In Focus

Inadvertently disruptive? Domestic abuse and the Family Court following the Court of Appeal's decisions in *Re H-N* and *K v K*

Chris Barnes, *4PB*
Charlotte Baker, *4PB*

The underlying theme of this article is developed from an article authored by Judith Masson, Professor of Socio-Legal Studies at the University of Bristol, published in the *Child and Family Law Quarterly* in 2017, entitled 'Disruptive Judgments'. Prof Masson's focus was on the Court of Appeal's decision in *Re B-S (Children)* [2013] EWCA Civ 1146, an appeal of a decision refusing leave to oppose the making of an adoption order, which was ultimately dismissed. *Re B-S* will be familiar to most family practitioners in practice at that time, including those who did not specialise in public children law.

The judgment in *Re B-S* followed swiftly on the heels of *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 2 FLR 1075 in the Supreme Court, and is, on Prof Masson's analysis, a paradigm example of a 'disruptive judgment', a concept introduced and defined by Prof Masson as follows:

> 'Disruptive judgments are "game-changing"; they interrupt existing expectations and practice, disorient practitioners and result in decisions or outcomes that are not predicted. Nevertheless, they may be welcomed – the decision in *Re B-S* has the support of practitioners and academics who favour the restriction of adoption. "Disruptive" is a contemporary not an historic assessment, based on the effect of a decision on day-to-day practice, even though this may be short-lived. Disruptive judgments may become landmarks but lack a foundation in law. They have disruptive impact in the real world not just the justice system, changing many future actions and decisions. Disruption is a matter of scale. The breadth of the area affected, the frequency with which the issue arises or the sheer volume of work impacted defines such decisions. […] Whilst judges deciding landmark cases may be unaware of this, those giving disruptive judgments cannot be. The judge wants to change the way things are done and constructs the judgment to maximise the chances that this will happen. Indeed, it is argued below that delivering a disruptive judgment is an intentional act.'

Prof Masson identified the following factors in *Re B-S* in support of her characterisation of it as an *intentionally* disruptive judgment (our emphasis):

(a) The constitution of the Court of Appeal magnified its importance (containing the Master of the Rolls, the President of the Family Division, and the Head of International Family Justice).

(b) The case was not an especially suitable vehicle – it concerned leave to oppose the making of an adoption order rather than substantive public law proceedings – and thus the judgment could not provide examples of what was said to be 'wrong' about the approach at the time.

(c) To have 'a marked effect or influence on everyday practice' the decision must be widely disseminated. In the case of *Re B-S* this was achieved by the President's Office emailing the judgment to all

Designated Family Judges[1] and featuring in the following edition of View from the President's Chambers.[2]

(d) The appeal in question was in fact dismissed, with each ground 'summarily rejected', and the judgment did not (at least to any significant degree) change the law as applicable to applications for leave to oppose adoption orders.

(e) The central comments relating to care and placement order applications and the way in which decisions regarding adoption were made and supported, were strictly obiter.

(f) The language used was particularly strong and excoriating towards local authorities, social workers, and judges:

(i) When setting the context of the appeal, the court observed 'lurking', 'serious concerns and misgivings' about the Family Court's approach to adoption orders, and aligned itself with them: 'We – all of us – share those concerns';

(ii) Practice was categorised as 'sloppy' and 'unacceptable'; and

(iii) The Court of Appeal expressed the firm view that it was 'time to call a halt'.

Prof Masson also, notably for our purposes in reflecting on *Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448, makes a passing reference to another Court of Appeal intervention designed to effect change:

> 'Through this process Lord Justice Wall gathered a group of contact cases, *Re L (A Child) (Contact: Domestic Violence)*, so that the Court of Appeal could issue a judgment enshrining guidance based on the advice of a committee he had chaired. Despite careful preparation, which included obtaining expert evidence, this decision has had little effect.'

The practical consequences of *Re B-S* were significant and its impact was felt across the family justice system. As well as becoming a frequently cited shorthand in public law proceedings, it has been linked to the significant reduction in the number of adoptions, and an increase in both appeals[3] and applications for leave to oppose adoption orders. Local authority and Family Court practice altered significantly in the years that followed the decision and has remained changed since.

These changes were not the consequence of new or improved statutes or rules or practice directions, but as a direct result of obiter comments which had been carefully crafted by the Court of Appeal, and principally the former President, with a view to effecting change. The judgment was therefore deliberately, and successfully, disruptive.

