline**

Following the enactment of section 11 of the Children and Families Act 2014, section 1(2A) of the Children Act 1989 houses the statutory presumption of parental involvement, which directs that 'A court ... is ... to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare'. Section 1(2A) raises two interconnected questions. Is this a 'presumption' in a traditional legal sense? And is the statutory presumption applicable to the cases involving domestic abuse? Both are significant since they raise questions about the compatibility of the presumption with the welfare principle. To answer both, it is necessary to unpack how section 1(2A) is intended to operate.

Section 1(6) defines 'parent' for the purposes of section 1(2A) as one who 'can be involved in the child's life in a way that does not put the child at risk of suffering harm', which will be the case unless there is 'some evidence' that the parent's involvement in the child's life 'would put the child at risk of suffering harm whatever the form of the involvement'. If there is no such evidence, then the statutory presumption should be applied, but the court can decide on the facts to rebut the presumption on the basis that the involvement of the parent in the child's life will not further the child's welfare. Section 1(2B) clarifies that 'involvement' does not mandate any particular division of a child's time and can be direct or indirect. This means that in order for the presumption not to apply, evidence must be produced to demonstrate that any form of contact – whether direct or indirect – would expose the child to a risk of suffering harm. Under section 1(6),

therefore, in domestic abuse cases the presumption will only not apply if there is evidence that even indirect contact would expose the child to a risk of suffering harm. For the presumption to be rebutted, it is necessary for the court to reach the conclusion that any form of involvement, whether direct or indirect, would not further the welfare of the child. In both scenarios, therefore, the onus falls on the parent opposing the contact, or on Cafcass, to make the case either that the presumption should not apply or that it should be rebutted.

The introduction of the statutory presumption does not change the fact that the other welfare factors within section 1(3) of the Children Act 1989 continue to apply, and the welfare of the child remains the courts' paramount consideration (section 1(1)). It has been argued, as a result, that interpreting section 1(2A) as a strict presumption which is 'conclusive until disproved by evidence to the contrary' (Kaganas 2018, p. 557) introduces incompatibility with the paramountcy of the welfare principle (Bainham and Gilmore 2015, Kaganas 2018). The Explanatory Notes accompanying the Children and Families Act 2014 appear not, however, to present the presumption of parental involvement as a strict legal presumption but rather as one of the factors for the court to 'weigh in the balance ... along with the other considerations in section 1 of the Children Act 1989, subject to the overriding requirement that the child's welfare remains the court's paramount consideration' (at 109) (see further Kaganas 2018).

In summary, the court is expected to work through the decision-making process outlined above, but retains discretion in relation to the weight to be given to the presumption in each case. It is not automatically the case, therefore, that the statutory presumption is inapplicable to cases in which domestic abuse has been found, proven or accepted. Practice Direction 12J ('PD12J') directs the court to 'consider carefully whether the statutory presumption applies' and, in doing so, to 'hav[e] particular regard to any allegation or admission of harm by domestic abuse to the child or parent or any evidence indicating such harm or risk of harm'. Given that 'involvement' can be direct or indirect, there will be few cases in theory in which the presumption will be deemed not to apply, since even if direct contact is considered to expose a child to a risk of suffering harm, indirect contact, such as the sending of birthday cards, is unlikely to be regarded as carrying this risk, provided this can be appropriately managed.

### **The path to the introduction of the statutory presumption**

The introduction of the statutory presumption of parental involvement speaks to one of the core tensions within family law. This is the strong public perception that has existed for many years that the courts fail to promote the involvement of fathers in the lives of their children post-separation and the lack of empirical evidence to suggest that this bias actually exists in practice (Harding and Newnham 2015). Debates on shared parenting have become intensely politically charged, not least as a result of the campaigns by the fathers' rights movement (Rhoades 2002, Rhoades and Boyd 2004, Trinder 2014, Bainham and Gilmore 2015). 'Shared parenting' is often used interchangeably with 'shared care', 'shared residence' and 'shared parenting time', but it lacks a uniform definition. Putting this lack of uniformity of definition to one side, the core argument of proponents of shared parenting has been that the designation of one parent, usually the mother, as the primary carer

minimises the involvement of the other, usually the father, in the child's life (Baker and Townsend 1996, Family Justice Review 2011a, Trinder 2014, Bainham and Gilmore 2015). Demands for reform have ranged from the introduction of a presumption of equal division of the child's time post-separation to a more pared-down presumption of a meaningful ongoing relationship (Bainham and Gilmore 2015). Reform to bring about any form of 'shared parenting' has been rejected numerous times (for example Law Commission 1986, 1988, Advisory Board on Family Law 2002, HM Government 2004, Family Law Act 1996, section 11(4)(c) repealed by the Children and Families Act 2014, section 18).

The 2010–2015 Coalition Government responded to the calls for shared parenting in 2012, launching its consultation on 'co-operative parenting' in June, hot on the heels of the publication of its response to the Family Justice Review's final report in February (Department for Education and Ministry of Justice 2012). The timing is significant because the final conclusion of the Family Justice Review was that there should be no statutory presumption of parental involvement (Family Justice Review 2011b). The Coalition Government nevertheless proceeded with its consultation on how to amend the Children Act 1989 to 'reinforce the principle that both parents should continue to play a role in their child's care post-separation', where it is 'safe and appropriate' (Department for Education and Ministry of Justice 2012, para 1.5).

