A Moving Target: Achieving Best Evidence in cases of Domestic Abuse (Control and Coercion)

Introduction

This article highlights various aspects of case preparation where allegations of domestic abuse are made and wants to provide practitioners with :

1. The tools to ensure that clients feel protected by their lawyer; and
2. The ability to facilitate the expression of the true nature of their client's experience in relation to any abuse they have suffered

We emphasise that an important aspect of achieving the above is to ensure that the practitioner is able to properly advise the client on the true impact of their life experience on any child caught up in any family dispute , and then through the Court process to achieve protection both for the client and any child/children . This is a complicated balance to achieve .

Sometimes cases of domestic abuse are not treated with the seriousness they warrant by the family justice system. It is not uncommon for private law matters, which often involve serious and multiple allegations of abuse, to be dealt with by the Magistrates or a deputy district judge. There is also the issue of judicial continuity in any event. It is not unusual for different judges to hear the matter throughout the proceedings, this can cause real difficulty in trying to bring a judge 'up to speed' with often nuanced patterns of behaviour and contested allegations. This is especially difficult when practitioners, certainly in a private law context, have to be mindful of legal costs and balancing the issue of thorough legal representation and cost. However, in attempting to achieve that balance we have seen examples of bad practice which assists no-one.

This article will examine how best to put a client's evidence before the Court, it states that whilst this specialist area of children law needs considerable reform like children work did in the 1980's basic principles will be retained . Principles of proper representation, abilities to get clients to share their experiences and the presentation of their evidence and experiences before the Court. . This article will also suggest procedural improvements and advise how best to put the client's experience of abuse before the Court.

The Context :

The context for proper consideration of domestic abuse comes from figures outlined in Re H-N and Others (children) (domestic abuse: finding of fact hearings)[1] where it was said that:

1. In 2019/2020 the Family Court received 55,253 'private law' applications by parents for a CA 1989 order.
2. It is thought that at least 40% of private law children cases now involve allegations of domestic abuse.
3. The Family Court is required to engage with the question of domestic abuse in around 22,000 cases each year.
4. The court received 29,285 applications in the year 2019/2020 for injunction orders under the Family Law Act 1996

Again, as detailed in Re H-N , there are a number of ongoing potential routes to reform:

1. The Ministry of Justice is moving to implement their report: The Harm Panel Report'[2] which in its recommendations says they regard the adversarial system by which contact disputes are presently determined as a barrier to the Family Court's ability to respond, '*consistently and effectively to domestic abuse'*. The Panel is looking to implement an approach to domestic abuse which is '*investigative and problem solving based on open enquiry into what is happening for the child and their family'* [3]Following the publication of the report, the Ministry of Justice has started work on how the proposed new approach can be effected and, as part of its recommendations, pilots of Integrated Domestic Abuse Courts (IDAC) are being designed.

2. The Domestic Abuse Bill is before Parliament.

3. Those within the judiciary, Cafcass and the legal and social work professions have contributed to the recommendations of the President of the Family Division's 'Private

[1] Re H-N and Others (children) (domestic abuse: finding of fact hearings) ***[2021] EWCA Civ 448***
[2] Assessing Risk of Harm to Children and Parents in Private Law Children Cases: ('The Harm Panel Report')
[3] Chapter 11.2

Law Working Group' (2nd report published April 2020) which are beginning to be piloted in the courts.

There is likely reform in the short/medium term in relation to Domestic Abuse work, however certain principles must be followed by practitioners whatever changes are proposed.

Taking instructions, the first appointment

The context of a first appointment is important when considering what is expected by way of rapport building with a client and the collation of essential information. A distinction has to be drawn between cases where clients seek an urgent protective order (non-molestation order , occupation order and/or prohibited steps order) compared to substantive non urgent proceedings. In the former there is a need to take as detailed a note as possible, often of an isolated or series of very recent events, in order to evidentially set out what is required to achieve an urgent order. The resources and time available in this dynamic are often limited and so quick, efficient instructions are required. There is arguably much less time for rapport building and exploration.

