Controlling and coercive behaviour: looking beyond the label

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Preparing cases where there are allegations of controlling and coercive behaviour takes time, resources, and considerable care

Anecdotally, it seems allegations of controlling and coercive behaviour feature in some degree in the vast majority of private children cases that come before the Family Court. The label "controlling and coercive behaviour" has been a useful tool in encouraging recognition of this sort of abuse, which frankly was around for a very long time before we developed the language to identify it. However, it is very important that the harm caused by such behaviour is not lost or obscured in the generalities of the label we now use to describe it. Of course some abusive behaviour appears in virtually all cases of this nature (like verbal abuse and insults), but much of it is often specific to the particular relationship at hand and the perpetrator's idea of what is likely to be most effective in their attempts to harm, punish or frighten their victim, or otherwise make them subordinate or dependent: it is unique to them. The well-known decision of Hayden J in *F v M* [2021] EWHC 4 contains a particularly compelling example of this point, and he recounts in his judgment how the mother described discovering she was pregnant and being made by the father to immediately call her own mother and forced to tell her. Hayden J described this incident thus at para 49 of his judgment:

> "I have highlighted the above passage because, as I have foreshadowed, it illustrates how something which, on the face of it, may appear relatively innocuous or natural such as a telephone call made to a mother by a daughter who had just discovered she is pregnant is, in context, a brutal act of mental and emotional cruelty to both the women concerned. Forcing M to telephone her mother before she had even a moment to absorb the news herself was intended to cause pain and it did so. Neither will ever forget the pain of that telephone call. In their evidence both women made reference to it in visceral language."

Controlling and coercive behaviour is as unique to the victim you are dealing with as their thumbprint, and it is vital to keep that in the forefront of your mind when preparing their case.

Step 1: identify the behaviour

It is quite common for victims of controlling and coercive behaviour, especially in the immediate aftermath of their separation from the perpetrator, to struggle to identify or describe their experiences. Per Cobb J in *Re B-B (Domestic abuse: Fact-finding)* [2022] EWHC 108 (Fam) at [§6]:

> "An abusive relationship is invariably a complex one in which the abused partner often becomes caught up in the whorl of abuse, losing objective sense of what was/is acceptable and unacceptable in a relationship. Like many abused partners, the mother in this case became immunised to the emotional volatility of the damaging relationship which she saw as normal and acceptable; like many abused partners, she clung to what she knew."

Where to start? At the beginning, is probably the obvious place, but even if you know where you are in time it is still often very difficult to extract from a client an account of what they have experienced. Often, even trying to identify "the beginning" in controlling and coercive relationships is a thankless task. There are, however, some useful tools which will assist in preparing Forms C1A and statements that act as either a prompt for clients and an *aide-memoire* for legal representatives. Some examples include the DASH questionnaire, Cafcass's "Assessment of Coercive Control" and the CPS's Guidance on controlling and coercive behaviour (see 3.2 "Relevant Behaviours") – all of which can be found with a quick Google search. They work well to provideprompts and starting points for discussion, but

they are not the complete answer, and it would be wrong to only focus on those things set out in these general guides at the expense of having a good and thorough understanding of the particular person you are dealing with, and their own unique experiences and traits. You need to be able to properly understand the reality of their lived experience.

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Step 2: marshal the evidence

There are the obvious sources of evidence, many of which are referred to in PD12J or are otherwise very familiar to those working in the Family Court: police and local authority disclosure if there has been involvement with one or both parties with either of those agencies. GP or other medical records, if your client spoke to their doctor about their experiences (or perhaps that they were prevented from doing so), and so on. There may be some other source of evidence relevant to the experiences your client has had, and applications for disclosure and inspection are an often underused tool in the armoury of the Family Court (see Part 21 of the FPR 2021, and paragraphs 78 onwards of *R v Secretary of State for the Home Department (Disclosure of asylum documents)* [2019] EWHC 3147 (Fam), which is a case decided in the context of an application to see the material in an asylum file, but of wider application).

Of course most couples these days are able to evidence their relationships through messages exchanged with each other and third parties. These provide a rich source of evidence, but it can be quite easy to cherry pick and construct a narrative based on messages exchanged on Monday, Tuesday and Wednesday, whilst omitting those exchanged on Sunday and Thursday. Context is everything, and I suspect many would feel squeamish about their private messages being exhibited to witness statements for lots of strangers to see, and that many more would say that what they say via text (or in birthday cards, or Facebook posts, or on Twitter) is not truly reflective of who they are as a person, or what they experienced at the time.

It is important to step outside the immediacy of what was happening as between the parties and cast the net wider. Think about what their friends, relatives and colleagues were doing too. Did your client's mother speak to her sister about her concerns about the relationship? Contemporaneous messages exchanged by third parties can act as a springboard for reflection, as well as assisting the court in anchoring what was happening in the relationship at different moments in time and registering the concern of those who bore witness to the relationship.