Re H-N

Those involved in *Re H-N* would be forgiven for expecting *Re H-N* to do, for domestic abuse, what *Re B-S* had done for adoption. The way it was set up certainly suggested that was the Court of Appeal's intention: like *Re B-S*, the appeal was managed and heard by a particularly authoritative constitution of the Court of Appeal: the President of the Family Division, the longest serving Family Law specialist in the Court of Appeal, and the Vice-President of the Court of Appeal Criminal Division (the latter a recognition of the issues raised regarding the imposition of criminal

1 The lead family judge for each of the regions of the Family Court in England and Wales.
2 *View from the President's Chambers*, No 7 (October 2013) available at: www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/view-7-changing-cultures.pdf (last visited October 2022).
3 Interestingly for present purposes, Prof Masson draws attention to a potential link between the subsequent increase in *public* law appeals brought in the Court of Appeal and the later decision to redirect *private* law appeals to the High Court.

concepts of sexual assault in Family Court decisions that arose in the appeals). Whereas *Re B-S* had considered a single appeal with no interventions from elsewhere, *Re H-N* comprised of four, separate appeals (much like *Re L* in 2000), all of which were much more closely connected to the subject matter of the issue under consideration than *Re B-S* was. In addition to the four appellants and respondents (all of whom were represented by leading and junior counsel) the Court of Appeal in *Re H-N* welcomed interventions from Cafcass, a coalition of women's groups (Rights of Women, Rape Crisis and both the English and Welsh branches of Women's Aid), Families Need Fathers and the Association of Lawyers for Children. A sure sign of the magnitude of the issues of public importance raised.

Many expected an indictment of the Family Court's approach to domestic abuse in private law proceedings and a call for change, but that was not to be.

The judgment, handed down on 30 March 2021, struck a markedly different tone to that of *Re B-S*. It was far more conciliatory and less critical and appeared in large part an attempt to reassure all that the Family Court was 'fit for purpose' in all respects. See, for instance, the following comments:

(a) The central conclusion of the court that '[w]e are therefore of the view that PD 12J is and remains, fit for the purpose for which it was designed';

(b) As to the approach of judges in the Family Court '[w]e are confident that the modern approach that we have described is already well understood and has become embedded through training and experience in the practice of the vast majority of judges and magistrates sitting in the Family Court';

(c) Without allowing 'any room for complacency' the court noted that '[t]he combination of the detailed guidance in PD 12J together with the training in place for those judges who try these cases means that despite the high volume of cases, the number of appeals in private law children cases is small';

(d) The burden on Family Court judges ('the Family Justice System is currently overborne with work (a situation which has been exacerbated as a result of the Covid-19 pandemic)') was explicitly recognised; and

(e) The court offered 'pointers' rather than remonstrating with more junior tiers of the Family Court.

There was no snappy dicta in *Re H-N*, nor any pithy soundbites (*obiter* or otherwise). The court itself emphasised that '[n]one of the four appeal decisions purports to establish 'new law'. They therefore do not establish any legally binding precedent'. Indeed, the judgment as a whole does not appear to have set out to be quotable, and to some extent, in the immediate aftermath of it being handed down it may well have appeared to those engaged in the Family Justice system to be underwhelming, especially in light of the conclusions of the Ministry of Justice's 'Harm' report, which had been published the summer before.

Damp squib, or slow burn?

Whilst the initial response to *Re H-N* might have been to wonder what real difference it was capable of making, in the 12 months or so immediately after its publication the Family Court was awash with decisions on domestic abuse – from substantive, first instance fact-finding hearings being reported at all levels of the Family Court, to a decent number of appeals and complex case management decisions, most of which have emanated from the High Court (the route of appeal for all private law cases, save for second appeals). What follows is a short survey of some of the more significant or stand-out decisions between March 2021 and April 2022:

(a) *AA v BB* [2021] EWHC 1822 (Fam) was the first appeal heard after *Re H-N* had been handed down, albeit permission to appeal had been given shortly before its publication. Heard in June 2021,

AA v BB was an appeal against case management decisions which had served to exclude material that was said to go beyond the allegations pleaded in a limited Scott Schedule, as well as corroborative and 'similar in fact' material. Judd J allowed the appeal, permitted the mother to file a narrative statement, and remitted the issues regarding the remainder of the evidence to a pre-trial review. This decision represents an early indication of the wholesale move from an incident-based focus in domestic abuse; to the importance of analysing patterns of abusive behaviour, started by Hayden J in *F v M* [2021] EWFC 4 shortly before *Re H-N*, and endorsed by the Court of Appeal in its judgment at para 29.

