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Overcoming a hostile or implacably hostile
primary carer who is frustrating contact

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1. Maintain an open critical mind and avoid litigation.
2. Take action and control of the process:
 - a. Assemble your legal and expert team and set up a conference;
 - b. Take note of the background of the relationship and breakdown;
 - c. Set out proposals promptly. Ensure these are detailed, reasoned and provide practical solutions and suggestions;
 - d. Avoid protracted negotiations;
 - e. Direct to parenting resourced
 - i. Anna Freud Centre - <https://www.annafreud.org/parents-and-carers/in-conflict/>.
 - ii. CAFCASS - <https://www.cafcass.gov.uk/grown-ups/parents-and-carers/resources-parents-carers/>,
 - iii. the parenting plan process and SPIP (<https://www.cafcass.gov.uk/grown-ups/parents-and-carers/divorce-and-separation/parenting-together/parenting-plan/>)
 - f. Issue promptly if negotiations breakdown

Collate evidence

3. Assist the court with a detailed supporting statement outlining the efforts made to instigate contact, reasonable proposals made, interventions relied upon.
4. Rely on the presumption in favour of contact and stress the harm being caused or potentially being caused to the child by being prevented from seeing the other parent.
5. Consider PD12J and evidence that may be needed from the police, school(s), GP etc.

Case law

Re M (Children) [2017] EWCA Civ 2164

[56] [...] After a detailed analysis of both the Strasbourg and domestic jurisprudence, this court in Re C (Direct Contact: Suspension) [2011] EWCA Civ 521, [2011] 2 FLR 912, at para [47], summarised matters as follows:

Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.

Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.

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There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact.

He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.

The court should take both a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.

The key question, which requires “stricter scrutiny”, is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.

All that said, at the end of the day the welfare of the child is paramount; “the child’s interest must have precedence over any other consideration”.’

*[57] To that summary, which has been both in *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494, and *Re Q (Implacable Contact Dispute)* [2015] EWCA Civ 991, [2016] 2 FLR 287, we only add a reference to what Balcombe LJ said in *Re J (A Minor) (Contact)* [1994] 1 FLR 729, at 736:*

‘... judges should be very reluctant to allow the implacable hostility of one parent (usually the parent who has a residence order in his or her favour), to deter them from making a contact order where they believe the child’s welfare requires it. The danger of allowing the implacable hostility of the residential parent (usually the mother) to frustrate the court’s decision is too obvious to require repetition on my part.’⁴

Re L-W (Enforcement and Committal: Contact)

Mumby LJ has set out guidance in cases of implacable hostility, stating there must be:

- (a) judicial continuity
- (b) judicial case management (including timetabling),
- (c) a judicial strategy
- (d) and consistency of judicial approach

CPL v CH-W and Others [2011] 1 FLR 1095, CA, at [97]

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“The proper handling of contact cases which have become or are on the way to becoming intractable requires judicial continuity and effective timetabling as essential components of the necessary judicial case management: see Re D (Intractable Contact Dispute: Publicity) [2004] EWHC 727 (Fam), [2004] 1 FLR 1226, paras [48]–[49]. Moreover, as I went on to say, referring to the judgment of Wall J (as he then was) in Re M (Intractable Contact Dispute: Interim Care Orders) [2003] EWHC 1024 (Fam), [2003] 2 FLR 636: ‘proper judicial control and judicial case management requires what Wall J referred to in Re M at para [115] as “consistency of judicial approach” within the context of a judicially set “strategy for the case”. This must form what he described at para [118] as “part of a wider plan for [the] children, which ... needs to be thought through”. ‘I added (at para [57]): ‘It may be that committal is the remedy of last resort but, as Wall J recognised in Re M at para [115], the strategy for a case may properly involve the use of imprisonment. Interestingly he seems to have accepted (see at para [117]) that imprisonment, even for a day, might in some cases be an appropriate tool in the judicial armoury. I agree. A willingness to impose very short sentences – 1, 2 or 3 days – may suffice to achieve the necessary deterrent or coercive effect without significantly impairing a mother’s ability to look after her children.’