In the latter dynamic there is more opportunity to develop a deeper and meaningful rapport with a client over a number of months. The first appointment is merely the first detailed conversation, it is usual now for a FHDRA to be listed 3-4 months after the date of issue. This permits an opportunity for a more considered instruction built up over time. The first meeting is but part of the process of collating information and instructions.

The above distinction should not be underestimated. In cases with an urgent aspect the first client appointment is going to be much more about extracting information to make an urgent application to the Court. The time constraints and context of the appointment will arguably make it more challenging to grapple with the deeper, often nuanced, patterns of behaviour that may be involved, but as yet not fully understood or discovered. It does not follow that no consideration should be given to patterns of behaviour at an initial appointment, but the reality is that this is going to be a very difficult topic of conversation; it may be that the client does not recognise or identify immediately a pattern of damaging abusive behaviours at an initial appointment. It is crude to suggest that a client will open up immediately and show considerable self-reflection and insight considering the nature of an urgent initial appointment. For many clients this will be their first

experience of speaking with a lawyer. Such clients are in need of urgent protection, there is not a lot of time or intellectual space per se to explore the complex factual matrix, often developed over a number of years, in such cases. The practitioner should be alive to this during the first appointment.

In substantive non urgent matters the situation is somewhat different. In an initial appointment a client may be seeking advice having received an application from the other parent to the court for a child arrangements order. It may also be that the client is considering their own application / cross application. There will be a lot of procedural points to cover at an initial appointment such as drawing the client's attention to the court process, the functioning and purpose of a finding of fact hearing, the role of CAFCASS, PD12J and issues such as legal cost. This is interwoven with taking a detailed factual background. This is a lot for a client to digest; often such appointments can be a couple of hours. There is not the same urgency as when an urgent protective order is sought, this allows for a more explorative appointment. The practitioner should be alert to this and take the opportunity to give the client the space and time to express their experiences and reflections in a safe space. These may be muddled or confused, as noted above, it would be rare and unusual for someone to immediately in an initial appointment identify with great sophistication their experiences. The practitioner should be alive to the evolution of self-reflection and accept the limitations even in this context of what can be achieved. It will often take several conversations over time to piece together a full factual background and what may be alleged.

Compiling a statement

The importance of seeing a statement evidentially from the outset is very important . A statement is evidence and needs to be drafted with care .Some practitioners do not see the statement as a formal pleading and so suggest to clients that they compose their own statement where the client will inform them why their relationship has broken down. These are sometimes then cut and pasted into a statement without a lot of further consideration. We say this is the wrong approach and a lot more consideration is needed. Whilst this does save costs it does so at too high a price and can fail to elicit the true abuse suffered by the client .Many clients have 'boxed off ' their abuse so they cannot recount the precise nature of what happened to them . They are , with this in mind, unlikely or even unwilling to identify the abuse they have suffered. Indeed, some may have been coercively abused but they didn't have an awareness that this was happening to them (those who are gaslighted and have been manipulated into thinking they are at fault for the breakdown of any relationship).

Abuse can sometimes be hard to identify for any victim . A person comes to a solicitor saying they have been mistreated and abused and yet the examples they give can be generalised. Also, on some occasions the circumstances alleged don't look significant on paper. There is a need to talk with the client , ensure that the finer details are encapsulated in the statement accepting that the proper preparation of a statement can take more than one 'sitting', but will eventually start to develop a narrative around a pattern of behaviour . The process is daunting for the practitioner, it is traumatic for the client if they , through the process, start to see patterns and or identify certain behaviours.

We have often found the CAFCASS Guidelines[4] an invaluable tool to help focus the minds of the client. It allows clients to focus on topics and discussions around them leading to other areas of exploration. In essence this can direct a conversation with a client assisting in generating a holistic overview. It provides the client a chance to explain why they feel certain matters are relevant and others may not be, this is part of the process of defining the client's lived experience. It is part of generating proper evidence which will be pleaded in the statement.

