PRESIDENT OF THE FAMILY DIVISION

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SEEKING SAFETY - THE WHOLE PICTURE

KEYNOTE ADDRESS FOR THE NATIONAL RESOLUTION DOMESTIC ABUSE CONFERENCE

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1. It gives me great pleasure to be asked to give the Keynote address to this important conference, and I am particularly pleased to see not just a police officer but also a judge amongst your speakers. John Platt sits in one of London's busiest courts in Romford and probably knows more about the subject than a number of my colleagues. But I will spare his blushes by making an important, albeit discreditable admission. We all now know that domestic abuse knows no social or legal boundaries. It is found in every class and nation. It is pervasive. But judges, I suspect, came late to realise the true evil of its effects on victims and on children. The ethos of the Children Act 1989 was perceived by many, myself included, as non-blameworthy, un-recriminatory. Look forward, not back. The relationship is over: don't spend time raking over its embers: look to the future.

2. I suspect that this attitude prevented a number of us from investigating allegations of domestic abuse, and also stopped us permitting victims to advance abuse as a reason - to take just one example - for denying contact. It was not really under the seminal Court of Appeal decision in *In re L (a child) (Contact: Domestic*

Violence); In re V, M and H heard on May and June 200 but not fully reported until [2001] Fam 260 that the judiciary really took domestic abuse on board for the evil that it is.

3. Even then, as I recall, a distinguished member of the Court of Appeal, who shall, of course, remain nameless, was able to assure me that domestic abuse was not really a problem because they had not had a case about it in the Court of Appeal! I like to think we have come a long way since then. Although we did not adopt the New Zealand model, the definition of "harm" in section 31(9) of the Children Act 1989 now includes ill-treatment or the impairment of health or development "including, for example, impairment suffered from seeing or hearing the ill-treatment of another". That amendment, introduced by the Adoption and Children Act 2002, gives me the opportunity to acknowledge the invaluable work done in this field by Baroness Hale of Richmond, who, as I understand it, is the author of that amendment. We are indeed fortunate to have a family lawyer of such distinction in the Supreme Court.

4. We now also have the revised *Practice Direction: Residence and Contact orders: Domestic Violence and Harm* of 14 January 2009 [2009] 2 FLR 1400, which was made by my predecessor, Sir Mark Potter following a report from the Family Justice Council (written by Jane Craig) on consent orders. This makes the point that where abuse is disputed, and where (if established) it is likely to affect the order you are going to make, you have to hold a fact finding hearing in order to establish whether or not the abuse has occurred.

5. Unfortunately, it has transpired that judges have been holding unnecessary fact finding hearings, sometimes lasting several days, as a result of which they find facts which are not relevant to the ultimate issue. This led, in the earlier part of this year, to my first *Guidance*, [2010] 2 FCR 271 from which I will only recite one paragraph: -

> Thus, for example, the fact that domestic abuse is put forward by the residential parent of a child as a reason for denying the non-residential parent contact with the child is not automatically a reason for a split hearing with a preliminary fact finding hearing. As the President's *Practice Direction: Residence and Contact order: Domestic Violence and Harm* [date and reference] makes clear, the court must consider the nature of any allegations, and the *extent* to which those allegations, if admitted or proved "*would be relevant in deciding whether to make an order about residence or contact and, if so, in what terms*" - see para [3] (emphasis supplied). In para [11] the court is again instructed to "*consider the likely impact of that issue (*domestic abuse*) on the outcome of the proceedings" (*emphasis supplied*)* and whether or not the decision of the court is likely to be affected by findings of domestic abuse. Plainly, if the allegations are unlikely to have any impact on the court's order, there is no need for a separate fact finding hearing.

6. I emphasised, and repeat, that nothing in what I said was designed to minimise or trivialise domestic abuse or its effects on children and upon its other victims, or to discourage victims from coming forward with abuse allegations.

7. Whilst judges have been slow to move, the transformation in the attitude of the police force has been dramatic. No longer are serious incidents dismissed as mere "domestics" and I am very sorry that I cannot stay to hear DI Leanne Brusted's paper. However, the very fact that the police have a "Staff Officer for Domestic Abuse" tells its own story.

