

CORAM CONFERENCE- 1 NOVEMBER 2022

FACT FINDING HEARINGS AND DOMESTIC ABUSE IN PRIVATE LAW CHILDREN PROCEEDINGS

Sarah Tyler's notes:

HOW AND WHEN TO HOLD A FACT FINDING HEARING

- THE LAW POST RE H-N 2021] EWCA (Civ) 448 -

Introduction

1. These notes accompany the talk given at the Coram Conference 2022 on fact finding hearings and domestic abuse in private law proceedings. These notes address how and when to hold a fact finding hearing (“FFH”), what tools practitioners need in their armoury to argue for/against a FFH, and the law post H-N.
2. Allegations of domestic abuse in family cases are common. Per the figures cited by the President in Re H-N, in 2019/2020 of 55,253 private law applications, at least 40% are considered to involve allegations of domestic abuse. That is in addition to the 29,285 applications in 2019/2020 for injunctions under the FLA 1996.
3. All family law practitioners will be aware of significant delays in the family justice system. Delay in determining questions relating to a child’s upbringing is likely to prejudice the welfare of the child (s.1(2) CA 1989) yet resolving disputed issues of domestic abuse takes time and court resources. How are the courts to ensure the right investigations are made, and the right decisions are taken for children to ensure they do not suffer harm or risk or harm, and their welfare is not unduly prejudiced by delay? Is there downwards pressure to limit or squeeze the number of FFHs taking place? Is that appropriate and how is it being managed?
4. Paragraph 6 in Re H-N describes the difficulty facing judges thus:

In the light of the binary nature of the burden and standard of proof, the responsibility placed upon each one of those magistrates and judges in each one of those cases is a weighty one. Given the nature of such allegations, the evidence may often turn on the word of one parent against that of the other. The evidence may not be crystal clear, yet the stakes may be high. If the court decides that an abusive allegation has not been sufficiently proved, the court must assess future risk on the basis that the event ‘did not take place’. If, in reality,

the abuse did occur but there is a lack of evidence to prove it, the court's subsequent orders may risk exposing the child and parent to further abuse. Conversely, if alleged abuse did not in fact occur, but the court finds the allegation proved, orders significantly limiting the 'perpetrating' parent's future relationship with their child may be imposed.

5. The additional attention and scrutiny on DA in private law cases comes at a time of huge delays and backlogs in the court system and on Cafcass, limited access to legal aid, increased numbers of litigants in person (will this rise with increased cost of living pressure?), together with a significant reduction in contact centres which can help ensure safe interim contact can take place. "How to meet the need to evaluate the existence, or otherwise, of a pattern of coercive and/or controlling behaviour without significantly increasing the scale and length of private law proceedings is therefore a most important, and not altogether straight-forward, question." [§57 Re H-N]. This question has not yet been answered.

6. The Domestic Abuse Act 2021 has now been passed into law. The Ministry of Justice "Assessing Risk of Harm to Children and Parents in Private Law Children Cases" ("The Harm Panel Report") was published in June 2020. It reviewed how the family courts handle domestic abuse and other serious offences (the overall conclusion was that the effectiveness of PD12J was being undermined as a result of: resource constraints; the pro-contact culture; working in silos; the adversarial system). The report raises concerns about the safety of victims within the court process. There has been no further report as yet and limited implementation of the recommendations. The Domestic Abuse Commissioner proposed a DA monitoring mechanism, which is part of the Integrated Domestic Abuse Court pilot scheme commenced in North Devon and Wales in March 2022. This scheme is to last two years before evaluation. The President of the Family Division's 'Private Law Working Group' ('PLWG') published a second report in April 2020 but has not published an updating report.

7. For now, litigants and practitioners have to try and bridge the divide between two competing objectives within existing frameworks.

8. This paper argues that practitioners dealing with private law cases with domestic abuse allegations who want those allegations determined are going to come under more intense scrutiny, and must have a sharp focus at all times on (1) what are the key allegations, what was the intention behind the behaviour (2) what is the harm caused by the behaviour and how do the allegations impact on the child's welfare if the allegations are proven; (3) how best to plead your case.

Definitions: Domestic Abuse

9. The definitions in FPR PD12J paragraph 3 are:

“domestic abuse” includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment; ...

“coercive behaviour” means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;

“controlling behaviour” means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.’

