



PUMP COURT  
CHAMBERS

**A Miscellany of Topical Issues**  
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## Topics covered

- Vulnerable witnesses & parties
- Domestic abuse findings of fact
- Adoption
- Jurisdiction after Brexit – LSQC

# Vulnerable witnesses & parties

- FPR Part 3A and PD 3AA in force on 27 November 2017
- Amended by The Family Procedure (Amendment No. 2) Rules 2021 (SI 2021/875) on 1 October 2021 as a result of s.63 Domestic Abuse Act 2021

# Vulnerable witnesses & parties

- Section 63 Domestic Abuse Act 2021 – special measures in family proceedings: victims of domestic abuse:
  - Where P is, or is at risk of being, a victim of domestic abuse carried out by a party to proceedings, a relative of a party (other than P) or a witness in proceedings
  - Assumed that the quality of P’s evidence and, where P is a party, P’s participation in the proceedings are likely to be diminished by reason of vulnerability
  - Rules may provide for an exception where P does not wish to be deemed eligible for special measures

# Vulnerable witnesses & parties

- New FPR r.3A.2A reflects s.63 DAA 2021:
  - Where it is stated that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, a relative of another party or a witness in the proceedings
  - The court must assume that the quality of the party or witness's evidence and, in relation to a party, their participation in the proceedings is diminished.
  - The party or witness can request that the assumption does not apply to them if they do not wish it to
  - Where the assumption applies, the court must consider whether it is necessary to make one or more participation directions

# Vulnerable witnesses & parties

- General provisions
  - Rule 3A.4 – court must consider whether a party’s participation in the proceedings is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions
  - Rule 3A.5 – court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions
  - Before making directions, court must consider any views expressed by the party or witness - rr.3A.4(b) & 3A.5(b)

# Vulnerable witnesses & parties

- Rule 3A.7 – What the court must have regard to when deciding whether to make participation direction(s)
  - Impact of actual or perceived intimidation
  - Mental disorder or significant impairment of intelligence or social functioning
  - Physical disability or disorder
  - Medical treatment
  - Nature and extent of information before the court
  - Issues arising in the proceedings, including concerns arising in relation to abuse
  - Whether matter contentious
  - Age, maturity and understanding

# Vulnerable witnesses & parties

- Rule 3A.7 – What the court must have regard to when deciding whether to make participation direction(s) - continued
  - Social and cultural background and ethnic origins
  - Domestic circumstances and religious beliefs
  - Any questions the court is putting or causing to be put in accordance with s.31G(6) Matrimonial and Family Proceedings Act 1984
  - Any characteristic relevant to participation direction
  - Whether any measure is available to the court



# Vulnerable witnesses & parties

- Rule 3A.7 – What the court must have regard to when deciding whether to make participation direction(s) - continued
  - Any other matter in PD 3AA, e.g. the ability of the party or witness to
  - Understand the proceedings and their role in them
  - Put their views to the court
  - Instruct their representative/s before, during and after the hearing
  - Attend the hearing without significant distress

# Vulnerable witnesses & parties

- Rule 3A.8 – measures, including:
  - Screens
  - Live link
  - Use of a device to help communicate
  - Intermediary
- Rule 3A.9 – when court’s duties apply & recording reasons for decisions made under this part
  - Duties arise as soon as possible after the start of proceedings and continue until resolution of proceedings
  - Record reasons on the court order

# Vulnerable witnesses & parties

- Rule 3A.13 introduced on 6 April 2022, by The Family Procedure (Amendment Rules) 2022 – SI 2022/44:
  - A Practice Direction may make provision in relation to prohibition of cross-examination in person under Part 4B of the Matrimonial and Family Proceedings Act 1984 – not yet in force – in May 2022, MoJ indicated “later in June”

# Vulnerable witnesses & parties

- ***Re A (A Child) (Fact Finding; Modern Slavery) [2021]***  
**EWFC 78**
  - Complex considerations re vulnerability and participation
  - Mother alleged victim of physical and sexual assault by father and BC
  - Considered vulnerable by the court, but not considering herself vulnerable or in need of participation directions
  - Father had cognitive needs, requiring an intermediary, and was an alleged victim of physical assaults and threats by BC
  - BC was a litigant in person
  - M, F and BC all required interpreters

