BLOOMSBURY FAMILY LAW CONFERENCE

Children Law:

Domestic Abuse in the Family Courts 20 Years after Re L

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Barbara Mills QC Charles Hale QC Jo Delahunty QC Teertha Gupta QC

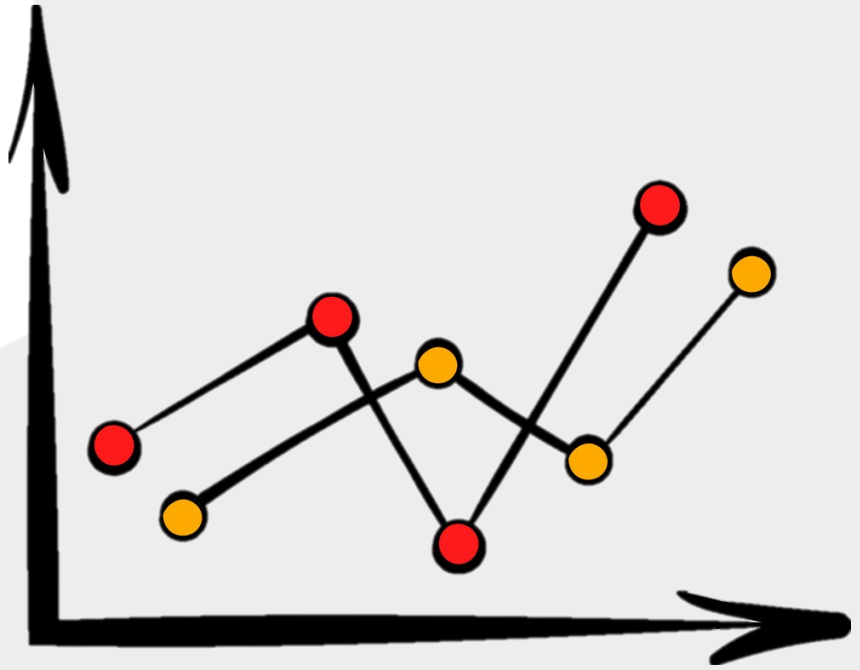
Bloomsbury Professional Family Law

4pb Four Paper Buildings

Introduction

- In the year 2019/2020 the Family Court received 55,253 ‘private law’ applications by parents for order seeking to resolve a dispute with the other parent relating to the future care arrangements for their child.

- At least **40% of private law children cases now involve allegations of domestic abuse**, meaning that the Family Court is required to engage with the question of domestic abuse in around **22,000 cases** each year.



Re L, V, M, H (Contact: Domestic Violence) [2000] EWCA Civ 194

1. A fact-finding hearing is held to determine the truth of the allegations; and

2. The court then makes a welfare-based decision about child arrangements incorporating and weighing up

   (a) the proven facts concerning domestic abuse;

   (b) the expert evidence concerning the effects of domestic abuse on children; and

   (c) the other factors in the welfare checklist.

Practice Direction 12J

Applicability of PD12J

Obligatory requirements for the Family Court and High Court at all stages of child arrangement cases

- Where there are allegations of domestic abuse (admitted or not)
- Where there is other reason to believe that the child or a party has experienced domestic abuse perpetrated by another party, or that there is a risk of such abuse

Definition of domestic abuse: PD 12J

- **“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. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment;
- **“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;

F v M **[2021] 4 EWFC [4]:** *Key to both behaviours* [coercive and controlling behaviour] *is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation.*

Definition of domestic abuse: Domestic Abuse Act 2021

1. Definition of **“domestic abuse”**

(1)This section defines “domestic abuse” for the purposes of this Act

(2) Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if—

(a)A and B are each aged 16 or over and are personally connected to each other, and

(b) the behaviour is abusive.

(3)Behaviour is “abusive” if it consists of any of the following—

(a)physical or sexual abuse;

(b) violent or threatening behaviour;

(c) controlling or coercive behaviour;

(d)economic abuse (see subsection (4));

(e) psychological, emotional or other abuse; and it does not matter whether the behaviour consists of a single incident or a course of conduct.

(4) “Economic abuse” means any behaviour that has a substantial adverse effect on B’s ability to—

(a) acquire, use or maintain money or other property, or

(b) obtain goods or services.

(5)For the purposes of this Act 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).

(6)References in this Act to being abusive towards another person are to be read in accordance with this section.

(7)For the meaning of “personally connected”, see section 2.

Definition of domestic abuse: Domestic Abuse Act 2021

2. Definition of "**personally connected**"

(1)For the purposes of this Act, two people are "personally connected" to each other if any of the following applies—

(a) they are, or have been, married to each other;

(b) they are, or have been, civil partners of each other;

(c) they have agreed to marry one another (whether or not the agreement has been terminated);

(d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);

(e) they are, or have been, in an intimate personal relationship with each other;

(f)they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));

(g) they are relatives.

(2) For the purposes of subsection (1)(f) a person has a parental relationship in relation to a child if—

(a) the person is a parent of the child, or

(b) the person has parental responsibility for the child.

[…]

Cross examination: PD12J

- LASPO 2012 increased the numbers of litigants-in-person in family courts, and so increased the number of alleged perpetrators of domestic abuse directly cross-examining their alleged victims.

- PD12J para 28 gives the judge a discretionary power to conduct the questioning, which raises a variety of potential problems such as: maintaining judicial neutrality and the relaying of questions ad verbatim. Highlighted in ***PS v BP*** **[2018] EWHC 1987 (Fam).**

- PD12J did not impose a ban on cross-examination as this was seen as a change which could only be instigated by Parliament. This has now been instigated via The Domestic Abuse Act 2021 (which will be expanded upon in due course).

Special measures

- Part 3A FPR and PD3AA give the court power to make special provisions to support vulnerable persons e.g. screens, separate entrances and exits.
- In deciding whether to make such provisions, the court must consider whether a party's participation in proceedings and/or the quality of evidence given is likely to be diminished due to their vulnerability, and if so, where it is necessary to make any participation directions.
- The court must also identify any vulnerabilities at the earliest possible stage.
- Identification can often go amiss for litigants in person.
- The role of Cafcass?
- See ***H v F*** **[2020] EWHC 86 (Fam)** for examples of procedural failings

Abusive applications

- Repeated applications made by alleged perpetrators against alleged victims can be seen as giving the former a continued platform of abuse against the latter.

- In an attempt to manage this, PD12J states that the court should consider whether the parent making the application is "**motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent"**

- Moreover, the Domestic Abuse Act 2021's amendment to the implementation of 'barring orders' in cases of domestic abuse may further help to alleviate this (discussed further).

Interim orders

- Where disputed allegations of domestic abuse are undetermined, PD12J prescribes that the court should not make an interim child arrangements order ***"unless it is satisfied that it is in the interests of the child to do so and that the order would not expose the child or the other parent to an unmanageable risk of harm".***

- Risk of status quo developing, which is harmful to parent-child relationship and has a knock-on effect on final contact order?

- What actually happens in practice? How does this square with potential concerns regarding a pro contact culture?

Interim orders: *M v F* [2020] EWHC 576

- M had issued her application, a dispute having arisen between the parties in respect of weekend contact with the parties daughter (10 years). Soon after, a telephone call between F and daughter took place in which it was alleged he had screamed at her for a prolonged period. M stated that the daughter no longer wished to have unsupervised contact with him. The parties agreed pending FHDRA contact would be supervised by an ISW.
- M made a number of serious allegations too.
- **FHDRA:** HHJ Tolson QC considered that the M's case would have to be investigated and that there should be a FF hearing. He directed himself to PD 12J. However, he could not conclude that there was any danger in the daughter spending generous amounts of time with her father based on supervised contact having been tried and the positive reports from the ISW. A draft child arrangements order was thereafter approved which the judge did not alter, and that included arrangements for the long term, including the Christmas, Easter, summer holidays, and beyond… In other words, it was a 'final order' in all but name.
- **M appealed. Mrs Justice Judd DBE allowed the appeal.**
- The judgment makes clear **the judge intended to make an interim order only.** It was probably the order had been approved by accident due to **enormous work pressures on the judge**. The provisions relating to child arrangements after the next hearing were set aside, as were the interim contact arrangements between the FHDRA and next hearing.

M v F [2020] EWHC 576

Take away points?

- It may seem obvious, but take care in drafting orders, there is no guarantee a judge will spot mistakes! This can have great procedural and costs consequences.
- There are immense strains on the Family Court: HHJ Tolson QC was dealing with the initial FHDRA during a lunch break with approx. 8 other cases in his list that day.
- The importance of the application of **PD 12J para. 25** is clear: Where the court directs a FF hearing is necessary or there are disputed allegations of domestic abuse which are otherwise undetermined, the court should not make an interim CAO unless satisfied in the best interests of the child to do so and would not expose them or the other parent to unmanageable risk of harm.
- Also see **PD 12J para. 26-7**: Have the child's expressed wishes and feelings been taken into account? What is the likely effect upon the child of the proposed interim arrangements? Is there any risk of harm which the child and parent is likely to suffer as a consequence of the proposed interim arrangements? What arrangements should be put in place to minimise risk of harm? In particular, should contact be supervised? Will contact be beneficial for the child?

Presumption of contact?

- Section 1(2A) of the Children Act 1989 creates a statutory presumption of parental involvement.

- PD12J para 7:
  - ***"…the involvement of a parent in a child's life will further the child's welfare, unless there is evidence to the contrary."***
  - However, it continues ***"…the court must in every case consider carefully whether the statutory presumption applies, having particular regard to any allegation or admission of harm by domestic abuse to the child or parent or any evidence indicating such harm or risk of harm."***

- However, research from the Harm Report suggests :

  "Overall, the evidence received by the panel suggests that the presumption is implemented inconsistently and is rarely disapplied. To the extent that the courts' pro-contact culture operates as a barrier to addressing domestic abuse, it serves to reinforce that culture."