10. The Domestic Abuse Act 2021 provides the following definition (s 1)
 1. This section defines “domestic abuse” for the purposes of this Act.
 2. Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if—
 - a) A and B are each aged 16 or over and are personally connected to each other, and
 - b) the behaviour is abusive.
 3. Behaviour is “abusive” if it consists of any of the following—
 - a) physical or sexual abuse;
 - b) violent or threatening behaviour;
 - c) controlling or coercive behaviour;
 - d) economic abuse (see subsection (4));
 - e) psychological, emotional or other abuse;and it does not matter whether the behaviour consists of a single incident or a course of conduct.
4. “Economic abuse” means any behaviour that has a substantial adverse effect on B’s ability to—
 - i. acquire, use or maintain money or other property, or
 - ii. obtain goods or services.
5. For the purposes of this Act A’s behaviour may be behaviour “towards” B despite the fact that it consists of conduct directed at another person (for example, B’s child).

11. Practitioners will bear in mind that (per Re H-N §32) “It is equally important to be clear that not all directive, assertive, stubborn or selfish behaviour, will be ‘abuse’ in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour. We would endorse the approach taken by Peter Jackson LJ in L v F (Relocation: Second Appeal) [2017] EWCA Civ 2121, [2018] 4 WLR 141, [2018] 2 FLR 608 (para [61]):

‘Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to “domestic abuse”, where “coercive behaviour” is defined as behaviour that is “used to harm, punish, or frighten the victim ...” and “controlling behaviour” as behaviour “designed to make a person subordinate ...” In cases where the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict.’

12. Ensuring you have the right information evidence at the right time is critical. This is addressed further below.

Family Procedure Rules 2010 | Practice Direction 12J “Child Arrangements and Contact Orders: Domestic Abuse and Harm” (“PD12J”)

13. PD12J is the starting point. It sets out what the court must do in any case where domestic abuse (“DA”) is alleged, admitted, or there is reason to believe a child or party has experienced DA by another party, or there is a risk of such abuse.

14. Practitioners will be familiar with its contents, but the following points are worth remembering and re-reading in full.

15. The court MUST at all stages, and specifically at the FHDRA, consider whether DA is raised as an issue (by parties or Cafcass) and if so must:

- Identify at earliest opportunity (usually FHDRA) the factual and welfare issues involved;
- Consider the nature of the allegation, any admission or evidence of domestic abuse and the extent to which it would be likely to be relevant in deciding whether to make a CAO and, if so, in what terms;
- Give directions to enable contested relevant factual and welfare issues be tried asap and fairly;
- Ensure that where DA is admitted or proven, any CAO protects the safety and wellbeing of the child and resident parent;
- Ensure any interim CAO is only made having followed paras 25-27

16. At the FDHRA:

- CAFCASS safeguarding checks must be available. If not, and no other reliable safeguarding information is available, the court must adjourn the FHDRA.
- The Court must ascertain at the earliest opportunity and record on the order whether DA is raised as an issue likely to be relevant to any decision of the court relating to the welfare of the child, and whether the child and/or parent would be at risk of harm in the making of any CAO.

17. The Court should determine ASAP whether it is necessary to hold a FFH into disputed allegations of DA (§16)
 - To provide a factual basis for any welfare report or assessment of factors at §36-37
 - To provide a basis for an accurate assessment of risk
 - Before it can consider any final welfare based orders for CAO or before it can consider the need for a DAPP.

18. In determining whether it is necessary to conduct a FFH, court should consider (§17)
 -
 - The views of the parties and CAFCASS
 - Whether there are admissions which provides sufficient factual basis on which to proceed;
 - If a party is in receipt of legal aid, whether the evidence required to obtain legal aid is sufficient;
 - Is there other evidence available to the court that provides a sufficient factual basis
 - Whether the factors at paras 36 and 37 can be determined without a FFH
 - The nature of the evidence required to resolve disputed allegations
 - Whether the nature and extent of the allegations, if proved would be relevant to the issue before the court; and
 - Whether a separate FFH is necessary and proportionate in all the circumstances of the case.

