THINKING THE UNTHINKABLE:
THE IMPLICATIONS OF RESEARCH ON WOMEN AND
CHILDREN IN RELATION TO DOMESTIC VIOLENCE

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in M. Thorpe and R. Budden (eds) Durable Solutions: The collected papers of the 2005 Dartington Hall Conference, Bristol, Family Law, Jordan Publishing. 159-172

PREAMBLE

This chapter argues that the central issue identified in the Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence (1999) — namely that safety was being compromised at the expense of contact — is a problem which still needs to be addressed. While a number of initiatives have been taken (guidelines for judges and magistrates, developments in case law, CIA forms), the evidence provided by research studies and the official statistics indicate that there has been little or no change. In fact, some of the data suggests that the situation is worsening.

The official statistics indicate that in fewer than 1% of contact applications is a ‘no contact order’ given. The serious incongruity between this figure and the data on domestic violence homicide and serious assaults raises major issues of concern. These data show that on average two women a week are killed by a partner or ex-partner; that 54% of rape is carried out by a partner or ex-partner; and that of the domestic violence murders which were reviewed in London during a 14-month period, 76% involved separation and almost 50% involved arguments about child contact (Richards and Baker, 2003).

Similarly, research studies are consistent in showing that there are serious negative impacts on the physical, cognitive and emotional well-being of children living with domestic violence, including high rates of direct child abuse. Up to two-thirds of children on the child protection register are children living with domestic violence. It is also a consistent theme in child death reviews.

The lack of responsiveness to the issues of serious domestic violence within the decision-making about child contact, and the current lack of any clause within the Children (Contact and Adoption) Bill which specifically ensures children’s safety or that of their primary carer (usually mother), suggests that the child contact arena has failed to take on the mounting evidence from the criminal justice and child protection systems about the damaging and sometimes lethal impact of serious domestic violence. This chapter calls for a shift in attitude, policy and practice to address the serious shortcomings which are raised by the research evidence in this area.

BACKGROUND

In 2003, 67,000 applications were made for contact under s 8 of the Children Act 1989 (Department of Constitutional Affairs (2004)). Only 601 cases were refused – a figure of fewer than 1% of all applications and one can only assume the lowest figure of any country where there is a well-developed system of family courts. This paper will argue that such a figure, when taken alongside what is known about domestic violence and other forms of child abuse, represents a very significant ‘institutional failure to protect’.
The paper will begin with a discussion of the backdrop against which issues of domestic violence and child abuse are raised within family court proceedings, including the polarised debates between father’s rights groups and women’s and children’s advocates. It will look briefly at the attempts which have been made so far to address the issue of domestic violence and child abuse before looking more closely at the salient data on post-separation violence. The implications for child-contact decisions are then explored, including the ‘unthinkable’ notion that while in some cases of domestic violence and child abuse accommodations in relation to supported and supervised contact can be made, for another group protection and recovery from the terrifying effects of severe domestic violence can only be made through indirect contact or no contact orders.

HIGH LEVELS OF AGREED CONTACT

Any discussion of the debates currently raging in the family court context needs to have some perspective on the extent of the problem. Data is dependent upon how contact is measured, who is being asked (resident, non-resident parents or children), and the extent of the study (Hunt and Roberts (2004)). A study by the Office of National Statistics of 661 parents (649 resident parents and 312 non-resident parents) reporting on the contact arrangements for 1,506 children showed the following results:

- At least half of all children had direct or indirect contact with their non-resident parent at least once a week.
- 43% of children in the resident parent sample and 59% of children in the non-resident parent sample had direct contact at least once a week.
- Slightly fewer than one in five (18% of both samples) saw their non-resident parent at least once a month. A further one-twentieth saw their non-resident parent only in the school holidays or once every three months.
- 24% of children in the resident parent sample and 10% of children in the non-resident parent sample have no direct or indirect contact with their non-resident parent (Blackwell and Dawe (2003)).

Another study of children in Bristol (Dunn (2003)) found that for the 82% where any form of contact was taking place, one-third had weekly contact and 90% had direct contact at least once a month. This Bristol cohort, in common with the Home Office Citizenship Survey (Attwood et al (2003)), show only a very small number of children with no contact with their resident parent – 10% and 9% respectively. In each study, the level of contact is reported to be higher in the immediate post-divorce period than after three or four years.