This intention to 'reinforce' the role played by both parents in children's upbringing was underpinned by three core objectives. The first was to remedy the public perception of bias against mothers or fathers, but in practice fathers (Family Law Week no date), within the family justice system (Department for Education and Ministry of Justice 2012). The courts were seen to be failing to give sufficient weight to the importance of both parents being involved in their children's lives post-separation (Department for Education and Ministry of Justice 2012). The second was to re-emphasise at a 'societal level' that both parents should bear joint responsibility for the upbringing of their children (Department for Education and Ministry of Justice 2012, para 3.2). The hope expressed was that these two objectives would, in turn, fulfil the third objective of encouraging parents to reach agreements between themselves over the arrangements for their children post-separation, without recourse to the court (Department for Education and Ministry of Justice 2012). The Government was clear from the outset that it was not intending to legislate to introduce any presumption that a child would spend equal time with both parents (Department for Education and Ministry of Justice 2012). This was never, therefore, a reform designed to engineer any radical change in the courts' approach (Secretary of State for Education 2013) and was likely, as a result, to disappoint those arguing for a harder-line version of shared parenting. Indeed, it was acknowledged by the Government at the time that the courts were already working on the basis that both parents should be involved in the child's life post-separation, except where this would not be safe or in line with the child's welfare (Secretary of State for Education 2013). There is little to refute the argument of Kaganas, therefore, that sitting unashamedly at the heart of this reform was the symbolic use of the law to send 'messages' (2013, p. 293).

The proposed reform was opposed on numerous fronts, including that a *de facto* presumption in favour of contact already existed in practice (for example O'Grady 2013, Kaganas 2018), and that the statutory presumption would not enjoy success in remedying

perceptions of bias (for example Justice Committee 2012) or diverting parents away from the court system (for example Kaganas 2013, O’Grady 2013). Most significantly in relation to cases involving domestic abuse, concerns were raised that the introduction of the statutory presumption would have the unintended effect of increasing the likelihood of unsafe contact arrangements being made by the court. Much of the concern here emanated from a fear that the statutory presumption would replicate the unintended consequences of the attempts in Australia to use legislative reform to promote the role of the non-resident parent in the post-separation family (Fehlberg 2012, Hunter 2014). Indeed, this concern shaped the Family Justice Review’s decision to withdraw its recommendation to introduce a legislative statement on parental involvement (2011b). A related concern was that the risk of unsafe contact arrangements being made by parties outside the court system would increase, with the presumption being misinterpreted and resident parents being pressured by non-resident parents into arrangements that were neither safe nor beneficial to children (Kaganas 2013, O’Grady 2013). It is not known how parents are interpreting the statutory presumption and what agreements are being reached on contact outside the court arena. It was not the intention of the study to fill this gap in the evidence base. What the study reveals is how the lower courts have been interpreting and implementing the statutory presumption in practice. These findings are now discussed, after first briefly summarising the insights from the reported case law.

### The impact of the statutory presumption

The most recent review of the reported case law was conducted by Kaganas (2018). This review found that the reform put on the statute book ‘what was already axiomatic’, namely that contact should be promoted wherever possible, and the courts were mostly ‘continuing with business as usual’ as a result (p. 561 and 569). The courts were ‘ignoring or paying lip service only’ to the statutory presumption (p. 563). The reported case law involving domestic abuse also suggests that the statutory presumption simply put on the statute book the approach long adopted in practice. In *Re J (Children) (Contact Orders: Procedure)*, for example, Lord Justice McFarlane said that the statutory presumption ‘enacts a basic tenet of child law’.<sup>6</sup> It has been suggested, however, that the statutory presumption might be having a more significant impact on the practice of the lower courts than the reported case law indicates (Kaganas 2018). In raising this concern, reference was made to the judgment in *F v L* in which Russell J lamented the<sup>7</sup>

[11] ... unsophisticated, over-simplistic approach, all too often taken by the Family Court when making child arrangements orders, to attempt to adhere to the amendments to the CA brought in by the Children and Families Act 2014 by making an order for shared care which is an even split of time and to compel parents to co-operate.

Kaganas’ concern is that if the approach taken by the lower courts reflects what is described above as happening ‘all too often’, the lower courts might be using the statutory presumption to resolve disputes ‘mechanistically without fully considering the safety or welfare implications of their decisions’ (2018, p. 563). To date, the understanding of the lower courts’ navigation of the statutory presumption has been limited to anecdotal evidence. This anecdotal evidence has suggested that the statutory presumption is indeed increasing the risk of unsafe contact arrangements being made in domestic abuse cases.

Concerns about the impact of the presumption have been expressed in different ways. Barnett suggested that the anecdotal evidence indicates that the ‘contact at all costs approach’ has been reinforced by the introduction of the presumption (2017, p. 399). The All-Party Parliamentary Group on Domestic Violence stated that the statutory presumption has ‘led to an increased emphasis in the family courts on the importance of children having contact with both parents’ (2016, p. 7–8). Women’s Aid similarly emphasised the ‘growing concerns amongst some practitioners and academics that the courts are prioritising contact with an abusive parent over the safety of the child and non-abusive parent’ (2016, p. 13). The author’s empirical study took on the task of answering the question of what impact the statutory presumption is having on the practice of the lower courts.

### *Is the statutory presumption changing the practice of the lower courts?*

The preliminary question is whether the lower courts are applying the statutory presumption in cases involving domestic abuse. Interviewees in the study confirmed the applicability of the presumption to these cases. One of the circuit judges, for example, said:

I don’t think it [the presumption] is ousted by the mere finding and in fact . . . Sir Justice Wall [said] exactly that: there can be no automatic assumption that there should be no contact because there’s been a finding. And the . . . Sturge and Glaser thinking perhaps tilted matters the opposite way and that’s why the court felt the need to say we don’t start from that premise because Sturge and Glaser almost did, frankly.

However, interviewees’ responses suggest that the statutory presumption is being applied haphazardly, with some judges and legal practitioners explicitly referencing the presumption and others not. In common with Kaganas’ findings, therefore, it does not appear that the decision-making process intended by statute is being followed to the letter, or at all in many cases. The expert panel similarly concluded that the statutory presumption is ‘implemented inconsistently’ (Ministry of Justice 2020b, p. 88). Some interviewees’ experiences were of the statutory presumption always or frequently being directly referenced (nine interviewees: four Cafcass practitioners, three solicitors, one barrister and one district judge). The experience of others was that it might or might not be formally referenced (seven interviewees: four barristers, two solicitors and one circuit judge). A circuit judge, for example, said:

Well, we mention it now and again and it quite often gets raised by, you know, counsel for the father. One of the things he puts in their skeleton argument, and rightly so. And, you know, who knows for those who are appointed occasionally to hear family work who are deputies and recorders and people who perhaps haven’t done very much in practice, it’s a good reminder. But it would, I would suggest, be in the warp and weft of any family practitioner’s thinking, in any event.