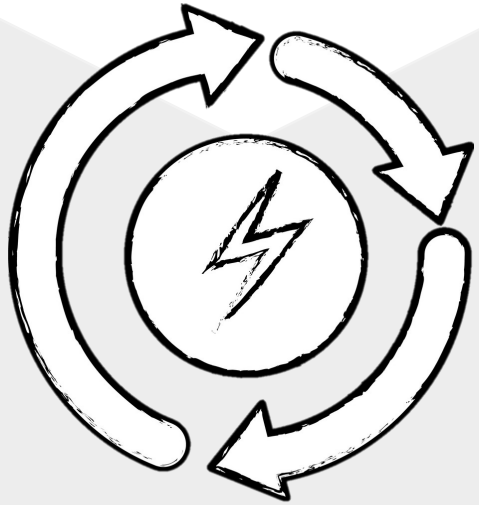
The Court of Appeal decision Re H-N [2021]

Re H-N [2021] EWCA Civ 448

- 4 joined appeals
  - **Re B-B ; Re H ; Re T ; Re H-N**
- **The President of the Family Division, Lady Justice King & Lord Justice Holroyde**
- **Important for <u>6 reasons:</u>**

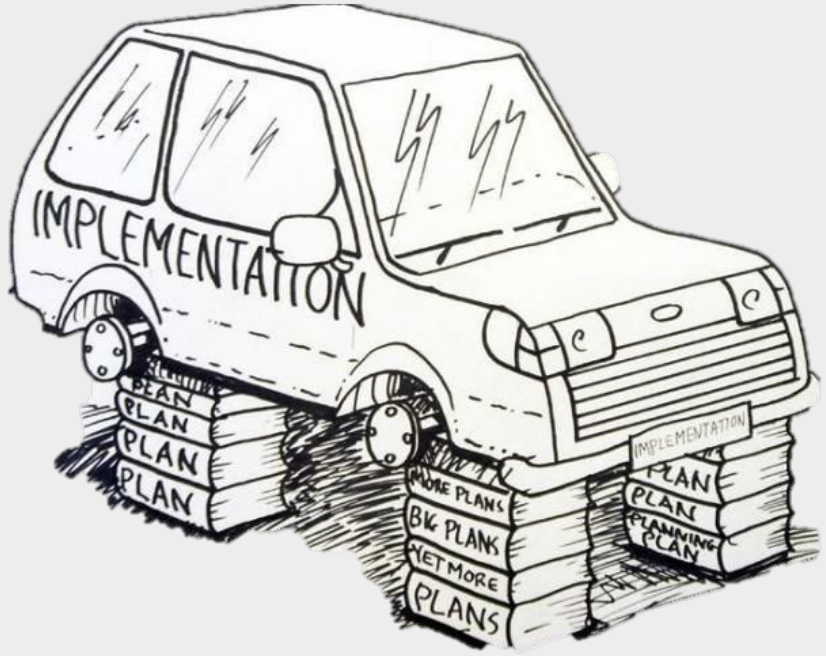
1. It provides commentary on the effectiveness of PD12J, and guidance on its implementation.
2. It provides guidance on approaching fact-finding hearings.
3. It has will be an important judgment for managing cases involving allegations of coercive and/or controlling behaviour.
4. It has provided commentary on the appropriateness of Scott Schedules and paved the way for a change in approach to dealing with allegations of coercive and/or controlling behaviour.
5. It has provided some important dicta in respect of dealing with cases involving allegations of rape and sexual assault.
6. However in doing so, it has arguably obscured the family court's approach to criminal law concepts.

PD12J - Effectiveness and Implementation



Re H-N [2021] EWCA Civ 448

- None of the submissions before the Court of Appeal suggested that the definition of 'domestic abuse in PD12J required substantial amendment.
- The Court of Appeal concluded PD12J remains **fit for purpose**, namely to provide courts with a structure of enabling the court first to recognise all forms of domestic abuse and thereafter how to approach such allegations in private law proceedings.
- **The challenges relate to the proper implementation of PD12J.**
    - In particular, the challenge is implementing PD12J in cases involving allegations of controlling and/or coercive behaviour.



Fact-Finding Hearings

Fact-Finding Hearings

Table 9.1 The prevalence of fact-finding hearings in samples of cases where domestic abuse is alleged[18]

Source	Prevalence
Perry and Rainey (2007)	'tiny minority'
Hunt and Macleod (2008)	8% of 154 cases involving allegations of DA
Hunter and Barnett (2013)	0–25% of cases involving DA allegations; largest group (42%) said less than 10%
Trinder *et al.* (2013)	3 held at enforcement stage and 3 at index stage of a total of 215 cases
Barnett (2015)	Reported to be 'a rarity'
Harding and Newnham (2015)	8 out of 86 cases involving DA allegations
Cafcass and Women's Aid (2017)	5 out of 62 cases involving DA allegations
Harwood (2019)	Reported to be 'rare'

Barnett, A. "Domestic abuse and private law children cases: a literature review"

Reasons for absence of fact-finding hearing:

a. The violence was not deemed relevant to the contact decision;
b. The violence was not considered serious enough;
c. The violence was considered 'historic' or not recent enough;
d. A fact-finding hearing would not affect the outcome of the case, since contact;
e. Would (and for some respondents should) be ordered in any event;
f. Fact-finding hearings cause unnecessary delay and are costly for the parties without;
g. Legal aid;
h. Fact-finding hearings promote acrimony between the parties and damage their ongoing relationship.

Re H-N [2021] EWCA Civ 448

- The decision in ***Re H-N*** includes a guide for the **proper approach to fact-finding hearings** with respect to PD12J paras. 5, 16 & 17 (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 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**.

i. 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**.

ii. 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'."

Re H-N [2021] EWCA Civ 448

- The Court of Appeal also made a number of other points clear:
  - The fact-finding process will **always produce a binary result**. Whether an allegation is proved or not proved is determined under ordinary civil law.
    - **Allegation proved = did take place** = orders which limit 'perpetrating' parent's future relationship with child imposed?
    - **Allegation not sufficiently proved = did not take place.**
    - Problems are that if abuse did occur but lack of evidence to prove it, the court's subsequent orders may risk exposing the child and parent to further abuse.
    - Further, just because an allegation is not proven, does not mean that it did not happen → can still be problems in respect of contact if the accusing parent considers it unsafe…
  - **Not every case involving allegations of domestic abuse requires a fact-finding hearing.**
  - The necessity of a fact-finding hearing needs to be determined at an **early stage** and in particular with regards to the **welfare of the child** before it is determined if it is necessary or not, and what form it should take.

Re H-N [2021] EWCA Civ 448

- It should be noted that before the Court of Appeal Cafcass made numerous submissions in respect of fact-finding hearings:
  - Cafcass submitted that the court and parties would benefit for there to be **Cafcass involvement prior to determination of whether or not a fact-finding hearing is necessary** (i.e. involvement greater than the 'safeguarding' letter that is currently produced before FHDRA). Cafcass contended that the present system was 'sub-optimal' and that, rather than a gatekeeping judge simply allocating a case for fact-finding hearing without any social work input other than the 'safeguarding' letter, **the judge should direct Cafcass to undertake an enhanced form of safeguarding assessment (including where appropriate meeting the child) prior to the case being listed for a second gatekeeping appointment**, with any resulting listing decision being made on a more informed and child-centred basis.
  - This was expressly supported by one of the interveners – the Association of Lawyers for Children.
  - The Court of Appeal did not deal with this suggestion and simply suggested that **this should be one of the areas that justifies close consideration by those charged with reviewing PD12J** …
  - Thoughts on this proposal?

F v G [2020] EWHC 2396

- Extensive custody proceedings in US (no findings of domestic abuse). M applied for a CAO mere weeks after the date of the US court's final decision following an incident at a pre-hospital admission appointment where the father had allegedly behaved in an overbearing and abusive manner.
- **FHDRA:** Initially → M applied for a FF hearing. HOWEVER, after the judge questioned the necessity (she was content for the children to have contact with him and go on holiday with him), she withdrew her application.
- Cafcass officer spoke to children, and found M's accounts of emotional abuse, intimidation/ threats plausible, and said F's presentation were similar to the domineering and overbearing presentation experienced. Concluded in s.7 report that DV likely to have occurred & M was experiencing coercive and controlling behaviours.
- **DRA: need for FF hearing NOT considered further.**
- **Final Hearing:** The trial judge made findings of fact against the father regarding domestic abuse, the hospital incident, the fact he had sought to influence what the children said to the Cafcass officer, and his refusal to co-operate with educational and medical issues. **The judge accepted the Cafcass officer's recommendations, ordering indirect contact only and a restriction on the father's PR.**

- **F appealed. Mrs Justice Judd DBE allowed the appeal.**

F v G [2020] EWHC 2396

Take away points?

- Active case management: Is the case being set up properly for a final hearing?
- Consideration of **PD 12J para. 16** at all procedural junctures: The court should be determining as soon as possible whether it is necessary to conduct a FF hearing re. disputed allegations of domestic abuse and consider, in determining the necessity of a FF hearing, the factors set out in **PD 12J para. 17**.

> *"27. Hindsight is a wonderful thing, and it is easy to see that at the DRA the focus of both parties and the court was on the proposal that the father should have a psychiatric assessment rather than upon defining the issues that required to be decided at the final hearing. The case was now being put on a very difference basis to the situation at the FHDRA."*

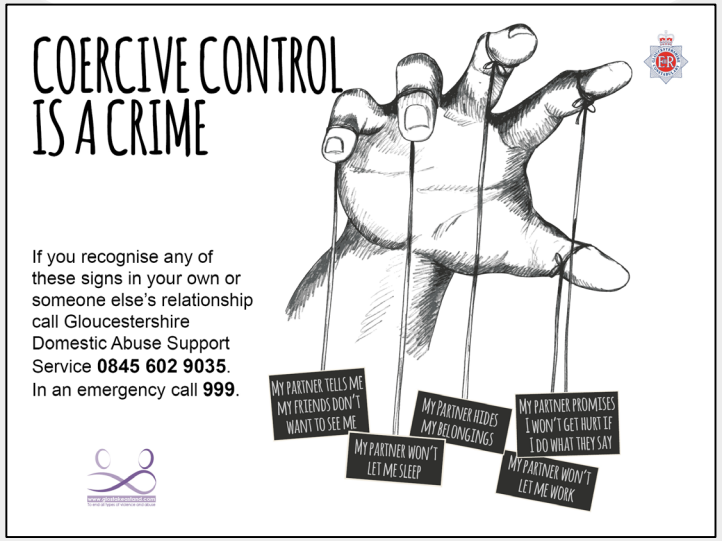
- Remember that if the court directs a FF hearing should take place, the court will not usually request a s. 7 report until after that hearing (**PD 12J para. 22**). This case was unusual due to the way M ran her case at FHDRA and changed her case largely as a result of what was contained in the s. 7 report. What should have happened at DRA?
  → FF hearing listed and addendum s. 7 report directed after this.
- A case which makes clear the importance of not taking the draconian step of stopping direct contact and unnecessarily restricting the involvement of a parent in their child's life without a factual determination.