Re A (Intractable Contact Dispute: Human Rights Violations) [2014] 1 FLR 1185, CA. - Utilise sanctions

The voice of the child

6. Consider this prior to the FHDRA and make the relevant application as soon as possible.
7. implacable hostility cases engage r.16.4 FPR 2010. Please see PD16A, 17.2:

The decision to make the child a party will always be exclusively that of the court, made in the light of the facts and circumstances of the particular case. The following are offered, solely by way of guidance, as circumstances which may justify the making of such an order –

..... (c) where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;

Fact Finding

8. The usual principles of PD12J apply in alienation cases.

Re H-N & Others [2021] EWCA Civ 448 with the Court setting out the following approach:[37]

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The court will carefully consider the totality of PD12J, but to summarise, the proper approach to deciding if a fact-finding hearing is necessary is, we suggest, as follows:

i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).

ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.

iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.

iv) Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in 'The Road Ahead'.

[58 and 59]

"As part of that process, we offer the following pointers: a) PD12J (as its title demonstrates) is focussed upon 'domestic violence and harm' in the context of 'child arrangements and contact orders'; it does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court; b) PD12J, paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is 'necessary' in order to: i) Provide a factual basis for any welfare report or other assessment; ii) Provide a basis for an accurate assessment of risk; iii) Consider any final welfare-based order(s) in relation to child arrangements; or Judgment Approved by the court for handing down. Double-click to enter the short title iv) Consider the need for a domestic abuse-related activity. c) Where a fact-finding hearing is 'necessary', only those allegations which are 'necessary' to support the above processes should be listed for determination; d) In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other.

9. Where the facts indicate parental alienation - Whilst McFarlane P (in his keynote address to the Families Need Fathers conference) noted that it is not important to determine definitely whether or not a 'parental alienation syndrome' actually exists, he accepted that in some cases a parent can, either deliberately or inadvertently, turn the mind of their child against the other parent so that the child holds a wholly negative view of that other parent where such a negative view cannot be justified by reason of any past behaviour or any aspect of the parent-child relationship. He

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further observed, '... where that state of affairs has come to pass, it is likely to be emotionally harmful for the child to grow up in circumstances which maintain an unjustified and wholly negative view of the absent parent'.

10. Re S (Parental Alienation: Cult) [2020] EWCA Civ 568 outlines the potential signs of alienation:

- Portraying the other parent is unduly negative light
- Suggesting that the other parent does not love the child providing unnecessary reassurances to the child about the time with the other parent
- Contacting the child excessively when with the other parent
- Making unfounded allegations

At [13] In summary, in a situation of parental alienation the obligation on the court is to respond with exceptional diligence and take whatever effective measures are available. The situation calls for judicial resolve because the line of least resistance is likely to be less stressful for the child and for the court in the short term. But it does not represent a solution to the problem. Inaction will probably reinforce the position of the stronger party at the expense of the weaker party and the bar will be raised for the next attempt at intervention. Above all, the obligation on the court is to keep the child's medium to long term welfare at the forefront of its mind and wherever possible to uphold the child and parent's right to respect for family life before it is breached. In making its overall welfare decision the court must therefore be alert to early signs of alienation. What will amount to effective action will be a matter of judgement, but it is emphatically not necessary to wait for serious, worse still irreparable, harm to be done before appropriate action is taken. It is easier to conclude that decisive action was needed after it has become too late to take it.

11. Re A (Children) (Parental Alienation) [2019] WLUK 445 the court commented on an exceptional case of parental alienation. Early intervention was essential to identify the problems within the family before the children's views became entrenched.

[6] My intention in releasing this judgement for publication is not because I wish to pretend to be in a position to give any guidance or speak with any authority; that would be presumptuous, wrong and beyond my station. However, this is such an exceptional case that I think it is in the public interest for the wider community to see an example of how badly wrong things can go and how complex cases are where one parent (here the mother) alienates children from the other parent. It is also an example of how sensitive the issues are when an attempt is made to transfer the living arrangements of children from a residential parent (here, the mother) to the other parent (the father); the attempts to do so in this case failed badly.

[10] It is beyond doubt that, in the long-term, what has occurred within this family will cause these children significant and long-term emotional harm, even if they cannot understand that now. I have said it and so have all the experts in this case. I

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am afraid that the cause of that harm lies squarely with this mother; whatever may be her difficulties, she is an adult and a parent with parental responsibility for her children. That parental responsibility, which she shares with the father, requires her to act in the best interests of her children. It also required her to promote the relationship between these children and their father. She has failed to do so. She had adult choices to make; the choices that she made were bad ones and deeply harmful to the children.

