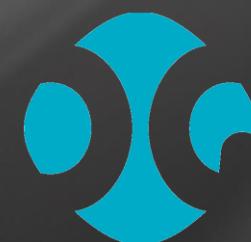


Complex contact cases

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Agenda

- How to approach proceedings involving domestic violence allegations in particular of controlling and coercive behaviour reflecting on the recent case of *Re H-N and others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448
- Legal arguments for promoting contact with non-resident parents, even where there have been some negative findings, and occasions when a no contact order is appropriate
- How to approach intractable cases including cases of alleged ‘parental alienation’

Domestic abuse and private children law

- H-N highlights that it is thought at least 40% of private law children cases (CAOs) now involve allegations of domestic violence, approx. 22,000 a year, plus 29,285 FLA 1996 applications for protection – a good proportion of which do not overlap [3]
- Fact-finding is under ordinary civil law
 - Burden on alleging parent
 - Standard of proof is balance of probabilities ‘that the occurrence of the event was more likely than not’
 - Binary analysis – if judge finds it more likely than not something did taken place, then it is treated as having taken place and vice versa

Evolution of understanding of domestic abuse

- Now understand that:
 - Not just physical – can be victim of controlling or threatening behaviour without ever sustaining a physical injury
 - Living in an abusive environment directly impacts children [24]
 - Can be a pattern of behaviour – see PD12J para 3 – specific incidents may be part of wider pattern rather than free-standing matters [27]
 - Not acceptable to regard this behaviour as ‘in the past’ and not relevant to future risk – can manifest in other, more subtle manner. Failure to consider = error of law [52 – 53]
- Definition in Domestic Abuse Bill is substantially the same as PD12J – unlikely to change significantly [27]

Controlling and/or coercive behaviour

- Central to modern definitions of domestic abuse [29]
- F v M [2021] EWFC 4 provides ‘comprehensive and lucid analysis’ of fact-finding hearing of domestic abuse allegations centre on coercive and/or controlling behaviour
 - *Coercion – pattern of acts e.g. assault, intimidation, humiliation & threats*
 - *Controlling behaviour – acts designed to render individual subordinate and to corrode their sense of personal autonomy*
 - *Key is appreciation of a ‘pattern’ or a series of acts, the impact of which must be assessed cumulatively and rarely in isolation*
 - *See Home Office statutory guidance*

Controlling and/or coercive behaviour

- A pattern of coercive/and or controlling behaviour can be as abusive as or more abusive than any particular factual incident that might be written down and included in a schedule [31]
- A pattern of abusive behaviour is relevant to the child as to the adult victim. A child can be harmed by 1 or more of the following:
 - Is directed against, or witnessed by, the child;
 - 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;
 - Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;
 - Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men

Controlling and/or coercive behaviour

- ⦿ Not all directive, assertive, stubborn or selfish behaviour = abuse
- ⦿ Much will turn on **intention** of perpetrator and **harmful impact**
- ⦿ *Re H-N* endorses Peter Jackson LJ in *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121 saying that few relationships lack instances of bad behaviour. Where the behaviour is not ‘used to harm, punish or frighten the victim’ or ‘designed to make a person subordinate’ it is not necessary to make detailed findings of fact – otherwise court just becomes ‘another battleground for adult conflict” [32]

When should a fact-finding be ordered?

- H-N emphasises long-lasting impact this might have on case [7]
- PD12J (mandatory application) provides detailed guidance at paras 5, 16, 17
- Key word is in PD12J ‘**necessary**’ – see also para 43, 46, 47 President’s Guidance ‘[The Road Ahead](#)’ (June 2020), reinforced in [Road Ahead 2021](#)
- H-N sets out suggested proper approach at [37]
 - 1. Nature and relevance of allegations
 - 2. Purpose of fact finding hearing – asses risk and impact on child(ren)
 - 3. Necessity – is there other evidence?
 - 4. Necessary and proportionate in light of overriding objective and Road Ahead Guidance

When should a fact-finding be ordered?

