



PUMP COURT CHAMBERS

What now after Re H-N and others Penny Howe QC and Jennifer Swan



Domestic Abuse Act 2021

Passed into law on 29th April 2021

Wide ranging changes but timetable for implementation of most key provisions yet to be announced – but worth knowing about

Headlines for family lawyers:

- New statutory definition of domestic abuse
- Provisions relating to protection for victims and witnesses
- Amendments to s91(14) CA 1989
- Introduces Domestic Abuse Protection Orders (DAPO's)

S1 Domestic Abuse Act 2021

Domestic Abuse encompasses:

- (a) physical or sexual abuse;
- (b) violent or threatening behaviour;
- (c) **controlling or coercive behaviour**;
- (d) economic abuse;
- (e) psychological, emotional or other abuse;

Whether as a single incident or a course of conduct

- Carried out by a person over the age of 16, towards another person over the age of 16
- Those persons must be “connected” – essentially, this means people who are intimate partners, ex-partners, family members or individuals who share parental responsibility for a child.
- There is no requirement for the victim and perpetrator to live in the same household.

(5) 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).

An interesting provision, in my view

S63: Special Measures – family court

Requires a change to FPR 3 and PD3A

Where P is, or is at risk of being a victim of domestic abuse carried out by

- A party
- A relative of a party to the proceedings
- A witness in the proceedings

it is to be *assumed* the quality of their evidence and participation will be diminished

So, the starting point will be that vulnerability – and therefore eligibility for special measures - is already established; although the question of which of those measures available is necessary remains for the judge.



S65: Prohibition on direct cross-examination

DDA 2021 introduces a scheme of amendments to s31 Matrimonial and Family Proceedings Act 1984.

Here is how the Government explains its aim in its latest Factsheet:

“These provisions will introduce an **automatic ban on cross-examination** in person:

- where one party has been convicted of, given a caution for, or charged with **certain offences** against the witness;
- where an on-notice protective injunction is in place between the party and witness;
- where there is other evidence of domestic abuse perpetrated by a party to the proceedings towards a witness (or vice versa). This evidence will be **specified in regulations**, and we intend to broadly replicate the evidence criteria used in the legal aid regime.

In each of these circumstances, the ban will apply both ways: it will protect the victim from cross-examination by their abuser, and from having to cross-examine their abuser themselves.”

Discretionary Prohibition

Also: a **discretionary prohibition** will exist to give the power to prohibit A from cross-examining B, where it appears to the court:

- The quality of the evidenceis likely to be diminished if conducted by A, or likely improved if A is prohibited

OR

- The cross-examination by A in person would be likely to cause significant distress to the witness or party B (and more than if it were conducted some other way)

There will be a checklist of matters the judge must consider in reaching a decision; and a direction may *only* be made if it is not “contrary to the interests of justice”

What happens instead?

How will cross-examination be achieved?

Of course judges already sometimes take the role of testing the evidence, and this will continue.

The statutory scheme will require the court to consider:

- If there is satisfactory alternative means to cross-examine or obtain the relevant evidence; and if not
- The court must invite the prohibited party to arrange a qualified legal representative to XX; and if they don't
- The Court must consider whether it is necessary to appoint one (paid from central funds)

S67: amending s91(14) CA 1989

S67 of the DAA 2021 will amend s91(14) CA 1989

- Where a court is satisfied that the making of an application **would put the child or another “relevant individual” (victim of DA) at risk of harm** it may make a s91(14) order
- Where an order is in force, on an application for leave the court must consider **whether there has been a material change of circumstances** since the order was made

Domestic Abuse Protection Orders

Domestic Abuse Protection Orders: “DAPOs” will be introduced.

- Replace DVPOs
- Similar to DVPOs, police can issue notices or take cases to the Mags without victim taking the lead
- But **DAPO’s will be available to the family court judge, either on an application or of its own motion**
- Apparently intended to sit alongside, and not replace, non-molestation orders under FLA 1996 (although not clear how!)



What is controlling or coercive behaviour?

- S76 Serious Crime Act 2015: new criminal offence created (max sentence 5 yrs)
- Statutory guidance under s77 of 2015 Act: Controlling or Coercive Behaviour in an Intimate or Family Relationship
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf
- Table of examples at page 4 of the guidance

If you remember nothing else...

