

**Domestic Proceedings and Magistrate’s Court (Guernsey) Law, 1988 – father’s application for joint custody and access - Practice Direction No 6 on 'Applications relating to Children – Domestic Abuse and Harm' – need to approach cases involving children, where there are allegations of domestic abuse, with particular care – inappropriate to agree terms of contact without consideration of the risk**

**IN THE MAGISTRATE’S COURT OF THE ISLAND OF GUERNSEY**

**The 30<sup>th</sup> July 2009 before Cherry Amanda McMillen, Assistant Magistrate**

**Advocate A M Merrien appeared for the Father  
Advocate L Le R Strappini appeared for the Mother**

**[In paragraphs 7 to 27 of her judgment the Assistant Magistrate dealt with the law relating to Practice Direction No 6 of 2008 and the manner in which it was approached by the Advocates and Safeguarders]**

7. The first hearing in the father’s application was listed before this Court on the 2<sup>nd</sup> December, 2008. On that occasion the parties highlighted the main issue in dispute, namely the issue of the child’s staying access with his father. The mother raised a concern that the father had acted violently towards her during the period of time they had lived together. The father was adamant that such an allegation was untrue and stated that he believed the mother was using the issue of access in terms ‘as a weapon’ in their mutual financial dispute.
8. As a consequence of the raising of these issues this Court directed the filing of relevant documents including a statement by the mother. In addition the Court directed that the child “*have interim contact with his father as agreed between the parties, and in consultation with the Safeguarder, but on the understanding there will be no overnight contact.*”
9. The last prohibition on the child’s overnight or staying access with his father was imposed bearing in mind the terms of and the rationale of *Practice Direction No. 6 of 2008*.
10. The parents duly complied with the filing directions of this Court and the matter came back for review on the 10<sup>th</sup> February, 2009, when further case management directions were made including the listing of a finding of fact hearing before this Court in June, 2009.
11. The matter was briefly reviewed again on the 10<sup>th</sup> March and on that date this Court was satisfied that in general terms this matter was ‘on track’ to be heard on the dates listed by the Court. Throughout this period the prohibition on the child having overnight or staying contact with his father remained in place and both parents were fully aware of this.

12. It subsequently transpired that both parents breached this prohibition on one occasion in or about the end of April, 2009, and I will refer to that breach later in this judgment.
13. On the 21<sup>st</sup> May, 2009, the parents and the safeguarder (and possibly one of the Advocates) met at what has been described as a ‘*round the table meeting*’. At that meeting the parties and the safeguarder drafted a consent order for submission to this Court for approval. The proposed order provided inter alia for:-
  - 1) The parents to have joint custody of the child
  - 2) The mother to have day to day care of the child
  - 3) The child to have reasonable contact with its father and the minimum terms of that contact was extensively defined in the draft consent order and in terms allowed the child to have regular staying contact with its father including, (but not exclusively), staying contact with its father every other weekend and once every week, over night and ‘a minimum of 4 weeks holiday a year’.
14. In addition the proposed consent order contained this Clause:-

*“Both parties have made allegations against the other so that the provisions of the Practice Direction No. 6 of 2008 would apply, however the safeguarder services and both parties are content with this document and as such request that the Court does not proceed to a finding of fact hearing.”*
15. When this draft order was placed before me, and I read the same, along with the contents of both parent’s filed statements, I was not prepared to approve the contents of the same, and directed that the finding of fact hearing already listed before this Court proceed.
16. It is appropriate in this judgment to set out why I refused to approve the proposed consent order.
17. Practice Direction Number 6 of 2008 is headed ‘*Applications relating to children – domestic abuse and harm.*’ The introductory paragraphs state that the 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 there is a risk of such abuse. For the purpose of this Direction, the term ‘domestic abuse’ includes physical violence, extreme or threatening, insulting and 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.*”
18. This Practice Direction is based in the majority although not identically on the Practice Direction issued by the President of the Family Division of England and Wales in May, 2008. Its purpose was to ensure that those involved in Court proceedings (from the judiciary to the parties) were aware of the need to approach

cases involving children where there are allegations of domestic abuse, with particular care.

19. The Practice Direction, in my view, did no more than codify in one place the conclusions and directions contained in numerous cases previously reported in relation to such issues. The Practice Direction is not particularly new law but a helpful reminder or restating of the case law. In particular, but again not exclusively, its contents reflect the “*Guidelines for good practice on parental contact in cases where there is domestic violence*” prepared by the Children Act Sub-Committee of the Lord Chancellor’s Advisory Board on Family Law and dated April, 2002 and exhibited as Annex 1 to the judgment in Re H (Contact: Domestic Violence) [2005] EWCA CIV1404.
20. I comment in this judgment that it is rare that I receive submissions from Advocates relating to the case law in cases where domestic abuse is alleged which would trigger the terms of Practice Direction No. 6 of 2008. This case is no exception. It is my experience that Advocates do refer to the Practice Direction but rarely in detail and usually only in passing reference.
21. I can do more than repeat part of the judgment of Lord Justice Wall in Re Z (children) [2009] EWCA CIV 430:

*“I make it as clear as I can that the Practice Direction is there to be obeyed. It is not designed to tell judges what to decide; it is there to tell judges how to go about deciding issues of residence and contact where there are allegations of domestic violence. Above all, it seems to me the Practice Direction places proper and firm emphasis on the importance of the fact-finding hearing and it is only if, at the conclusion of the hearing, the judge finds as a fact, having heard all the evidence, that the children are in no way at risk or that, for some other reason, contact, unsupervised or unsupported, can take place that he should and could/can make an order for contact....”*
22. Domestic abuse perpetrated by one parent on another is a failure of parenting. This applies whether the children are or are not physically present in the household when the abuse takes place. In such households children are placed at emotional risk. Even if the parents have separated, it is crucial for the emotional and physical future safety of the child for there to be consideration given to the abusing parent’s ability to develop insight into the impact of their past behaviour on his or her co-parent and of their ability to change.
23. In the case before this Court the mother alleged in her position statement dated the 23<sup>rd</sup> December, 2008, that the father had on at least four occasions assaulted her including on three of these occasions putting his hands around her neck. She also alleged the father had regularly verbally abused her. As I have already stated, the father has vehemently and persistently denied the allegations.
24. It follows from what I have stated in this judgment that I regard the decision to hold a round-the-table meeting to consider terms of contact between the child and the father to have been flawed. The primary issue is the assessment of risk that the children face in any contact. To agree terms of contact without consideration of the risk is inappropriate.

25. There is nothing to prevent parties agreeing facts upon which the Court can then consider whether contact can occur and if so on what terms. However, it is also the experience of this Court that the presentation of a schedule of agreed facts to the Court can raise the prospect of one or both parents paying lip service to the facts and one parent can often minimise or marginalise the impact their actions have had on the other parent.
26. Where there are agreed facts the role of the Safeguarder must be to satisfy his or herself that the parties understand the seriousness of the issues raised by these agreed facts. The Court also retains the jurisdiction to hear evidence from the parents in order to satisfy itself that, even where there is a schedule of agreed facts, there is a genuine understanding on the part of the parents of the impact on the children of their actions. The dilemma that presents itself to the Court is the consequential increase in Judiciary and Court time and indeed increased costs for the parties who often present in impecunious circumstances.
27. It is the responsibility of the Court to balance all of the competing factors, the primary consideration being the welfare of the children involved.

**[The Assistant Magistrate then set out her findings on the allegations made by the mother.]**