The experience of several other interviewees was that the statutory presumption is not being explicitly referenced at all, or only very exceptionally (13 interviewees: four judges (two magistrates, one district judge and one circuit judge), three solicitors, three Cafcass practitioners, two barristers and one domestic abuse organisation). This is consistent with Barnett’s review of the reported case law from the end of 2013 until October 2016, which



found that the presumption was not referenced in any of the eight cases reviewed (Barnett 2017). It is also consistent with Kaganas' more recent review of 30 child arrangements cases initiated and decided after the statutory presumption came into force, with no reference being made to the statutory presumption in two-thirds of those cases (Kaganas 2018). The picture appears to be, therefore, that the courts are not, on the whole, following the statutory decision-making process on the applicability of the statutory presumption.

Crucially, even when the statutory presumption is referenced, the experience of the vast majority of interviewees in the study was that it was having no impact on their approach, or resolution of cases. This was the experience of every judge interviewed. Even among the judges who said that the statutory presumption is quoted in proceedings, its lack of impact on the courts' approach was emphasised. One of the district judges, for example, said:

Either way, whatever order I am making I will read it [the statutory presumption] out because if I am ordering no contact I've got to demonstrate that I am aware of that and if I am about to order contact I might be saying to the mum "Look, this is the strong presumption that I have to work under. The Court of Appeal have said to me, and the Act says, so this is how it's going to be". So, yes, I would quote it, so you might see it in cases quite often and you might often say "Well, look how often judges are quoting it; it must be important". But I think if it wasn't there it wouldn't make any difference.

A magistrate also confirmed that the statutory presumption is having little impact on the resolution of cases, even when raised by lawyers:

... if you've got a private case that's coming in and they've brought in a lawyer as opposed to be self-representing, then they will come in and then they are the ones who start quoting this and that and then the parents might be thinking "Oh that sounds really good" but it doesn't necessarily change any decision that we might make.

That the statutory presumption is not changing the courts' practice was corroborated by the barristers, who were similarly definite about its lack of impact. Both within and between these professional groups, there were, however, subtly different understandings of why the presumption was having no effect. The Cafcass, solicitor and domestic abuse organisation interviewees had more mixed views on the significance of the statutory presumption and whether it was changing the courts' practice, but the majority confirmed that it was simply maintaining the status quo.<sup>8</sup> The reasons given for the lack of impact of the statutory presumption are revealing of the courts' emphasis on the promotion of contact, with the following explanations given: first, that a specific presumption in favour of contact was already well-established prior to the reform; second, that the courts already promoted contact, albeit not through a specific presumption; and third, that the presumption was never intended to change practice.

### *The statutory presumption is not changing practice – there was already a specific presumption in favour of contact*

Four barristers, one circuit judge, one solicitor, one Cafcass practitioner and one of the domestic abuse organisations said a specific presumption in favour of contact existed in practice long before the presumption of parental involvement entered the statute book. The circuit judge, for example, reported that the statutory presumption has not 'changed anything because we had that presumption anyhow'. One of the barristers described it as

a ‘watered-down presumption’ which has ‘added absolutely nothing’ because ‘there’s always been that presumption’. The Cafcass practitioner also reported that the presumption was not changing the courts’ resolution of cases because the presumption had ‘always been there’. And the solicitor said:

I haven’t really seen any impact in practice. I think that the view, for a long time, has been that there should be contact, regardless. So, unless you are talking about care proceedings, and where there has clearly been neglect, sexual abuse, something like that, the presumption is, children should see both parents.

Another barrister again made the same point:

... that’s always been a presumption. Kids should know their parents, and have a relationship with them, unless it is not in their best interests.

As did another:

I suppose as practitioners, we all for some time now ... I mean that’s now been incorporated into statute. But, quite frankly, that’s the presumption we were all operating on anyway, so it almost didn’t need saying.

And another:

... it’s not a new presumption. It’s newly written down but it’s absolutely the presumption we have always worked on that a child should have a relationship with both of its parents if it is safe to do so. ... we always say, “It is in a child’s interests to have a relationship with both parents if it is safe and appropriate to do so”. And we have always said that, and we will always say it.

One of the domestic abuse organisations similarly agreed that the statutory presumption was not changing the courts’ practice because the courts were already working on the basis of there being a presumption in favour of contact prior to the reform:

I don’t really find that presumption or Practice Direction 12J, I don’t think that’s made any difference to the way the courts operate. I think the presumption was already there and, as usually happens, statute follows the case law ... case law goes in a certain direction and every so often statute gets updated and they just reflect what is already happening in the court. ... I mean it might be enforced ... or it might give judges something to quote when they are making the decision that they would already have made because, in their mind, they are always making decisions which are in the best interests of the child.

### *The statutory presumption is not changing practice – the courts already promoted contact*

Other interviewees also attributed the lack of impact of the statutory presumption to it already being firmly established within judicial thinking that it is better for children to have contact than not. In contrast to the interviewees above, these interviewees agreed that the courts promoted contact but did not state that the courts were working with a specific presumption prior to the reform. Five judges (three district judges and two magistrates), four barristers and one Cafcass practitioner shared this view. These interviewees expressed themselves in slightly different ways. One of the district judges described the ‘starting point’ for the courts as being that ‘a child has two parents’. One of the barristers said the statutory presumption ‘hasn’t made the slightest bit of

difference' because the courts already promoted contact wherever possible, describing the statutory presumption as 'stupid nothingness'. Another district judge said the statutory presumption was having 'no impact whatsoever' on the courts' resolution of cases because:

I think every . . . me and all of my colleagues who have done children work for years have always had that view that it's better to have contact than nothing at all so that, in the Act, has made no difference.

A magistrate again made the same point, emphasising the benefits to the child of contact:

I would say that's always been our approach that bar there being reasons not to have it [contact], that is always the way that you want to go. It's the best for the child. The most healthy so . . . .