AB v CD [2021] EWHC 819

- Successful appeal by F against findings of rape and threats to remove the child to Pakistan
- Handed down on same day as Re H-N
- Judge had decided not to consider allegations of physical abuse made by M
- Approved order included recital noting the "*strength and power*" of these allegations
- This was a mistake.

> *"The inevitable inference to be drawn from that recital is that, despite having elected to make no findings in relation to them, she nevertheless brought them into account to one degree or another and further that she had carried out an evaluation of evidence which she claimed she had ignored in reaching her conclusions."*

Allegations of Coercive and/or Controlling Behaviour



SD v AFH (Appeal: Coercive and Controlling Behaviour: Inference or Speculation) [2019] EWHC 1513

"46. The dividing line between behaviour which can properly be characterised as coercive or controlling and within PD12J and behaviour which does not cross that threshold is not a bright line. The PD12J definition by its own terms makes clear that to amount to coercive or controlling behaviour the behaviour will be well outside that which is acceptable within a relationship. The evidence in this case plainly demonstrated that the father's behaviour was outside those fairly broad parameters of acceptable relationship based behaviour. In respect of the behaviour surrounding the reaching of the agreement in June it may have been towards the lower end of the spectrum of behaviour within PD12J but within it, it plainly was. By September it had progressed along the spectrum. There is no merit in the father's contention that his behaviour could not properly be characterised as controlling or coercive behaviour within the statutory definition."

R v P (Children: Similar Fact Evidence) [2020] EWCA Civ 1008

- The decision came in the context of a father's application for contact with his children (ages 5 and 2 years). The mother objected on the basis that **the father had subjected her to very serious coercive and controlling behaviour. This included an allegation of rape**.

- At the end of the parties relationship the father started a relationship with another woman, Mrs D. A Welsh local authority contacted the London local authority to alert it to the fact there were ongoing proceedings in respect of Mrs D's children, and that concerns had been raised about the father's behaviour towards Mrs D and her children.

- A s. 37 report a court in Wales had been ordered which raised serious concerns, and revealed information about the influence exerted by the father over Mrs D and her children. Mrs D's children had been removed from her care and placed with Mr D.

- **The mother argued the Welsh reports, and other evidence including letters provided by Mr D and Mrs D's parents, showed the father had subjected his previous partner to the same kind of coercive control he had directed against her.**

- The judge at first instance however **excluded the Welsh reports and the letters**, and criticised the mother's solicitors for including it in the court bundle. The reports were said to contain hearsay and the father could not have a fair hearing if the reports were admitted on the assumption they were true.

R v P (Children: Similar Fact Evidence) [2020] EWCA Civ 1008

- M appealed, arguing it was **highly relevant** both to the fact-finding hearing and any welfare decision.
- It was **logically probative** as showing a **propensity** for the father to act in a coercive and controlling manner.
- She argued that it is **often difficult for a party to prove the other party's behaviour had been coercive and controlling because behaviour of that sort is a pattern**.
- The second section 7 report of the London local authority was prepared by direction of the court to take into account the Welsh reports. These reports could not be ignored.
- **The relevance was not considered at all**, nor was any necessary analytical exercise in relation to admission or exclusion, in accordance with legal principles carried out.
- She argued the judge was wrong to have regard only to the fairness to the father when **the exclusion of such significant evidence would be unfair to her.**

R v P (Children: Similar Fact Evidence) [2020] EWCA Civ 1008

- The Court of Appeal considered the relevant procedural rules, practice directions and case law. In summarising the main principles, the court considered the analysis which applies to civil cases also applies to family proceedings means the court should consider:
    1. If the evidence is **relevant** as potentially making the matter requiring proof more or less probable.
    2. If it is in the **interests of justice** for the evidence to be admitted.
    3. **Propensity**: The court must be satisfied on the basis of proven facts that propensity has been proved, in each case to the civil standard. The proven facts must form a sufficient basis to sustain a finding of propensity but each individual item of evidence does not have to be proved.

- The appeal was allowed to set aside the judge's order; a necessary analysis concerning whether the disputed evidence should be admitted had not been carried out by the trial judge.
- Relevant and in the interests of justice → admissible. Whether propensity est. or not a matter for trial judge…

Take away? Keep this decision in mind if you have evidence which may show a propensity to certain behaviours, and are trying to prove a pattern of behaviour. Evidence showing propensity can be particularly important (as pointed out by M) in cases involving **allegations of coercion and control** where it is difficult to evidentially show a pattern of behaviour over time. There may be challenges regarding admissibility, and the guidance outlined by the Court of Appeal should be considered in such circumstances.

F v M [2021] EWFC 4

- Following ***R v P (Children: Similar Fact Evidence)***, the Court of Appeal transferred the matter back to the High Court where it came before Hayden J for a **10 day fact-finding hearing**.
- Hayden J's judgment in ***F v M*** is an important judgment and has been expressly endorsed by the Court of Appeal in ***Re H-N***. It is **essential reading** for all practitioners working in private children law.

F v M [2021] EWFC 4

Similar fact evidence:

- As noted previously, soon after the mother left the father, he commenced a relationship with a woman in her 40s (J, or Mrs D as referred to in the above case), and moved in with her and her two young sons.
- Within a few weeks she had resigned from her teaching career and sold her car. She moved with the father and her sons to Wales without telling anyone.
- Her children's new school contacted their father (T, or Mr D), and the boys were eventually transferred into his care. It was T's evidence that the boys had been physically neglected and emotionally traumatised by the father.
- The court found that the similar fact evidence concerning F's relationship with his previous partner was relevant and admissible due to the striking parallels with both the father's relationship with the mother and J. When compared, the force of F's abuse came into greater focus, and the comparison served to better illustrate the corrosive and debilitating impact of that abuse.

- E.g.
  1. **Both the mother and J were alienated from family and friends;**
  2. **The father was directly involved in engineering J's job resignation, as he had been in the mother quitting university, and in both cases there was real professional concern that each woman had made the decision reluctantly and under duress;**
  3. **It was found that J had acted out of character by uprooting her children, disappearing to Wales and losing sight of her children's welfare interests. When J's father had attempted to see her, F manipulated events to portray him as an aggressor and persuaded J to take out a non-molestation order against him. This had similar tones to his demonisation of the mother's parents.**

F v M [2021] EWFC 4

- Hayden J found that M's evidence established a **compelling and authentic paradigm of abuse by F through coercive and controlling behaviour**. Her evidence was supported and strengthened by the wider evidence of her parents, friends and various others. The court made findings that:

  - F raped M, probably on more than one occasion.
  - He alienated M from her friends and family. Further, he was determined to erode her morale and self-esteem and ensure that she quit her university course.
  - He took away all of M's means of communication.
  - He controlled M's food.
  - He restricted M's physical movement.
  - He exploited M financially by taking her savings and by using her name to run up debts.
  - He forced her into a second pregnancy.
  - He indulged in gratuitous emotional torture of M's parents. He used M to threaten, intimidate and frighten them.
  - He made entirely groundless accusations that M's parents were prejudiced and hostile to him as a Muslim, that they had tried to force M to terminate her first pregnancy, and that M was at risk of honour-based violence. He cast himself as a victim, and it was concerning that that had been tacitly accepted by the police and others without a more sceptical assessment of his credibility.
  - It followed that the court was satisfied that between December 2013 and September 2017, F subjected M to a brutalising, dehumanising regime, which subjugated her and was profoundly corrosive of her autonomy.

- Hayden H found F to be "***a profoundly dangerous young man, dangerous to women he perceives to be vulnerable and dangerous to children.***"

F v M [2021] EWFC 4

- The court gave the **guidance** in respect of identifying coercive and controlling behaviour:

1. In the Family Court **coercive and controlling behaviour is given no legal definition and requires none.**

> "4. **In my judgement, it requires none. 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. There has been very little reported case law in the Family Court considering coercive and controlling behaviour. I have taken the opportunity below, to highlight the insidious reach of this facet of domestic abuse. My strong impression, having heard the disturbing evidence in this case, is that it requires greater awareness and, I strongly suspect, more focused training for the relevant professionals."

F v M [2021] EWFC 4

2. Understanding and identifying coercive and controlling behaviour required *"**an evaluation of a pattern of behaviour in which the significance of isolated incidents could only be understood in the context of a much wider picture**."*

3. he statutory guidance published pursuant to the Serious Crime Act 2015, Pt 5 s 77(1) identified **paradigm behaviours**: it was necessary to be vigilant to those. The behaviours identified by Hayden J in *A County Council v LW & Anor* [2020] EWCOP 50 as apposite in the context of vulnerable adults are *"strikingly relevant here"* too….

F v M [2021] EWFC 4

- 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 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
- Controlling ability to go to school or place of study
- Taking wages, benefits or allowances
- Threats to hurt or kill
- Threats to harm a child
- Threats to reveal or publish private information (e.g. threatening to 'out' someone)
- Threats to hurt or physically harm a family pet
- Assault
- Criminal damage (such as destruction of household goods)
- Preventing a person from having access to transport or from working
- Preventing a person from being able to attend school, college or University
- Family 'dishonour'
- Reputational damage
- Disclosure of sexual orientation
- Disclosure of HIV status or other medical condition without consent
- Limiting access to family, friends and finances.