- Cafcass input – in some cases, 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 involvement prior to fact-finding – Cafcass says this is sub-optimal and a gatekeeping judge should direct enhanced safeguarding assessment to enable more informed and child-centred decision making

Scott Schedules

- ⦿ Striking feature of oral submissions in *Re H-N* 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’ – “undoubtedly a need to move away from using” them(?) [43 – 39]
- ⦿ Patterns and cumulative impact of coercive and controlling behaviour cannot be identified simply by separate and isolated consideration of individual incidents at specific date and time – not ‘necessary’ to determine subsidiary date specific-factual allegations
- ⦿ Trying to limit allegations to 10 produces false portrayal of relationship – reducing field of focus means court cannot view quality of alleged perpetrator’s behaviour as a whole & removed consideration of whether there was a *pattern*, which can be subtle

So how will the courts evaluate patterns of behaviour?

CoA provides some pointers:

- PD12J does not establish free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the child welfare issues
- Only allegations necessary to provide factual basis for welfare report/assessment, risk assessment, final welfare-based orders or a domestic-abuse related activity (i.e. PD12J para 16 purposes) should be considered at a fact-finding hearing

So how will the courts evaluate patterns of behaviour?

- Both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other – *problematic and unwieldy*
- Pattern of behaviour = primary issue, other specific allegations should be selected because potential probative relevance to alleged pattern of behaviour and not otherwise, unless so serious that justifies determination irrespective of the allegation of a pattern



Note focus on **necessity** and **relevance**



Relevance of criminal law concepts

- *Re H-N* refers to *Re R (Children) (Care Proceedings: Fact-finding Hearing)* [2018] EWCA Civ 198 where held that **fundamentally wrong** to analyse factual evidence in proceedings relating to welfare of children based on criminal law principles and concepts – latter tries to develop a narrative account of a period of time rather than binary outcome of guilty/not guilty or liable/liable
- Do not have the evidential or legal basis for a finding of ‘murder’ etc, it could cause upset and also risks becoming bogged down in legal technicality and side-tracked from ‘the central task of simply deciding what has happened and what is the best future for the child.’ It is the *fact* that matters in a fact-finding hearing

Re B-B

- Fact-finding judge, frustrated with poor compliance with directions and delays, made remarks to mother at March 2019 hearing including ‘if this goes on the child will be taken into care and adopted’ and that he would have to report the matter to social services. Also commented fact-findings are a waste of time because end result is, at some stage, contact outside with father
- Fact-finding came back before same judge in August 2019, who queried the need for a fact-finding in a ‘very straightforward case solely about contact.’ Said he would not deal with first allegation of schedule which was insufficiently particularized – this was a reference to controlling and coercive behaviour in mother’s statement

Re B-B

- ❖ Mother agreed to consent order which had progressed to unsupervised contact by March 2020 at which point she stopped contact in context of start of pandemic
- ❖ CoA agreed that statement from mother explaining the continuing impact the judge's comments had upon her and how she alleges it had affected her decision would undoubtedly have assisted [107]
- ❖ However, the judges comments have to be regarded as having had long lasting repercussions for her – hard to see how she would have felt herself to have retained any real negotiating boundaries. Was her last experience in front of judge even if 5 months before [108 – 109]

Re H

- ❖ Mother appealed failure of judge to find that mother had been raped by father on 2 occasions and failure to investigate allegations of financial and emotional abuse
- ❖ This was not actually an appeal against the order, it was the recitals that recorded the allegations were not proved and there were no risks to child having unsupervised contact
- ❖ Mother did not object to unsupervised contact and it was considered safe & overwhelmingly in H's best interests both by local authority and another judge in a subsequent fact-finding hearing relating to allegation father acting sexually inappropriately towards H