As did one of the barristers:

Most of the judges here have been pretty pro-contact in the vast majority of cases that I can think of over the last 10 or 15 years. A lot of them are people that I have been in practice with in the past and they are pretty pro-contact for the reasons that I've spoken of already about the make-up of a child's psychological well-being. . . . So, I have no personal experience of the presumption having made a difference.

And another district judge suggested judges automatically equate making contact happen with the promotion of the welfare of the child:

I don't mention it [the statutory presumption] ever. I don't think I need to because, you know, I mean the welfare of the child is my paramount consideration and, in my view, that dictates having a relationship with both parents unless there is reason why not, so I think that's implicit. All it does is put it in there as the majority of people who come in front of you don't know about the Children Act anyway, you know. Doesn't make any difference to them.

One of the barristers also suggested contact was synonymous with children's best interests in judicial decision-making:

. . . [the judge] might articulate it [the presumption] in their judgment but actually I don't think it makes practical difference in their decision-making; they've just decided what's in the best interests of the child and that's where they are coming from.

A further magistrate and barrister also made this same point, that the statutory presumption had not made any difference to practice, but did so through the language of 'rights'. The magistrate said:

I personally don't think it's made a lot of difference because I've always approached it from that point of view that the child has the right to have both parents in their lives unless it's not safe to do so so, you know, in that sense, I think it's reinforcing what we probably already felt was the right thing anyway. So I don't think it's made a huge difference, no.

And the barrister said:

I can't say that it weighs heavily on anybody. We all know that wherever possible a child has a right and should know the absent parent, and their families.

### *The statutory presumption is not changing practice – parliamentary ‘window dressing’*

Other interviewees attributed the lack of impact of the presumption to its purpose being politically motivated, aimed not at changing the courts’ practice but rather placating those who perceived the courts to give insufficient weight to the importance of both parents in children’s lives post-separation. In common with the findings above, this again underlines how the courts were working on the basis that contact should be promoted wherever possible prior to the reform, even in the domestic abuse cases. One of the district judges described the statutory presumption as ‘parliamentary window dressing’ and one of the circuit judges said:

I think it was a statement of what ought to have been the obvious, which was put in for political reasons because there was a lobby which said there is, you know, not enough emphasis in underlining a child’s right to a relationship with both parents in statutory form. But I think it was there in terms of common law long before it was there in terms of primary legislation.

Another of the district judges, along with a barrister, made a similar point about the symbolic message-sending intention behind the reform but put the emphasis here on the reform being aimed at litigants in person. The district judge said:

It’s [the statutory presumption] for the punters isn’t it? It’s to remind, you know, like many things are now put into the rules, it’s because, of course, there are more litigants in person I suppose so that helps them but no, it’s had no . . . I would like to think I was aware of that, the case law. I don’t need anybody to take me to that provision. It’s there. . . . But, no, it’s made no difference to the way I deal with cases. I would be surprised if many experienced judges thought it had to them.

And the barrister said:

Perhaps it was for people outside of the legal community . . . perhaps it’s for the litigants in person . . . just to reiterate to the public that this is the presumption; this is what we are operating on the basis of.

In line with some of the comments made by the judges and barristers, one of the solicitors also identified the use of the statutory presumption to send messages, stating:

I guess when you get things like that introduced into law it’s because the legislators are worried that we’ve forgotten something that we should be doing in the first place. And that’s how I see it.

In contrast to the concerns discussed earlier based on anecdotal evidence, therefore, the vast majority of interviewees in this study reported that the statutory presumption was having no impact on outcomes. Interviewees had different perceptions of why the presumption has not changed practice, but the clear common experience was that the courts already promoted parental involvement post-separation long before the reform. Whilst the statutory presumption had endorsed a pro-contact approach, interviewees’ experiences suggested that its impact was limited to maintaining the status quo. A minority of interviewees had not had this experience and indicated that the statutory presumption was heightening the risk of unsafe contact arrangements being made.

*The statutory presumption is changing practice – heightening the risk of unsafe contact arrangements being made*

The minority of interviewees who shared the experience that the presumption was changing practice consisted of three Cafcass practitioners, two solicitors, and one of the domestic abuse organisations.<sup>9</sup> The domestic abuse organisation was among the most definite that the statutory presumption had made it more likely that contact would be ordered inappropriately in cases involving domestic abuse:

I think definitely and in terms of really forcing contact through without a clear understanding of what that might mean for the family . . . It's like, "well, you know, they should be able to have a relationship with their father", despite the fact that he is a known, violent criminal.

The experience of one of the solicitors was that the statutory presumption had changed practice 'slightly', making it more likely that contact would be ordered in cases involving domestic abuse, particularly in cases heard by magistrates:

You can't just do a carte blanche saying there is a presumption for contact because people like justices run with that and they won't go against that. . . . [it is stated] in the 2014 Act 'unless the risks outweigh' but no-one hears that little bit.

The other solicitor was more definite that the presumption was changing practice, describing the presumption as turning the 'tide' towards contact being ordered more readily and highlighting the use of the presumption by lawyers:

. . . a tide is turning almost isn't it because there is a presumption so it's not "This will/won't have contact", it's "This child will have contact unless there are very good reasons why not". So, already, if you are acting for a person who is applying for contact, they are one step ahead. Before, I think it was "Well, let's look at everything" but you are starting off and that's the first point I make whenever I do a hearing: "the presumption is contact will take place so let's get contact moving", if I am acting for the person that wants contact.

. . . And if you are not, if you are representing for a mum who is opposing it, you have to say to them "It is an uphill struggle because the presumption is . . . and even if, even if findings are made, it's still very rare that contact is stopped".

Among the three Cafcass practitioners who said that the statutory presumption had increased the likelihood of contact being ordered in cases of domestic abuse, two did not elaborate and the third said the presumption had increased the pressure on the resident parent to prove why contact should not go ahead:

I think it's made it more likely that contact will be ordered if I were to be honest. . . . it puts the burden on the resident parent to kind of prove their case that you are not safe as opposed to the other way around because, you know, the applicant will come in and say "I haven't had contact with my children because she has been obstructive" and then it's now down to the respondent to say "Well, actually, this is why it's not happening and this is my case" whereas I think . . . the onus should be on the perpetrator to evidence what changes they have made right from the get go.

