

# WESTGATE CHAMBERS



**PRIVATE CHILDREN LAW UPDATE ON DOMESTIC ABUSE AND FACT  
FINDINGS**

**2 YEARS ON FROM RE H-N**

John Hatton

## INTRODUCTION

- 4 parts:
  1. Recent cases
  2. Domestic abuse and the treatment of vulnerable witnesses
  3. “Lawfare” and use of s.91(14) orders
  4. (briefly) Contact costs

### **I. RECENT CASES**

- Recent FFH in Brighton
  - The issues
  - The court’s approach
    - Necessity:- *K v K* [2022] EWCA Civ 468
    - Pleadings (Scott):- *Re JK (A Child) (Domestic Abuse: Finding of Fact Hearing)* [2021] EWHC 1367 (Fam) § p.27:
      - (a) a summary of the nature of the relationship,
      - (b) a list of the forms of domestic abuse that the evidence is said to establish,
        - Clusters:- *Re B-B (Domestic Abuse: Fact finding)* [2022] EWHC 108:
          - 1. It is useful to consider the evidence in relation to each form of domestic abuse in "clusters" which makes it easier to see whether patterns of behaviour emerged.
          - 2. Delay in hearing the evidence compromised the quality of the evidence as well as taking its toll on the parties.
          - 3. Flexible arrangements are needed to ensure that participation directions truly meet the needs of the parties and the case.
          - 4. Advocates need to focus on those issues which are necessary to determine; submissions and oral evidence must be cut down to that which the court needs to hear.
          - 5. The evidence of the parties themselves is always likely to be far more valuable than that of third parties; judges must rigorously test what real value additional witnesses will bring.
          - 6. Judicial continuity is important in domestic

abuse cases; here it would have enhanced the "efficient and sympathetic management of the process."

7. An abusive relationship is invariably complex in which the abused partner is often "caught up in the whorl of abuse, losing objective sense of what was/is acceptable and unacceptable in a relationship."

- (c) a list of key specific incidents said to be probative of a pattern of coercion and/or control;
- (d) a list of any other specific incidents so serious that they justify determination irrespective of any alleged pattern of coercive and/or controlling behaviour.

- Takeaways
  - FFH necessary?
  - Pleading the case
  - Credibility is (even more) key!

## II. TREATMENT OF VULNERABLE WITNESSES

- **Topic:-** Responsibilities and duties on the parties and the court to consider vulnerability and the question of participation directions.
- **Principles:-**
  - Family Procedure Rules, PD12J
  - Domestic Abuse Act 2021, section 63

*(2) Rules of court must provide that where P is, or is at risk of being, a victim of domestic abuse carried out by a person listed in subsection (3), it is to be assumed that the following matters are likely to be diminished by reason of vulnerability—*

    - (a) the quality of P's evidence;*
    - (b) where P is a party to the proceedings, P's participation in the proceedings.*

*(3) The persons referred to in subsection (2) are—*

    - (a) a party to the proceedings;*
    - (b) a relative of a party to the proceedings (other than P);*
    - (c) a witness in the proceedings.*
  - Family Procedure Rules, PD3AA

- **Examples:-**

**M (A Child) [2021] EWHC 3225 (Fam): Appeal in the High Court before Mrs Justice Judd**

- Findings on appeal: In respect of Ground one, Mrs Justice Judd noted the following:

a. that it did not appear from any of the orders that the question of participation directions was considered or determined by the court. The provision that M and F should attend court on different days to give evidence appears from the wording to have been made in order to meet the restrictions on too many parties being in one room as a result of Covid.

b. the provisions of rule 3A and PD3AA are **mandatory**. The word used is '**must**' and **the obligation is upon the court, even though the parties are required to cooperate.**

c. the obligation to consider vulnerability is upon the court

d. This was a very sensitive case where there were allegations of the utmost seriousness.

e. There was explicit video material and photographs obvious sexual nature and M was asked extensively about these on behalf of F.

f. **There was evidence before the judge that M had some long-term underlying fragilities and that she was anxious. In short this was a case that cried out for participation directions and Ground Rules Hearing not just for the sake of M but for the integrity of the court process itself.**

g. There should have been consideration of whether M should be visually shielded from F when she gave her evidence and what topics should have been covered in cross examination.

h. It was not possible to know how the lack of special measures may have affected M and her evidence.

