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PRACTICE DIRECTION NO 6 OF 2008

**APPLICATIONS RELATING TO CHILDREN -
DOMESTIC ABUSE AND HARM**

1. This Practice Direction applies to any private law family proceedings in the Magistrate's Court and the Royal Court, in which any application is made relating to custody, care and control or access (contact), or injunction proceedings in respect of or involving any child.
2. The practice set out in this Direction is to be followed in any case in which it is alleged, or there is otherwise reason to suppose, that the child or children has experienced domestic abuse perpetrated by another person or that there is a risk of such abuse. For the purpose of this Direction, the term "domestic abuse" includes physical violence, extreme or excessive threatening, insulting or intimidating behaviour and any other form of abuse which, directly or indirectly, may have caused harm to the other party or to the child or which may give rise to the risk of harm. Harm in relation to a child means ill-treatment or the impairment of health and development including, for example, impairment suffered from being present in the same premises or witnessing or being aware of the ill treatment of another.

General Principles

3. The Court, must, at all stages of the proceedings, consider whether domestic abuse is raised as an issue, either by the parties or otherwise, and if so, must:
 - identify at the earliest opportunity, the factual and welfare issues involved
 - consider the nature of any allegation or admission of domestic violence and the extent to which any allegation or admission of domestic violence and the extent to which any domestic violence which is admitted, or which may be proved, would be relevant in deciding whether to make an order about custody, care and control, or access or other such relevant order and, if so, in what terms;
 - where there is a relevant application before the Court should give directions to enable the relevant factual and welfare issues to be determined expeditiously and fairly.
 - if the application relates to injunction proceedings alone in which domestic abuse is alleged but there is no pending application relating to either the custody of or access to the children the Court should consider whether the risk of harm to any children in the household is such that the family should be referred to the Health and Social Services department (Children's Services) for their assessment of the potential risk of harm to the children.

4. In all cases it is for the Court to decide whether and which order should be made. Any agreement between the parties must be scrutinised by the Court accordingly. The Court should not endorse the terms of a consent order relating to such applications unless the parties have endorsed the proposed consent order with relevant information as to whether there are allegations of domestic abuse and if so what those allegations have been in order that the Magistrate or Judge can consider the same when considering whether to grant the consent order in the terms sought.
5. If the parties reach consent which involves the children having access to a person whom it is alleged has perpetrated domestic abuse against them or another, at the contact centre, then the parties or their Advocates must advise the Court as to whether the Contact Centre are aware of the allegations and the Court must give consideration as to whether the Safeguarder service should be invited to carry out a risk assessment of the children in such an environment. In addition the Contact Centre should be asked as to whether they wish to carry out a risk assessment in relation to the staff or volunteers who monitor the contact.
6. In considering, on an application for a consent order for any relevant application, whether there is any risk of harm to the child, the Court shall consider the evidence and information necessary and may request a report from the Safeguarder Service (either oral or in writing) before it makes its determination. It is expected that in preparing such a report for the Court purposes the Safeguarder will have ready access to information from the Department of Health and Social Services and the States of Guernsey Police Force, subject to those bodies retaining discretion as to what information is disclosed to the Safeguarder and the Court from their records. If there is a dispute or uncertainty as to what information should be disclosed to the safeguarder, the parties and the Court, the Court should be asked for guidance.
7. It is intended that the contents of any written report by the Safeguarder Service be disclosed to the parties, unless it considers that to do so would create a risk of harm to another, including a party or to a child. All such reports will remain confidential to the Parties and the Court and cannot be disclosed to any other person or body in part or in their entirety without leave of the Court.
8. It will be the responsibility on all Advocates to ensure that the Safeguarder Service receives copies of all the relevant documents, both at the commencement of the application but on an ongoing basis thereafter as and when documents are filed with the Court.

Applications

9. At the first hearing before the Court, the Advocates or parties should be ready to advise the Court as to whether there are historical or current domestic abuse issues in the family or household(s) where the child lives or regularly visits, involving not only the natural parents but also other adults and children who may reside therein or be regular visitors to. If either the Advocates or parties subsequently discover that the information that was provided to the Court was either insufficient or incorrect they are under a duty to write immediately to the Court when they become so aware and advise the Court of the relevant facts.
10. The Court must ascertain at the earliest opportunity whether domestic abuse is raised as an issue and must consider the likely impact of that issue on the conduct and outcome of the proceedings. In particular, the Court should consider whether the nature and effect of the domestic abuse alleged is such that, if proven the decision of the Court is likely to be affected.