## If the statutory presumption is not changing the practice of the lower courts, why the need for reform?

The recent expert panel examining the family courts' assessment of risk of harm to children and parents in private law cases concluded that a review of the statutory presumption is 'needed urgently in order to address its detrimental effects' (Ministry of Justice 2020b, p. 9). At first sight, it might be questioned why reform is needed, given that the experiences of the majority of interviewees in this study, and the findings from the reported case law, are that the statutory presumption is having no major impact on outcomes. The findings from this study suggest that the answer to this question is fourfold.

First, the vast majority of interviewees made clear that the statutory presumption endorses a pre-existing pro-contact approach. The problem is that this pro-contact approach is not rooted in the empirical evidence base on the relationship between contact and children's well-being. A significant body of literature documents the harms caused to children by domestic abuse, and the associated risks posed by contact (for example Holt 2011, Fortin *et al.* 2012, Morrison 2015, Barnett 2020). The child can be at risk of physical, sexual or psychological/emotional abuse during contact, particularly when the perpetrator is using contact as a means to continue the perpetration of abuse (for example Sturge and Glaser 2000, Morrison 2015, Barnett 2020). This abuse can be fatal (Women's Aid 2016). Post-separation abuse of mothers is also prevalent, and contact is often the vehicle for this abuse (for example Brownridge 2006, Radford and Hester 2006, Harrison 2008, Harne 2011, Morrison 2015, Holt 2017, McLeod 2018, Barnett 2020). Along with posing significant risks to mothers' safety, this increases the likelihood of children continuing to witness domestic abuse post-separation (for example Radford and Hester 2006, Thiara and Gill 2012, Morrison 2015, Thiara and Harrison 2016, Holt 2018, Barnett 2020). The undermining of children's welfare by the negative impact on mothers of domestic abuse has also been recognised (for example Mullender *et al.* 2002, Holt *et al.* 2008, Coy *et al.* 2012, Morrison 2015, Thiara and Harrison 2016, Holt 2017, Thiara and Humphreys 2017, Barnett 2020). Whilst contact can be beneficial in some cases involving domestic abuse (Sturge and Glaser 2000), there is, therefore, no conclusive evidence to suggest that a general pro-contact approach should be adopted (Sturge and Glaser 2000, Gilmore 2006, Holt 2011, Barnett 2014, 2020). The approach most compatible with the evidence base is for the courts to balance carefully the risks and benefits of contact in each individual case, and presumptions do not find a natural home within this approach.

This speaks to the second answer, which is that presumptions are conceptually incompatible with the understanding that each child is different and that the welfare of each child must always be the courts' paramount consideration. Even if the statutory presumption is not intended to operate in a traditional legal sense as a strict presumption, it nevertheless directs the courts to approach the resolution of cases through the lens that contact is beneficial to children, rather than through a more neutral perspective that the risks and benefits must be weighed carefully in each case.

Third, this pro-contact lens encapsulated within the statutory presumption is at best unhelpful, and at worst dangerous, in cases in which domestic abuse is an issue. The findings from the study indicate that a pro-contact stance is applied to cases involving domestic abuse, and the statutory presumption put that pre-existing pro-contact stance

on the statute book. The fact that the presumption is now on the statute book gives rise to an unnecessary and ongoing risk of misinterpretation in the cases that reach the courtroom. As one of the solicitors warned, the existence of the statutory presumption opens the door to its blunt application, with it understood as an inflexible rule that contact must always take place. It is unfortunate, therefore, that greater weight was not given to the Family Justice Council's warning prior to the reform that, '[r]ather than introducing a provision that creates problems and then adding a fix for those problems, it would be far more sensible not to introduce the problem-creating provision in the first place' (Family Justice Review 2011b, p. 141).

Fourth, without reform to the statutory presumption it is difficult to see how the courts' pro-contact approach documented by the interviewees in this study can be re-routed. As the expert panel highlighted, the statutory presumption limits 'the possibility for further, more nuanced development of case law' (Ministry of Justice 2020b, p. 87). In reviewing the options for reform, a presumption against contact presents one route to give greater weight to domestic abuse.

### **A presumption against contact**

Can the concerns about the courts' existing practice be addressed by recalibrating the type of presumption being made, or is this a set of problems that requires a more nuanced solution? Over the years, there has been some support for a presumption against contact (Hester and Radford 1996, Piper and Kaganas 2010, Victims' Commissioner 2018). If introduced, such a presumption could direct the court to presume that there should be no contact with the parent accused of domestic abuse at the interim stage, and/or no contact with the parent found, proven or accepted to be domestically abusive at the final order stage, unless evidence can be adduced to demonstrate that contact would be both safe for all parties and beneficial to the child. Whilst not labelled as a presumption, this is not miles away from the existing approach mandated by PD12J at the interim stage, although any suggestion that a specific presumption against contact exists has been firmly rejected.<sup>10</sup> This is that interim child arrangements orders should not be made in cases in which directions have been given for a fact-finding hearing, or where there are undetermined disputed allegations, unless the court is satisfied that the order is in the interests of the child and would not put the child, or the other parent, in a position of 'unmanageable risk of harm' (para 25). As the findings below demonstrate, however, there was virtually no support for elevating this into a specific presumption against contact at the allegations stage, nor was there such support at the final order stage. Such a presumption would also be subject to the same criticism that can be directed at a presumption in favour of contact, namely that it is conceptually incompatible with the understanding that each child is different and that the welfare of each child is the courts' paramount consideration.

### ***Should there be a presumption against contact at the allegations stage?***

The problem with introducing a presumption against contact at the interim stage is that it gives rise to the risk that a parent who has not, in fact, perpetrated domestic abuse loses contact with their children whilst the court makes its determination of the

facts. There are, however, obvious safety risks to allowing contact to take place before the facts have been determined. It can also be difficult for the non-abusive parent to argue successfully that contact permitted at the interim stage should later cease. The concern is that the parent who has perpetrated domestic abuse could ‘play the game’ long enough during the period of interim contact to then be given longer-term contact as part of the final arrangements for contact, when that parent actually poses a risk of harm to the child and/or contact would not promote the child’s welfare. Interim contact was not the focus of the study, but a number of interviewees commented on the desirability and workability of a presumption against contact in response to allegations of domestic abuse.