8. In my experience, physical domestic abuse is largely a male problem. There are, of course, women who physically abuse their partners and their children, but they are, in my experience, the minority. This is not a politically correct opinion. The politically correct view is that domestic violence affects both sexes and is perpetrated by both. So, of course, it is, but male violence is, in my experience, more common. Moreover, in my experience, men are notoriously unwilling to admit to being the perpetrators of domestic abuse. Furthermore, it seems to me that if men embrace the

comfortable doctrine that domestic abuse affects people of both genders, that is but a short step away from doing nothing about it.

9. Again, as we all know, one of the many evils of domestic violence is that it is frequently hidden. Victims are ashamed to talk about it, or to admit that it is happening. Courts, of course, cannot address the problem of domestic abuse unless they know about it. This has been a major problem in England. How do we persuade victims to come forward? The adversarial criminal law in England has, historically, required victims to give oral evidence and to be cross-examined. Many victims are unwilling to undergo this process. Moreover, it is often the case that they do not want the perpetrator to be imprisoned or otherwise punished: they simply want the violence to stop.

10. We have also learned that victims often stay with perpetrators and do not separate from them because their partners are violent. There may be many reasons for this. It may be fear of the perpetrator. It may be economic dependence. It may be fear that the system will not afford them adequate protection. I never ceased to be surprised by victims telling the court that the reason they had stayed with the perpetrator was that they believed their partner when he said they would lose the care of their children if they told the authorities of the abuse. And as I have already said, it may be also, of course, be that the victim is economically dependent on the perpetrator, or still loves him, and simply wants the violence to stop.

11. Above all, however, the most important lesson which we have learned is that domestic violence has a very serious effect on the development of children, and the area in which this question arises most acutely is in cases in which the violent parent seeks contact post separation with the children of a former partner.

12. My own particular interest in domestic abuse began in 1996, three years after I had been appointed to the High Court Bench. I was asked to be a member of the Lord Chancellor's Advisory Board on Family Law (ABFL) which was set out to advise the government on the implementation of divorce law reform following the enactment of the Family Law Act 1996 (the 1996 Act). This, it will be recalled, had been passed in the dying days of the Major administration, and had been substantially amended (some would day mauled and rendered unrecognisable) in Parliament as a means of ensuring that it got through. A bit like the recent "wash-up". The government did not, in the end, implement the reform of the divorce law (contrary to our recommendation) although the Lord Chancellor of the day (James McKay) was able to salvage that part of the Act with dealt with the occupation of property and the powers to protect victims against domestic abuse. See now also the extension to Part IV in the Forced Marriage (Civil Procedure) Act 2007.

13. The year 1996 also saw the abolition of the Children Act Advisory Committee (CAAC), latterly chaired by the late and much missed Bracewell J. CAAC had been set up to monitor the implementation of the 1989 Act and to oversee good practice. CAAC poured out good advice and practice on the working of the 1989 Act. In 1996, the government flatly refused to renew its mandate. Such committees, we were told, were given a life of five years: CAAC was already past its sell-by date and that was that.

14. The abolition of CAAC meant, of course, that there was no official body monitoring the implementation of the 1989 Act or continuing to promulgate good practice under it. These, it will be recalled, were the days long before the Family Justice Council. I therefore insisted that ABFL should have a sub-committee, known as the Children Act Sub-Committee (CASC). CASC comprised the chair of ABFL, Sir Thomas Boyd-Carpenter, an ex soldier, two well known London family solicitors,

Naomi Angell (predominantly a public law children's solicitor) and Jane Simpson (predominantly a private family lawyer) Dr. Carole Kaplan, a consultant psychiatrist from Newcastle, Arran Poyser then a senior inspector with HM Courts' Service, and now retired, David Skidmore, an Assistant Chief Probation Officer in the West Midlands and the sadly now deceased Anthony Wells, the former Director of the National Council for Family Proceedings.