An overview of studies in this area (Hunt (2003)) showed that resident parents generally want their partners to see their children more often, not less. In the large ONS study (Blackwell and Dawe (2003)) more resident (31%) compared with non-resident parents (17%) felt that contact was insufficient and that children could benefit from seeing their fathers more often.

In short, there are very high levels of contact informally agreed between parents in the community. There are also groups of resident and non-resident parents who would like more contact. Only a minority of parents use the law to make decisions about child contact. The ONS study (Blackwell and Dawe (2003)) showed this occurred for an estimated 10% of parents. There is also a group of parents who do not take their cases through the family courts but who are also unhappy with contact arrangements.

WHO IS IN THE 10%?

It is difficult to ascertain the constituency of those who comprise the 10% of parents making applications as detailed aggregated data from the different courts is not kept, or at least is not publicly available. Hunt and Roberts (2003) in their overview estimate that between 75% and 86% of applicants will be fathers and 9% to 16% will be mothers. Eight out of 10 applications are about contact. Residency is less contested. Within this 10% are approximately 15% of
‘intractable cases’ which continue for many years and take up substantial amounts of court time (Buchanan et al (2001)).

‘The 10%’ are a diverse group who will include non-resident fathers who want more contact with their children and where there are no issues of abuse, child neglect or violence. There will also be resident mothers who are unhappy with child contact arrangements and where there are also no issues of abuse, child neglect of violence from the non-resident father.

Also within the 10% are also a group of men and women where domestic violence and child abuse have been major issues. It is this group who provide the focus of the rest of the article. The probation service estimates that there are 16,000 cases (24% of total applications) where there is domestic violence (Association of Chief Officers of Probation (1999)). The study by Buchanan et al (2001) of ‘intractable cases’ suggested that domestic violence featured in the majority of these cases. In three out of four of the intractable cases (78%) at least one parent reported fear as some point and over half (56%) reported physical violence. The violence reported by women in their study was generally at the severe end of the continuum of domestic violence, with two thirds reporting chronic violence with injuries ranging from severe bruising to broken bones, internal injuries as well as sustained harassment, emotional abuse and intimidation. This level of violence is also where issues of significant harm to children are at the forefront of concerns.

This scene-setting exercise emphasises that when discussing situations of domestic violence and child abuse that reference is being made to a significant but minority group and that there is no suggestion that the issues raised for this group are applicable across the spectrum of child contact. They apply quite specifically to this group of parents and their children.

**CLAARIFYING THE CONCEPT OF DOMESTIC VIOLENCE**

Unfortunately there is little agreement within the family court arena about the concept of domestic violence. The definition used by CAFCASS is as follows and indicates that issues beyond physical violence need to be considered:

> ‘Patterns of behaviour characterised by the misuse of power and control by one person over another who are or have been in an intimate relationship. It can occur in mixed gender relationships and same gender relationships and has profound consequences for the lives of children, individuals, families and communities. It may be physical, sexual, emotional and/or psychological. The latter may include intimidation, harassment, damage to property, threats and financial abuse.’ (CAFCASS Domestic Violence Assessment Policy (2005))

Research in the late 1990s also highlighted unequivocally the close links between domestic violence and child abuse, through both direct abuse as well as the harmful effects of living with and often witnessing domestic violence (Mullender and Morely (1994); NCH Action for Children (1994)).

There is little shared agreement between groups advocating fathers’ rights and women and children’s advocates about the nature of domestic violence. Within this contested arena both groups argue strongly that they have the best interests of children at the heart of their dispute. The issues are helpfully summarised by Jaffe et al, (2003, p 12).

<table>
<thead>
<tr>
<th>Issue</th>
<th>Father’s rights</th>
<th>Domestic violence advocates</th>
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<tr>
<td>Post separation parenting arrangements</td>
<td>Shared parenting is best</td>
<td>Shared parenting endangers abused women</td>
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<tr>
<td>Prevalence of domestic violence</td>
<td>Domestic violence is exaggerated</td>
<td>Domestic violence is under reported</td>
</tr>
<tr>
<td>Nature of domestic violence</td>
<td>Women are as violent as men</td>
<td>Male violence is more severe, injurious and greater risk to</td>
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The evidence base will be looked at in relation to a number of these issues.