19. If the court determines a FFH is not necessary, the order must record the reasons (as per the standard orders) (§18)

20. If the court determines a FFH is necessary, it must give directions as to how it will be conducted, so the issues can be determined ASAP, fairly and proportionately and within the capabilities of the parties. In particular it should consider (§19):
 - Key facts in dispute
 - Is a split hearing necessary (ie FFH before welfare hearing)
 - Whether the key facts can be contained in a schedule, and can this schedule be completed at the first hearing, with the assistance of the judge”
 - What evidence is required in order to determine the existence of coercive, controlling or threatening behaviour, or any other forms of DA
 - Statements from the parties with details of behaviour and responses;
 - Directions for documents from third parties: police, health, DA support services;
 - Witness statements from third parties and provision for their giving oral evidence;
 - Directions for the provision of documentation from abroad;
 - Consideration of the evidence given by, and support for, alleged victims of DA;
 - Measures to ensure participation by alleged victim;
 - What support the alleged perpetrator may need to have a reasonable opportunity to challenge the evidence;
 - Whether a PHR would be helpful to ensure directions have been complied with and all required evidence is available

21. Where the court fixes a FFH it must at the same time fix a DRA to follow (§20) .

22. Judicial continuity: where the court has made findings of fact, any subsequent hearing in the proceedings should be conducted by the same judge or by at least the same chairperson of the justices. Exceptions may be made only where observing this requirement would result in delay to the planned timetable and the judge or chairperson is satisfied, for reasons which must be recorded in writing, that the detriment to the welfare of the child would outweigh the detriment to the fair trial of the proceedings (§31).

FPR rule 1.1: Overriding Objective

23. The court must at all times have in mind the provisions of rule 1.1, the over-riding objective which provides "Dealing with a case justly includes, so far as is practicable:

1. Ensuring that it is dealt with expeditiously and fairly;
2. Dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
3. Ensuring that the parties are on an equal footing;
4. Saving expense; and
5. Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

What did Re H-N [2021] EWCA Civ 488 decide?

24. Re H-N concerned four appeals heard together before President of Family Division, Lady Justice King and Lord Justice Holroyde. The court heard submissions from interveners: (1) Cafcass, (2) Women's Aid, Women's Aid Wales, Rape Crisis and Rights of Women; (3) Families Need Fathers; (4) Association of Lawyers for Children. There were a number of issues arising in submissions as to the proper approach to cases such as these: (i) whether there should be a finding of fact hearing; (ii) the challenges presented by Scott Schedules as a means of pleading a case; (iii) if a fact-finding hearing was necessary and proportionate, how an allegation of domestic abuse should be approached; and (iv) the relevance of criminal law concepts.

25. The importance of the case was primarily the consideration and analysis of coercive and controlling behaviour and how such allegations should be pleaded and managed. This is addressed by John Paul Cregan's paper.

26. In considering the decision as to whether a FFH was necessary, the Court considered the President's Guidance in "The Road Ahead" which specifically highlights the need for proportionality [§36] (emphasis added):

43. "If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to

be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear.”

46. Parties will not be allowed to litigate every issue and present extensive oral evidence or oral submissions; an oral hearing will encompass only that which is necessary to determine the application before the court.

27. The court heard from Cafcass [§38], and in its submissions, Cafcass proposed additional support to the court when deciding whether to hold a fact-finding hearing:

‘It would benefit the court and the parties for there to be Cafcass involvement prior to determination of whether or not a fact-finding hearing is necessary. At present, the “safeguarding” system and the preparation of a Cafcass “Letter to the Court” allows a Cafcass Officer to report on allegations that have been made, but nothing more. In some cases, the allegations may be such as to make it obvious that a fact-finding hearing is required before any further assessment can take place. In others, early social work assessment could lead to a conclusion that a fact-finding hearing is not necessary, but that some other intervention would be more helpful. At present, it is rare for there to be any substantive Cafcass involvement prior to fact-finding.’

[39] In putting forward this submission, Cafcass contended that the present system was ‘sub-optimal’ and that, rather than a gatekeeping judge simply allocating a case for a fact-finding hearing without any social work input other than the Cafcass ‘safeguarding’ letter, the judge should direct that Cafcass undertake an enhanced form of safeguarding assessment (including where appropriate meeting the child) prior to the case being listed for a second gatekeeping appointment, with any resulting listing decision being made on a more informed and child-centred basis.

[40] As is the case with some other submissions and suggestions that were made to the court, this offer by Cafcass (which was expressly supported by the Association of Lawyers for Children) seems to us to justify close consideration by those who are charged with reviewing PD 12J.

