

# *Proving Coercive and Controlling Behaviour in the Family Courts*

22 JUNE 2022

*Rebecca Thomas*



Since the offence was introduced in the Serious Crime Act 2015 the words ‘coercive and controlling behaviour’ have gained considerable resonance both in the Family Courts and the public sphere. The judgment in *Re H-N and Others* (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448 demonstrated the total sea-change that has occurred in recent times. The Court of Appeal made clear that consideration of coercive and controlling behaviour was likely to be “the primary question in many cases” [51].

Earlier this year the Court of Appeal returned to the issue in *Re K* [2022] EWCA Civ 463, providing further guidance regarding the approach the Court should adopt where coercive and controlling behaviour is alleged.

This article will examine the extent to which the original guidance has been implemented and the approaches practitioners might adopt in the interim.

## Definitions

Practice Direction 12J (PD12J) is used by the Family Courts to define domestic abuse and it includes very similar concepts to the criminal offence. Expanded in 2017, its definitions of coercive and controlling behaviour are as follows:

‘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.

The Court of Appeal declared these definitions fit for purpose and cited with approval guidance provided by Mr Justice Hayden in *F v M* [2021] EWFC 4. In that case Hayden J observed that

*“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” [4]. The Court of Appeal added that “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 in a schedule in court proceedings” [31].*

## Fact-Finding Hearings

In *Re H-N* the Court provided guidance to assist in deciding whether a fact-finding hearing is necessary once allegations of abuse are raised. It is not the case that factual disputes of abuse between the parties will automatically result in a fact-finding in proceedings concerning the welfare of children.

The Court of Appeal suggested that the proper approach is essentially to focus on the extent to which allegations are relevant to determining child arrangements. In *Re K* considerable emphasis is placed on the importance of the parties exploring out of court resolutions at an

early stage.

The judgment in *Re H-N* sets out at length the pressures on Family Courts and repeats the observations made by Sir Andrew McFarlane in *The Road Ahead* (June 2020) that

*“should the Family Court have any chance of delivering on the needs of children or adults... there will need to be a very radical reduction in the amount of time that the court affords to each hearing”*

[43][1]. This advice has been repeated in 2021 and 2022 guidance.

In *Re K* the Court of Appeal arguably goes further, observing that the nature of fact-finding hearings is likely to have “a negative impact on [parents’] ongoing relationship and ability to cooperate” [42].

It is clear that the Family Courts must now distinguish between allegations which if proved could, for example, affect the recommendations of Cafcass, and allegations which serve simply to turn the Court into an arena for adults to litigate their grievances.

### **Scott Schedules**

Having constricted the scope of fact-findings in one way *Re H-N* simultaneously advocated a more holistic, expansive approach to the way they are conducted.

For many years the Courts have encouraged the use of Scott Schedules as effective ways to organise and structure pleadings. The Court of Appeal acknowledged the limitations of an approach requiring parties to list numbered allegations where findings of coercive and controlling behaviour are sought, first because isolating each incident runs counter to the aim of identifying patterns of coercive and controlling behaviour which have had a cumulative effect on an individual and secondly because inevitable attempts by efficiency-minded judges to trim down the number of allegations risks distorting the Court’s view of a relationship.

During the course of submissions in *Re H-N* it was suggested that a ‘threshold’ type document, similar to those used in public law proceedings, might be a better way to show a

pattern emerging from a narrative. In *F v M* the Mother's legal team used an 'umbrella schedule' whereby allegations were set out under thematic headlines and examples of the behaviour alleged were provided under each headline.

In *Re K* the Court observed that allegations ought to be considered

*"in the context of the contention that most fundamentally [affects] the question of future contact, namely whether the father was demonstrating coercive and controlling behaviour" [10].*

The Court went on to note that generally this focus should make it unnecessary to determine "subsidiary date-specific factual allegations" [68].

### **Scope of coercive and controlling behaviour**

Whilst *Re H-N* does invite Courts to consider a broader set of behaviours as amounting to coercive and controlling the judgment also strikes a note of caution:

Not all directive, assertive, stubborn or selfish behaviour, will be 'abuse' in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour. [32]

In *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121 Peter Jackson LJ observed that where conduct does not meet the bars imposed by the definitions contained in Practice Directions it is unlikely to be in the interests of the child for the court "to allow itself to become another battleground for adult conflict" [61].

Whilst more innocuous-seeming behaviours may now be considered by Courts as indicative of coercive and controlling behaviour, parties will need show either that behaviour is being "used to harm, punish or frighten the victim..." or that the behaviour is "designed to make a person subordinate". It is not the case that parties who have behaved in mean-spirited or unedifying ways in conflicts throughout a relationship will necessarily be labelled as an 'abuser' in the Family Courts.

## The way forward

The judgments in both *Re H-N* and *Re K* anticipate that further guidance will be necessary to clarify the approach practitioners should take – particularly regarding the use of Scott Schedules. We are yet to see any such guidance materialise.

In the meantime, the judgments pose several dilemmas. Fact-finding hearings are to be limited to matters which are relevant to the welfare of the children, but Courts should be wary of restricting allegations where coercive and controlling behaviour is being alleged to avoid distorting a cumulative picture. In many cases this may well involve exploring the history of a relationship which would otherwise be irrelevant to the children.

In *F v M* the Court welcomed the use of an umbrella schedule approach – pleading by way of examples under headings of behaviour – but at the same time allegations plainly must be properly particularised in order to be responded to. In reality, it is challenging for a Respondent to tackle allegations that they are e.g. holistically financially controlling and are likely to need to tackle the factual basis of examples provided.

In the interim practitioners seeking to draft allegations of this nature need to be creative and consider carefully the best way to present their factual matrix. Responding parties and the Courts should be alerted to the overarching themes of allegations at the earliest possible stage.

One year on from *Re H-N*, the problem the courts – and practitioners- continue to grapple with is that by its very nature, coercive and controlling behaviour may well be comprised of a number of fairly innocuous-seeming incidents. There is no simple way to distinguish this form of abuse from a dysfunctional but non-abusive relationship.

**Rebecca Thomas** has a growing practice in private children and domestic abuse proceedings and welcomes instructions in family public law cases. Rebecca has been instructed in a variety of family matters, including occupation orders and non-molestation orders. She has experience acting for both applicants and respondents in child arrangement order proceedings. Rebecca also prosecutes and defends in a wide range of criminal cases.

## References

[1] The Family Court and Covid 19: The Road Ahead