11. If at any stage the Court is advised by the Safeguarder Service or by any other relevant person or body that there is a need for special arrangements to secure the safety of any party or child attending any hearing, the Court shall ensure that appropriate arrangements are made for the hearing and for all subsequent hearings in the case, unless it considers that these are no longer necessary.

Admissions

12. Where, at any Court hearing any person, whether a party or not to the proceedings makes an admission of domestic abuse to another party or to the child, that admission should be recorded in writing and retained on the Court file.

Directions for a fact-finding hearing

13. The Court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegations of domestic abuse before it can proceed to consider any final relevant order(s). Where the Court determines that a finding of fact hearing is not necessary, the order shall record the reasons for that decision.
14. Where the Court considers that a fact-finding hearing is necessary, it must give directions to ensure that the matters in issue are determined expeditiously and fairly and in particular it should consider:
 - Directing the parties to file written statements giving particulars of the allegations made and of any response in such a way as to identify clearly the issues for determination.
 - Whether material is required from third parties such as the Police or Children's Services, or Health Services and may give directions accordingly;
 - Whether any other evidence is required to enable the Court to make findings of fact in relation to the allegations and may give directions accordingly.
15. Where possible, the hearing relating to the final determination of the application should be heard by the same Magistrate or Judge who heard the finding of fact hearing.
16. In any case where domestic abuse is raised as an issue the Court should consider whether to direct the preparation of a report by the Safeguarder Service on the issues raised by the application prior to the finding of fact hearing, unless the Court is satisfied that it is not necessary to do so to safeguard the child's interests. If the Court directs the preparation of a report it should consider the extent of any enquiries which can properly be made at that stage and whether it is appropriate to seek information on the wishes and feelings of the child before the findings of fact have been made.
17. It is anticipated that after any findings of fact hearing the Court will seek a report from the Safeguarder Service in preparation for the final hearing of the determination of the application.

Representation of the Child

18. Subject to the seriousness of the allegations made and the difficulty of the case, the Court shall consider whether it is appropriate for the child who is the subject of the application to be made a party to the proceedings and be separately represented. If the child is made a party to the proceedings the Advocate will take instructions from the allocated Safeguarder unless there is a difference of views between a child and the Safeguarder when an application can be made to the Court that the Advocate take instructions directly from the child.
19. It is anticipated that the child would be granted legal aid to enable representation on any application where the child has been joined as a party to the proceedings.

Interim Orders

20. Where the Court gives directions for a fact-finding hearing, the Court should consider whether an interim order, and in particular for custody (including care and control) or contact, is in the interests of the child and in particular whether the safety of the child and the residential parent can be secured before, during and after any contact.
21. In deciding whether an order for interim contact or other relevant interim order should be made or not, pending a findings of fact hearing, the Court should:-
 - (a) take into account the paramountcy of the child's welfare as set out in Guernsey legislation
 - (b) have reference to the following factors:
 - the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)
 - the child physical, emotional and educational needs
 - the likely effect on the child of any change in his circumstances
 - the child's age, sex, background and any characteristics of his which the court considers relevant
 - any harm which the child has suffered or is at risk of suffering
 - how capable each of the child's parents (and any other person in relation to whom the Court considers the question to be relevant) is of meeting his needs
 - The range of powers available to the Court under any current legislation
 - (c) give particular consideration to the likely effect on the child of any contact and any risk of harm, whether physical, emotional or psychological, which the child is likely to suffer as a consequence of making or declining to make an order.
 - (d) take into account what arrangements are required to ensure, as far as possible, that any risk of harm to the child is minimised and that the safety of the child and the parties is secured; and in particular, whether contact should be supervised or supported and if so by whom and where and the availability of appropriate

facilities for that purpose and if direct contact is not appropriate, whether it is in the best interest of the child to make an order for indirect contact.

The fact finding hearing

22. At the fact-finding hearing, the Court should, wherever practicable, make findings of fact as to the nature and degree of any domestic violence which is established and its effect on the child, the child's parents and any other relevant person. The Court shall record its findings in writing and to which all parties and the Safeguarder Service shall have a copy. The Court should also consider whether copies of the findings should be disclosed to any other person or body.
23. All judgements of the Court whether on an interim basis or at the conclusion of the application remain confidential to the parties and the Safeguarder Service and must not be disclosed in part or in their entirety to any other person or body, without leave of the Court.
24. Depending on the findings made, the Court should consider at the conclusion of the findings of fact hearing the following:-
 - whether there should be any interim order, and if so, what order.
 - the Court should consider whether it would be assisted by any social work, psychiatric, psychological or other assessment of any party or the child and if so, subject to the necessary consent, make directions for such assessment to be undertaken and for the filing of any consequent report.
25. The parties and the Safeguarder should take steps to provide information to the Court as to facilities which are available locally to assist any party or the child in cases where there are admissions or findings that domestic abuse has occurred. Such information should include the availability of any treatment or advice available to the person in relation to whom any findings of domestic abuse have been made (or where that person has made relevant admissions).