Finally, it is often extraordinarily helpful to take a step out of the present relationship and consider whether this is the first and only time someone has made a complaint about the alleged perpetrator's behaviour. Have they behaved abusively in previous relationships, or indeed in subsequent ones? This Court of Appeal decision is a very useful tool and well worth keeping at the top of your list of go-to cases: *Re R-P (Children) (Domestic abuse: Similar fact evidence)* [2020] EWCA Civ 1088.

Step 3: construct the narrative

Once you have, in effect, all of your cards turned face up on the table, you can begin to start identifying patterns of behaviour and clustering examples into recognisable categories of abuse. This is a crucial part of the task, because you are not asking the court to look at individual acts, but to understand and find that these pieces fit together to create an overarching pattern of controlling and coercive behaviour and that there was a dynamic of abuse within the relationship.

Chronologies are a simple and effective way of taking a step back and piecing together exactly what was happening around the same time, not just between the parties, but everywhere else too. It is often the case that seemingly innocuous or random events take on a greater significance when placed side-by-side.

Step 4: demonstrate why it is relevant

Having done all of that, the final and crucial step is draw a *causal link* between the allegations made and the resultant decisions the court is required to make concerning the parties' children. *Re A* [2015] EWFC 11 remains (in my view) the best expression of the fundamental principle that you must demonstrate *why* the facts you assert justify the conclusion you are asking the court to reach – see paragraph 12. In short: you need to be able to show why it is "relevant".

In *Re H-N* the Court of Appeal seemed to go beyond the binary of supervised/unsupervised and daytime/overnight when considering relevance by placing it in the context of the harm experienced by the child, and its impact on the abused parent:

> "31. […] It follows that the harm to a child in an abusive household is not limited to cases of 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:
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> i) Is directed against, or witnessed by, the child;
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> 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.

[…]

52. […] 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."

The Court of Appeal's recent decision in *Re K* [2022] EWCA Civ 468, however, appears to take a more restrictive view, limiting "relevance" to the nuts and bolts of the specific type of child arrangements orders the court will be invited to make in due course:

"65. A fact-finding hearing is not free-standing litigation. It always takes place within proceedings to protect a child from abuse or regarding the child's future welfare. It is not to be allowed to become an opportunity for the parties to air their grievances. Nor is it a chance for parents to seek the court's validation of their perception of what went wrong in their relationship. If fact-finding is to be justified in the first place or continued thereafter, the court must be able to identify how any alleged abusive behaviour is, or may be, relevant to the determination of the issues between the parties as to the future arrangements for the children.

66. At the risk of repeating what has been said at [37] in *Re H-N* and at [41] above, the main things that the court should consider in deciding whether to order a fact-finding hearing are: (a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of the child arrangements order, (b) that the purpose of fact-finding is to allow assessment of the risk to the child and the impact of any abuse on the child, (c) whether fact-finding is necessary or whether other evidence suffices, and (d) whether fact-finding is proportionate."

The court's powers when seised with private law applications are very limited, but I would argue that an understanding of the parties' relationship and, particularly, whether or not there was a dynamic of abuse and a pattern of controlling and coercive behaviour either during that relationship or post-separation is crucial to the exercise of the court's discretion under the Welfare Checklist, and not just under s1(3)(e) harm. At the very least, it goes to the child's needs (s1(3)(b)), the likely effect of them of any change in circumstances (s1(3)(c)), and the capability of each parent in meeting their needs (s1(3)(f)). It is not just relevant to the type of contact (by which I mean the supervised/unsupervised and daytime/overnight binaries), but the quantum and frequency of time spent with the abusive parent, and the court's management of the parental relationship going forward.

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What next?

Preparing cases where there are allegations of this nature takes time and significant emotional energy (and not just from the client). It is unapologetically intrusive and requires clients to open up to virtual strangers about some of the most intimate parts of their lives, and that's even before they are required to give evidence before a judge or magistrates that they may never have seen before. It is made far more difficult for those clients who do not speak English as a first language, or even at all.

However, in order to properly explore and examine whether there was a dynamic of abuse in a relationship, the court needs a full account of that relationship and the time to wade through the contemporaneous material relied upon in support.

Time and resource are two things that the Family Court is (famously) particularly low on, and this article does not even begin to suggest how to approach these issues where one or both of the parties are litigants-in-person and have to navigate this all on their own. Although I do not have the solution (I might if I were given a blank cheque), I am sure that it requires more time to adjudicate these cases fairly, rather than fewer attempts to adjudicate allegations of domestic abuse full-stop.

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