28. Around a year later, the President released Fact Finding Hearings and Domestic Abuse in Private Law Children Proceedings; Guidance for Judges and Magistrates 05.05.2022. This guidance was produced after a survey of judges at the President’s request. It warrants reading in full. Below are notes of what judges and magistrates are advised to do when considered listing FFH:

29. It encourages judges to:

- Make every hearing count. Remain in control. Probe.
- Strive to achieve judicial continuity and take ownership of the case
- Interrogate the parties’ and Cafcass’s reasoning as to the necessity for a FFH
- Consider whether the court is the place to determine allegations of DA

30. At FHDRAs Judges and Magistrates are encouraged to:
- Encourages/reminds of the use of mediation, with protective measures if necessary
 - Identify the issues, particularly those pertaining to the child's welfare
 - What is alleged and by whom
 - Is Form C1A completed? Can safe contact be achieved? If not why not? Should the court obtain a verbal summary of the allegations and response?
 - Does the C100/C1A contain sufficient information to reach a determination without further evidence?
 - What further information is required? Are schedules appropriate?
 - Ensure you obtain essential information: what/where/when; witnesses; effect; other evidence; was it cause or effect of breakdown in relationship?
31. Is a FFH required?
- The guidance refers to the PD12J provisions, reminding fundamentals are: relevance, purpose and proportionality.
 - As per Para 15, Judges are invited to: Always consider whether the allegations (at their highest) go to safeguarding in general or to particular circumstances that could be mitigated by supervision of contact or some other measures. If the latter and mitigations are available, why is it said that a fact-finding hearing is required? [Note: It is not clear what this really means]
32. In terms of case management, judges and magistrates should:
- Consider relevance, purpose and proportionality
 - Robustly case manage
 - Apply particular scrutiny of third party disclosure requests. "Will a GP summary suffice instead of a party's full GP records?"
 - Interrogate the necessity of witness evidence.
 - Do not timetable a case to FFH without a properly completed witness template. "This will assist the parties and manage their expectations."
 - Consider participation directions
 - At the FFH control the evidence.
 - Ensure any summary of findings made is fairly and accurately recorded on the order or a document attached to it.
33. Revisiting a decision not to have a fact finding hearing (paras 27-28). The court must, at all stages in the proceedings, consider whether domestic abuse is raised as an issue: FPR PD 12J [5]. However, in this guidance, judges "must guard against attempts to re-argue the question once a decision has been made. What is said to have changed to undermine the original analysis? Proceedings should have judicial continuity, wherever possible, and a consistent approach. If 'new' evidence relating to past events is presented, ask why it was not available or disclosed before. If no good reason is advanced, then you may refuse to admit it. The more significant the evidence is said to be, the more compelling the explanation needs to be for its late receipt."

34. It is submitted that this guidance represents significant downwards pressure from the President, and it is argued that it is at odds with the serious nature of the allegations – particularly where the difficulties of pleading coercive and controlling behaviour have not yet been resolved - and risks being wrongly interpreted by busy DJs and Lay Justices.

The Focus on the Impact on the Child’s Welfare

35. From the authorities and guidance, this is the key area on which to focus preparation, for applications, statements and evidence.

36. PD12J Para 4 describes the harm to children directly and indirectly.

‘Domestic abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to domestic abuse, or witness one of their parents being violent or abusive to the other parent, or live in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both parents.’

37. Re H-N (para 24) refers to Re L, Re V, Re M, Re H, [2000] 2 FLR 334 which considered and accepted the report of Drs Sturge and Glaser, consultant psychiatrists. The Court of Appeal in Re L accepted there needed to be a heightened awareness of the existence of and consequences for children of DV. Re H-N described this as the “seminal moment in approach to domestic violence”.

38. In Re L Drs Sturge and Glaser were instructed by Official Solicitor to prepare a report. It is available at [2000] Fam Law 615 and provides a helpful starting point for analysing the effect on children of contact and of being exposed to harm / risk of harm; the purposes of contact; the particular role of fathers; benefits of direct and indirect contact; the risks of direct and indirect contact; weight to be placed on a range of factors where the child expresses a wish not to see the non-resident parent; circumstance in which a court might consider no contact.

39. In arguing that allegations are relevant, because they go to welfare and CAO, and thus a FFH must be listed, practitioners will need to consider a range of factors. A good starting point are the following (not an exhaustive list), drawn primarily from the Sturge and Glaser report:

- Is there independent evidence of any effect on the child of being subject to/witness to abuse? This could be police, school, medical, third party.
- Is there a risk of abuse during contact? What type of abuse (physical, sexual, emotional). Sturge and Glaser report research showing parents who are violent to each

other, are more likely to be violent to their children at a risk of between 3 and 9 times greater than in non-violent families.