15. The first topic CASC determined to tackle was the question of parental contact to children in case in which there was domestic violence. I recall with wry amusement the hostility we encountered from Ministers and, through them, from their officials at our wish to address this topic. We were told – in terms – that the government did not want us to address the subject and saw no point in us doing so. I say "wry amusement" because when we did report and the government responded to our report, its response began with the words: "We invited the committee to report to us on the question ....."

16. CASC carried out a detailed consultation. We were extremely impressed by the responses, of which there were a total of 223, including detailed replies from across the whole spectrum of the family justice system, including, of course, academics, pressure groups, judges, lawyers and charities. The result was a report entitled "A report to the Lord Chancellor on the question of Parental Contact in Cases where there is domestic violence".

17. The main debate which we had in the committee – at which I have already hinted - was whether or not we should follow the New Zealand model and legislate for a presumption against contact in cases in which domestic violence was alleged. Now is not the time or the place to summarise the pros and cons for you. One of our recommendations was the publications of good practice guidelines, preferably to be

introduced by way of Practice Direction along the lines set out in the report. We also, I see, recommended careful monitoring of the guidelines over a defined period with a review of the need for legislation at the end of that period. We also, I see, recommended "a systematic gathering and analysis of information relating to applications made to the court for contact in which domestic violence is an issue" as well as "longitudinal research funded by the Department".

18. In summary, therefore, I think the current position is that we are now much more acutely aware of the significance of domestic abuse in contact cases. Gone, I think, are the days when a man could be violent to the mother of his children and yet still be considered a good father. We are much more aware of the risks to children posed by domestic abuse, and I think this has helped to underline the proposition that, in English Law, contact is the right of the child, not the right of the parent, and that the child's safety and well-being in contact is paramount.

19. All in all, therefore, whilst the judiciary in England and Wales retains its autonomy, and has to treat each cases on its particular facts, there can I think be no doubt that our increased awareness of domestic abuse has had a substantial impact on our thinking, and on our approach to contact cases. We will, of course, have to wait and see how the Practice Direction turns out. There is, however, no doubt in my mind that since *Re L* there has been a radical shake-up in our thinking.

20. The preparation of the CASC report coincided with the important development in English Law to which I have already referred, namely the decision of the Court of Appeal in the case of *In re L* In each of the four cases before the court, there had been domestic violence, and in each the court had refused to make an order for contact. In each case the fathers of the children concerned (who had been denied contact) appealed, and in each case the appeal was dismissed.

21. One aspect which, in my view, the lawyers have not yet got right is the interface between the criminal and the civil aspects of domestic abuse. Of course, it is correct that domestic abuse should be identified both in the criminal and in the civil context, but do we really need eight Acts of Parliament – nine if you include the forced Marriage (Civil Protection) Act 2007 - starting with Part IV of the Family Law Act 1996 and ending with the Children and Adoption Act 2006? May I just highlight two of the issues which arise? The first is largely due to the increasing specialisation of the profession. Both the Family and Criminal jurisdictions are increasingly complex and it very rare for practitioners to be expert in both fields. As a result, there is little real understanding of the procedures by each of the other area, and in particular of, for example, the practicalities of sharing information across the two jurisdictions. Efforts have been made at a high level to address this and the Family-Criminal Interface Committee, jointly set up by my predecessor President and the Solicitor General includes representatives from both jurisdictions who are able to consider such issues. A major achievement of the Committee is the publication, through the Law Society, of the Good Practice Guide: Related Family and Criminal Proceedings[1]. The Guide sets out, for example, the ACPO Police/Family Disclosure Protocol.[2] The second issue is that a defendant who is in breach of the more serious provisions of the harassment legislation can, as I understand it, elect for jury trial in the Crown Court. Apart from discrepancies in sentencing (contempt in the civil context is limited to two years imprisonment (itself rarely ordered) this can mean that a defendant spends an extended time on bail. But I would always rather have too much legislation than too little, and I should not perhaps look a gift horse in the mouth.

[1] ISBN 978 1 85328 609 4
[2] Disclosure of Information in Family Proceedings

51. The point with which I wish to conclude is one which I see is being addressed today, and which I regard as of critical importance namely "honour" based violence. I would like to discuss this in the context of cases with which I have been involved, and which, in my judgment, indicate the likely nature of the problem.

