

Charlie Barrass-Evans has reviewed the recent Court of Appeal judgment in the case of Re H-N and Others in respect of allegations of coercive and controlling behaviour.

The Court of Appeal, which included the President of the Family Division, was concerned with a number of appeals from private child cases, all of which involved allegations of domestic abuse.

The decision comes at a time when the Domestic Abuse Bill is currently before parliament, and whilst the recommendations of the Harm Panel and the postscript comments of Hayden J in *F v M* [2021] EWFC 4 are fresh in the memories of family practitioners. In *F v M*, Hayden J stressed, in cases of alleged coercive and controlling behaviour, the importance of evaluating ‘individual incidents in the wider forensic landscape’ [102] and that a ‘tight, overly formulaic analysis may ultimately obfuscate rather than illuminate the behaviour’ [108]. He emphasised the significance of the wider context of behaviours, which must be appreciated when considering allegations of coercive control, rather than single acts.

For those reasons, he saw Scott Schedules in such cases as inappropriate, describing them as having ‘such severe limitations in this particular sphere as to render them both ineffective and frequently unsuitable... I would... question whether they are a useful tool more generally in factual disputes in family law cases’. He could not ‘discount the possibility that there will be cases when they have real forensic utility’ and therefore left their suitability as a matter for individual judge to decide, ‘unless, of course, the Court of Appeal signals a change of approach’.

Many saw *Re H-N* as an opportunity for exactly that, and the Court of Appeal were asked to provide guidance on PD12J and the court’s approach in cases of alleged domestic abuse.

The Court of Appeal were of the view that PD12J remains fit for purpose, but that the difficulty lies in its interpretation and implementation [29], particularly in cases involving alleged patterns of behaviour. The court gave important guidance on the following points:

- **When a Finding of Fact Hearing is appropriate**

The Court [37] set out a number of well-established considerations for whether a FFH is appropriate. They stressed the importance of considering 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). The court reminds us that the purpose of a FFH is to provide a basis for the assessment of risk and therefore the impact of the alleged abuse on the child(ren). Whether a FFH is ‘necessary’ will depend on whether there is other evidence which provides a sufficient basis for the assessment of risk, and on the relevance of the allegations is proven.

- **Whether and how Scott Schedules should be utilised**

The court saw it as ‘striking’ that there was virtual unanimity in the submissions heard that Scott Schedules’ utility has declined to the extent that they are often a hindrance rather than an aid [43]. The Court agreed with submissions that Scott Schedules fail to identify the wider context, including patterns of coercive and controlling behaviour: they endorsed the recommendations in the recent Harm Report and Hayden J’s postscript in *F v M*. The time to move away from their use had ‘undoubtedly’ come [49]. They stressed

that ‘serious thought’ is needed to develop a different way of summarising and organising the matters that are to be tried at a FFH ‘so that the case that a respondent has to meet is clearly spelled out, but the process of organisation and summary does not so distort the focus of the court proceedings that the question of whether there has been a pattern of behaviour or a course of abusive conduct is not before the court when it should be’ [46].

The Court heard submissions on the possible alternative approaches to allegations, including a ‘threshold’ type document, formal pleadings by way of particulars of claim, and a narrative statement in a prescribed form [48]. Ultimately it would not be appropriate for the court to do any more than setting out the options available, and it would be (for example) for the Harm Panel and Private Law Working Group to recommend changes to the FPRs or the issuing of guidance through a new PD [49].

- **How allegations of controlling and coercive behaviour should be approached**

The court agreed with submissions that the overwhelming majority of domestic abuse is underpinned by coercive control, and therefore it is the overarching issue that ought to be tried first. The court stated that whether the evidence establishes an abusive pattern or coercive/controlling behaviour is likely to be the ‘primary issue’ in many abuse allegation cases, irrespective of whether there are more specific incidents relied upon [51], and it may be that where the focus of the court is on whether there is such a pattern of behaviour, it will cease to be necessary to determine a range of subsidiary date-specific factual allegations [56]. Where a FFH is necessary as a result of an allegation of an abusive pattern of behaviour, that assertion should be the primary issue for determination. Other more specific factual allegations should be selected for trial because of their probative value in relation to the alleged pattern of behaviour, and not otherwise, unless the specific alleged incident is so serious that it justifies determination irrespective of any alleged pattern (the court cited the specific example of allegations of rape) [59].

The difficulty, according to the Court of Appeal, is with ensuring that family proceedings – in a time when the family justice system is already overborne with work, partly due to the COVID-19 pandemic – are not delayed further due to an increase in the scale or length of proceedings as a result, which would be contrary to the ‘very rights and needs of the children and parents that the jurisdiction exists to meet’ [55]. Once more, it would be for others to recommend amendments and guidance, but the court provided ‘pointers’ which focused on the relevance and necessity of a FFH, and suggested that in every case in which domestic abuse is alleged, both parents should be asked to describe in short terms (in a statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other [58].

- **The relevance of Criminal Law concepts in Family cases**

The court noted that it would be wrong for the family court to be drawn into an analysis of factual evidence based on criminal law principles and concepts: 'Family courts should avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or not proved... The Family Court may well make a finding as to what injury was caused, but need not spend time analysing whether in a criminal case the charge would allege actual bodily harm or grievous bodily harm' [72].