- Neat “proper approach” for deciding whether there should be a FFH (para 37);
- Scott Schedules are on the way out (RIP);
- Controlling and/or coercive behaviour will be the focus in all cases where it’s alleged and there’s a FFH;
- Keep your Criminal law out of our Family jurisdiction - “what matters in a FFH are the findings of fact”

- 4 conjoined appeals within ‘private law’ jurisdiction
- All involved allegations of domestic abuse (4 of c.22,000 per year)
- 3 of the 4 appeals were allowed - one was academic

The 'Proper Approach'

1. Whether there should be a FFH;
2. The challenges presented by Scott Schedules as a means of pleading a case;
3. If a FFH is necessary and proportionate, how should an allegation of domestic abuse be approached?
4. The relevance of criminal law concepts.

Whether there should be a FFH

Para 37;

i) the first stage is to 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) in deciding whether to have a FFH 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/ren.

iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a FFH, 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) Under PD12J.17 (h) the Court has to consider whether a separate FFH is '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*".

FFH? Absolutely!

- PD12J was commended as “fit for purpose” - focus on the definitions (para 3) - “act or pattern of acts”
- F v M [2021] EWFC 4 “*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” (quoted at para 29)*
- Potential impact on controlling & coercive behaviour on children (para 31);
 - “The child can be harmed in any one of a combination of ways for example where the abusive behaviour;
 - i) is directed at, or witnessed by, the child;
 - ii) causes the victim of the abuse to be so frightened of provoking an angry outburst or reaction from the perpetrator that s/he is unable to give priority to the needs of their 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”



FFH? NO WAY!

- “not every case requires a FFH even where domestic abuse is alleged” (para 8)
- *“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”* (para 32)
- Re L (Relocation: Second Appeal) [2017] EWCA Civ 2121

“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”

- Necessity, necessity, necessity...



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“It would benefit the Court and the parties for there to be CAFCASS involvement prior to determination of whether or not a FFH 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 FFH is required before any further assessment can take place. In others, early social work assessment could lead to a conclusion that a FFH is not necessary, but that some other intervention might be more helpful. At present, it is rare for there to be any substantive CAFCASS involvement prior to FFH.”

Scott Schedules (RIP)

- “The process before this Court has undoubtedly confirmed the need to move away from using Scott Schedules” (para 49)
- But... then what??
 - A ‘threshold’ type document?
 - Formal pleadings by way of particulars of claim?
 - Narrative statement in a prescribed format?

Approach to Coercive & Controlling behaviour?

“[it was submitted that] ‘the overwhelming majority of domestic abuse (particularly abuse perpetrated by men against women) is underpinned by coercive control and it is the overarching issue that ought to be tried first by the court’. We agree and it follows that consideration of whether the evidence establishes an abusive pattern of coercive and/or controlling behaviour is likely to be the primary question in many cases where there is an allegation of domestic abuse”
(para 51)



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“the approach of regarding coercive or controlling incidents that occurred between adults when they were together... as being ‘in the past’ and therefore of little relevance... should, we believe... be considered to be old fashioned and no longer acceptable” (para 52)

“Where an issue properly arises as to whether there has been a pattern of coercive and/or controlling behaviour within a family, and the determination of that issue is likely to be relevant to the assessment of the risk future harm, a judge who fails expressly to consider the issue may be held on appeal to have fallen into error” (para 53)



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- If there are allegations of a pattern of coercive and/or controlling behaviour, AND a FFH is ‘necessary’ per PD12J,

THEN

- That assertion should be the primary issue for determination
- Any other, more specific, factual allegations should be selected for trial to prove the ‘pattern’
- UNLESS a factual allegation is so serious it requires determination anyway (i.e. rape)

So what do I do?

Early Identification

- “Are you afraid?” - get a narrative
- Alternative sources (refuge/GP/hospital)
- Power & control wheel

Pleading

- Highlight the issue ASAP
- How many allegations?
- Impact of the alleged behaviour
- Physical & sexual abuse are still forensically important

Criminal Law Concepts

Re R (Children) (Care Proceedings: Fact-Finding hearing)[2018]
EWCA Civ 198:

“it is 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”

“importation of concepts from the criminal courts to the Family Court is inappropriate, unnecessary and unwise, and should be avoided” (quoted at paras 63 & 64)

And finally...

- Neat “proper approach” for deciding whether there should be a FFH (para 37);
- Scott Schedules are on the way out (RIP);
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- Keep your Criminal law out of our Family jurisdiction - “what matters in a FFH are the findings of fact”