**i. the failure to abide by the procedural rules was so serious that decision of the court could not stand.**

j. These matters need to be addressed to avoid the risk that the integrity of the trial will be undermined.

**B v P [2022] EWFC B18 (31 March 2022): Appeal in the Family Court sitting at Portsmouth before HHJ Levey**

- Similar to above

HHJ also referred to s63 of the **Domestic Abuse Act 2021** which had not been passed into law at the time of the hearing, but provided that where a person 'is, or is at risk of being, a victim of domestic abuse', the court **must assume** that their participation and evidence will be reduced by reason of vulnerability. **Rule 3A 2A of the Family Procedure Rules 2010** adopts this. Although this was not in force at the time of the hearing, she noted that there were measures in place for vulnerable witnesses which the court was obliged to follow as set out in **rule 3A** and **PD3AA**. These had not been followed.

- **Takeaways:-**

- Need to be aware of vulnerabilities, need for GRH and special measures to be considered
- Likely to get some pushback but need to remind the court of its duty to ensure process followed

### III. **"LAWFARE" AND SECTION 91(14) ORDERS**

- **Topic:** - increasing use of section 91(14) orders and widening the cases in which such an order will be appropriate

- **Principles:-**

- Section 91(14) CA 1989

*On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court.*

- Domestic Abuse Act 2021, section 67

*(2)In section 91 (effect and duration of orders etc.), at the end of subsection (14) insert—*

*"For further provision about orders under this subsection, see section 91A (section 91(14) orders: further provision)."*

*(3)After section 91 insert—*

*"91ASection 91(14) orders: further provision*

*(1)This section makes further provision about orders under section 91(14) (referred to in this section as "section 91(14) orders").*

*(2)The circumstances in which the court may make a section 91(14) order include, among others, where the court is satisfied that the making of an*

*application for an order under this Act of a specified kind by any person who is to be named in the section 91(14) order would put—*

*(a) the child concerned, or*

*(b) another individual (“the relevant individual”),*

*at risk of harm.*

*(3) In the case of a child or other individual who has reached the age of eighteen, the reference in subsection (2) to “harm” is to be read as a reference to ill-treatment or the impairment of physical or mental health.*

- *Re P (A minor) (Residence Order: child’s welfare)* [2000] Fam 15: [1999]2 FLR at p19.
  - Section 91(14) should be read in conjunction with s. 1(1).
  - The power to restrict applications to the court is discretionary and in the exercise of its discretion the court must weigh in the balance all the relevant circumstances.
  - An important consideration is that to impose a restriction is a statutory intrusion into the right of a party to bring proceedings before the court and to be heard in matters affecting his/her child.
  - The power is therefore to be used with great care and sparingly, the exception and not the rule.
  - It is generally to be seen as a useful weapon of last resort in cases of repeated and unreasonable applications.
  - In suitable circumstances (and on clear evidence), a court may impose the leave restriction in cases where the welfare of the child requires it, although there is no history of making unreasonable applications.
  - In cases under paragraph 6 above, the court will need to be satisfied first that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute or between the local authority and the family and secondly that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain.
  - A court may impose the restriction on making applications in the absence of a request from any of the parties, subject, of course, to the rules of natural justice such as an opportunity for the parties to be heard on the point.
  - A restriction may be imposed with or without limitation of time.
  - The degree of restriction should be proportionate to the harm it is intended to avoid. Therefore, the court imposing the restriction should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of the order.