With all the benefit of hindsight, I consider that there were these ten factors which have contributed significantly to the difficulties that have arisen:

[...]

v) The use of indirect contact in a case where there is parental alienation has obvious limitations, as this case demonstrates. The father's letters, cards and presents were being sent by him into a home environment where he was 'demonised', to use the terminology of Dr Berelowitz. They served no purpose in maintaining any form of relationship between the father and the children. It is regrettable that there was not more perseverance in the earlier private proceedings to resolve the obstructions to contact.

vi) These proceedings have seen a vast number of professionals. I have counted 10 and I am sure that I have omitted some. The difficulty that that creates is obvious. Each new person brings a new, personal and different insight into a case of this nature. Family members (especially children) are embarrassed about speaking of personal issues with strangers, develop litigation fatigue and learn to resent the intrusions into their lives by a succession of professional people. As the children have done, people reach a stage where they say: 'no more.'

vii) A particular difficulty in this case has been the absence, at times, of collaborative working by professionals. A particular example of that occurred when an attempt was made to move the children to the father's care. The professionals involved with the court process and the schools had not had sufficient dialogue before that move was attempted and now have very strong and opposing opinions about what occurred and the merits of moving the children from the mother. Pre- planning for the move was inadequate, in my opinion. If professional people show their disagreements, as happened here on the day of transfer, it undermines the process and allows cherry- picking by family members of what they want to hear.

viii) Early intervention is essential in a case such as this, in my opinion. It did not occur in this case. It took years (probably five) to identify the extent of the emotional and psychological issues of the mother. By that stage it was too late for there to be any effective psychotherapeutic or other intervention in relation to her, the children's views having already become so entrenched.

ix) There is an obvious difficulty about how to approach the expressed wishes and feelings of children who are living in an alienating environment such as this. If children who have been alienated are asked whether they wish to have a relationship with the non-resident parent there is a likelihood that the alienation they have experienced will lead them to say 'no.' Therefore, in this type of case, the approach to

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the wishes and feelings of children has had to be approached with considerable care and professionalism. To respond simply on the basis of what children say in this type of situation is manifestly superficial and naive. The children in this case have been expressing wishes that they should not see their father for many years now. The lack of an effective and early enquiry into what was happening within this family meant that there was no effective intervention. That, in turn, has led to the children's expressed wishes being reinforced in their minds. It has also resulted in the mother being able to say 'we should listen to the children', rather than addressing the underlying difficulties.

Transfer of residence

12. The case law shows us that a transfer of residence is **not** an measure of last resort.
13. Re L (a Child) [2019] EWHC 867 reminds us that the decision to transfer residence is a balancing exercise and requires a holistic view as to the welfare checklist.

[59] Having considered the authorities to which I have referred, and others, there is, in my view, a danger in placing too much emphasis on the phrase "last resort" used by Thorpe LJ and Coleridge J in Re: A . It is well established that the court cannot put a gloss on to the paramountcy principle in CA 1989, s 1 . I do not read the judgments in Re: A as purporting to do that. The test is, and must always be, based on a comprehensive analysis of the child's welfare and a determination of where the welfare balance points in terms of outcome. It is important to note that the welfare provisions in CA 1989, s 1 are precisely the same provisions as those applying in public law children cases where a local authority may seek the court's authorisation to remove a child from parental care either to place them with another relative or in alternative care arrangements. Where, in private law proceedings, the choice, as here, is between care by one parent and care by another parent against whom there are no significant findings, one might anticipate that the threshold triggering a change of residence would, if anything, be lower than that justifying the permanent removal of a child from a family into foster care. Use of phrases such as "last resort" or "draconian" cannot and should not indicate a different or enhanced welfare test. What is required is for the judge to consider all the circumstances in the case that are relevant to the issue of welfare, consider those elements in the s 1(3) welfare checklist which apply on the facts of the case and then, taking all those matters into account, determine which of the various options best meets the child's welfare needs.

14. Re H (Parental Alienation) [2019] EWHC 2723 (Fam)

[34] It is the only realistic option that ensures H's welfare best interests are met. I am satisfied that this order is a necessary and proportionate response to the harmful and damaging situation that H has found himself in recent years.