Firstly, in relation to the under-reporting of domestic violence there is certainly a significant amount of evidence in all studies of domestic violence which show that there is under-reporting to formal agencies such as the police (Hester and Westmarland (2005)), though the level of reporting from confidential surveys such as the latest British Crime Survey suggest that both men and women report significant levels of physical and emotional abuse within their domestic relationships (Walby and Allen (2004)). 13% of women and 9% of men report being subjected to domestic violence in the past year. However, when the most heavily abused are considered, based on the frequency of attacks, the range of forms of violence and the severity of injury, women are overwhelmingly the most victimised. Among people subjected to four or more incidents of domestic violence, 89% were women. Moreover 81% of all incidents were attacks on women (Walby and Allen (2004)). Women are twice as likely to be injured, and three times as likely to report living in fear than men (Mirrelees-Black (1999)). When homicide is considered, 37% of women homicides were committed by a partner or former partner, as against 8% of male homicides. At least 54% of rape and serious sexual assault are perpetrated by a male partner or former partner (Walby and Allen (2004)). Domestic violence incidents and recorded crime again show overwhelmingly gendered patterns, with 90% of incidents involving a female victim and a male perpetrator (Scottish Executive (2003)). This is therefore not to deny the levels of violence which about 10% of male victims of domestic violence experience which is severe and chronic, though some of this occurs within gay relationships.

The research on domestic violence therefore suggests that it is not a homogenous concept, but one which covers a wide range of abusive behaviours. This raises very real issues for the family courts in assessing what is meant by ‘domestic violence’. Risk and safety assessments are required when there are allegations of domestic violence as the ‘story of the violence’ is significant in determining the incidence and severity of the emotional and physical abuse which also has a profound a damaging effect on children. Different levels of protection and safety will need to address the complex issues of safe contact.

**IS DOMESTIC VIOLENCE TAKEN SERIOUSLY?**

There is no doubt that there have been steps by those with responsibility for policy and practice in relation to family court decision-making to take domestic violence more seriously than has been evident in the past. Steps include:

- A widespread Government consultation on domestic violence and child contact which led to the publication of a Report to the Lord Chancellor on the Question of Parental Contact in Cases Where There is Domestic Violence (1999). This report acknowledged that ‘the issue is not currently being fully or appropriately addressed by the courts’ and that there was a widespread view across most stakeholders in the sector that the courts had swung too far towards an assumption that ‘all contact was in the best interests of the child’ with too little consideration of the issues of safety and risk of harm.
- Prior to four judgements in the Court of Appeal where domestic violence was a feature, an expert’s report was called for to review the evidence on domestic violence and its effects on children. This report (Sturge and Glaser (2000)) recommended that there should be no
presumption that contact was in the best interests of the child where there had been domestic violence; in fact the evidence all pointed in the opposite direction.

- The judgements in the Court of Appeal did not order direct contact in any of the four cases before them (Re L; Re V; Re M; Re H [2000] 2 FLR 334; or in the earlier judgement Re M (Contact; Violent Parent) [1999] 2 FLR 321).

- An outcome of this work was the publication by the Lord Chancellor’s Department of Guidelines for Good Practice on Parental Contact in Cases Where There Is Domestic Violence (2001)) which recommended that an early finding of fact needed to be established where there were allegations, that contact should only be ordered where it could be guaranteed to be safe before, during and after contact, and helpful guidelines were given which raised the wide range of concerns that needed to be addressed when considering the appropriate orders when there were allegations of domestic violence.

- Development of supervised and supported child contact centres and standards has created places which provide different levels of supervision for contact. These developments have been double edged for women and children where there is serious domestic violence. However, they do provide contact provision which is beyond unsupervised contact, though often the pressures to ‘move on’ mean that even the protection provided by low-level observation may be short-lived (Aris et al (2001)). High-level, supervised contact is expensive and in relatively short supply with many areas having no access to this provision.

- Changes to the definition of harm through the Adoption and Children Act 2002 which now includes ‘impairment suffered from seeing or hearing the ill treatment of another’, means that domestic violence is now named as a potential form of harm to children which needs to be considered.

- The C1A or ‘Gateway Forms’ which attach to applications for contact and the response by the resident parent have recently been introduced and should allow for early reporting of abuse allegations. However, they have yet to be evaluated and it is unclear how they will be used by both resident and non-resident parents.