# Vulnerable witnesses & parties

- ***Re A (A Child) (Fact Finding; Modern Slavery) [2021]***  
**EWFC 78**
  - Recorder Samuels QC directed [35-45]:
    - M, F, BC, intermediary, interpreters and one legal representative for each parent in court
    - Child's solicitor to ask a pre-prepared and agreed questions of BC to elicit evidence in chief, BC have not managed to comply with directions for a narrative statement
    - Complex considerations re vulnerability and participation
    - Ground rules for F as to support during hearing, translated documents and method of questioning of F
    - Child's solicitor to conduct cross-examination of M on the basis of written questions prepared by BC
    - BC to participate remotely from another room in the court building whilst M was giving evidence

# Vulnerable witnesses & parties

- Importance of considering measures and adhering to them, once directed:  
e.g. ***Re S [2022] EWCA Civ 8***
  - Findings made against an intervener ('A') without the benefit of an intermediary
  - In proceedings concerning A's children, she was assessed as needing an intermediary
  - Appeal allowed on grounds of procedural unfairness
- Advocate's Gateway toolkits  
<https://www.theadvocatesgateway.org>

# Domestic abuse findings of fact

- Most prominently considered in the context of private law proceedings
- ***Re H-N (Children) (Domestic Abuse: Finding of Fact Hearings)*** [2021] EWCA Civ 448, [2021] 2 FLR 1116
  - At [31] : Child can be harmed where abusive behaviour:
    - (i) Is directed against, or witnessed by, the child.
    - (ii) Causes the victim of 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.

# Domestic abuse findings of fact

- ***Re H-N (Children) (Domestic Abuse: Finding of Fact Hearings) [2021] EWCA Civ 448, [2021] 2 FLR 1116***
  - At [44] & [45]: concern about the utility of Scott Schedules
  - At [46]: *“[...] [s]erious 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 the 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.”*
  - At [49]: need to move away from Scott Schedules – work to be done outside confines of a particular case, e.g. by Private Law Working Group



# Domestic abuse findings of fact

- Fact Finding Hearings and Domestic Abuse in Private Law Children Proceedings - Guidance for Judges and Magistrates
- Issued on 5 May 2022
- Paragraph 10:

*“Allegations that can be defined (such as specific incidents of physical abuse) may be suitable for reduction to a schedule. Other allegations that require the court to take a broad overview and look at patterns of behaviour (such as coercive and controlling behaviour) are likely to require a statement. A hybrid of the two, dividing types of abuse into clusters to provide an overview akin to a threshold document in public law proceedings might be appropriate.”*

# Domestic abuse findings of fact

- Application in public law proceedings:  
***Re L (Fact-finding Hearing: Fairness)* [2022] EWCA Civ 169**
- Recorder made a finding of coercive control not explicitly sought by the LA in its threshold document
- In part, decision guided by *Re H-N* and the concern expressed by the CoA that the requirement for a document distilling the allegations of abuse down to specific factual incidents tied to a particular date and time risked blinding the court to the wider context of whether there has been a pattern of behaviour that was coercive and controlling

## Domestic abuse findings of fact

- Court of Appeal endorsed the Recorder's approach, also referring to *Re H-N* and quoting [44] of that judgment:  
*"The principled concern arose from an asserted need for the court to focus on the wider context of whether there has been 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. Abusive, coercive and controlling behaviour is likely to have a cumulative impact upon its victims which would not be identified simply by separate and isolated consideration of individual incidents."*
- CoA held that if the recorder interpreted the evidence as sufficient to establish that the father had exerted coercive control over the mother, it was his duty to say so – *Re L*, [87] , citing [51] of *Re H-N*

# Domestic abuse findings of fact

- Points to consider in public law proceedings:
- CoA in *Re L* held at [91] that  
*“it would have been better for the parties to have identified the discrepancy between the local authority’s threshold document and the case which X intended to advance, and to have clarified expressly at the outset when the decision was taken to proceed with the fact-finding, that coercive control was potentially to be part of the argument on threshold.”*
- Consider as early as possible in proceedings what exactly is alleged in terms of domestic abuse and by whom
- Added challenge in public law proceedings that those with first-hand knowledge of abuse may not want to make or pursue allegations

# Adoption

## *Re Ms L; Re Ms M (Declaration of Parentage)* [2022] EWFC 38

- Adults who were adopted in the 1960s applying for declarations of parentage as to their birth fathers
- Court considering the interplay between s.55A Family Law Act 1986 and s.67 Adoption and Children Act 2002
- The former deals with parentage as a matter of fact, the latter is concerned with the legal position