A good statement needs to be presented in a way that is succinct and clear to read. The directions in relation to the presentation of statements in civil proceedings need to be adhered to[5] the format of the pleadings , font size, line spacing etc. The document needs paragraphs ,subparas , headings , page numbers . It must properly take the reader to any corroborative evidence . Corroborative evidence must be exhibited but again properly paginated so the reader can be taken to it in the body of the statement .

There must be a focus on what is to be achieved by the statement:

- Is the victim saying she / he has been abused?
- If so what form does the abuse take?
- If so how and when over what period of time ?
- Has the child(ren) been privy to the abuse?

[4] Private Law Assessment of coercive control.docx (voiceofthechild.org.uk)
[5] Brown & Anor (t/a Maple Hayes Hall School) v AB [2018] EWHC 623 (QB) Mr Edward Pepperall QC (sitting as a Deputy High Court Judge)

- Will the abuse and risk continue?
- Is the abuse significant?
- How is this relevant to the child(ren)?
- What should happen as a consequence of the abuse to safeguard the parent and child(ren)?

It is imperative that the client shows the significance of the abuse suffered. When a relationship has broken down most people's emotions are raw and people are upset, something important has ended for them and there have been aspects of their partner's behaviour they are unhappy with. Many parties read of apparent case examples obtained from the internet and relate this to their own experience . They consider the behaviour of their partner has been controlling . However not all 'controlling' behaviour is significant enough to impact on a child's ongoing relationship with a parent. The distinction between behaviour a party does not like and abusive behaviour was noted by Peter Jackson LJ in Re L (Relocation: Second Appeal) [2017] EWCA Civ 2121 (paragraph 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."

It is important for the practitioner to identify significant domestic abuse, and its relevance to any child(ren)should be the focus of any statement.

Significant domestic abuse if proved can impact on the types of orders the Court can make in Children Act proceedings:

1. There is an argument that shared care should be the default order on any separation of parents. Significant domestic abuse would counter this assumption[6]

2. The balance between abuse and a continuing relationship with the subject child when applied to the welfare checklist, may mean less frequent contact for the abuser to manage the effect the abuse would have on both the caring parent and the child .

3. The impact of the abuse on supervision and arrangements for handovers of the child(ren).

4. The need for assessment of the abuser following a fact finder[7].

5. The possibility of a no contact order . The presumption of contact to be considered as per PD12J[8].

The statement needs to focus on the allegations and their relation to the outcome. It needs to be remembered that the court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child. The end CAO result is down to the management of any risk the other parent may pose .

So, statements need to be succinct on point . Statements in domestic abuse cases are complicated pleadings which need to be treated as such . They are not just story telling . They need to be focussed, drawing out often a complex mix of incidents and overarching patterns of behaviour. To get the best result there can be a substantial number of drafts and redrafts.. This can become time consuming and an expensive process .

The Schedule / Findings document

In Hv N the Court said that Scott Schedules may well be a thing of the past :[9]

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[6] *Re X and others (children) (agreed transfer of residence*) [2021] EWFC 18 (26 February 2021) *;F v M and others* [2021] EWFC 18 (26 February 2021)

[7] PD12J Para 33.

[8] PD12J Para 7 – "*In proceedings relating to a child arrangements order, the court presumes that the involvement of a parent in a child's life will further the child's welfare , unless there is evidence to the contrary. The court must in every case consider carefully whether the statutory presumption applies, having particular regard to any allegations or admission of harm by domestic abuse…"*

[9] Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings) [2021] EWCA Civ 448 Re H-N and Others (children) judgment (judiciary.uk) Para 46 onwards.

In an article last year, it was advocated that the way forward in these cases was to replace Scott Schedules with a findings document [10]

Compiling either a Scott Schedule or findings from a statement shouldn't be too onerous but the documents do need to relate to each other . The practitioner takes the headings of domestic abuse ,sexual abuse , physical abuse , emotional abuse, control and coercion and then explores in the statement examples ensuring precise pleading of the abuse suffered or at risk of suffering ,and the factual event relied upon with any separate corroborative evidence . All paginated with reference to the statement before the Court . Those advocates used to the drafting of threshold documents in public law will have an awareness of the process involved .The document needs to be precise , not 'woolly' and vague. What the Court is being asked to determine is very serious with important consequences for those involved .