- A Risk Assessment and Guidance for CAFCASS on Domestic Violence (2005) has been developed, though is yet to be implemented.

While the list suggests that action is being taken to ensure safe contact, there have been other processes which have undermined progress which on the surface suggests that contact is safer. Such actions have included:

- A very successful campaign by father’s rights groups that have consistently argued that men are disadvantaged in child contact cases. The public perception as a result of this publicity is that this is a majority rather than a minority of non-resident fathers and that widespread reform is needed in the court system.

- Very strong presumptions in favour of contact created by case law including: Latey J in M v M (Child: Access) [1973] 2 All ER 81 at 88 which emphasises the long-term advantages to the child of keeping in touch with the non-resident parent which outweigh any initially minor and superficial upset; Re H (Minors) (Access) [1992] 1 FLR 148 per Balcombe LJ which provides the accepted test for child contact – ‘are there any cogent reasons why this father should be denied access to his children?’; Re P (Contact: Supervision) [1996] 2 FLR 314 and Re O (A Minor) (Contact: imposition of conditions) [1995] 2 FLR 124 in which it is stated that ‘it is almost always in the interests of a child whose parents are separated that he or she should have contact with the parent with whom the child is not living’ (The Report to the Lord Chancellor on the Question of Parental Contact in Cases Where There Is Domestic Violence (1999)). Research suggests that the presumption is such that few judges are able to countenance anything other than direct and preferably unsupervised contact in their decision-making even where there was evidence of severe abuse of either women or children (Bailey-Harris et al (1999)).

- Making Contact Work (2002) was a consultation which followed on from the Children Act Sub-Committee Report on Domestic Violence. The Report highlighted that there were high levels of dissatisfaction expressed particularly by non-resident fathers, but that enforcement should nevertheless only be used as a last resort. Women’s groups were particularly
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Concerned about enforcement being used when there had been inadequate assessments about why either resident mothers or their children may be resisting contact. In many cases this was due to domestic violence or child abuse. Almost all of the recommendations have been accepted by the Government.

- At this stage, it is unclear whether and how ‘The Gateway forms’ will be used and whether the number of non-resident fathers reporting low level domestic violence will override their usefulness as a mechanism for exploring issues of severity and frequency of abuse for seriously abused men, women and children. This issue is planned to be the subject of evaluation by the Department of Constitutional Affairs in the future.

- The draft Children (Contact and Adoption) Bill has now been the subject of consultation and has also received attention from the Scrutiny Committee which oversees all draft legislation. In spite of ‘safe contact’ being mentioned in several places within the draft Bill at the time of writing there are no mechanisms, sections or clauses about how safety will be ensured and under what circumstances. The Bill has been written as though none of the prior policy backdrop on domestic violence has occurred (Masson and Humphreys, 2005).

  ‘Both the Constitutional Affair’s Committee and the Scrutiny Committee have raised serious concerns about the proposed legislation. It asserts that “the interests of children should be paramount” in disputes between adults over children and that the Bill in its current form did “little to challenge the ‘adult to adult’ character of this litigation.” In the Committee’s opinion, the Bill “reflected one particular view of the nature of problems over contact…that these reflect the intransigence…of the resident parent.”’ It suspected that contact disputes which reached the courts were “considerably more complex…and not easily resolved by …one-off enforcement measures.”’ (para 35) (Masson and Humphreys, 2005)

In summary, a range of measures have been taken to both address safety and enforcement of contact. Ideally, these should deal with different cases. However, grave concerns have been expressed by both children’s charities and women’s advocates that unless nuanced risk and safety assessments are undertaken and recommendations acted on by the courts, contact will be enforced where there is a history of violence and abuse either towards resident mothers or the child or both.

WHAT IS THE EVIDENCE OF CHANGING PRACTICES ABOUT DOMESTIC VIOLENCE?

At this stage, there is little evidence of substantial change towards taking domestic violence seriously.

- Clearly the statistics quoted at the beginning of the article suggest that the chances of gaining an order for no contact are virtually nil, no matter what the severity of abuse (Department of Constitutional Affairs (2004)). From a very low baseline, the figure of less than 1% represents a continuous trend towards fewer and fewer orders refused from 3% in 1998, 2.7% in 2000, while in 2001 there were 55,030 contact orders granted by the courts and only 713 (1.3%) were refused (Lord Chancellor’s Department Judicial Statistics).