F v M [2021] EWFC 4

4. However, as per Hayden J's judgment in *A County Council v LW & Anor* [2020] EWCOP 50:

> "22. It is important to emphasise that this list is **not exhaustive**. It does not, for example, include controlling intake of food and nutrition, which was such a striking facet of the evidence here. **Abusive behaviour of this kind will often be tailored to the individual circumstances of those involved.** The above is no more than a check list which should prompt questioning and enquiry, the responses to which should be **carefully recorded so that the wider picture emerges**. That which might, in isolation, appear innocuous or insignificant may in the context of a wider evidential picture be more accurately understood."

5. It is also helpful to consider the guidance and assistance in FPR PD12J, and **the offence of controlling and coercive behaviour in an intimate or family relationship as defined in section 76 of the Serious Crime Act 2015.**

F v M [2021] EWFC 4

6. Hayden J also noted:

"108. **a tight, overly formulaic analysis may ultimately obfuscate rather than illuminate the behaviour… When Judges are called upon to resolve issues of fact, we do so by evaluating separate strands of evidence and then considering them in the context of the whole. Some features of the evidence will weigh more heavily than others and evidence which may not be significant, in isolation, may gain greater relevance when placed in the context of the wider evidential canvas."**

7**. The definition in PD12J provides useful guidance when broken down:**

"*Coercive Behaviour:*

i. a pattern of acts;

ii. such acts will be characterised by assault, threats, humiliation and intimidation but are not confined to this and may appear in other guises;

iii. the objective of these acts is to harm, punish or frighten the victim.

Controlling Behaviour:

i. a pattern of acts;

*ii. designed to make a person **subordinate** and/ or **dependent**;*

iii. achieved by isolating them from support, exploiting their resources and capacities for personal gain, depriving them of their means of independence, resistance and escape and regulating their everyday activities."

F v M [2021] EWFC 4

8. In assessing evidence of coercive and controlling behaviour, it was necessary to factor in a recognition of the behaviour's "***insidious scope and manner***" (para. 109). Hayden J emphasised:

> "109. 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**."

9. It was often difficult for professionals to identify behaviour → there would be clues, hints, indicators and triggers that might stimulate forensic curiosity. **Broader professional education on the scope and ambit of coercive and controlling behaviours needed** → all to frequently it **lies buried or only superficially investigated.**

Re H-N [2021] EWCA Civ 448

- **"**All parties commended it to the court for its **comprehensive and lucid analysis**, and for the plea contained within it urging greater prominence to be given to coercive and controlling behaviour in Family Court proceedings." (para. 29) → the Court of Appeal calls it "**essential reading for the Family judiciary**" (para. 30)

- **The Court of Appeal also provides some useful commentary of its own in respect of coercive and/or controlling behaviour.**

- The Court of Appeal **made explicitly clear that coercive control is relevant to past and future harm to THE CHILD:**

"31…harm to a child in an abusive household is not limited to actual violence to the child or to the parent. A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:

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 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."

Re H-N [2021] EWCA Civ 448

- The Court of Appeal endorsed submissions made by the second interveners (Women's Aid, Rights for Women, Rape Crisis England & Wales, and Welsh Women's Aid) that **coercive control is the overarching issue that ought to be tried first by the court:**

> 51. Ms Mills QC on behalf of the second interveners, ('Women's Aid', 'Rights for Women', 'Rape Crisis England and Wales' and 'Welsh Women's Aid'), 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, irrespective of whether there are other more specific factual allegations to be determined.** The principal relevance of conducting a fact-finding hearing and in establishing whether there is, or has been, such a pattern of behaviour, is because of the impact that such a finding may have on the assessment of any risk involved in continuing contact."

Re H-N [2021] EWCA Civ 448

- It was clear that establishing whether a pattern of coercive and/or controlling behaviour was present in a relationship **may add to an already lengthy forensic evaluative process**, in particular in circumstances in which the FJS is currently **overborne with work**. The Court of Appeal also made clear that **delay is inimical to the welfare of the child, and needed to be borne in mind when determining the necessity of a fact-finding hearing**.

- The court **did not wish to further burden the already over-burdened FJS with guidance that resulted in additional fact-finding hearings, or extend the length of fact-finding trials causing further delay that would be contrary to the very rights of children and parents**.

- The question of how to evaluate the existence or otherwise of coercive/ control without **significantly increasing the scale and length of private law proceedings is not straight-forwards** → matter for those working through implications of Harm Report, implementing Domestic Abuse Act, and revising PD12J.

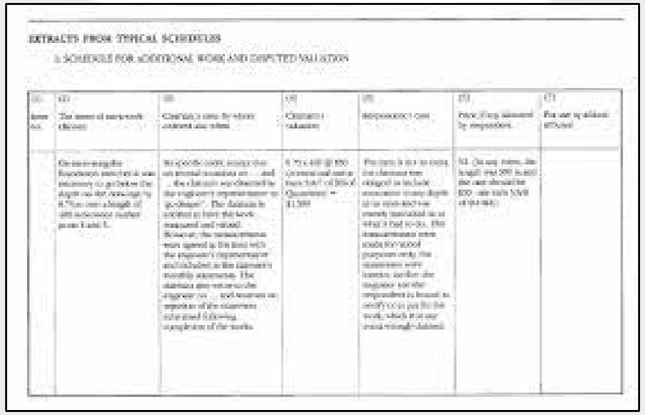
    - A deflection or the appropriate decision?

Re H-N [2021] EWCA Civ 448

- The Court of Appeal did however give the following useful '**pointers**' including:

58. **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 fact-finding 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).**"

Scott Schedules


EXTRACTS FROM TYPICAL SCHEDULES

1. SCHEDULE FOR ADDITIONAL WORK AND DISPUTED VALUATION

Re LG (Re-opening of Fact-Finding) [2017] EWHC 2626 (Fam)

- Concerns in respect of the use of Scott Schedules in cases involving allegations of coercive and/or controlling behaviour.

- (C.f. The Harm Report Chapter 5.4 and 7.5.1)

- The need for the court to recognise patterns of behaviour in such cases was discussed by Mr Justice Baker in ***Re LG (Re-opening of Fact-finding)*** **[2017]**. In particular, Baker J refers to the draw-backs in the court restricting allegations in Scott Schedules for fact-finding hearings to **a few "specimen" allegations**, noting that the parties and the court must be careful to **ensure that significant issues are not overlooked**. **Sometimes a pattern of harassment and other forms of domestic abuse are only discernible by conducting a broader examination of the allegations and comprehensive analysis.**

- A comprehensive analysis of the allegations may demonstrate that the mother has fabricated or grossly exaggerated her case.

- Alternatively, it may demonstrate that some or all of the allegations are true and that the pattern of incidents alleged by the mother demonstrates abusive behaviour on the part of the father.

- EITHER WAY, the conclusion reached by the court on this issue will have a fundamental impact on the future child arrangements for the child.

F v M [2021] EWFC 4

<u>An important Post Script</u>…

- While Hayden J declined to give prescriptive guidance on the use of Scott Schedules in family cases generally, he noted that **such an insidious type of abuse may not be captured by this formulaic approach to marshalling the evidence and honing allegations**.

- An intense focus on particular and unspecified incidents may be **counterproductive and risk obscuring the serious nature of harm perpetrated by a pattern of behaviour.**

- ***"The subtleties of human behaviour are not easily receptive to the confinement and constraint of a Schedule."***

- When coercive and/or controlling behaviour is alleged, Hayden J suggested Scott Schedules may therefore have **severe limitations as to render them ineffective and unsuitable.**

- The door was left open to the Court of Appeal to signal a change of approach …

Re H-N [2021] EWCA Civ 448

- The Court of Appeal did not go as far as hoped by some of the parties and the interveners. It concluded (para. 43 onwards) that:

    1. The value of Scott Schedules in domestic abuse cases had declined. Sometimes they were a **potential barrier to fairness and good practice, rather than an aid**.

    2. There are a number of **principled and pragmatic concerns** in relation to Scott Schedules.

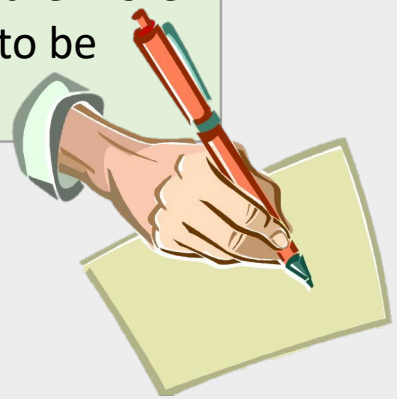
Principled concerns: the asserted need for the court to focus on the wider context of whether there has been a pattern of coercive and controlling behaviour, as opposed to a list of specific factual incidents tied to a particular date and time. Abusive, coercive and controlling behaviour is likely to have a cumulative impact upon victims that would not be identified simply by separate and isolated consideration of individual incidents	**Pragmatic concerns:** In one of the four appeals, parties were required to 'limit' the allegations to be tried to 10, and the judge reduced it further to 3. The very process of directed selection, produces a false portrayal of the couple's relationship. If an applicant succeeds in proving the 3 allegations, there is a risk the court will move forward on the basis that those three episodes are the only matters 'proved' and therefore the only facts upon which any adverse assessment of the perpetrator's future risk falls to be made: **"***By reducing and then further reducing its field of focus, the court is said to have 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.*" (para. 45)

Re H-N [2021] EWCA Civ 448

3. The courts needed to focus on the **wider context** of whether there had been a pattern of coercive and controlling behaviour rather than on a list of specific factual incident.

4. Serious thought was needed to develop a different way of summarising and organising the matters to be tried at a fact finding hearing without limiting the number of allegations or minimising the abuse. Suggestions included a **'threshold' type document** as in public law proceedings, **formal pleadings of particulars of claim** as seen in civil proceedings, and a **narrative statement in a prescribed form**. Thoughts on these options?

> "48. […] The particular advantage of a narrative statement was, it was submitted, that it would allow there to be a focus on the overall nature of the relationship and expressly whether a party says that she had been harmed as a result of the behaviour and, if so, in what manner. Such an approach would allow the court to identify at an early stage whether an allegation of controlling and coercive behaviour is in issue. Identifying the form of harm (which may be psychological) and only then looking back at the more granular detail, would, it was submitted, allow the court to determine what specific facts need to be determined at a fact-finding hearing."