There was little support for a presumption against contact at the allegations stage, principally due to concerns about false allegations. Only two interviewees (one Cafcass practitioner and one domestic abuse organisation) wanted to see such a presumption. Both supported the presumption on the basis that the parent alleged to have been abusive should have to make the case for contact proceeding. The domestic abuse organisation rejected the argument that a presumption would invite false allegations:

... we definitely should be putting the onus onto perpetrators and if a woman is saying that she’s been abused then, in my time that I have been working with women who are victims of domestic abuse, I am not yet to meet one who is telling me a complete pack of lies and making it up. I don’t believe that I’ve met one who has told me a pack of lies . . . .

Two further interviewees (both solicitors) expressed some support for a presumption against contact but heavily qualified their responses. One took the view that practice needed to change to give more weight to domestic abuse but had reservations about using a presumption against contact to secure that change, principally as a result of concerns about false allegations:

It’s difficult to say, isn’t it? It’s like with anything – you might think it’s a good idea and it’s well-intentioned but is the foreseeable outcome what you expect it to be? . . . Because, you know, you do see cases where it’s flipped round and obviously it’s absolutely devastating for people’s lives if false allegations are made against them. . . . I don’t know the answer to that [whether there should be a presumption against contact], but I can see why people might be thinking about it. I think things need to change if we are going to deal with domestic abuse and it’s how you do it.

Another solicitor said it was the ‘child’s right to have a relationship with the parent’ but that cases involving allegations of domestic abuse have to be looked at ‘in isolation’. She expressed some support for a presumption against contact at the allegations stage, depending on the severity of the allegations:

And I guess, at the outset, you would look at how serious that was so obviously if you’ve got a case where, you know, mother has turned up at the police station and she is covered in bruises and she has applied for a non-molestation order and got it then probably you would say that the presumption should be no contact until . . . well, until it’s ascertained as to what has happened, what effect this is going to have on the children, was it a one-off incident – I’m not saying that’s right but obviously it’s different to when there is a pattern of behaviour . . . and maybe you need, you know, look at every case differently.

This interviewee again, however, shared the view of other interviewees about the risk of false or exaggerated allegations being made:



... there are, unfortunately, a lot of cases where people either make up allegations or exaggerate that something has happened when actually there has been argie-bargie between the two of them ... doesn't make it right but to say "oh well, you know, he has hit me or he has done this or we've had this incident at handover today" and the presumption is it just stops ... by the time the court application ... number one the father has got to be able to afford to take it to court. He's not going to get legal aid. Two, that takes time. You can have a child who has actually had quite a good relationship with his dad or parents which is going to break down and have to start again: "where's my dad gone? I've been left by my dad". The feelings of ... yes, so I don't think I'm wrong in saying that.

None of the other interviewees who commented on a presumption against contact at the allegations stage supported its introduction, again principally because of concerns about false allegations (four interviewees: three Cafcass practitioners and one solicitor). One of the Cafcass practitioners thought false allegations would be encouraged because they felt that it is harder to disprove allegations than prove them. The experience of another Cafcass practitioner was that false allegations are made in 'many cases' and opposed the introduction of a presumption against contact at the allegations stage as a result. The solicitor voiced concern that such a presumption would give rise to the risk of perceptions that 'there's no smoke without fire', when the allegation could be 'spurious'. A barrister did not directly link their opposition to the presumption to a concern about encouraging false allegations but explained their opposition as follows, '... you can't prove that you didn't do something. It would be completely to reverse the entire principle of English justice so that would be a bad thing! A very bad thing!'

Taken as a whole, therefore, whilst a presumption against contact at the interim stage had some support, most interviewees opposed reform, with concerns about false allegations the driving force behind this opposition. This same concern also existed in the opposition to a presumption against contact in cases of found, proven or accepted domestic abuse. This concern about the prevalence of false allegations is surprising, given that it is out of step with existing evidence. Quantifying the number of false allegations is challenging, but the available evidence suggests that false allegations of abuse are rare (Allen and Brinig 2011, Hunter and Barnett 2013, Barnett 2020).

### ***Should there be a presumption against contact once domestic abuse has been found, proven or accepted?***

Arguments for a presumption against contact in the cases in which domestic abuse is established centre on the perceived need to put the onus on the domestically abusive parent to make the case for contact going ahead. That parent should demonstrate why contact is both safe and beneficial, rather than the parent who has experienced domestic abuse having to show why contact should not take place (Hester and Radford 1996, Piper and Kaganas 2010). Sturge and Glaser's (2000, p. 623) opinion to the court in the seminal case of *Re L (A Child) (Contact: Domestic Violence)*; *Re V (A Child) (Contact: Domestic Violence)*; *Re M (A Child) (Contact: Domestic Violence)*; *Re H (Children) (Contact: Domestic Violence)* ('*Re LVMH*') was that a domestically abusive parent should demonstrate<sup>11</sup>

... why he can offer something of such benefit not only to the child but to the child's situation (i.e. act in a way that is supportive to the child's situation with his or her resident parent and able to be sensitive to and respond appropriately to the child's needs) ...

Sturge and Glaser's view was shared by the small minority of interviewees who supported the introduction of a presumption against contact in established domestic abuse cases. This minority consisted solely of an interviewee from the domestic abuse organisations and Cafcass practitioners (three interviewees: two Cafcass practitioners and one domestic abuse organisation).<sup>12</sup> In contrast, none of the barristers supported a presumption against contact, nor did any of the solicitors, although some expressed greater openness towards it. The Cafcass practitioners who commented were more evenly split but, overall, a small majority also opposed it and one of the three domestic abuse organisations firmly opposed it. Interviewees' perspectives are set out below, starting with the view of the minority that a presumption against contact should be introduced.