- Further evidence from a case file analysis of 300 cases of applications before the courts shows that in 61% of cases there were allegations of domestic violence. In one third of cases the allegation was proved, though the researcher suggests this was an under-estimate due to under-reporting and difficulty in adducing evidence. In the vast majority of cases, fathers were granted contact with their children regardless of their violent and abusive behaviour. While 58% of men had some contact when they came into the court arena, this had risen to 94% by the end of the legal proceedings, though 5% was indirect contact (National Association of Probation Officers (2002)).

- A case file analysis based on a random selection of 430 cases found that 22% of cases involved allegations of domestic violence. Direct contact was granted in half these cases. In only four cases during the proceedings was there an order for no contact. In one of these
cases the father then withdrew the application, while in the other three cases contact was eventually granted (Smart et al (2003)).

- A survey of 178 Women’s Aid refuges in 2003 undertaken to gather views from the domestic violence sector about whether practice had developed which was more sensitive to the needs of women and children leaving situations of domestic violence since the introduction of the Good Practice Guidelines (Lord Chancellor’s Department (2001)) makes depressing reading (Saunders and Barron (2003)). Workers cited cases of 21 children since the new guidelines were introduced where unsupervised contact has been ordered with a Schedule 1 offender or with a parent whose behaviour caused the child to be on the child protection register. 20% of respondents knew of cases where residence had been granted to a domestic violence offender, totalling 101 children. Threats by CAFCASS officers or judges that there would be a change to the residence order if mothers did not allow contact were the most common way of coercing women survivors of domestic violence and their children into agreeing to contact. This was cited in cases concerning 64 women.

- The British Crime Survey of domestic violence showed that in 19% of cases where there was child contact it had been court ordered (Walby and Allen (2004)).

In summary, there is little in this evidence which suggests that domestic violence is being taken seriously. More supervised and supported contact is being ordered, but many of these centres are not set up to manage the safety issues involved in domestic violence and child abuse, and they are not established to deal with contact in either the medium or long term (Aris et al (2002)). The worst fears in relation to the enforcement of contact where there is domestic violence are not allayed by any of these studies of court practice. In fact, the opposite is true.

AN INSTITUTIONAL FAILURE TO PROTECT

The unprecedented levels of contact which are being ordered in cases where there are substantial issues of child abuse and severe domestic violence suggest that some of the evidence base in relation to these issues has not been understood by the family courts.

Strong evidence exists from several different sources which highlight the seriousness of the harm to children and the parent (usually mother) living with the fear of domestic violence.

- Within the criminal justice system and police response to domestic violence the dangerousness of separation where there has been a history of domestic violence is now highlighted. At the top of the risk assessment factors which London police take into account when attending an incident of domestic violence is whether there has been a separation following a history of violence. The London murder reviews and serious physical and sexual abuse on which the London risk assessment tool was developed (Richards (2003)) showed that there were 56 murders in a 14-month period. Of the 30 cases analysed, in 76% of cases separation had occurred and in 47% of these murders arguments about jealousy, separation and child contact featured. In 30% of cases children witnessed the murder of their mother.

- Other studies indicate that the most serious domestic violence offenders in the relationship (those which have resulted in hospitalisation, use of weapons, attempted strangulation, sexual assault, obsessively controlling and jealous, threats to kill) are also the ones who are most dangerous following separation. This includes both physical violence (Morrison (2001); Burgess et al (1997)) and serious psychological abuse (Davis and Andra (2000); Mechanic et al (2000)).

- While the immediate post-separation period may be extremely dangerous, a significant amount of early violence and threat may subside. In a study of women using domestic violence outreach services it was found that in about one-third of cases post-separation violence continued and these were often the most persistent and dangerous offenders

\[1\] Care needs to be taken about over-stating this relationship. Statistics Canada (1994) in the most comprehensive prevalence study of domestic violence found 8% of women reported violence commenced at separation – a similar finding to Walby and Allen (2004).
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(Humphreys and Thiara (2003)). This finding is supported by US research which showed that the length of time since separation was the strongest predictor of increased stalking (Mechanic et al (2000)). These persistent and long-term stalkers are dangerous and survivors (usually women) and their children are in need of protection from these offenders.