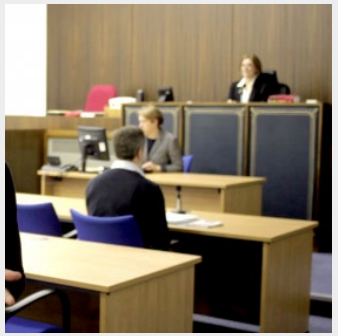


5. However, **such work was not for the court** → The Harm Report & Private Law Working Group which may lead to changes in FPR or fresh guidance through the medium of a PD…
again, a deflection or the appropriate decision?

Allegations of Rape & Sexual Assault

JH v MF [2020] EWHC 86 (Fam)

- Appeal following a FF hearing in private children proceedings involving allegations of domestic abuse, including of the most serious sexual assault.
- Russell J on appeal found there had been a number of serious procedural irregularities at the hearing.
- Russell J also found the trial judge's, HHJ Tolson QC, approach to the fact-finding exercise that it was so flawed as to lead to the conclusion it was unsafe and wrong:



1. **The judge had erred in his task in balancing the evidence by placing insufficient, or perhaps any, weight on corroborative evidence or material before the court, and placing undue weight on irrelevant matters**.
2. **The judge failed properly and correctly to balance the evidence before the court and gave insufficient reasons for not making findings.**
3. **The judge placed undue weight on the demeanour of the parties when assessing the evidence.**
4. **The judge failed to take into consideration that the respondent had previously, and repeatedly, been involved with the police in respect of incidents of domestic violence and harassment, and failed to properly assess the police reports and intervention not just with this appellant but other previous partners and female relatives.**
5. **The judge had been wrong to make findings on matters not put to the appellant.**

JH v MF [2020] EWHC 86 (Fam)

6. Perhaps most crucially, the judge was wrong to allow outdated views on sexual assault and likely victim responses to influence his findings and conclusions, in particular with respect of findings that the appellant had not been raped by the respondent. <u>This was particularly in regard to the trial judge's astoundingly flawed treatment of the issue of consent.</u>

- The judge had relied on the view that because the appellant had not physically fought off or resisted the respondent, there was consent and no rape.
- Russell J held that the judge had been "*manifestly at odds with current jurisprudence, concomitant sexual behaviour, and what is currently acceptable socio-sexual conduct*". [§33]

"37. This judgment is flawed. This is a senior judge, a Designated Family Judge, a leadership judge in the Family Court, expressing a view that, in his judgment, it is not only permissible but also acceptable for penetration to continue after the complainant has said no (by asking the perpetrator to stop) but also that a complainant must and should physically resist penetration, in order to establish a lack of consent. This would place the responsibility for establishing consent or lack thereof firmly and solely with the complainant or potential victim. Whilst the burden of proving her case was with the Appellant in any counter allegation the burden lay with the Respondent. Indeed it was the Respondent who had brought the case as the applicant in the Family Court, thus the burden of proof did not lie solely with the Appellant. Moreover the judge should have been fully aware that the issue of consent is one which has developed jurisprudentially, particularly within the criminal jurisdiction, over the past 15 years (of which more below)."

JH v MF [2020] EWHC 86 (Fam)

- Further, the judge's comment in relation to the appellant not taking immediate action in respect of the first incident to call the police or anyone else (i.e. seeking medical advice) was wrong, and contrary to the accepted position that many victims will not do so out of fear, embarrassment etc.

- In relation to the second incident where the appellant did go to the police to make a complaint the judge criticised impliedly, and to some extent explicitly, the appellant because she had accompanied a friend to the police station to complain about the respondent's aggressive behaviour to that friend, and it was the friend who then raised the incident of sexual assault to the police:

"42. The friend told the Police, as the judge quoted in his judgment (above), '"I asked her what had happened and she said that she had let the [Respondent] have sex with her as it was easier than saying no."' This, the judge found, could hardly be said to support a coherent account of rape. This conclusion is obtuse, any decision of consent must include a coherent account (to borrow the judge's own phrase) and consideration of the extent to which the complainant or victim was free to choose and to consent, or to paraphrase the relevant criminal statute (s74 Sexual Offences Act (SOA) 2003), that person has had the freedom and capacity to make that choice. It is arguable, at the very least, that the evidence before the judge was that the Appellant's freedom and capacity to choose had been extinguished or at least gravely compromised."

JH v MF [2020] EWHC 86 (Fam)

- To give an idea **of HHJ Tolson QC's approach at first instance**:

> ”28. **My findings on this occasion, as to both these occasions, is that the sex between the parties carried the consent of both. This was not rape. It may have been that at a point during both occasions of intercourse the mother became both upset and averse to the idea of the intercourse continuing. But if she did so, I emphasise this was something which was usual for her, the product of events in her past and her psychological state in not being able to take physical pleasure from sex. It was not a consequence of any action on the part of the father. Moreover, at no point during these occasions do I find that the mother withdrew consent or conveyed to the father any discomfiture that she was feeling about the intercourse continuing.** I cannot even, on this evidence, find that the father was somehow insensitive to the mother's position. I can accept that he would have asked for sex perhaps on a number of occasions before sex commenced, but that is as far as it goes. […]

JH v MF [2020] EWHC 86 (Fam)

- Russell J set out why this approach was so problematic before concluding :

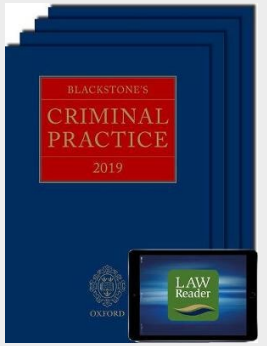
> 44. …. **The fact is that this judge had largely relied on his view that the Appellant had not vigorously physically fought off the Respondent.**
>
> 45. … **The logical conclusion of this judge's approach is that it is both lawful and acceptable for a man to have sex with his partner regardless of their enjoyment or willingness to participate.**

- HHJ Tolson QC's approach to the issue of consent was **entirely at odds with the approach applied in the criminal jurisdiction**; it could not be lawful or jurisprudentially apposite for the Family Court to taken approach to consent including a need to demonstrate physical resistance when the same was not needed in the criminal courts (more on this shortly…)
- The case was remitted for retrial.
- A formal request was made for those judges who might hear cases of this nature to be given appropriate training.

F v M (Appeal: Finding of Fact) [2019] EWHC 3177

- F appealed against a determination of fact made at the conclusion of a fact-finding hearing that the subject child's conception had been as a result of rape.
- The mother claimed that after a short time engaged in the sexual act, she told the father she did not want him to continue and she did not want him to ejaculate inside her.
- F denied that she ever asked him to "stop," and said that prior to the initiation of sexual intercourse they had agreed he would not ejaculate inside of her. He maintained he had accidentally done so. The judge found that in failing to stop and withdraw before ejaculation, F had raped M.
- The appeal was dismissed. **The judge had heard evidence from both parties, and formed mixed views about the reliability and truthfulness of both parties. However, she had analysed the contextual evidence, including the communications between the parties, and was particularly struck by the consistency of the references by the mother in text messages to the fact she had pleaded with the father to "stop."**
- While the judge may have inadvertently given the impression she was relying on the fact the father ejaculated inside the mother's vagina as part of the proof of rape, **her conclusion was founded on the fact that part-way through the sexual act, the mother ceased to consent to the act and made it known to the father she wished him to "stop."**
- Finally, the court noted that there are a number of reasons why the circumstances of the child's conception might ultimately be **relevant to future child arrangements**; it would be important for there to be a determination of if the father's conduct was violent or abusive, and in turn, whether the conduct would likely be relevant in deciding whether or not to make a child arrangements order.

Criminal law concepts in family law
Re R (Children) (Care Proceedings: Fact-finding Hearing) [2018] EWCA Civ 198



- The Court of Appeal, having considered the degree to which the Family Court should deploy criminal law concepts in its own evaluation of the same or similar behaviour, held, as a matter of principle, that **it was fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based on criminal law principles and concepts** (paras. 62-67).

    - Focus is on welfare of the child; different to prosecution by State of an individual before a criminal court.
    - Criminal courts → culpability for criminal offence. Fact-finding in Family Courts → determination of facts across wide canvas regarding past events in order to evaluate which of a range of options for the future care of child best meets welfare.
    - Criminal law concepts, such as the elements needed to establish guilt of a particular crime or defence have neither relevance nor function within a process of fact-finding in the Family Court.
    - Given the wider evidence admissible and lower standard of proof→ meaningless for Family Court to make finding of 'murder' or 'manslaughter' or 'unlawful killing'.
        - How is such a finding to be understood by professionals and family members?
        - Potential to be misunderstood and cause profound upset and harm.
    - Potential for process to become unnecessarily bogged down in legal technicality→ i.e. over-complicated and side-tracked from central task of deciding what has happened and what is the best future course for a child .

Criminal law concepts in family law
F v M (Appeal: Finding of Fact) [2019] EWHC 3177

- Cobb J relied on the Court of Appeal's decision in ***Re R*** **[2018]:**

"29.There is a **risk in a case such as this**, where the alleged conduct at the heart of the fact-finding enquiry is, or could be, of a criminal nature, **for the family court to become too distracted by criminal law concepts**. **Although the family court may be tempted to consider the ingredients of an offence, and any defence available, when considering conduct which may also represent an offence, it is not of course directly concerned with the prosecution of crime.**"

Criminal law concepts in family law
JH v MF [2020] EWHC 88

- As referred to above in the authority of ***JH v MF* [2020]** Russell J made the following comments however which may be read as being *contrary* to the decision of the Court of Appeal in ***Re R (Children) (Care Proceedings: Fact-finding Hearing)* [2018]**:

47. While a trial in the Family Court cannot, and must not, set out to replicate a trial or to apply, or seek to apply, Criminal Law or statute it **cannot be lawful or jurisprudentially apposite for the Family Court to apply wholly different concepts or to take an approach wholly at odds from that which applies in the criminal jurisdiction when it comes to deciding whether incidents involving sexual intercourse, whether vaginally penetrative or not, and other sexual acts including oral penetration, penetration by an object or in other form were non-consensual**. Non-consensual sexual intercourse was considered lawful within a marriage until as late as 1992 (Cf. R [1992] 1 AC 599) it has not been lawful in any other sphere for generations. **There is no principle that lack of consent must be demonstrated by physical resistance, this approach is wrong, family judges should not approach the issue of consent in respect of serious sexual assault in a manner so wholly at odds with that taken in the criminal jurisdiction** (specifically the changes in place since SOA 2003 and subsequent amendments). **Serious sexual assault, including penetrative assault, should be minimised as an example of coercive and controlling behaviour (itself a criminal offence) although such behaviour may form part of the subordination of a potential victim's will** (see the guidance set out at paragraphs 19 and 20 above).