Re H

- ❖ CoA referred to 3 requirements to be satisfied before an academic appeal may be allowed to proceed as set out in *Hutcheson v Popdog Ltd* [2011] EWCA Civ 158. 2 out of 3 not satisfied in this case:
 - ❖ Issues of significance are capable of being dealt with by reference to the other 3 linked appeals before the court
 - ❖ Obvious father would not wish the appeal to proceed, having recently been through 2nd fact-finding hearing, where contact is progressing, not disputed and where up-to-date welfare enquiries
- ❖ No purpose in considering judge's approach to allegations given they no longer have any direct relevance to any welfare decisions which need to be made in relation to H

Re T

- ❖ Mother argued that judge had failed to appreciate significance of findings she did make, and failed properly to find mother had been anally raped by father
- ❖ Judge entitled to find very significant inconsistencies in mother's account of rape and that it was not proved – she had advantage of seeing both parties give evidence
- ❖ [165, 167, 169] for judicial comments on 3 proved allegations of physical violence
- ❖ CoA did not accept that words which can be interpreted as threats to kill are words which are 'commonly used in anger which do not import any genuine threat to life'

Re T

- ❖ Judge fell into error in that she failed to stand back to look at findings she had made as a whole, so failed
 - ❖ To appreciate the true significance and seriousness of the father's behaviour and
 - ❖ to consider whether the key primary Q of whether these findings established a pattern of coercive and/or controlling behaviour [174 & 178]
- ❖ These findings are highly relevant to any risk assessment but judge did not appreciate their significance [182]

Re T

- Failed to acknowledge the **seriousness** of two incidents where father made ref to dying/killing, even if father did not intend to strangle/suffocate that did not prevent the mother from being the victim of 2 extremely frightening episodes.
- Failed to look at **impact** on mother: felt as if ‘she wanted to die’
- Failed to look at **context** – probably held the mother in the vicinity of her neck when he spoke – ‘a signal piece of highly **intimidating** behaviour’ and plastic bag incident only a month later – 2 intimidating and highly abusive incidents of a similar type carried out within a few weeks of each other

Re H-N

- ❖ Father seeking child come to live with him in France
- ❖ CoA agreed that HHJ Tolson failed to look at
 - ❖ the **pattern** of control and abuse which were demonstrated even on the basis of the father's admissions alone.
 - ❖ the **impact** on the mother of such behaviour.
- ❖ Not expected to analyse or comment on every detail or submission, need to take into account all significant features e.g. supportive police evidence, **context**, namely that mother heavily pregnant at the time of a slap arising from an argument about father opening mother's post (itself submitted to be controlling behaviour)

Re H-N

- Admissions of violence, unlawful retention of child not considered within allegation of emotionally abusive, controlling behaviour, to see if there was a controlling pattern overall
- Did not consider impact of these actions on mother on own presentation/behaviour during the time they were together, or on H-N despite nursery report of separation anxiety after return to UK
- In fact, mother's untidiness/lack of routine used to dismiss allegation of emotional abuse/controlling behaviour, without explanation.

Re H-N

- “It goes without saying that an individual does not have to be ‘blameless’ to be the victim of domestic abuse” (para 218)
- Failure properly to analyse the evidence & draw together threads of father’s admission inc retention of child when put against intense focus on mother’s ability as a parent and her vulnerable mental health, instead of domestic abuse ‘leaves one unclear as to whether what the judge was in fact seeing in the presentation of this mother was not an intelligent manipulative mother making up allegations for her own ends, but a woman who, whilst she has undoubtedly suffered mental health issues, was demonstrating...the classic signs of a person who has been the victim of domestic abuse & in particular a controlling and coercive relationship

Re H-N – practical concerns

- Potential for oral evidence at FHDRA/DRA – ramifications for later evidence and ‘non-adversarial’ approach?
- Scheduling and organising fact-finding hearing – absence of Scott schedule and/or replacement with ‘threshold’ type document
- Narrative statements more widely
- Further impact on litigant in person?
- Impact on child - potential for parental alienation if allegations unproven
- Delay

Promotion of contact after findings made

No easy answers. Consider following (dependant on level of acceptance):