Factors to be taken into account when determining whether to make residence or contact orders in all cases where domestic abuse has occurred

26. When deciding the issue of custody or access, the Court should, in the light of any findings of fact it has made, apply the individual matters in the welfare checklist with reference to those findings; in particular, where relevant findings of domestic abuse have been made, the Court should, in every case, consider any harm which the child has suffered as a consequence of that abuse and any harm which the child is at risk of suffering, if an order for custody or access is made and should only make an order for access in particular if it is satisfied that the physical and emotional safety of the child and the parent or carer with whom the child is living can, as far as possible, be secured before during and after access.
27. In every case where a finding of domestic abuse is made, the Court should consider the conduct of both parents towards each other and towards the child; in particular, the Court should consider:
 - (a) the effect of the domestic abuse which has been established on the child and on the parent with whom the child is living;

- (b) the extent to which the parent seeking custody or access is motivated by a desire to promote the best interests of the child or may be doing so as a means of continuing a process of abuse, intimidation or harassment against the other parent;
- (c) the likely behaviour during access of the parent seeking custody (including care and control) or access and its effect on the child;
- (d) the capacity of the parent seeking custody (including care and control) or access to appreciate the effect of past abuse and the potential abuse on the other parent and the child;
- (e) the attitude of the parent seeking custody (including care and control) or access to past abusive conduct by that parent; and in particular whether that parent has the capacity to change and to behave appropriately.

Directions as to how the Court is to proceed

28. Where the Court has made findings of domestic abuse but, having applied the matters in the welfare check list, nonetheless considers that direct access is in the best interest of the child, the Court should consider what, if any, directions or conditions are required to enable the order to be carried into effect, and in particular should consider:

- (a) whether or not access should be supervised, and if so, where and by whom,
- (b) whether to impose any conditions to be complied with by the party in whose favour the order for contact has been made and if so, the nature of those conditions, for example by way of seeking advice or treatment (subject to any necessary consent) and the facilities available to assist in the satisfaction of those proposed conditions
- (c) whether such contact should be for a specified period or should contain provisions which are to have effect for a specified period;
- (d) whether or not the operation of the order needs to be reviewed; if so the Court should set a date for the review and give directions to ensure that at the review the Court has full information about the operation of the order.

29. Where the Court does not consider direct access to be appropriate, it shall consider whether it is in the best interests of the child to make an order for indirect contact.

30. Where the Court makes any order whether relating to custody (including care and control), or access whether direct or indirect, either pending a findings of fact hearing or subsequent thereto, the parties cannot agree to mutually amend the same without returning the matter to the Court, wherein it is expected the court will seek the opinion of the Safeguarder previously allocated to the case (wherever possible).

31. The Court should give detailed reasons in any oral or written judgement as to how the findings of fact that it has made relating to domestic abuse, have influenced its decision on custody (including care and control) and access. In particular, where the Court has found domestic abuse proved but nonetheless makes an order, the Court should always explain, why it takes the view that the order which it has made is in the best interests of the child.

Consent Orders

32. Where the parties are agreed as to which orders they seek from the Court, the Court retains the final discretion as to whether to make the orders as agreed, or whether to amend or refuse the same.
33. The Court will be particularly concerned with having sufficient information which will allow it to assess the risk to the residential parent and the children. Therefore, in those circumstances, the parties (or their Advocates) will be asked to submit the proposed consent order in a certain format – attached hereto as Appendix 1. It is expected that the parties and their Advocates will provide detailed information in this format and further they will be required to certify that to the best of their knowledge all relevant information has been provided to the Court.
34. The Court has the discretion to request the Safeguarder Service to carry out an assessment of the family and in addition may, if it considers it relevant refer the children of the family to the Health and Social Services Department for their assessment and/or investigation with a request in both cases, that a written report is provided to the Court concerning specific aspects about which the Court has concern.
35. Parents and children are entitled to have access with each other subject to the Court being satisfied that the access is safe, healthy and positive.

The Children (Guernsey and Alderney) Law 2008

36. It is intended that this Practice Direction continue to apply post the commencement of The Children (Guernsey and Alderney) Law, 2008. It is noted that the criteria set out in paragraph 21 (b) will be replaced by section 4(2) of The Children (Guernsey and Alderney) Law, 2008 once implemented.

30 September 2008

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