15. Re T (Parental Alienation [2019] EWHC 3854 (Fam)

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[69] In relation to further findings I find as follows:-

d) That T has suffered and continues to suffer emotional harm from living with her Mother for denying her a positive paternal relationship. This is the opinion of the professionals in the case (SW, Dr Shbero, the Guardian) and I accept it.

e) That historically the Mother has provided T with an extremely negative picture of her Father which T now acts out in play. This was evidenced by Dr Shbero and the Social worker, both of whom had seen this and heard T's violent games directed at the 'daddy' toy.

f) That Mother has and continues to minimise the role of Father in T's life. I base this finding on the clear evidence of the SW and Dr Shbero that in spite of the therapy undertaken by the Mother, she has not yet been able to demonstrate or evidence any actual change of approach. The Guardian's report, dated 12th December 2019 at para 9.10 reports that the Mother struggled to articulate any positives for T in having a relationship with her Father. Sadly, in spite of the work and the professional input, BR has some way to go before this deep-rooted mind- set can be varied.

g) That on the evidence, the Father is better able to promote a relationship between T and her Mother than the Mother can promote a relationship between T and her Father. There has been a parenting assessment of the Father and numerous other experts have interviewed him. He has consistently said that, provided it is safe for T, he will promote a relationship with T's mother. He repeated that in court. Neither I, nor any of the other professionals, have been given any reason to doubt this. Unfortunately, there is clear evidence that the Mother cannot promote the relationship with the Father at this time. f) I find that T has been the subject of proceedings and interventions and assessments for most of her short life, and that she needs a period of stability and calm and freedom from litigation and expert analysis in so far as is possible. This, it seems to me, is self- evident. I am not an expert in autism, but I agree with Dr Shbero that there are probably other important factors operating on T which may explain her behaviours apart from a diagnosis of autism. My suggestion is that the parents should be led by the school and social worker in due course as to whether there is a need for any further assessment of T's educational or social/emotional needs.

16. *Re A (Children) (Parental Alienation) (No.1) [2020] EWHC 3366 (Fam)*

[57] A child arrangements order will be made in the terms that I have set out above. Either party and/or Mrs Woodall will have liberty to apply for urgent directions made by email to my clerk. Any further applications in respect of these children, whether issued or to be issued will be reserved to me. I am completely satisfied that the child arrangements order detailed by me above meets the needs of the children and most likely is the one which enables them to overcome the emotional and psychological harm which they have suffered and are suffering at the hands of their mother.

17. *FA v MA [2021] EWFC 58*

[124] In the medium to long term it is likely that if A lived with their father this would provide the best opportunity to have a meaningful relationship with both sides of the family. How they would cope with missing their mother and their home in Scotland is

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not known. It may be profoundly difficult for them. The depth of A's distress cannot be known at this time. A is not thought to show any additional psychological or emotional disturbance. However, the effect of the move may be to cause these symptoms. The Guardian does not have sufficient knowledge of A to advise on this matter. The psychologist thought that he did not need to see A in this case to make his recommendations.

[125] I am aware that for some children the sort of move contemplated in this case can cause long-term scarring, a sense of fear and loss which they cannot come to terms with. In some children the reaction is so strong that the change in residence has had to be reviewed and changed.

[126] Against this, A is young, knows their father and is not thought to think bad of him. It is suggested by the psychologist and the Guardian that transfer of residence is a necessary step to take.

[127] There is an obvious risk of emotional harm if the move is implemented. Indeed, the move itself is likely to be traumatic

[128] If no move is allowed it is likely that A will continue to suffer emotional harm through the impairment of a relationship with their paternal family. Although at times MA has talked in positive terms about the need for this relationship, and at times she has done well to promote this, she has also acted decisively in the opposite direction by refusing contact and disobeying orders on numerous occasions. Even since the hearing in February 2021 her compliance with the order for contact has been less than half of what was expected of her. She is not in court to explain her reasons for denying contact in Scotland in July. Based on the evidence of FA, it would appear that she had no good reason to refuse to accommodate contact on the dates which he proposed.

[159] I am satisfied that an order to transfer of residence, option 3, would better enable A to maintain a relationship with both sides of the family. The more difficult question is whether it is justified in the best interests of A given the likely risks of emotional harm.

18. *Re L-H (Children)* (December 2017, CA – the risk of foster care as a bridging position.