- Examples

**Re A (A Child) (supervised contact) (s91(14) Children Act 1989 orders) - [2021] EWCA Civ 1749 (23 November 2021): Appeal in the Court of Appeal before King LJ, Newey LJ and Arnold LJ**

- LJ King emphasised that she was entirely satisfied that this was one of those unhappy cases where the choice was not between supervised or unsupervised contact but between no direct contact or supervised contact. She carefully considered the case law setting out the legal principles at play when making section 91 (14) orders. In particular, she referred to the guidelines set out in Re P (A minor) (Residence Order: child's welfare) [2000] Fam 15: [1999]2 FLR at p19.
- **King LJ referred to the fact that the forensic landscape had changed out of all recognition since April 1999 when the guidelines were set out noting the following:**
  - **The advent of the smart phone and social media and the almost universal use of email as a means of instant communication and the changes that those bring.**
  - **The withdrawal of legal aid in the majority of private law cases meaning that a large proportion of parents are unrepresented and therefore do not have the 'steadying influence' of legal advisers.**
  - **Parties and often the Judge him or herself are bombarded with emails which can be as part of a campaign of behaviour by one parent against the other which amounts to a deeply disturbing form of oppressive behaviour on their part.**
- **King LJ goes on to refer to guideline 6: 'In suitable circumstances (and on clear evidence), a court may impose the leave restriction in cases where the welfare of the child requires it, although there is no past history of making unreasonable applications.' She goes on "in my judgment the sort of harassment of the father seen in this case, in the form of vindictive complaints to the police and social services, is an example of circumstances where it would be appropriate to make an order under s91(14), even if the proceedings were not dogged by numerous applications being made to the judge".**
- Of note at para 41 and 42 she states that, **in circumstances where one parent is using court proceedings as "lawfare", "the court may feel significantly less reluctance than has been the case hitherto"** before making an order under s91(4) [§ 41]. She also notes that the **"prolific use of social media and emails in the modern world may well mean that orders made under s91(14) need to be used more often"** [§ 42].
- In respect of section 67 of the Domestic Abuse Act 2021 which had not come into effect at the time of the hearing, she noted that the proposed new section 91A dovetailed with the modern approach which she suggested should be taken to the making of s91(14) orders. she noted that s 91A(2) gives statutory effect to Guideline 6 of Re P by permitting s 91(14) orders to be made where

the making of an application under the Children Act 1989 would put the parent or child at risk of physical or emotional harm.

- **Takeaways:-**

- in circumstances where one parent is using court proceedings as “lawfare”, “the court may feel significantly less reluctance than has been the case hitherto... “prolific use of social media and emails in the modern world may well mean that orders made under s91(14) need to be used more often

#### IV. **CONTACT COSTS**

**Griffiths v Griffiths (Guidance on Contact Costs) [2022] EWHC 113 (Fam): Appeal in the High Court heard by Mrs Justice Arbuthnot**

- Arbuthnot J decides to deal with the issues in the following order:
  - o Whether in principle a court has the power to order that a party pay for contact under section 11(7) of the 1989 Act: - YES
  - o Whether the Judge was wrong to order direct contact in the particular circumstances of this case;
  - o **whether a victim of abuse should pay the costs of contact for the abuser to have contact with the party's child.**
- [pp.131 – 132] In respect of whether a victim of rape or domestic abuse should share the payment of the costs of contact with their child with the perpetrator of that rape or domestic abuse, **Arbuthnot J says that she cannot envisage a situation where the court would order the victim share the cost of contact but it is impossible to give guidance which will cater for every case. She goes on to state that there must be a very strong presumption against the victim of domestic abuse paying for the contact of their child with the abuser and sets out, at paragraph 132, matters the court might want to take into account if exceptionally it has to consider this.**

*"131. First, there must be a very strong presumption against a victim of domestic abuse paying for the contact of their child with the abuser.*

*132. Second, if, wholly exceptionally, the court has to consider this, the matters a court might want to take into account could include the following:*

*a. The welfare checklist including the age of the child*

*b. The factors in PD12J.*

*c. The nature of the abuse proved or admitted, and the parties' conduct that the court considers relevant*

*d. The impact of the abuse on the caregiver with consideration as to whether any payment would give rise to financial control*



*e. The extent of the relationship between the child and the abusive party*

*f. The nature of the section 8 order made*

*g. The parties' financial resources*

*h. The cost of the contact*

*i. Whether, if the contact is in the best interests of the child, it would take place without a sharing of the costs."*

- Arbuthnot J goes on to set aside the order that the mother pay direct or indirect contact costs and orders indirect contact in the interim.