




Re H-N: Scott's demise?

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Focus

Approach to cases where allegations of **coercive and controlling behaviour** following the case of ***Re H-N and Others (children) (domestic abuse: finding of fact hearings)*** [2021] EWCA Civ 448

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Context

- 2019/2020: 55,253 'private law' applications by parents for an order under CA 1989
- Approx. 40% of private law children cases involve allegations of domestic abuse
- **22,000 cases a year** involving domestic abuse

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- No evidence numbers will decline – the opposite
- Impact of pandemic: not necessarily an increase in number of victims but escalation in severity of abuse

Police crime data show an increase in offences flagged as domestic abuse-related during the coronavirus (COVID-19) pandemic. While it cannot be determined whether this increase can be directly attributed to the coronavirus pandemic. There has generally been an increase in demand for domestic abuse victim services during the coronavirus pandemic, particularly affecting helplines as lockdown measures eased; this does not necessarily indicate an increase in the number of victims, but perhaps an increase in the severity of abuse being experienced, and a lack of available coping mechanisms such as the ability to leave the home to escape the abuse, or attend counselling.

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseduringthecoronaviruscovid19pandemicenglandandwales/november2020>

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Definitions

What is coercive and controlling behaviour?

Starting point: PD 12J

- **Re H-N confirms PD12J is fit for purpose**
- **The issue: implementation**

We are therefore of the view that PD12J is and remains, fit for the purpose for which it was designed namely to provide the courts with a structure enabling the court first to recognise all forms of domestic abuse and thereafter on how to approach such allegations when made in private law proceedings. As was also recognised by The Harm Panel, we are satisfied that the structure properly reflects modern concepts and understanding of domestic abuse. The challenge relates to the proper implementation of PD12J.

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PD12J, 3

“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.

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PD12J, 3

"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;

'harm' "harm" means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another, by domestic abuse or otherwise;

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- Concept coercive and controlling behaviour was incorporated into PD12 J in 2014
- Not only is coercive control the most common context in which [women] are abused, it is also the most dangerous" Evan Stark (2007) Coercive Control. How Men Entrap Women in Personal Life. New York: Oxford University Press.
- Cited as rationale for new offence: *Section 76 of the Serious Crime Act 2015 created a new offence of controlling or coercive behaviour in an intimate or family relationship, into force on 29 December 2015.*

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf

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- coercive and/or controlling behaviour by one party may cause serious emotional and psychological harm to the other members of the family unit, whether or not there has been any actual episode of violence or sexual abuse.
- 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 in court proceedings
- harm to a child in an abusive household is not limited to cases of actual violence to the child or to the parent.

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• *Examples of harm to a child:*

- 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 /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.*

Re H-N [31]

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F v M [2021] EWFC 4 Hayden J

- Coercive and controlling behaviour: the term is unambiguous and needs no embellishment
- Understanding the scope and ambit of the behaviour however, requires a recognition that 'coercion' will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats
- 'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy.
- Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation

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F v M [2021] EWFC 4 Hayden J

- *Whilst the facts found in F v M may be towards the higher end of the spectrum of coercive or controlling behaviour, **their essential character is not**, and will be all too familiar to those who have been the victim of this form of domestic abuse, albeit to a lesser degree or for a shorter time*
- Highlights **paradigm behaviours of controlling and coercive behaviours** set out in Statutory Guidance to the offence under. S 76 SCA 2015 '*That guidance is relevant to the evaluation of evidence in the Family Court.*'

Re H-N [30]

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Examples of coercive and controlling behaviours

- Isolating a person from their friends and family;
- depriving them of their basic needs;
- monitoring their time;
- monitoring a person via online communication tools or using spyware;
- taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep;
- depriving them of 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;
- 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;
- financial abuse including control of finances, such as only allowing a person a punitive allowance;
- threats to hurt or kill;
- threats to a child;
- threats to reveal or publish private information (e.g. threatening to 'out' someone).
- assault;
- criminal damage (such as destruction of household goods);
- rape;
- preventing a person from having access to transport or from working.

This is not an exhaustive list.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf

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Examples of coercive and controlling behaviours

- Copies of emails
- Phone records / Text messages
- 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
- Lifestyle and household including at scene photographic evidence
- Records of interaction with services such as support services, (even if parts of those records relate to events which occurred before the new offence came into force, their contents may still, in certain circumstances, be relied on in evidence)
- Medical records
- Witness testimony, 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
- Bank records to show financial control
- Previous threats made to children or other family members
- Diary kept by the victim
- Victims account of what happened to the police
- 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.,
- Where the perpetrator has a carer responsibility, the care plan might be useful as it details what funds should be used for

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Abuse or bad behaviour?