- Is there is an ongoing climate of conflict? Will this undermine a child's stability and sense of emotional well-being? Will the child feel responsible for the conflict? Will contact affect the relationship between the child and resident and non-resident parent.
- What understanding is there of the ongoing effect of being exposed to violence for the child? Ongoing fear and dread of violence is emotionally very damaging, and persecutory fears are deep-seated and persistent. Does the child have a continued sense of fear of the parent?
- What is the effect on the child's own attitude to violence, to forming parenting relationships of their own?
- What effect will encouraging children to have relationships with a parent who has behaved criminally towards their other parent, in a way that specifically denigrates them and distorts the caring and protective roles of parents?
- Is there a risk of harm from neglect, being placed in dangerous situations, because the parent has delusional beliefs at the time of contact or is under the influence of alcohol or drugs?
- Will the non-resident parent cause emotional harm through direct denigration of the child, or through seeking to undermine the resident parent (by seeking derogatory information, engendering secrets, making derogatory remarks)? This can distort the child's perceptions and understanding of reality. Is there evidence of this through comments made by the child, text messages/communications between parents?
- Is the non-resident parent motivated by positive feelings for the child? What was the nature of their parent/child bond during the relationship?
- Will there be a continuation of an unhealthy relationship (eg inappropriately dominant or bullying relationship, controlling through subtle or blatant fear? This is particularly acute where the child is aware the resident parent is concerned about the non-resident parent.
- Will the non-resident parent undermine the child's sense of stability and continuity by deliberately or inadvertently setting different moral standards or standards of behaviour? This can affect their understanding of right and wrong and give them the means to challenge the resident parent.
- Will the non-resident parent show little or no interest in the child through an inability to prioritise the child? Will contact be a stimulating experience for the child?
- Will there be a continuation of unresolved situations, where the child has a memory or belief about a negative aspect of the contact parent which is either denied, or not addressed by that parent? This is particularly destructive as it fails to recognise and validate the child and their experiences, and fails to recognise and help the child come to terms with what happened.
- Will contact be unreliable? Children feel let down, rejected and unwanted by failing parents. It undermines predictability and stability. The child is likely to feel let down, disappointed, angry and undervalued or rejected. The resident parent has to deal with this all and may undermine their situation. Children who do not want contact for this reason should be heard.

- Would the child be required to attend contact against his or her own wishes?
- In respect of indirect contact, would the non-resident parent convey undermining and distorting messages? Could information as to home address, school address or routines be used as an abduction risk or in undermining the resident parent?

40. This understanding is further updated in Re H-N [§31] to reflect the harm of coercive and controlling behaviour:

It follows that the harm to a child in an abusive household is not limited to cases of actual violence to the child or to the parent. A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:

- (i) Is directed against, or witnessed by, the child.
- (ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child.
- (iii) Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child.
- (iv) Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men.

41. For a vivid account of the impact of coercive and controlling behaviour on children, read paragraph 96 of F v M [2021] EWFC 4 (Fam) of Mr Justice Hayden.

42. Courts often need reminding of the ongoing effects of coercive and controlling behaviour and DA generally, and that it can continue beyond separation and/or protective measures being put in place [See §52 Re H-N]:

The fact that there may in the future be no longer any risk of assault, because an injunction has been granted, or that the opportunity for inter-marital or inter-partnership rape may no longer arise, does not mean that a pattern of coercive or controlling behaviour of that nature, adopted by one partner towards another, where this is proved, will not manifest itself in some other, albeit more subtle, manner so as to cause further harm or otherwise suborn the independence of the victim in the future and impact upon the welfare of the children of the family.

Impact on the Parent

43. The effect on parents is relevant to the orders that the court has to make, and should not be forgotten. This is also an important factor and it is wise to think carefully about how to evidence and describe this issue. In Re B v B (Domestic Abuse: Fact-Finding) [2022] EWHC 108 (Fam) Mr Justice Cobb considered [§95] that “the mother was caused to live at times in a state of worry and anxiety, and as she put it herself ‘... often terrified and deeply confused by constant contradictions, not able to speak my mind or think clearly. I was controlled through

fear, intimidation and bullying.” Further Cobb J found “that by reason of the father’s conduct towards her and in the relationship she has been caused severe anxiety, depression, and trauma.” [§97].

44. This may be very difficult for a client to articulate and additional care will be needed in taking instructions and identifying what is the best form of evidence and what protective/special measures may be needed at a trial. See John Paul Cregan’s and Gill Honeyman’s papers for more detail.