Practitioners should not shy away from exhibiting text or social media messages in a statement . Such communication is often as abusive as the spoken word, the effect on the client cannot be underestimated . The client, however, needs to be aware once social media is opened up this leaves the possibility of telephone accounts and all messaging being interrogated which can be expensive. Arguments can be made against full disclosure not being proportionate, but it remains a risk.

Directions appointments

It is important that the practitioner, who may regularly undertake the FHDRA without briefing counsel due to cost, is mindful that early judicial continuity and placing the matter at the right judicial level is key. These matters are not appropriately dealt with in the Magistrates Court; the practitioner should seek a direction early for the transferring of the matter to an experienced District Judge. As soon as possible the matter should be reserved for continuity. In cases with isolated incidents and patterns of behaviour, far too often directions appointments , can become side-

[10] The tension between domestic abuse, control and coercion, Scott Schedules and the welfare of the child – John Jackson Barrister Jordan's Family Law January 2020 The tension between domestic abuse, control and coercion, Scott Schedules and the welfare of the child (familylaw.co.uk)

tracked by bringing a new judge up to speed. Or, mid-proceedings, a process of refining and reducing allegations, as can often be directed, is undermined by a different judge hearing the subsequent hearing and having no context in which to place that process.

In our experience there has been a varied and inconsistent approach by the judiciary since the advent of PD12J. The judgment Hv N tries to clarify the process[11].

The proper approach to deciding if a fact-finding hearing is necessary is, we suggest, as follows:
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 arrangement order and if so in what terms (PD12J.5).
ii) In deciding whether to have a finding of fact hearing 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) Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing 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'.

The key balance to this is the use of the overriding objective , which provides the judiciary with a wide-ranging discretion and therefore makes an appeal against any case management decision difficult. Because a Court can decide on whether a fact finder can take place at any time just because the application has been pushed back once doesn't mean the Court can't change its mind at a future hearing.

All practitioners will have an awareness of the overriding objective . All arguments for domestic abuse need to be balanced and proportionate using this objective.[12]

[11] Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings) [2021] EWCA Civ 448 Para 58.
[12] https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_01

A District Judge has a wide discretion and, in our experience, how this discretion is applied nationwide is inconsistent . What amounts to control and coercion in Maidstone may not amount to control and coercion in Carlisle?

The advocate's ability to establish a pattern of coercive behaviour is difficult. The need to be succinct and yet establish a pattern over many years suggests a contradiction . In Hv N when considering the approach to controlling and coercive behaviour at Paragraph 51 the court emphasised the need to evaluate the existence or otherwise of a pattern of coercive and controlling behaviour without significantly increasing the scale and length of private law proceedings, in circumstances where delay is prejudicial to the welfare of a child.

It is difficult to know how this can be done without proper exploration and challenge, a process which does not take place at a directions hearing. How do you effectively put together a pattern of coercive behaviour over a number of years if you don't itemise it ? And for it to be 'significant' one would have thought there would be a need to show this behaviour has happened on a number of occasions .

In Hv N :*Where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary in the context of PD12J, paragraph 16, that assertion should be the primary issue for determination at the factfinding hearing. Any other, more specific, factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise, unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape).*

Earlier in the Judgement there was an acceptance by the Court of Appeal of the need to show a pattern of conduct .' *Although the principal focus in this judgment has been on controlling and coercive behaviour, it should be noted that the definition of domestic abuse makes reference to patterns of behaviour not only in respect of domestic abuse refers to a 'pattern of incidents' not only in relation to coercive and/or controlling behaviour but to all forms of abuse including physical and sexual violence. Our observations therefore apply equally to all forms of abuse*. ' Para 33

Hayden J in his postscript in the case of F v M [2021] EWFC 4[13]

[13] F v M [2021] EWFC 4 Para 109

'*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.*

It is suggested the way forward is for a findings document and a context chronology document be prepared which would show the following :

- A pattern of facts alleged.
- Each fact to be probative of what is being asserted.
- Evidence in support of each fact to be properly referenced and paginated as to where it is in the Court Bundle .
- How each fact alleged impacts on the subject child
- How each fact fits into a broader context in an applicant's chronology.