- Child contact is continually cited as an arena through which domestic violence offenders continue their violence and abuse of both women and children (Walby and Allen (2004); Humphreys and Thiara (2003)).

Looking at this research based within the criminal justice arena, it can be seen that the dangerous consequences of domestic and post-separation violence are now being taken more seriously in this arena. Risk assessment tools (Richards (2003)) have been developed as a means through which high-risk offenders can be targeted and apprehended and victims and their families better protected.

Emerging from within the child protection arena are also studies which are highlighting the connections between significant harm to children and domestic violence. In understanding these connections, it needs to be recognised that generally only the most serious cases of child abuse come into the statutory child-protection system with most cases being referred out to voluntary sector agencies or ‘no further action’.

- An audit of the Cheshire Social Services database of 3,321 case files open to statutory children and families’ workers during a one-week period showed that in 41% of cases domestic violence was a feature of the case. The significance of domestic violence increased with the seriousness of concerns, with 66% of cases on the child protection register featuring domestic violence (Sloan (2003)).
- Studies such as that by Ross (1996) of 3,500 cases of marital conflict and child abuse found that the men who were most violent towards women were also physically or sexually abusing their children in virtually 100% of cases. Ross (1996) suggests that this finding has important implications for child contact.
- A systematic overview of the relationship between child abuse and domestic violence shows that between 30-66% of children who suffer physical abuse are living with domestic violence (Edleson (1999)).

Within the child contact research arena there are also numerous research studies which consistently show that children are continuing to suffer harm when they are subjected to post-separation violence and high levels of conflict.

- At the extreme end children are being killed. At least 29 child homicides have occurred at child contact or handover since 1994 of which 10 occurred in the past two years. In five of these families, contact was ordered by the court (Saunders (2004)). While the death of Victoria Climbie galvanised changes to the child protection system, these children’s deaths appear to have no impact on court practice.
- The study by Buchanan et al (2001) of intractable child contact cases found that children living with high levels of post-separation conflict were as emotionally distressed as children in care proceedings. In the backgrounds of at least 56% of these children were issues of domestic violence, much of which was at the severe end of the continuum. When domestic violence was an issue in the proceedings the children scored on tests three times more than would be expected within the general population (Buchanan et al (2001), p 78).
- Increasingly, a body of research is developing which indicates that child contact may be of little benefit to children if it occurs under highly conflictual circumstances including where there is post-separation violence (Kelly (2000)).

In short, the over-arching principle that ‘all contact is in the best interests of the child’ needs to be reassessed in the light of the harm to children created through post-separation violence.
CONCLUDING COMMENTS

Within the arena of statutory child protection, many women are now being urged to leave violent partners as a means of protecting their children (Humphreys (2000)). This strategy is useless if these same women who are criticised for their ‘failure to protect’ are then railroaded into child contact proceedings in which protective action on their part and a reluctance to engage with child contact is construed within the family proceedings courts as ‘implacable hostility’. Hester (2004) has referred to the chasms between the criminal, public and private law sectors as ‘child care on different planets’. Such incongruities between these different sectors are intolerable for the children and domestic violence survivors (usually women) involved.

This paper does not argue that all situations of domestic violence should be resolved with no-contact orders. Sensitive risk and safety assessments using agreed protocols need to be utilised to assess the level of risk and harm (Radford et al, 2006). No contact and indirect contact should not be unthinkable given the knowledge we now have about the serious risk of harm to children and survivors of domestic violence. The father’s rights to contact and the child’s need to know their father should not be allowed to over-ride issues of trauma, fear, depression, poor cognitive development, the valorisation of attitudes of violence and abuse of women and at the most severe end, the fear of (or actual) homicide of survivors and their children. A group of these women and children come before the family proceedings courts seeking protection from on-going violence and abuse, they should not be met by ‘an institutional failure to protect’.

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Author/s: HUMPHREYS, C

Title: Thinking the Unthinkable: The implications of research on women and children in relation to domestic violence

Date: 2006

Citation: HUMPHREYS, C, Thinking the Unthinkable: The implications of research on women and children in relation to domestic violence, Durable Solutions, 2006, 1, pp. 159 - 169

Publication Status: Published

Persistent Link: http://hdl.handle.net/11343/35074

File Description: Thinking the Unthinkable