48. To consider the relevant approach to be taken reference should be made to the statutory provisions in respect of consent; **s 74 of the Sexual Offences Act (SOA) 2003 provides that "'Consent' (for the purposes of this Part – my parenthesis) a person consents if he agrees by choice, and has the freedom and capacity to make that choice."** There are circumstances in criminal law where there can be evidential or conclusive presumptions that the complainant did not consent set out in ss75 & 76 which, respectively, concern the use or threat of violence by the perpetrator and the use of deception; neither of which preclude reliance on s74 (Cf. Blackstone's B3.46 2020 ed.)

49. […] **There can be no reason why this approach should not be followed in the Family Court, whilst applying a different standard of proof. The deleterious and long-term effects on children of living within a home domestic abuse and violence, including serious sexual assault, has been accepted for some years, as is the effects on children's welfare, and their ability to form safe and healthy relationships as adults, if their parents or carers are themselves subjected to assault and harm."**

Criminal law concepts in family law
Re H-N [2021] EWCA Civ 448

- So where are we left after the recent Court of Appeal decision….?

1. The Court of Appeal concluded that there was a **clear distinction between judges needing to have a sound understanding of the impact of abuse and being drawn into an analysis of factual evidence based on criminal law principles** (para. 65).

2. The Court of Appeal concluded that **the Family Courts should avoid analysing evidence of behaviour by the direct application of the criminal law.** What mattered was determining how the parties had behaved to each other and their children, not whether that behaviour came within the definition of a criminal act (para. 65).

3. The law as stated by McFarlane and Hickingbottom LJJ in ***Re R (Children) (Care Proceedings: Fact-finding Hearing)* [2018]** was an authoritative statement of the law, and insofar as the judgment in ***JH v MF* [2020]** differs the Court of Appeal's finding in ***Re R*** is binding and must prevail over the High Court (paras 65-66).

4. Judges would make findings on the **balance of probabilities** and would not decide whether a criminal offence had been proved to a criminal standard (para. 73).

5. **Terminology used should not give an impression that the abusive parent had been convicted of a criminal offence** (para. 73).

Criminal law concepts in family law
Re H-N [2021] EWCA Civ 448

6. Following on from Russell J's comments in ***JH v MF* [2020]**, the Court of Appeal referred to the progress has been made by the Judicial College in devising free standing sexual assault awareness training programme for judges (paras. 67-68)

7. The court noted that **the Family Court should be concerned with how the parties behaved and what they did with respect to each other, rather than whether such behaviour fits into the definition of a serious crime under criminal law.**

8. Nonetheless, that is not to say Family Courts and parties who appear in them **should shy away from using words in the manner generally used in ordinary speech (e.g. 'rape' for non-consensual penetrative sex) as this would produce a wholly artificial approach…** The point made in ***Re R*** is that **Family Courts should avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or note proved….** (paras. 71-72)

DISCUSSION: WHERE DOES THIS LEAVE US? IS THE LAW ANY CLEARER? IS THE LAW AS STATED BY THE COURT OF APPEAL CORRECT?

The appellants in Re T have applied for permission to appeal to the Supreme Court on this very issue.

Proposals for Change

The Private Law Working Group

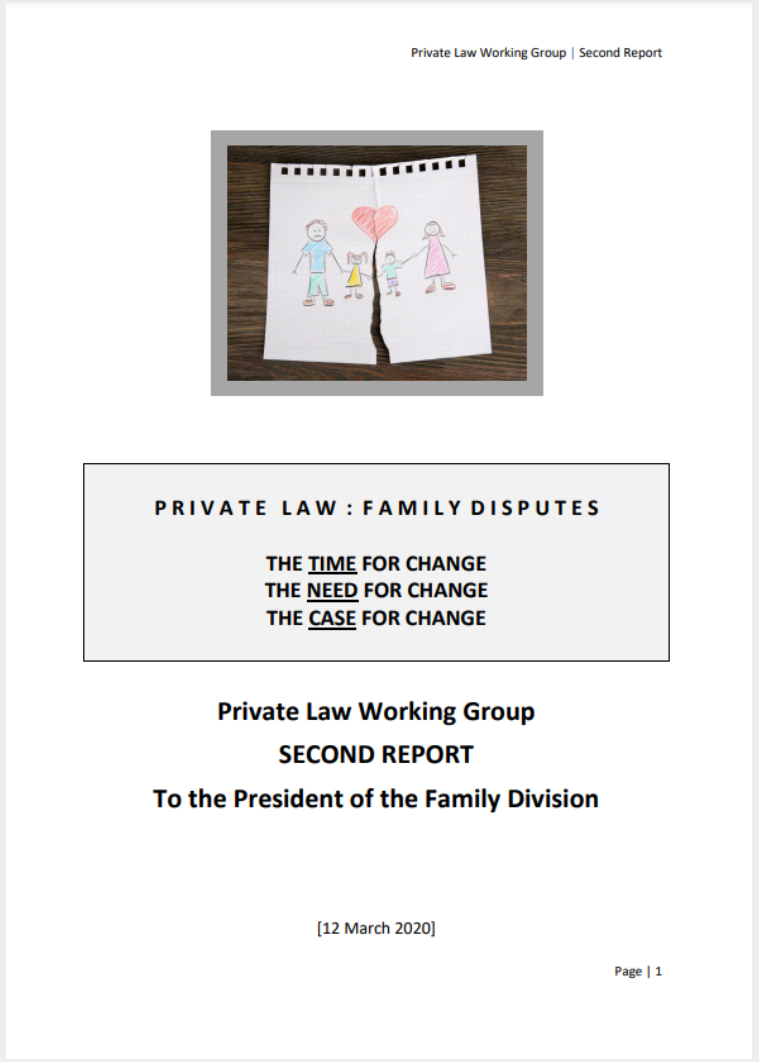
The Harm Report

The Domestic Abuse Act 2021

The Private Law Working Group

The Private Law Working Group

- Convened by Mr Justice Cobb at the invitation of Sir Andrew McFarlane
- Second report published 12 March 2020
- “Fundamental, long term and sustained change” needed



Private Law Working Group | Second Report

PRIVATE LAW : FAMILY DISPUTES

THE TIME FOR CHANGE
THE NEED FOR CHANGE
THE CASE FOR CHANGE

Private Law Working Group

SECOND REPORT

To the President of the Family Division

[12 March 2020]

Page | 1

The Private Law Working Group

- Recommendations on

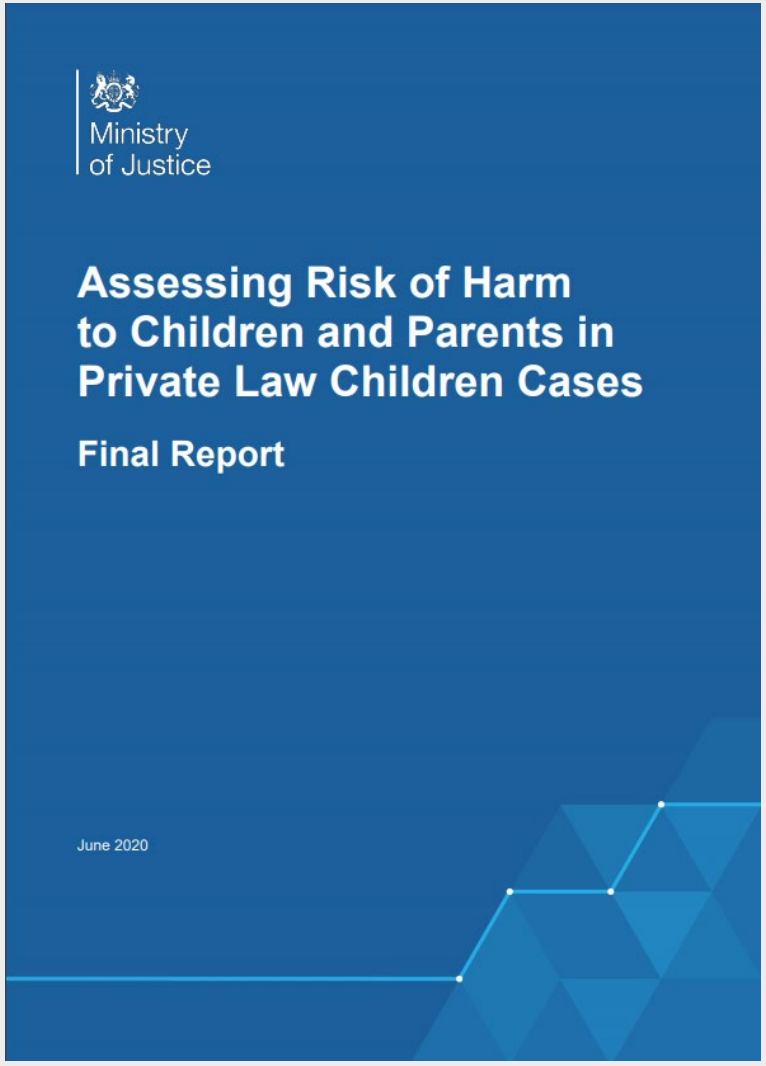
- **interim contact**
- **support services for separating families**
- **‘tracking’ of cases**
- **evidence of children and vulnerable witnesses**
- **police disclosure**