What next after findings are made? Domestic Abuse Perpetrator Programmes

45. Sturge and Glaser also argue that there are a number of factors from research that experts considered necessary before contact could take place with someone who had been abusive. It had always been the expectation that post findings, perpetrators would attend a DAPP which would increase their acknowledgement, acceptance and understanding of their actions and effect on the child/other parents. This can no longer be guaranteed (see below), but these requirements remain valid:

- Some (preferably full) acknowledgment of the violence;
- Some acceptance (preferably full if appropriate, ie the sole instigator of violence) of responsibility for that violence;
- Full acceptance of the inappropriateness of the violence particularly in respect of the domestic and parenting context and of the likely ill-effects on the child;
- A genuine interest in the child’s welfare and full commitment to the child, ie a wish for contact in which he is not making the conditions;
- A wish to make reparation to the child and work towards the child recognising the inappropriateness of the violence and the attitude to and treatment of the mother and helping the child to develop appropriate values and attitudes;
- An expression of regret and the showing of some understanding of the impact of their behaviour on their ex-partner in the past and currently;
- Indications that the parent seeking contact can reliably sustain contact in all senses.

46. DAPPs were directed by way of contact activity direction. In the Harm Report it was recommended (recommendation 10) that DAPPS should be more widely available in England and Wales and should allow for self-referral for parents in private law proceedings. Notwithstanding this, in June 2022 the contracts between DAPP providers and Cafcass expired, and have not been renewed with last referrals on 30 June 2022. Cafcass report that “The Ministry of Justice has decided to work towards replacing the existing DAPP with a new programme to better meet the needs of a wider range of families” . There is currently no new alternative provision, although it is understood this is under review.

47. It now appears to be left up to perpetrators to identify and fund their own attendance at DAPP programmes (some of which are RESPECT accredited and some of which are not).

Conclusion

48. Where a client makes allegations of domestic abuse, their legal team must be prepared to argue in detail of the need for a FFH at the FHDRA, and the client needs to be clear about their concerns before their discussion with Cafcass (for safeguarding checks). This requires detailed instructions on the history of domestic abuse, the intention behind the behaviour, the harm that the behaviour goes to and the effect on the child and the parent. Where the behaviour and harm alleged does not meet the requisite threshold, practitioners will need to address with clients how their unhappiness (rather than safeguarding concern) can be addressed satisfactorily.

49. Instructions are needed on the evidence available to prove the case, so that the appropriate directions should be made at the FHDRA. Third party direct witnesses should be named, with a summary of what evidence they would give.

50. Where a client is arguing that the harm alleged is sufficient to justify a FFH, proposals made for contact need to reflect the level of concern. Parties should attend FHDRA's armed with an analysis of whether contact can take place safely (and if not why not), either in formally or informally supervised settings, together with details of locations, cost, waiting list, transport arrangements etc.

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1 November 2022

[John-Paul Cregan notes:](#)

LIFTING THE VEIL ON COERCIVE AND CONTROLLING BEHAVIOUR

- HOW TO PLEAD YOUR CASE -

Introduction

1. Coercive abuse is an invisible and insidious abuse – which is not immediately apparent to someone outside an intimate or family relationship, and certainly not to a judge. It is behaviour that stops short of serious physical violence, but can equate to extreme psychological and emotional abuse.

2. It is a criminal offence under s.76 Serious Crime Act 2015 and will carry a maximum of 5 years' imprisonment, a fine or both.

What is coercive and controlling behaviour

3. Importantly is defined by reference to a consistent pattern of behaviour designed to threaten, intimidate, subjugate, humiliate; the net effect of which is to harm or frighten the victim making them dependent on the perpetrator and stripping them of any sense of independence and self-respect. Self-esteem is undermined to the extent the victim is rendered powerless to resist, oppose or manage their day to day life.

4. Building on examples within the CPS and Home Office Statutory Guidance, relevant abusive behaviour of the perpetrator can include:

- Isolating a victim from their friends and family
- Depriving them of their basic needs
- Monitoring their time – use of hidden CCTV
- Monitoring via online communication tools or using spyware
- Taking control over aspects of their everyday life, such as where they can go, what to wear and when and where they can sleep
- Depriving them access to support services, such as specialist support or medical services
- Repeatedly putting them down such as telling them they are worthless
- Enforcing rules and activity which humiliate, degrade or dehumanise the victim
- Financial abuse including control of finances, benefits or allowances, such as only allowing a victim a punitive allowance
- Threats to hurt or kill
- Threats to harm a child
- Threats to reveal or publish private information (e.g. release of intimate images/videos)
- Disclosure of sexual orientation
- Threats to hurt or physically harming a family pet
- Assault
- Criminal damage (such as destruction of household goods)
- Preventing a person from having access to transport or from working
- Preventing a person from being able to attend school, college or University
- Family 'dishonour'
- Reputational damage
- Disclosure of HIV status or other medical condition without consent
- Limiting access to family, friends and finances
- Forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities.