(b) In July 2021, Lieven J determined an application made by two journalists to publish, on a non-anonymised basis, the fact-finding decision concerning former MP Andrew Griffiths, and his ex-wife and current MP for Buxton and Uttoxeter: Kate Kniveton.[4] Although the application was allowed on 30 July 2021, neither that decision nor the underlying fact-finding judgment were published until December 2021 as a result of the father's appeal, which was ultimately refused.[5] Interestingly for present purposes, one of the bases upon which publication was both sought and allowed was as a consequence of the public interest of the Family Court being seen to deal 'with great care and sensitivity' with allegations of domestic abuse, as was evident in that case. Lieven J observed that it was 'exceedingly rare' for fact-finding decisions of this nature to be published, and that there was a real benefit in the judgment being brought to the public's attention, noting the well recorded concern that victims of domestic abuse are often unwilling to come forward (see para 50).

(c) The parents in that application were subject to a further tranche of litigation as a result of the mother's appeal of a decision on interim child arrangements and orders requiring her to pay the costs of supervised in October 2021. The case came before Arbuthnot J[6] who highlighted the framework for decisions on interim child arrangements in cases where PD 12J is engaged, and determined:

(i) The terms of s 11 of the Children Act 1989 are sufficiently broad to enable a court to make an order that a party pay the costs of a contact centre;

(ii) Findings are relevant to the consideration of establishing, or continuing, interim contact; and

(iii) There was a 'very strong presumption' against a victim of domestic abuse paying for the contact of their child with the abuser and set out a list of matters which might require consideration if 'wholly exceptionally' the court is to consider making such an order.

(d) Only 10-days before the fact-finding judgment in Griffiths was published, along with the decisions on publication itself, was the decision of Judd J in *M (A Child)* [2021] EWHC 3225 (Fam). This sparked a focus on the critical importance of the mandatory obligation upon the Court to consider and adopt special measures pursuant to r 3A and PD 3AA, even when faced with a legally represented vulnerable party.

4 *Tickle v Griffiths* [2021] EWHC 3365 (Fam) (www.judiciary.uk/wp-content/uploads/2022/07/Griffiths-v-Tickle-judgment-high-court-300721.pdf).
5 *Griffiths v Tickle and Others* [2021] EWCA Civ 1882.
6 *Griffiths v Griffiths (Guidance on Contact Costs)* [2022] EWHC 113 (Fam).

It also drew attention to the impact of alleged abuse on vulnerability and on a vulnerable party's evidence, and the consequences of failing to consider the overall pattern of alleged abuse versus compartmentalising it. The appeal was allowed and swiftly followed by a number of similar appeals in both the High Court and the Family Court, which in turn have generated a yet greater focus on vulnerability and special measures, see for instance, *GK v PR* [2021] EWFC 106 reported later that month.

(e) Following the appeal, the case of *Re M* remained in the High Court and as part of the subsequent case management process,[7] Knowles J – now the lead judge for domestic abuse – provided guidance on the treatment of intimate images and discussed the limitations on cases concerning past sexual history (noting the observation at para 93 that 'there may be some limited circumstances in other private law children proceedings in which previous sexual history may be an issue of relevance'). The contrast between the arrangements for the original fact-finding hearing and the special measures now allowed to the mother, crafted as a consequence of a psychological assessment which diagnosed the mother with complex PTSD, could not have been starker.

(f) In January 2022, Cobb J handed down his decision in *Re B-B (Domestic Abuse: Fact-Finding)* [2022] EWHC 108 (Fam), which was the rehearing of one of the four appeals which comprised *Re H-N*. Cobb J (the former lead judge for private law) provided a comprehensive example of the 'modern' approach to domestic abuse that the Court of Appeal was confident was already well understood in the Family Court when disposing of *Re H-N*. Of particular note is the following:

(i) The approach of clustering the hearing of allegations and evidence to consider the cumulative effect of alleged abusive conduct;

(ii) Findings being made notwithstanding significant issues weighing against the mother, and a broad understanding that there is no 'perfect victim', or indeed 'perfect witness';

(iii) The acceptance of 'gaslighting' as a means of abuse;

(iv) Physically sexually abusive conduct; and

(v) The recognition of the importance of a 'power imbalance' in intimate relationships and the normalisation of abuse.