…. And on many more aspects of the private law system

The Harm Report

The Harm Report

- Convened by MoJ
- Public consultation and literature review
- Published June 2020
- Multi-disciplinary panel including Mr Justice Cobb, Isabelle Trowler (Chief Social Worker for England (Children and Families)), representatives from Women's Aid and Respect
- Authored by academic researchers (Professor Rosemary Hunter, Professor Mandy Burton, Professor Liz Trinder)



The Harm Report

- Themes in the evidence reviewed:

1. **Resource constraints**
2. **Pro-contact culture**
3. **Working in silos**
4. **Adversarial system**

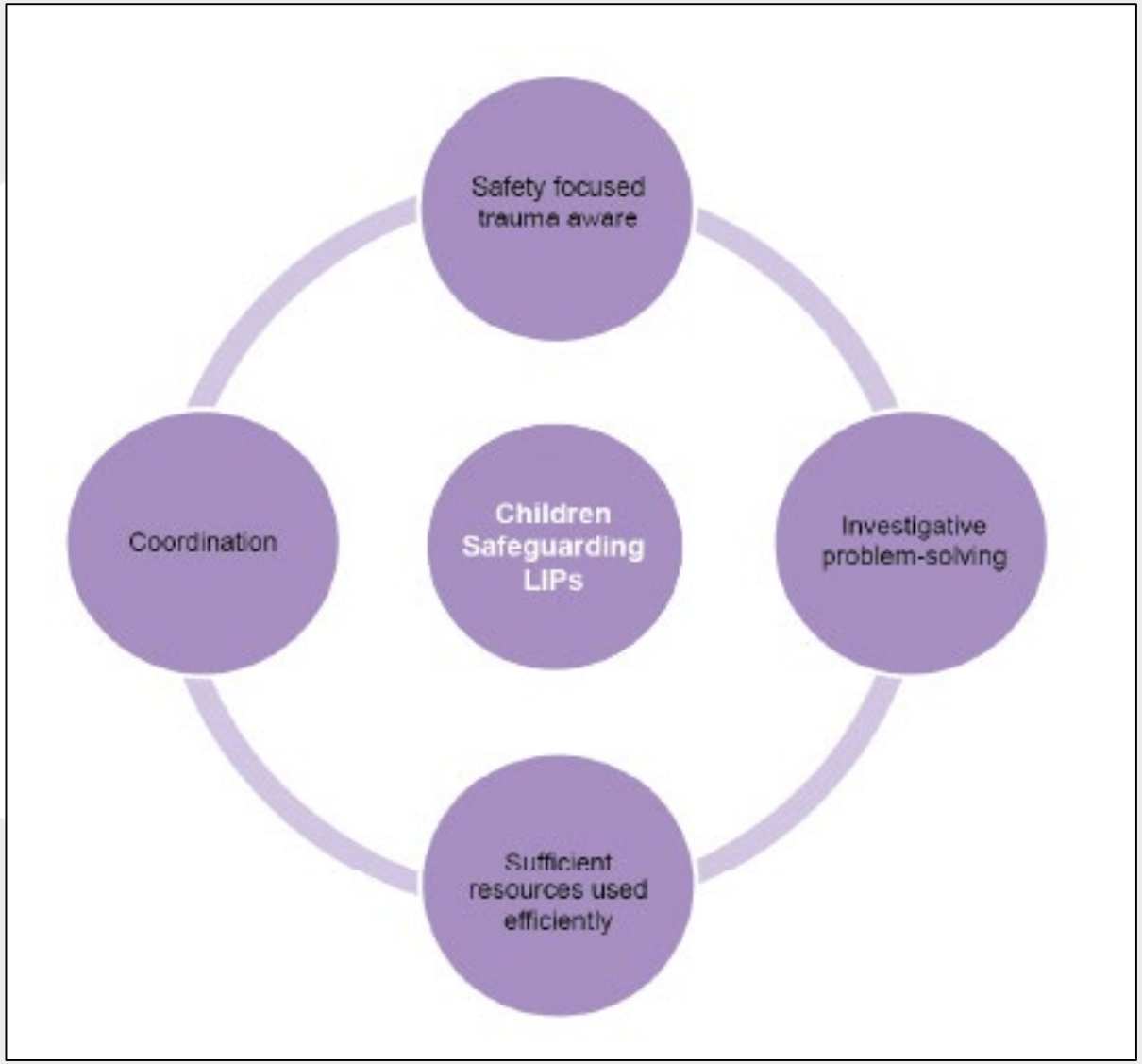
"four overarching barriers to the family court's ability to respond consistently to domestic abuse and other serious offences"

The Harm Report

Four problems and proposed changes

The Harm Report

Principles of the system



The Harm Report

Safety and security at court

Getting to court	• Victims informed about special measures and encouraged to use them • Offered pre-adjudication familiarisation visits • Access to pre-adjudication counselling and support
Court building	• Separate entrances and safe waiting areas • Court staff well trained and effective arrangements in place to ensure they are aware of the needs of parties • Robust response to breaches of safety and security
In the courtroom	• Move to a more investigative, problem-solving approach • Proactive and trauma-aware identification of vulnerability • Special measures such as screens and video link readily available • Effective limitations on abusive cross examination • Understanding of effects of trauma on how victims present and give evidence • Support workers permitted in courtroom • Inequality of arms addressed
Repeat applications	• Judicial continuity, consistent approach • Proactive identification of abuse via court proceedings • More effective use of section 91(14) orders to prevent further abuse

The Harm Report

Reformed Child Arrangements Programme

Communication and co-ordination

Presumption of parental involvement review

DAPPs

Training

Social work accreditation

Statement of Practice

Voice of the child

Monitoring and oversight

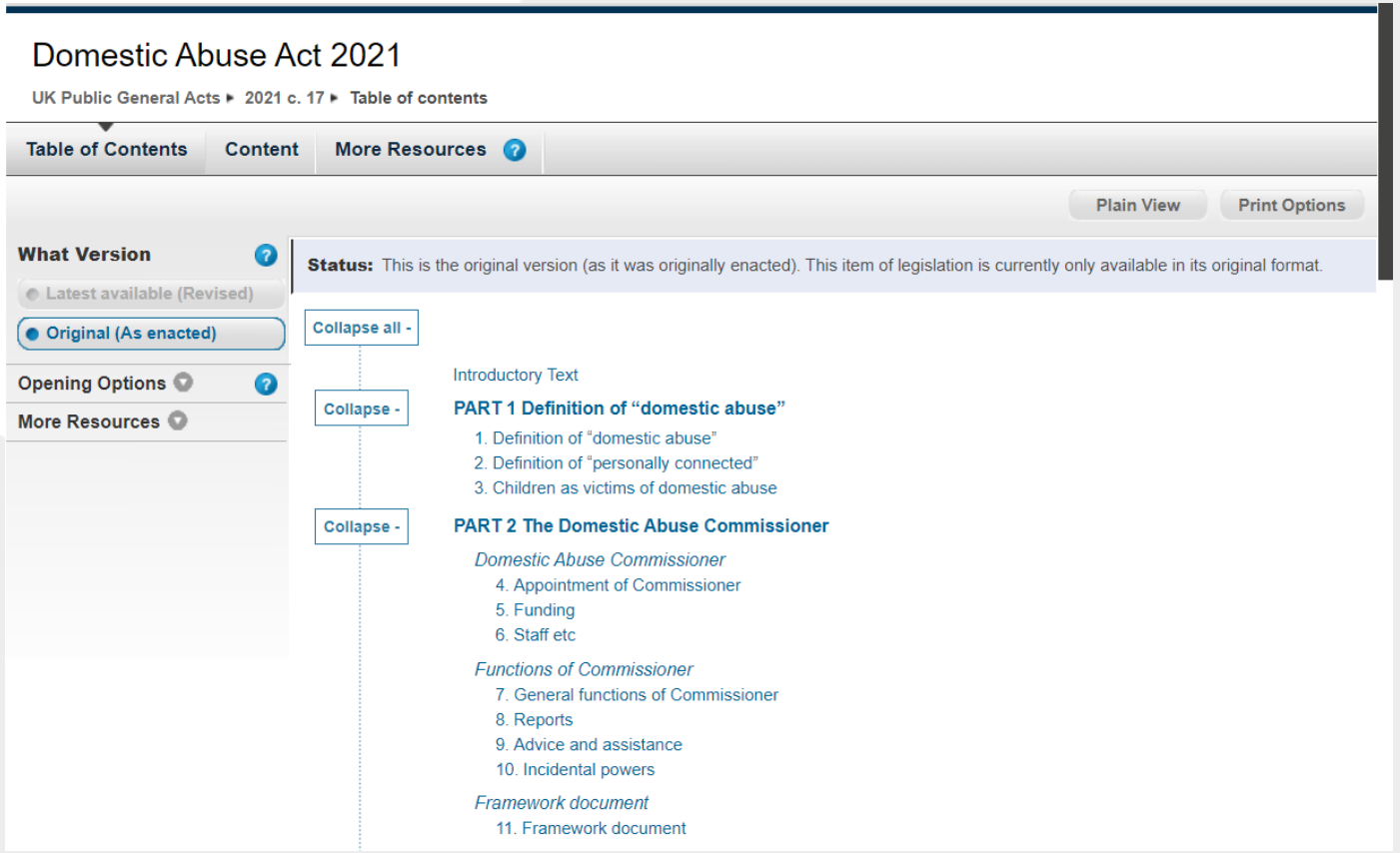
Additional investment

Further research

The Domestic Abuse Act 2021

The Domestic Abuse Act

- Bill became law on 29 April 2021
- Implementation predicted 2021/2022



Prohibition of direct cross examination

- **Automatic prohibition** on direct cross-examination where:
  a. A party has been convicted of, given a caution for, or charged with a 'specified offence'; or
  b. An on-notice protective injunction is in force between the parties; or
  c. Where 'specified evidence' is adduced that a party has carried out domestic abuse.

- **Discretionary prohibition** on direct cross examination where:
  a. the quality of evidence given by the witness is likely to be diminished if the cross-examination is conducted by the party in person, and it would be likely to be improved if the prohibition was imposed; or
  b. the cross-examination by one party in person would be likely to cause significant distress to the witness or another party and that distress is likely to be more significant than if the cross examination were conducted some other way.

