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1GC | Family Law

# Re H-N: Time to recap, reset and discuss how to look ahead

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12 May 2021

## Recap

Re L (Contact: Domestic Violence);  
Re V (Contact: Domestic Violence);  
Re M (Contact: Domestic Violence);  
Re H (Contact: Domestic Violence)  
[2000] 2 FCR 404; [2000] 2 FLR 334.  
“The messages from *Re L* led to a  
significant change in the approach”

## Recap

Re L, referenced the joint report:

- Drs Sturge and Glaser
- [2000] Fam Law 615

# Recap

## The revised FPR PD12J:

- Child Arrangements and Contact Order: Domestic Abuse and Harm.
- In force from October 2017
- Places a duty to consider at all stages if domestic abuse is an issue. If so, what are the factual issues and welfare issues involved?

# Recap

## Cases post revised PD12J:

- Re LG (Re-opening of Fact-Finding) [2018] 1 FLR 1358, FD
- SD v AHF (Appeal: Coercive and Controlling behaviour: Inference or Speculation) [2019] EWHC 1513 (Fam)
- JH v MF [2020] EWHC 86 (Fam)

# Recap

## F v M [2021] EWFC 4

- Mr Justice Hayden. Judgement following a two week fact-finding hearing.
- C of A described the parties' endorsement of the Judgment as "*fully justified*".

# The Domestic Abuse Bill

- The Bill was introduced 3 March 2020. Second Reading on 28 April 2020. Public bill Committee, 12 sessions 4 – 17 June 2020. Report and Third Reading on 3 July 2020.
- Then, extensive amendments in the Lords, inc:
- A statutory duty for the findings of a domestic homicide review to be sent to the Domestic Abuse Commissioner
- Requirement for the DA Commissioner to publish a report on the need for community based support services, and for LA to monitor services.
- For DA Protection Orders to extend to work places

## Domestic Abuse Bill, contd.

- Extend special measures and XX in civil proceedings
- Further guidance on 'barring orders' (s.91(14))
- Extending the offence of coercive and controlling behaviour (s.76 SCA 2015) to cover former partners/family members not living together
- New offence of non-fatal strangulation/suffocation
- A prohibition on charging for medical evidence in support of a civil legal aid claim in DA cases



# Domestic Abuse Bill contd.

There were a large number of amendments in the Lords, including:

- A requirement for formal accreditation of child contact centres/organisations
- S of S to publish a strategy on judicial training on family proceedings inc. DA and coercive control
- Amending the law on self-defence
- Various provisions for migrant victims
- Extending legislation for MAPPA cases.

# Re H-N: Judgment – key guidance

1. Effectiveness of PD12J;
2. Implementation of PD12J;
3. Fact-finding hearings;
  - The need for a fact-finding hearing;
  - Approach to allegations; and
  - Scott Schedules.
4. The relevance of criminal law concepts.

# 1. Effectiveness of PD12J

- PD12J remains fit for the purpose for which it is designed: *“namely to provide the courts with a structure enabling the court first to recognise all forms of domestic abuse and thereafter on how to approach such allegations”* [ §28]
- PD12J.3:
  - “domestic abuse’: includes any incident or pattern of incidents...”*
  - “coercive behaviour’: means an act or a pattern of acts...”*
  - “controlling behaviour’: means an act or a pattern of acts...”*

# 1. Effectiveness of PD12J

Challenge relates to the proper implementation of PD12J [ § 28]

## 2. Implementation of PD12J (1)

- Proper consideration of allegations of coercive and controlling behaviour.
- Recognition that the definition of domestic abuse is not limited to specific incidents of violence or sexual abuse, can involve a ‘pattern of acts or incidents’.

## 2. Implementation of PD12J (1)

- PD12J.3 – definitions [ § 31]
- F v M [2021] EWFC 4 – “essential reading for the Family Judiciary” [ § 30]
- Statutory Guidance published by the Home Office (F v M [2021] § 60) [ § 30]

## 2. Implementation of PD12J (2)

Recognition of the harm and extent of harm that coercive and/or controlling behaviour, or a 'pattern of acts or incidents' can cause to the adult victim and child.