(g) Finally then, for present purposes, in March 2022, Morgan J[8] allowed an appeal against a fact-finding hearing in which the trial judge had prevented the mother from relying on allegations which pre-dated previous proceedings which concluded in 2017. Morgan J determined that in precluding exploration of the issues which preceded the 2017 order, the Court had denied itself a full and informed understanding of the circumstances in which it would, in welfare terms, go onto assess risk and make decisions for the child. PD 12J had not been properly applied.

Overall then, the year that followed *Re H-N* saw a significant strengthening of the Family Court's approach to the management of allegations of domestic abuse and a disruption of the practice that had gone before it. The short survey of decisions set out above reflect an innovative, thoughtful and nuanced approach to both the process

7 *M (A Child: Private Law Children Proceedings: Case Management: Intimate Images)* [2022] EWHC 986 (Fam).
8 Unreported, but summary available at [2022] WLUK 377.

and substance of domestic abuse allegations post *Re H-N*, which was welcomed by many.

Whether or not the Court of Appeal had intended to effect change; it was happening.

Attempts to douse the flames

The cases set out above were all determined before the Court of Appeal handed down its judgment in *K v K* [2022] EWCA Civ 468 on 8 April 2022. Featuring both the President of the Family Division and Lady Justice King, but with the Master of the Rolls replacing Lord Justice Holroyde, *K v K* was an overt attempt by the Court of Appeal to 'provide guidance' following *Re H-N*, and to correct the 'misunderstanding' that they considered had developed post *Re H-N*. Per para 65:

> 'It seems that a misunderstanding of the court's role has developed. There is a perception that the Court of Appeal has somehow made it a requirement that in every case, in which allegations of domestic abuse are made, it is incumbent upon the court to undertake fact-finding, involving a detailed analysis of each specific allegation made. That is not the case. As *Re H-N* explained and we reiterate here, the duty on the court is limited to determining only those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, in what terms.'

The Court of Appeal was keen to emphasise that its decision was not a departure from *Re H-N*, but it was certainly an attempt to limit what it viewed as a proliferation of fact-finding hearings thereafter.

The judgment reinforces the impression of *Re H-N* as an inadvertently, rather than deliberately, disruptive judgment and the case itself – a second appeal of a fact-finding hearing convened prior to *Re H-N* – has the sense of having been picked out as a useful vehicle for attempting to limit the (perhaps unintended) consequences of *Re H-N*.

K v K concerned allegations of domestic abuse (including rape) which pre-dated periods of post-separation, unsupervised contact, although it was common ground that less than 6-months post-separation, the eldest daughter of the parents had refused to see her father anymore, and it appears there had been referrals to statutory agencies in the period prior to the father's application to the Family Court. In his application, the father alleged that the mother had alienated the children from him and sought to reinstate weekend contact and half the holidays. In response, the mother made allegations of domestic abuse, but did not oppose unsupervised contact by way of her Form C1A, although it appears she did seek to limit the arrangements to daytime visits only.

Much of the judgment in *K v K* focusses on the importance of MIAMs and the consideration of non-court dispute resolution at an early stage in proceedings. Whilst mediation occupies a valuable space in the resolution of many private law disputes which would otherwise consume scarce resources in the Family Court, it will not always be appropriate (and indeed, it will sometimes be manifestly inappropriate) for mediation to be employed as a means of resolving a dispute where one parent alleges they are the victim of domestic abuse and the other alleges that person is an alienator. Skilled mediators may be able to break the deadlock between two parents, but where one is intent on alleging parental alienation and the other says they are the victim of rape and controlling behaviour, it does not appear likely that mediation is the venue with which matters concerning the welfare of their children will be resolved.

In *K v K's* focus on the 'relevance' of allegations of domestic abuse as limited to the 'nuts and bolts' of child arrangements, it is certainly arguable that it departs from *Re H-N* (see para 63 onwards).

Conspicuously absent from the passages described by the Court of Appeal in *K v K* as those from *Re H-N* which are 'most crucial' are paras 31 and 51–53, all of which combine together to indicate that the

'relevance' of domestic abuse (in PD 12J terms) may well go beyond the binaries of unsupervised and overnight contact, and serves to place domestic abuse within the wider context of the harm it causes as well as emphasising the importance of proper risk assessment. The Court of Appeal in *Re H-N* sought to depart from the 'old-fashioned' approach that just because a relationship is over there is no risk of harm to an abused parent, and in doing so identified the potential for domestic abuse perpetrated during a relationship to continue in a 'more subtle manner' post-separation, so as to suborn the independence of the victim and impact upon the welfare of the subject children.