A well drafted findings document with a carefully drafted statement and a context chronology should suffice to surpass the first hurdle of the listing of the Fact Finding to protect the client . This means a lot of the work is 'front loaded' being completed ideally before the proceedings are issued or early in the proceedings so the party is not rushed into a timescale set by the Court.

Also, at Court hearings practitioners also need to be aware of alleged 'abusers ' using the Court process to continue their abuse . This can be done by numerous methods : multiple applications , a litigant in person not agreeing orders all of which can cause 'the abused 'stress by frequent 'unnecessary ' attendances at Court, increased correspondence between court appointments which increases client costs . This over a period of time can debilitate the client and impact upon her/ him and their ability to remain represented, remain focused and the process of giving evidence at a final hearing. It is important evidence is given in the best form possible. There should be no hesitation in

the requesting of special measures [14] to protect a vulnerable client .There is also the practical consideration of costs when parties have multiple directions appointments in private law matters due to a LIPs poor conduct / non-compliance. The Courts are very reluctant, before the factual matrix is decided, to make costs orders.

Court hearings by video platforms do not have the same level of protection of the vulnerable .During the pandemic hearings involving PD12J allegations of domestic abuse have been heard by our courts on a regular basis. The full range of such hearings have proceeded in a variety of forms – over the telephone, via full video hearing, in a hybrid hearing format and in a full in person attended hearing.

Pre-COVID at any in-person attended hearings involving allegations of domestic abuse, the court would have the implementation of special measures for those that allege they have suffered domestic abuse at the forefront of its considerations. For example, in a fact-finding hearing involving allegations of domestic violence, a complainant may be offered such measures as a secure and separate entrance to the court building, a secure conference room and a screen for the duration of the proceeding. There is a concern this type of awareness has not extended to remote hearings . It is important for practitioners to be aware of this because abuse can be subtle.

During telephone hearings those that allege that they have suffered domestic abuse at the hands of a former partner may have to sit and listen to that same former partner dismiss or seek to minimise the experiences that they have suffered down the telephone line, with no additional support in place to assist them. This scenario is potentially further distressing to a party that has suffered domestic abuse through the means of telephone communication, such as threatening calls and voicemails.

Video hearings create a whole host of issues in respect of special measures. Parties are attending hearings where they are meeting face-to-face with the person that they allege perpetrated domestic abuse against them. Even without the implementation of a screen at an in-person hearing the experience would be far less intimidating and intense as parties would ordinarily be sat parallel to one another, with a fair distance between them, dependant on the layout of the court room. They are now beamed directly into one another's homes, homes where they may have been suffering the same domestic abuse that they allege within the proceedings.

[14] Family Procedure Rules part 3A.7and Practice Direction 3AA.

As it would appear that remote hearings are here to stay for some time yet, serious consideration needs to be given to this issue, not least to ensure that those that allege domestic abuse have the opportunity to give their best evidence on such profoundly important issues whilst not adding to distress and damage caused by recounting such allegations through the means by which the court proceedings are conducted.

The future

Domestic abuse cases require a mixture of skill and compassion from every practitioner balancing the need to protect the client ,advance a case, consider the overriding objective, the welfare of the child and proportionality . This is work that should be undertaken by practitioners with experience and expertise . New laws and procedures will no doubt be introduced to this landscape . The importance of interpersonal skills , empathy and understanding cannot be underestimated . Is this a time for a special qualification (or mandatory training) to be taken for practitioners and judges undertaking this works? This would provide a level of expertise and consistency of approach. Practitioners need to show proper drafting skills and the need to properly evaluate evidence. We say that a move away from Scott Schedules towards findings documents and the contextual chronology may assist .Hopefully the momentum shown in recent months will increase legal standards for all who have suffered domestic abuse.

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23 April 2021