## 2. Implementation of PD12J (2)

Risk of emotional and psychological harm – even where there is no actual episode of violence or sexual abuse [ § 31]

*“A pattern of coercive and/or controlling behaviour can be as abusive as or more abusive than any particular factual incident that might be written down and included on a schedule in court proceedings” [ § 31]*



## 2. Implementation of PD12J (2)

[ §31] [...] *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.*

### 3. Fact-finding hearings: (a) Need for a fact-finding

*“It is important for the court to have regard to the need for procedural proportionality at all times, both before and during any fact-finding process. A key word in PD12J paragraphs 16 and 17 is ‘necessary’” [ § 36]*

PD12J should be read together with the provisions of the overriding objective [ §140] and paragraphs 43, 46 – 47 of the President’s Guidance ‘*The Road Ahead*’ (June 2020) [ § 36]

## 3. Fact-finding hearings:

### (a) Need for a fact-finding

The proper approach to deciding whether a fact-finding hearing is necessary [ §37]:

- 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).
- 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.

## 3. Fact-finding hearings:

### (a) Need for a fact-finding

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.

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'.

# 3. Fact-finding hearings:

## (b) Court's approach

### Post-separation abuse [ §52]:

“[...] the approach of regarding coercive or controlling incidents that occurred between the adults when they were together in a close relationship as being ‘in the past’, and therefore of little or no relevance in terms of establishing a risk of future harm, should, we believe, also be considered to be ‘old fashioned’ and no longer acceptable. The fact that there may in the future be no longer any risk of assault, because an injunction has been granted, or that the opportunity for inter-marital or inter-partnership rape may no longer arise, does not mean that a pattern of coercive or controlling behaviour of that nature, adopted by one partner towards another, where this is proved, will not manifest itself in some other, albeit more subtle, manner so as to cause further harm or otherwise suborn the independence of the victim in the future and impact upon the welfare of the children of the family”

### 3. Fact-finding hearings: (b) Court's approach

#### **Coercive and/or controlling behaviour [ § 59]:**

*“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)”*

# 3. Fact-finding hearings:

## (b) Court's approach

### Proportionate timetable [ § 56]

### Balance between evidence and case management [ § 58]:

*a) PD12J (as its title demonstrates) is focused upon 'domestic violence and harm' in the context of 'child arrangements and contact orders'; it does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court;*

*b) PD12J, paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is 'necessary' in order to:*

# 3. Fact-finding hearings:

## (b) Court's approach

**Balance between evidence and case management [ § 58]:**

- i) Provide a factual basis for any welfare report or other assessment;*
- i) Provide a basis for an accurate assessment of risk;*
- iii) Consider any final welfare-based order(s) in relation to child arrangements; or*
- iv) Consider the need for a domestic abuse-related activity.*



# 3. Fact-finding hearings:

## (b) Court's approach

**Balance between evidence and case management contd.[ § 58]:**

*c) Where a fact-finding hearing is 'necessary', only those allegations which are 'necessary' to support the above processes should be listed for determination;*

*d) In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other.*

### 3. Fact-finding hearings: (c) Scott Schedules

- *“The process before this court has undoubtedly confirmed the need to move away from using Scott Schedules”*  
[ § 49]
- *Assessing Risk of Harm to Children and Parents in Private Law Children Cases* (Chapter 5.4 and 7.5.1)
- Principled and pragmatic concerns in relation to Scott Schedules [ § 44 – 45]

## 4. Relevance of criminal law

- *Re R* [2018] EWCA Civ 198 – remains binding authority
- Key principles in case law [ § 72 – 73]
- Procedural manner in which hearings are conducted in the family courts warrants separate consideration from general prohibition

# Looking ahead – impact on case management

## Early identification:

*“It is of critical importance to identify at an early stage the real issue in the case in particular with regard to the welfare of the child before a court is able to assess if, a fact-finding hearing is necessary and if so, what form it should take.” [ § 8]*

Statements: *“In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other” [ § 58(d)]*

# Looking ahead – impact on case management

## **Fact-finding hearings not required in every case:**

*“As discussed at paragraphs 36 – 41 above that does not, however, mean that in every case where there is an allegation of, even very serious, domestic abuse it will be either appropriate or necessary for there to be a finding of fact hearing, so much is clear from the detailed guidance set out in paragraphs 16 – 20 of PD12J and, in particular, at paragraph 17” [ § 139]*

*“Not every case requires a fact-finding hearing even where domestic abuse is alleged” [ § 8].*

# Looking ahead – impact on case management

## Scott Schedules:

*“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” [ § 48]*

Private Law Working Group together with The Harm Panel’s implementation group [ § 49]

# Looking ahead – impact on case management

## Importance of the court considering relevant allegations:

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

[ § 53]

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Thank you for listening!

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