How to construct a case

5. A useful reference tool is the Statutory Guidance referred to above, used in building a criminal prosecution. It will provide a template or checklist when taking instructions and preparing a statement. However it is important to remember it has been held that as a matter of principle, it was fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts; *Re H-N and Others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA (Civ) 448 §62.

6. Efforts aimed at gathering evidence to build a robust case should focus on the wider pattern of behaviour and on the cumulative impact on a person.

7. The following list employed by the CPS builds on the examples provided in the Statutory Guidance:

- Copies of emails
- Phone records
- Text messages/WhatsApp
- Evidence of abuse over the internet, digital technology and social media platforms
- Photographs of injuries such as: defensive injuries to forearms, latent upper arm grabs, scalp bruising, clumps of hair missing
- 999 tapes or transcripts
- CCTV footage
- Body worn video footage
- Lifestyle and household including at scene photographic evidence
- Records of interaction with services such as support services
- Medical records
- Witness statements, for example the family and friends of the victim may be able to give evidence about the effect and impact of isolation of the victim from them
- Previous threats made to children or other family members
- Bank records to show financial control
- Diary kept by the victim
- Victims account of what happened to the police if reported
- Evidence of isolation such as lack of contact between family and friends, victim withdrawing from activities such as clubs, perpetrator accompanying victim to medical appointments
- GPS tracking devices installed on mobile phones, tablets, vehicles etc.

8. Practitioners may also find the Cafcass website helpful and in particular its Assessment of Coercive Control tool is very useful.

Moving away from Scott Schedules

9. The Court of Appeal in *Re H-N and Others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA (Civ) 448 grappled with the utility of continued use of Scott Schedules, and how to devise a replacement practice to plead coercive control;

“One striking feature of the dozen oral submissions heard during the hearing of these appeals was that there was effective unanimity that the value of Scott Schedules in domestic abuse cases had declined to the extent that, in the view of some, they were now a potential barrier to fairness and good process, rather than an aid” [§43].

“For our part, we see the force of these criticisms and consider that serious thought is now needed to develop a different way of summarising and organising the matters that are to be tried at a fact-finding hearing so that the case that a respondent has to meet is clearly spelled out, but the process of organisation and summary does not so distort the focus of the court proceedings that the question of whether there has been a pattern of behaviour or a

course of abusive conduct is not before the court when it should be. This is an important point. Everyone agrees” [§46].

26. Further guidance in the wake of *Re H-N* is offered by Poole J re *FG v HI and JK* [2021] EWHC 1367 (fam) at § 24-28;

“... in Patterns of behaviour are formed from many individual incidents of conduct. It is difficult therefore to separate the pattern from the specific events said to establish the pattern. In this case every one of the mother’s allegations is denied by the father. The court cannot make findings about a pattern of behaviour without evaluating the evidence in relation to specific incidents that allegedly contributed to that pattern. The difficulty is in identifying a limited number of incidents that would, if proved, establish a pattern of behaviour. Some specific instances of behaviour will not constitute abuse themselves and may appear to be relatively trivial if looked at in isolation but are in fact important evidence of a pattern of abuse, or the effects of abuse, when set alongside other findings. For example, there is evidence in this case of the mother texting the father to ask if she can use the toilet in his bedroom. Arguably, she did so because she was conditioned by him to ask his permission to perform many of her activities of daily living. How does the court keep a finding of fact hearing within proportionate and manageable limits without filtering out what might be highly relevant evidence of coercion or control?” [§26].

“Had this case been case managed after the judgment in *Re H-N* then, once it had been determined that a finding of fact hearing was necessary, it would have been helpful to have had, in addition to the witness evidence, concise statements on behalf of each party including (a) a summary of the nature of the relationship, (b) a list of the forms of domestic abuse that the evidence is said to establish, (c) a list of key specific incidents said to be probative of a pattern of coercion and/or control, (d) a list of any other specific incidents so serious that they justify determination irrespective of any alleged pattern of coercive and/or controlling behaviour. The court would have needed to know which specific allegations listed at (d) were admitted or disputed, but, in my view there would have been no need to have formal responses to the other sections of the statements” [§27].

Narrative statement or analysis of findings document as a pleading

10. Therefore, a Scott Schedule can no longer be considered as an appropriate framework to set out coercive and controlling behaviour. Instead, a carefully crafted narrative statement must do the work. This is distinctly advantageous as it make it less likely a number or series of allegations will be struck out before trial, rather a statement will be treated as a homogenous document. Remember it will of necessity now be a complex legal document which will need to distil happenings, events, and incidents into patterns of behaviour. A strong narrative is needed but this in and of itself is insufficient – it must be underpinned by an overarching legal purpose.