Alternatives to direct cross examination

- If there are not satisfactory alternative means of obtaining evidence, the court must invite the prohibited party to arrange for a qualified legal representative to act for them for the purpose of cross-examining the witness.

- If no representative has been appointed by the party by the specified date, the court must consider whether to appoint a qualified legal representative to represent the interests of the party. If the representative is appointed, their remit is limit to cross-examining only.

- Though this might be more favourable that judges conducting questions (as previously suggested by PD12J), it must be considered how it can work in practice:
  - Is it practicable for a representative to step in solely for the purposes of cross-examination?
  - It does nothing to alleviate the client's vulnerability at other points of the hearing

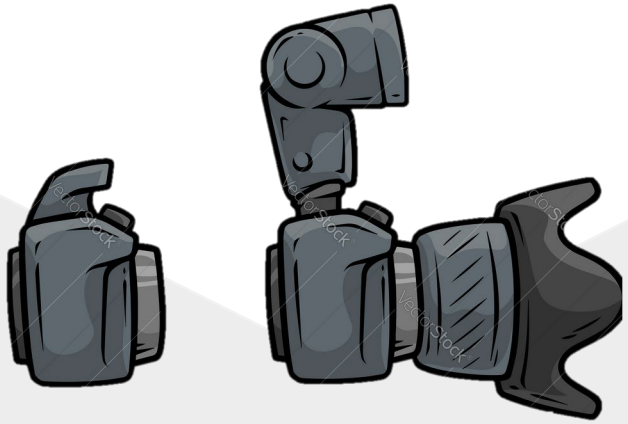
Barring orders

- Courts allowing repeated applications made by alleged perpetrators against alleged victims can be seen as giving the former a continued platform of abuse against the latter.
- Section 91(14) of the Children Act 1989 allows the court to prevent a parent making further applications without first obtaining permission from the court to do so – known as “barring orders”.
- Typically a measure of last resort (see ***Re P* [2000] Fam 15**) used where the respective parent has made repeated, vexatious or unmeritorious applications.
- The Act allows the court to make a barring order where it is satisfied that the making of an application would put the child or another ‘relevant individual’ at risk of harm.
- Though this was permitted under existing law, it has now been made explicit.

Domestic Abuse Protection Orders ‘DAPO’

- Allow the police, family and magistrates’ courts to put protective measures in place in the immediate aftermath of a domestic abuse incident to protect the victim even if there is insufficient evidence to charge the perpetrator.
- Combine elements of DVPOs and NMOs
- Can last indefinitely.
- A suspected breach of a notice or order is arrestable (an officer needs reasonable ground to believe there has been a breach and does not need a warrant)
- A breach of a DAPO is a criminal offence, punishable by a maximum sentence of 5 years in prison
- Whereas NMOs are prohibitive in nature, DAPOs can also impose mandatory requirements.

Widening the lens.....



Domestic Abuse and the Hague Convention

Public Law

Domestic abuse and the Hague Convention

The Hague Convention: key principles

- PD12J is not applicable to Hague cases.

- The 1980 Convention was designed to protect children from the harmful effects of wrongful removal or retention and establish procedures to ensure the prompt return of abducted children to the State of their habitual residence, as well as to secure protection for rights of access.

- Under the 1980 Convention, if an application is brought within 12 months of the removal and the removal is demonstrated as wrongful, the court must order a return unless one of the statutory defences can be made out.

Limits on the availability of oral evidence

- Oral evidence is rare in 1980 Convention cases as per in ***Re E (Children) (Abduction: Custody Appeal)*** **[2011] UKSC 27** at [32] the Supreme Court stated "it will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination".

- In practice, this means fact-findings in cases involving the 1980 Convention are few and far between, even in cases of alleged domestic abuse.

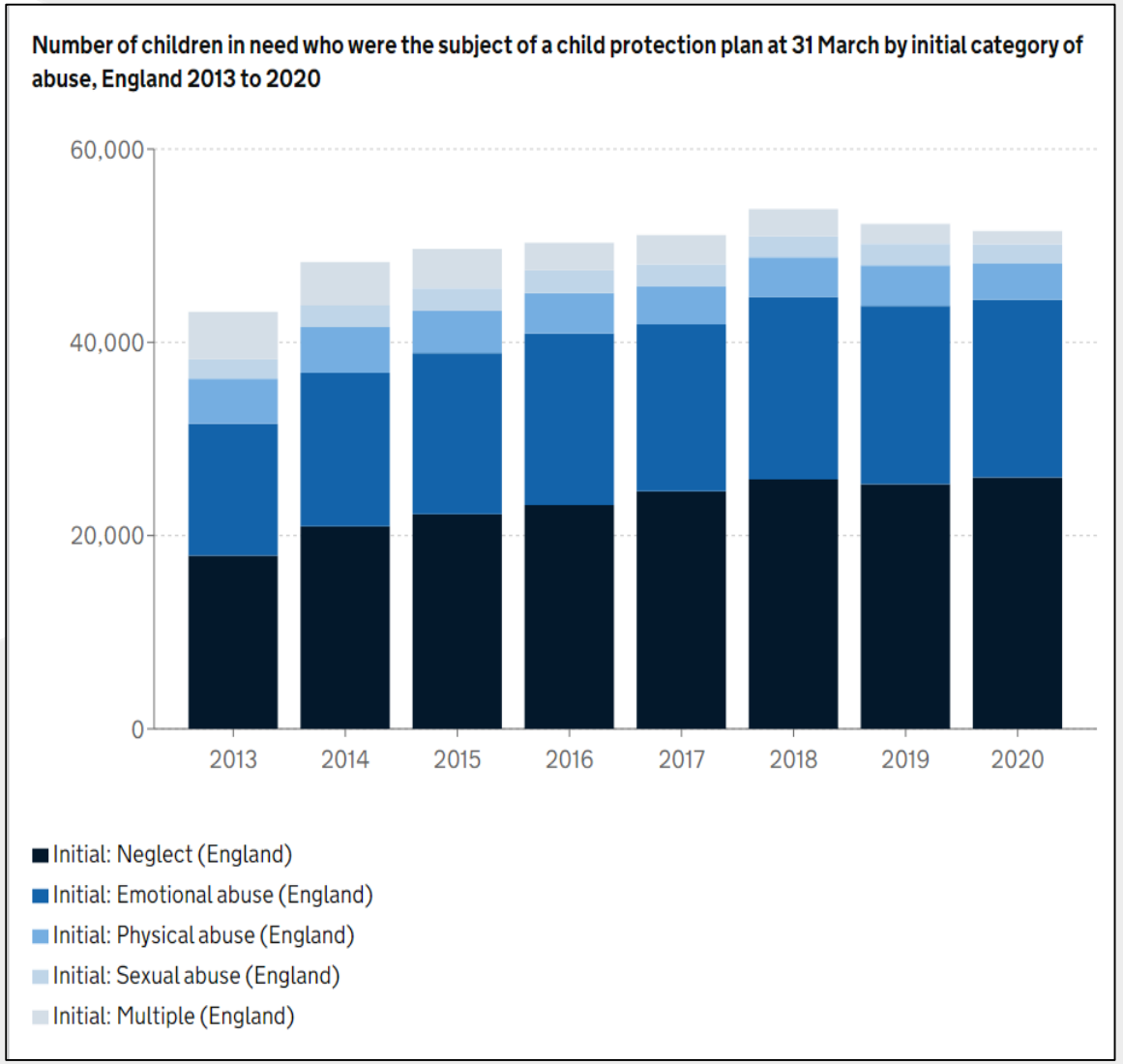
- Exceptions to the general rule tend to be where allegations are made which are capable of establishing a grave risk, and the purported protective measures offered are insufficient to ameliorate that risk. One example is ***DT v LBT (Abduction: Domestic Abuse)*** **[2010] EWHC 3177 (Fam).**

- **This, in addition to the absence of applicability PD12J, demonstrates how differently cases involving alleged domestic abuse can be treated in the family courts.**

Public law

Wider context

- S120 Adoption and Children Act: definition of 'harm' in s31(9) now includes '*impairment suffered from seeing or hearing the ill-treatment of another*"
- **Domestic abuse an increasingly common reason for statutory protection agencies to be involved with families**



Re MA (Children) [2009] EWCA Civ 853

“Given the underlying philosophy of the Act, the harm must, in my judgment, be significant enough to justify the intervention of the State and disturb the autonomy of the parents to bring up their children by themselves in the way they choose. It must be significant enough to enable the court to make a care order or a supervision order if the welfare of the child demands it”

HHJ Jack in ***North East Lincolshire Council v G & L*** **[2014] EWFC B19**, cited by Munby P in ***Re A*** **[2015] EWFC 11, [2016] 1 FLR 1**

> *"I deplore any form of domestic violence and I deplore parents who care for children when they are significantly under the influence of drink. But so far as Mr and Mrs C are concerned there is no evidence that I am aware of that any domestic violence between them or any drinking has had an adverse effect on any children who were in their care at the time when it took place. The reality is that in this country there must be tens of thousands of children who are cared for in homes where there is a degree of domestic violence (now very widely defined) and where parents on occasion drink more than they should, I am not condoning that for a moment, but the courts are not in the business of social engineering."*

Mrs Justice Hogg: ***Re A and B (one parent killed by the other)*** **[2011] 1 FLR 782, [2010] EWHC 3824 (Fam)**

1. **Threshold met**
2. **LA to consider issuing proceedings**
3. **Should not leave extended family to issue**
4. **Immediate appointment of Guardian**
5. **Transfer to High Court**
6. **Careful case management**
7. **Specialist guidance**
8. **Therapeutic help**
9. **Involvement of school**
10. **Family home as crime scene**
11. **Contact**
12. **Family of perpetrator as carer**
13. **Professional reflection**

Where do we go from here?

Resource constraints

- Rise in private law applications
- Impact of the Covid-19 pandemic
- Reviews and pilots?

Cafcass

- New guidance to FCAs published 12 May 2021
- Significant backlog (700+ cases)
- Cafcass only to recommend DAPP where it is truly necessary: will involve significant delay
- All other cases to involve alternatives including risk-assessed contact, or a final order for no contact
- Impact on parents and children....