- 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.**
- Endorsed the approach taken by Peter Jackson LJ in *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121 (paragraph 61):

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Abuse or bad behaviour?

"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."

Re H-N [32]

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The proper approach

Issues identified

- 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 is **necessary and proportionate**, how should an allegation of domestic abuse be approached
- iv) The relevance of criminal law concepts

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Should there be a fact finding?

- i) The first stage :consider the nature of the allegations and the extent to which it is likely to be **relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).**
- ii) the court should have in mind its **purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.**
- iii) Careful consideration must be given to PD12J.17: as to whether it is **'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.**
- iv) Is it **'necessary and proportionate'**. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in 'The Road Ahead'

Re H-N [37]

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Scott Schedules

- Unanimity that value of Scott Schedules had declined to the extent that now a **potential barrier to fairness and good process, rather than an aid.** [43]
- 2 bases for concern:
 1. Principled: need for the court to focus on the **wider context of whether a pattern of coercive and controlling behaviour, as opposed to a list of specific factual incidents that are tied to a particular date and time** [44]
 2. Pragmatic: requirement to limit allegations to be tried court *'is robbed itself of a vantage point from which to view the **quality of the alleged perpetrator's behaviour as a whole** and, importantly, removed consideration of whether there was a pattern of coercive and controlling behaviour from its assessment.'* [45]

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Alternative to Scott Schedules

- Confirmed the need to move away from Scott Schedules
- Not role of court to do more than set out options:
 - a. Threshold type document
 - b. Formal pleadings by way of PoC in civil proceedings
 - c. narrative statement in prescribed form

Re H-N [46-48]

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Alternative to Scott Schedules

- New guidance or rule changes developed by PrLWG working with Harm Panel's implementation Group
- Change to the FPR or guidance through the medium of a new Practice Direction

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Approach to controlling and coercive behaviour

- likely to be the **primary question** irrespective of whether there are other more specific factual allegations to be determined [51]
- considered to be 'old fashioned' and no longer acceptable to regard coercive or controlling incidents that occurred between the adults when they were together as being '**in the past**', and **therefore of little or no relevance in terms of establishing a risk of future** [52]

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Approach to controlling and coercive behaviour

- How to evaluate pattern of coercive and controlling behaviour without **significantly increasing scale and length of proceedings?** [54]
- Difficult question that requires further consideration by relevant bodies

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In the meanwhile, pointers ...

- allegations must be **relevant to the determination of the child welfare issues that are before the court**;
- PD12J para 16: a fact-finding hearing should be directed only when such a hearing is '**necessary**' in order to:
 - Provide a factual basis for any welfare report or other assessment;
 - Provide a basis for an accurate assessment of risk;
 - Make final welfare-based orders
 - Consider need for domestic-abuse related activity

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In the meanwhile, pointers ...

- c) Only **allegations necessary to support** that process will be determined
- d) In **every case** where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) **the overall experience of being in a relationship with each other**.
- e) Where assertion of coercive and/or controlling behaviour:
 - that assertion should be the **primary issue** for determination
 - specific, factual allegations should be selected for trial because of their **potential probative relevance to the alleged pattern of behaviour**, unless any particular factual allegation is so serious that it justifies determination e.g. rape [59]

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Relevance of criminal law concepts

- 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 [62]
- *Re R (Children) (Care Proceedings: Fact-finding Hearing)* [2018] EWCA Civ 198; [2018] 1 WLR 1821 [62] endorsed
- Judges are not required to avoid using the word 'rape' in their judgments as a general label for non-consensual penetrative sexual assault; to do otherwise would produce a wholly artificial approach [72]

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Conclusion – an important stop-gap

- Much anticipated
- Important and useful
- Not radical - extent of general guidance limited [2]
- 'Stop gap' pending initiatives driven by:
 - Assessing Risk of Harm to Children and Parents in Private Law Children Cases Final Report, June 2020 – The 'Harm' report
 - President of the Family Division's 'Private Law Working Group' ('PLWG') (2nd report published April 2020) - a multi-disciplinary group set up to review the CAP and;
 - The Domestic Abuse Bill

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