11. An integral component of a statement will be a relevant chronology or timeline which provides essential detail - a prism through which behaviours may be analysed to reveal a pattern.

12. It cannot be overemphasised that key here is to focus on patterns rather than individual acts.
“The overall approach to the assessment of evidence here is the same as in any other case. What requires to be factored into the process is the recognition of the insidious scope and manner of this particular type of domestic abuse. The emphasis in Section 76 of the Serious Crime Act 2015, is on "repetition" and "continuous engagement" in patterns of behaviour which are controlling and coercive. Behaviour, it seems to me, requires, logically and by definition, more than a single act. The wording of FPD 2010 12J is therefore potentially misleading in so far as it appears to contemplate establishing behaviour by reference to "an act or a pattern of acts". Key to assessing abuse in the context of coercive control is recognising that the significance of individual acts may only be understood properly within the context of wider behaviour. I emphasise it is the behaviour and not simply the repetition of individual acts which reveals the real objectives of the perpetrator and thus the true nature of the abuse”. Per Hayden J in F v M [2021] EWFC 4 [§109].

13. However, there are important practical drafting points to consider:

- Establish a trusting relationship – support a client to reveal their experience in the context of an abusive relationship
- Be aware a client may not recognise all the signs of abuse – a product of abuse itself
- Support client to acknowledge what has happened to them
- The narrative statement is a powerful tool which must be crafted with care
- It is the story of how the client suffered abuse – spell it out with a beginning, middle and end e.g with an introduction/overview, cite the forms of abuse under separate headings and evidence, pull themes of abuse together, finish with conclusion/impact statement
- Remember realisation often comes at the end of the relationship not during
- Identify the actual abuse – how the client has suffered. The court doesn’t have a crystal ball
- Draw out details, scenarios and examples from the client – help them give their experience a shape. Avoid vague and general assertions – they have little probative value. A client may need encouragement here
- Don’t underestimate the emotional impact on a client – and an inclination towards avoidance or minimisation
- Think about presentation. Make it attractive with a clear and logical layout. It should flow and make sense. Consider how best to achieve this aim – use headings, sub-headings, cluster behaviours, interlock sections – show a trajectory
- Link different behaviours with particular impact and associate with other behaviours to establish an overarching picture
- Sensible editing will avoid a descent into unhelpful and mindboggling detail
- Avoid slavishly deploying a narrative prepared by a client – this can only be a rough draft. It must be given a sensible and legally coherent shape
- Identify effect on children of the family
- Above all don’t rush a statement – have a number of sessions with the client

- Recap, prune and refine – does the statement provide a clear and concise account of coercive and controlling behaviour, and does it show how the client has been affected
- Don't give the perpetrator anywhere to go – anticipate counter allegations

14. Corroborative evidence is essential and should be woven in seamlessly – make it easy to understand and see the point. If there are a great number of exhibits some of which are relevant to more than one point, perhaps consider compiling one exhibit (a discrete bundle) and refer to page numbers.

15. Have regard to and consider the provisions FPR 2010 PD12J – establish risk of harm.

16. Consider if abuse is continuing post separation – through control of 'time spent' arrangements or litigation tactics designed to undermine and bully.

A word of caution

17. Beware that some forms of behaviour complained of by a client may fall short of domestic abuse. A determined client may believe it does especially as emotions are high. A judicious yet sympathetic filtering process should be applied. A distorted melange of information will confuse and detract from and undermine serious matters of abuse.

“Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is defined as behaviour that is 'used to harm, punish, or frighten the victim...' and 'controlling behaviour' as behaviour 'designed to make a person subordinate...' In cases where the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict.” Peter Jackson LJ in *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121 [§61].

18. That said, bear in mind Poole's words above at §26 *Re FG v HI and JK* – be careful not to throw the baby out with the bathwater.

Conclusion

19. It is immediately obvious from recent authorities and judicial thinking that there is to be an improved and more effective way to present a case of coercive controlling behaviour if crucial findings are sought. Undoubtedly further guidance will be provided. In the meantime it is essential to revisit the methodology of preparing a statement. This will now require an abundance of time, skill, knowledge of the evolving legal landscape and a finely attuned legal acumen and intuition.

JOHN PAUL CREGAN

Coram Chambers
1 November 2022

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