### *Support for a presumption against contact – putting greater responsibility on the domestically abusive parent*

Only two interviewees, both Cafcass practitioners, supported an outright presumption against contact. Both shared the view that the domestically abusive parent must take responsibility for the abuse perpetrated. One said:

I like that approach [a presumption against contact]. I ... yes, that's really interesting. ... I am a believer in ... there has to be some acceptance, there has to be some responsibility and there has to be acknowledgement with the child depending on the age. So, I am a great believer in, and I always say I will help a parent put something in writing or have a meeting with the child to basically say "I am sorry".

The other said:

I think that [a presumption against contact] would be a really positive step, really, because I think even in child protection the onus, or the scrutiny, is on the victim. The victim needs to protect her children and actually nothing happens to the perpetrator. No-one even tries to even speak to the perpetrator so absolutely I think a lot of perpetrators that I have come across are very keen to just sort of brush things under the carpet and say "Whatever has happened, happened. I need to see my children" or blame shift. ... I think it should come as standard that if you have got a conviction for a violent offence, you need to, you know, you need to satisfy the court that you are safe. It's not for the other party to prove that you are unsafe.

The only other interviewee to express support for a presumption against contact was one of the domestic abuse organisations. This interviewee, however, felt such a presumption would not gain support in practice and should not be pushed for as a result, despite it representing 'the safest way for children'. That a presumption against contact would not secure support in practice was confirmed by the vast majority of interviewees.

### *Opposition to a presumption against contact – false allegations*

Driving some interviewees' opposition to a presumption against contact in cases of found, proven or accepted domestic abuse was the same concern that arose in relation to a presumption against contact at the allegations stage: that it would lead to a rise in false allegations, even if the presumption only applied to cases of established domestic

abuse. This concern was shared by seven interviewees (four barristers and three solicitors). One of the barristers, for example, said that a presumption against contact would 'lead to even more exploitation', encouraging parents to make false allegations to 'get back at the other parent'. Another barrister raised concern about false allegations stemming from parents being put on an 'antagonistic footing' by a presumption against contact. For the same reason, a further barrister described the presumption as 'disastrous for the child'.

### *Opposition to a presumption against contact – each case needs to be determined on its own merits*

Some interviewees opposed a presumption against contact on the basis that each case needs to be determined on its own merits, with presumptions seen to sit uneasily with this approach (five interviewees: two Cafcass practitioners, two solicitors and one barrister). The barrister described a presumption against contact as 'utterly over-simplistic' and a 'typical academic point of view' because '[i]t's meaningless to have a presumption. Every case is determined on its own back'. A related argument was that domestic abuse is variable, and a parent who has perpetrated domestic abuse does not necessarily pose a risk to the child. One of the Cafcass practitioners, for example, highlighted the capacity of domestically abusive fathers to change:

Well I think every case needs to be looked at on an individual basis . . . it may be that there have been incidents but the father has changed, he has taken on board, he has done a programme, he is remorseful, he regrets his behaviour, he can see the impact it's had on the children and he is in a position to be able to offer them something now and repair that relationship now and be a part of their lives in some way so . . . yes, I think we would need to be careful about presuming there shouldn't be any because currently it is carefully assessed whether there should be some anyway.

And one of the solicitors was of the view that a parent can be domestically abusive but still maintain a positive relationship with the child:

Sometimes domestic abuse is just a volatile relationship and isn't directed specifically towards the child, so you can have a positive relationship with the child because obviously abuse isn't always violent, and you could have a positive relationship with the child, but not necessarily with that particular person. I think, as with anything, it should be judged on the merits of the individual case and judged that way, which is how the judiciary really deal with it . . . .

The logistics of making a presumption against contact work in the light of the fact-specific nature of cases also deterred some interviewees from supporting such a presumption (four interviewees: three barristers and one solicitor). Distinguishing between 'out of character' abuse, which was seen as confined to a relationship, and ongoing domestic abuse, which was seen as involving long-term risks, was identified as a particular challenge. One of the barristers said:

You've also got to look at the difference between people who are abusive all the time or occasionally have lapses. When relationships break down, emotions get tense, people become heightened. People say and do things which are completely out of the ordinary which don't reflect their normal pattern of behaviour and you have to be able to distinguish between the person who is genuinely abusive day in, day out and an abusive person who behaved badly

due to complex emotional relationship breakdown and all the fears that go with that, who maybe slapped his wife, or maybe has kicked the dog . . . and I'm not condoning either. But if you look at that as being out of character, I don't see that as presenting a risk factor going forward. But if you could say, "well, he slapped his wife, therefore domestic abuse, therefore the presumption is against contact". It wouldn't be right in my view.

Another barrister's opposition was also based on a perception that there are different grades of severity of domestic abuse:

And what do you mean by domestic abuse? You know, sort of the parent having hammer and tongs the night they separate or long-sustained . . . you know, where somewhere in that continuum you would draw the line . . . you know, if there's bruising, no contact? It's just nonsense. No, I would heartily resist anyone who argued that.

One of the solicitors expressed some support for a presumption against contact, concerned that any parent opposing contact has to rebut the presumption in favour of contact, but also questioned the feasibility of a presumption in the light of having to determine 'some sort of scale of measurement as to the abuse'. These challenges in responding to fact-specific scenarios reflect the inherent problems with presumptions outlined earlier, along with definitional challenges in categorising domestically abusive behaviour. Some interviewees based their opposition to a presumption against contact not on these challenges but rather on the view that contact should be promoted in domestic abuse cases.

### *Opposition to a presumption against contact – domestic abuse should not be a barrier to contact*

Interviewees raised a number of different arguments in expressing opposition to a presumption against contact on the basis that domestic abuse should not be a barrier to contact. One was that a presumption would interfere with the child's 'right' to contact. A barrister described it as a child's 'fundamental human right' to have contact and one of the solicitors also rooted her opposition within rights-based discourse:

. . . unless there is definitive evidence that this behaviour has affected the children involved then surely it has to be the children's right to have a relationship with both their parents but by elevating the presumption to one against contact, you are really sort of putting the facts of the relationship before the children.