52. Firstly, there are two cases in the Court of Appeal. The earlier is *Re K (Non-Accidental Injuries: Perpetrator: New Evidence* [2004] EWCA Civ 1181 and the second is *B-M (children)* [2009] EWCA Civ 205. In the first case, a young woman, who had been brought to this country following an arranged marriage in India, took part in what the judge described as a conspiracy of silence in relation to gravely serous non-accidental injuries perpetrated against one of her two children. Only after the children had been made the subject of care proceedings and freed for adoption did she break away from the family home and begin to tell the truth of the abuse which both she and the child had suffered. In the Court of Appeal, we set aside the care and freeing orders, but told her that her only hope of regaining the children's care was absolute frankness.

53. In the second case, it was the Pakistani father who had come to this country having entered into an arranged marriage. His brother in law (his wife's brother) murdered one of his own two children, and was serving a life sentence. The brother in law's wife, who was illiterate, had been brought to this country from Pakistan following her (arranged) marriage to her husband. She had also faced criminal proceedings along with her husband relating to the deceased child, but she had been acquitted. She had nowhere else to live apart from the home of her in-laws. The mother of the children with whom we were concerned was, of course, her sister in law.

54. The brother-in law's wife then gave birth to a second child, and fled from her in-laws' home. The tale she told was horrific. She had been kept a prisoner in her in-laws' house: she had no money and only one change of clothes. She did not even know in which town she was living. She had been physically abused, but only fled when she overheard her in-laws' family discussing a plot to kill her.

55. Following her flight, the brother-in law's family was determined to track her down and recover her child. They went to extreme lengths in order to do so. These included the mother of the children with whom we were concerned inflicting injuries on herself, spraying the night clothes of one of her own children with accelerant and setting fire to the house – with the children in it – in an attempt to persuade the police that these acts had been committed by her brother's wife, and in an attempt to galvanise the police into tracking her down and arresting her. Fortunately, the police saw through the device. They arrested the mother, who was serving a 5 year term for arson when we dealt with the case.

56. What these cases brought home to me was that criminal violence was cynically used not only to abuse the bother's wife but to intimidate the sister. She refused to implicate her brothers in the plot. The reason for her refusal to do so was not far to seek. If she did so, she would be killed. Equally, she would have been killed had she not participated in the plot to frame her brother's wife.

57. The third was is one in which I handed down judgment last week, and which has not yet been reported. The local police had information which led them to believe that a young woman was about to be forced into marriage. They applied to a judge under the 2007 Act for a forced marriage protection order, which the judge granted

ex parte. So far so good. But what happens when the family applies to set the order aside? If the information known to the police – and on which they obtained the original order - was disclosed to the family, there was a risk that it would be abused, and that serious harm to either the person to be protected or another witness might result. What happens, in this context, to ECHR Articles 6 and 8?

58. I was asked to appoint special advocates to represent the family so that the information could be disclosed to the advocates and so that a fair trial could take place. On the facts, I refused. But take a different, but quite likely scenario. Information which is necessary for a member of the family to have in order to defend himself, if disclosed, may be misused by a third party – or indeed by the self same member of the family. Somebody may be injured or even killed. How is this question to be addressed?

59. In a fourth case, a young woman who is currently the subject of an interim care order, a FMPO, and living with foster parents wishes to go home. Should her parents be given the information which permits them to defend the care proceedings and set the FMPO aside? They assert their innocence, but if they are not, the information could well be used to abuse the young woman.

55. I have no idea of the extent of the problem in ethnic minority communities. My colleagues on the North Eastern Circuit tell me that such cases are commonplace. Any culture which routinely abuses women or treats them as second class citizens is unacceptable in English law. I am clear that both women in the first two cases required enormous courage to flee as they did. They spoke no English. They were

cutting themselves off from everything they knew. They were dependent upon the local authority and the networks they could create for their very survival.

56. I do not propose to lengthen this introduction by extensive citations from my various judgments. What, however, these cases have taught me is that we still have mountains to climb.