# Adoption

## ***Re Ms L; Re Ms M (Declaration of Parentage) [2022] EWFC 38***

- In line with *H v R & An Adoption Agency (Declaration of Parentage Following Adoption) [2020] EWFC 74* the court has jurisdiction in an appropriate case to grant a declaration of parentage in respect of a child who has been lawfully adopted
- Cobb J made declarations of parentage and directed that they and the applications be sent to the Registrar General

# Adoption

## ***Re B (A Child)(Adequacy of Reasons)* [2022] EWCA Civ 407, [2022] 4 WLR 42**

- E was the mother's 5<sup>th</sup> child – the other 4 had been placed for adoption
- Last order made in November 2016
- E born in August 2020
- Residential placement from September to December 2020, with negative conclusion
- Psychological assessment

# Adoption

## ***Re B (A Child)(Adequacy of Reasons)* [2022] EWCA Civ 407, [2022] 4 WLR 42**

- Concerns included
  - M's dependent personality style and continuing contact with K, the third person in the pool of perpetrators
  - M's severely insecure adult attachment style
  - Parents not accepting findings of inflicted injury
  - Inability to protect
  - F's history of cannabis use
  - Evidence of parents not working honestly with professionals
- Psychologist considered need for sustained period of change and therapeutic input over at least 6 months



# Adoption

## ***Re B (A Child)(Adequacy of Reasons)* [2022] EWCA Civ 407, [2022] 4 WLR 42**

- Final hearing in November 2021
- M's counsel put to psychologist:
  - No evidence of contact with K since November 2020
  - No evidence of cannabis use by F since August/September 2020
  - Last episode of aggression by F January 2021
  - No domestic abuse between the parents
  - Parents now have housing and are in employment
  - Parents had started therapy
- Judge made care and placement orders

# Adoption

## ***Re B (A Child)(Adequacy of Reasons) [2022] EWCA Civ 407, [2022] 4 WLR 42***

- Parents appealed on the grounds that the judgment contained serious flaws and must be set aside:
  - Judge referred very largely to written evidence, which related to work done nearly 12 months earlier
  - Very little reference to oral evidence that indicated changes
  - Judgment did not adequately consider the parents' oral evidence and the case they advanced
  - Judgment made no reference to the psychologist's and guardian's acknowledgment that the balance of risk had changed
  - Linear and polar analysis of welfare – ruling out parents early on, when considering only s.1 Children Act 1989

# Adoption

## ***Re B (A Child)(Adequacy of Reasons) [2022] EWCA Civ 407, [2022] 4 WLR 42***

- Additional concern that judgment did not identify the basis on which threshold was met
- Appeal allowed – rehearing
- At [17]

*“The task of evaluating threshold goes to the core of the judicial exercise in every case. It is, in essence, what the case is about. Unless the court has a clear and detailed understanding of the basis upon which it finds, if it does, that a particular child “is suffering or is likely to suffer significant harm”, substantial difficulties will be encountered when the court moves on to evaluate future risk of harm at the welfare stage.”*

# Adoption

## ***Re B (A Child)(Adequacy of Reasons)* [2022] EWCA Civ 407, [2022] 4 WLR 42**

- Much of the judge's summary of the evidence from the residential unit and the psychologist relies on the written material and not what was said by professionals during the hearing – [20]
- Importantly, there is effectively no account by the judge of the parents' evidence or the general case put forward on their behalf - [21]
- The judge failed to engage with the central issue of the changes made by the parents - [32]

# Adoption

## ***Re B (A Child)(Adequacy of Reasons)* [2022] EWCA Civ 407, [2022] 4 WLR 42**

- Wrong to consider the care order application on its own – [40]
- Standing back and looking at the judgment as a whole, it is impossible to avoid attaching the “linear” label to it, but it’s not helpful to introduce more jargon and call it “polar” or “siloes” – [49]
- Appeal allowed on the basis that the judicial analysis fell significantly short, not only in terms of evaluation of evidence but also because of the structure and content of the essential welfare balancing exercise

# Adoption

***Re B (A Child)(Adequacy of Reasons)* [2022] EWCA Civ 407,  
[2022] 4 WLR 42**

- Peter Jackson LJ sets out helpful summaries of what judgments should address
- [59] in general
- [62] in respect of placement order applications