Another argument was based on the perception that contact is crucial to children's well-being. One of the barristers said:

I'd see it [a presumption against contact] as a negative development because it is very important for a child's psychological well-being growing up to have a positive image . . . as positive an image as possible of each of its parents because children realise that they are part mum and part dad and for them to have a positive image of their whole selves, they need to have a positive image of each parent as well. And I can't see how that could be achieved in a presumption against contact in a domestically abusive situation.

And a Cafcass practitioner said that whilst each case needs to be determined on its own facts, it remains in children's interests for the presumption to be in favour of contact:

. . . I think the presumption that . . . the presumption that contact or time spent is the right presumption from a child's point of view unless there is serious reason, you know, as to why that child wouldn't want to see their parent.

A further argument was that the adoption of a presumption would be incompatible with well-established practice. One of the barristers said a presumption would be ‘against the grain’ of the legislation and case law, which makes clear that the ‘starting point for a court in dealing with children is that they should have a relationship with both parents’. His view was that the courts may already be reversing the presumption in favour of contact in cases of ‘serious’ domestic abuse, but this is not articulated.

And, finally, one of the domestic abuse organisations similarly opposed a presumption against contact on the basis that domestic abuse should not be an automatic barrier to contact:

... I don’t have any reason to believe why a child shouldn’t have contact with an abusive father. What I think is that mothers need to be protected throughout the process. They need to be protected from being dragged to court, they need to be protected at handovers ...

## Conclusion

Presumptions have never sat easily within family law since they conflict with the basic tenet that each child is different, and each case needs to be determined on its own merits. The introduction of the statutory presumption of parental involvement into the Children Act 1989 was a largely symbolic exercise: the intention behind the reform was to put on the statute book the approach already adopted by the courts and practitioners in order to impress upon parents the importance given by the courts to both parents remaining involved in their children’s lives post-separation. In turn, it was hoped that public perceptions of bias within the court system would be corrected. Whilst the statutory presumption was not intended to change the courts’ practice, therefore, its introduction nevertheless gave rise to concerns that it would have the unintended consequence of increasing the likelihood of unsafe contact arrangements being made in cases involving domestic abuse. The findings from the study, however, do not suggest that the statutory presumption is having a material impact on the practice of the lower courts. The presumption has reinforced the status quo, which is that the courts adopt a pro-contact approach, even in cases involving domestic abuse.

This is not to say, however, that the statutory presumption poses no risks in domestic abuse cases. It remains the case that the approach endorsed by the statutory presumption finds little justification in the empirical evidence base. At a conceptual level, there is also incompatibility between presumptions and the established knowledge that each child is different, and children’s welfare being the courts’ paramount consideration. The existence of the presumption on the statute book also gives rise to the ongoing risk of misinterpretation, both by the courts and by parents in cases resolved outside the court system. As the expert panel emphasised, the presumption further places limits on the capacity of case law to evolve to take a more nuanced approach to the resolution of disputes.

Overall, therefore, the presumption is, at best, unhelpful and, at worst, dangerous in domestic abuse cases. The question then is how the dominant narrative on the necessity of contact can be reappraised to instil a more balanced approach to the courts’ resolution of cases. There has been resistance in the past to taking formal steps to increase the weight given to domestic abuse within proceedings. Lord Justice Waller set out in *Re*

*LVMH* that domestic abuse should not be ‘elevated to some special category’ since it is ‘one highly material factor amongst many which may offset the assumption in favour of contact’.<sup>13</sup> In the light of the risks posed to parents and children by contact, however, there is increasing justification for ‘elevat[ing]’ domestic abuse into this ‘special category’ by making it a greater barrier to contact than is the case within current practice. A presumption against contact presents one possible solution but is itself problematic due to the fact-specific nature of cases. The findings from the study also suggest that any proposal to introduce such a presumption would not find support in practice. This is not, therefore, a problem that will find a solution in the introduction of new or reversed presumptions. What is needed is reform that marks a sea-change in the way in which domestic abuse is conceptualised and evidenced in proceedings, and the way in which that evidence shapes court outcomes. The recently concluded expert panel has started this work, and the forthcoming Government review into the operation of the statutory presumption is an important and necessary component of this process.

## Notes

1. The terms ‘contact’ and ‘residence’ were replaced with ‘child arrangements orders’ by the Children and Families Act 2014, but in the light of ‘child arrangements orders’ not distinguishing between contact and residence, ‘contact’ is used in this paper.
2. In response, Cafcass has taken several actions, including the formation of a Learning and Improvement Board involving a number of domestic abuse charities. Cafcass’ response can be read here: <https://www.cafcass.gov.uk/2020/06/25/cafcass-responds-to-the-publication-of-the-report-from-the-ministry-of-justice-expert-panel-on-harm-in-the-family-courts/>.
3. Representatives from two national organisations and one local refuge were interviewed. Across all the practitioner groups, the interviews took place face-to-face, apart from one telephone interview (solicitor).
4. These were: Bar Council Direct Access Portal; Waterlow’s Directory; Law Society’s ‘Find a Solicitor’; and Resolution’s ‘Find a Member’. Some barristers were identified through the chambers’ websites listed on these directories.
5. The legal practitioners were asked if they predominantly represented alleged victims or alleged perpetrators to ensure the sample contained a diversity of experiences.
6. [2018] EWCA Civ 115 at [48].
7. [2017] EWHC 1377 (Fam).
8. One of the solicitors interviewed could not comment on the impact of the statutory presumption, having not heard of it before. Another did not comment on the impact of the statutory presumption but confirmed the existence of a pro-contact approach. One of the Cafcass practitioners did not comment on its impact. Three Cafcass practitioners discussed whether the statutory presumption had impacted their own practice.
9. The other domestic abuse organisation had not come across the presumption and did not comment on its impact as a result.
10. See, for example, *A v C* [2018] 12 WLUK 95 at [39].
11. [2001] Fam 260.
12. Although it could be assumed that the interviewees who thought there should be a presumption against contact at the allegations stage would support a presumption against contact once domestic abuse is found, proven or accepted, the total number of interviewees supporting a presumption against contact at either stage still represented a minority.
13. [2001] Fam 260, 301.

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