- Indirect contact to show period of commitment
- Move to virtual, monitored contact (concerns re. safety/control)
- Supervised contact (NACCC centre if available) or family supervision
- Domestic abuse course – or parenting course *if* addresses concerns
- Child Contact Intervention (if CAFCASS willing - can be used for intractable contact disputes/support to re-establish/further assessment of risk))
- Isolated resources specialise in working with families where findings not accepted, e.g. Resolutions-style assessments (c.f. Tracy Carboni)
- Don't underestimate impact of apology – written can be safest

When ‘no contact’ orders are appropriate

R (no order for contact after findings of domestic abuse) [2020] EWFC

B57 - application of the law on contact and PD12J on serious domestic abuse (controlling and physically abusive behaviour)

- No acceptance of allegations from F – undermining M
- Continued ‘overwhelming’ intensity of F’s emotions & inability to prioritise child’s needs
- Risks cannot be managed by supervised contact or SS intervention
- No contact (direct or via Skype (intrusive, hard to manage as child gets older, hard as no established relationship and fuelled M’s anxiety)– cards/letters/gifts only)



No order for PR (possible appeal?)

Intractable contact cases

- Often involve allegation of ‘parental alienation’ (itself controversial)
- One of most problematic areas of private law
- Can be hard to identify against difficult behaviour from both parents
- Can be even harder to persuade court/CAFCASS that alienation taking place, especially if contact technically taking place
- Often delays reaching contested hearing to properly challenge evidence
- Delay itself can add to alienation – balance between not involving child in proceedings and child feeling abandoned by other parent
- Labelling parent as ‘alienating’ or ‘intractable’ can make matters worse

Re S (Parental Alienation: Cult: Transfer of Primary Care) [2020] EWHC 1940 (Fam)

- Transfer of residence of a 9 year old to father's care after mother failed to adequately disengage from the cult of Universal Medicine (concerns about sexual predation by founder and adherents losing ability to question what taught/leave without threat of curses and losing 'salvation')
- Mother effectively denied alienation and no active attempt to resolve alienation or speak to child about leaving UM – had disassociated from individuals but not beliefs/practices
- Child staying overnight with father but looked to mother/UM for all direction, sometimes violent to father

Re S (Parental Alienation: Cult: Transfer of Primary Care) [2020] EWHC 1940 (Fam)

- Ultimate transfer of residence to father
- No direct or indirect contact between mother and child over the summer
- Reintroduction of contact between mother and child to be decided by father in consultation with ISW (supervised initially)
- Judge to write letter to child to explain decision, to be delivered by father
- Proceedings ended but no s.91(14) order made barring future applications

Parental alienation: over-arching points

- Keep child at forefront but don't let them be drawn in – difficult balance
- Views of child must be heard (fundamental principle of Children Act/UN Convention on the Rights of the Child). PA can amount to emotional harm - *Re H [2014] EWCA Civ 733*
- But - how should CAFCASS assess child without adding to conflict? Should child be spoken to at all?
- Consider behaviour as well as spoken views – 'ascertainable', not 'expressed' (***Re L [2019] EWHC 867 (Fam)*** – decision by CAFCASS not to speak to child compatible with welfare framework).

Parental alienation: over-arching points

- Consider Guardian and separate representation of child
- Consider professional assessment at early opportunity
- Change of residence no longer ‘weapon of last resort’? (In theory if not in practice – *Re L*)
- Particularly hard to tackle in cases of older children – alienation can be more ingrained and harder to revise position
- Sibling (often younger) attending contact can sometimes be key to alienated child attending – also applies to DA cases in some circumstances

Parental alienation: over-arching points

- Consider also appeal of other family members, e.g. grandparents, attending initially to assist with handover or early stages of contact – balance against needing quality contact with parent alone
- Long-term approach – case unlikely to resolve in usual timescales. Not unusual to see applications for contact withdrawn.
- Be mindful of professional anger and frustration that those involved can experience