Those paragraphs are set out in full below, with our added emphasis:

> '31. The circumstances encompassed by the definition of "domestic abuse" in PD12J fully recognise that coercive and/or controlling behaviour by one party may cause serious emotional and psychological harm to the other members of the family unit, whether or not there has been any actual episode of violence or sexual abuse. In short, 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 (see "Scott Schedules" at paragraph 42 -50). 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:*
>
> *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.*
>
> […]
>
> 51. Ms Mills QC on behalf of the second interveners, ("Women's Aid", "Rights for Women", "Rape Crisis England and Wales" and "Welsh Women's Aid"), submitted that "the overwhelming majority of domestic abuse (particularly abuse perpetrated by men against women) is underpinned by coercive control and it is the overarching issue that ought to be tried first by the court." We agree and it follows that consideration of whether the evidence establishes an abusive pattern of coercive and/or controlling behaviour is likely to be the primary question in many cases where there is an allegation of domestic abuse, irrespective of whether there are other more specific factual allegations to be determined. *The principal relevance of conducting a fact-finding hearing and in establishing whether there is, or has been, such a pattern of behaviour, is because of the impact that such a finding may have on the assessment of any risk involved in continuing contact.*
>
> 52. Professionals would now, rightly, regard as "old fashioned" the approach of the DVMPA 1976 where protective measures were only triggered in the event of "violence" or "actual bodily harm". In like manner, 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.*
>
> 53. We are confident that the modern approach that we have described is already well understood and has become embedded through training and experience in the practice of the vast majority of judges and magistrates sitting in the Family Court. *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.'*

Viewing domestic abuse as 'relevant' to private law proceedings beyond the binaries of unsupervised and overnight contact, which may themselves have been fixed as a result of abusive behaviour, is consistent with the new Domestic Abuse Act 2021 which – per s 3(1) – defines a child who is related to a victim or perpetrator of domestic abuse as a victim of domestic abuse themselves.

Indeed, many would argue that an understanding of whether or not a relationship was and remains characterised by domestic abuse is likely to be relevant to the Court's discretion under the Welfare Checklist, including the potential or reality of harm suffered, but also the child's needs, the likely effect on them of any change in circumstances, and the capability of each parent in meeting the child's needs. We would argue that it is certainly not something that should be artificially guillotined from the Court's consideration simply because the principle of unsupervised contact itself is unopposed, and we note that although the Court of Appeal in *Re B (A Child)* [2022] EWCA Civ 1439 did not in the end grapple with this point, permission to appeal was granted in part on the basis that the treatment of allegations of domestic abuse in cases where there is no issue about a child spending substantial time with both parents raises an important point of principle and practice.

Some tentative conclusions

It remains to be seen what impact *K v K* will have both at first instance and in the private law appeals that come before the High Court. It will perhaps focus a greater degree of scrutiny on the 'relevance' of allegations made. At first blush, it seems unlikely that it will serve to meaningfully stymie the progress that has been made since *Re H-N*, especially in light of the increased interest and scrutiny of the Family Court's treatment of domestic abuse from the media, and the public at large.

K v K aside, over the next few years we anticipate more of the following:

(a) An increase in creative case management in the Family Court, focussing on casting a wide net to establish patterns of behaviour;

(b) Increased polarisation, where allegations of domestic abuse are met with counter-allegations of parental alienation, and are used themselves as a defence to such claims;

(c) More frequent applications for publication of non-anonymised judgments for those campaigners on issues of domestic abuse who have obtained a fact-finding judgment in their favour in the Family Court and who wish to tell their story;

(d) Attempts to grapple with the inevitable and significant difficulties caused by the uncertainty of what will replace the DAPP, which may well require the higher courts to consider and give guidance on how the welfare stage of private law proceedings is to be managed; and

(e) The prospect of applications for cases to be re-opened or re-heard, particularly those which were tried

> prior to the decision in *Re H-N*. The power to do so is potentially very broad and requires 'new evidence or information' which 'casts doubt on the accuracy of the original findings' and establishes 'solid grounds'. Historic judgments which are plainly deficient may be vulnerable, especially if they are to form the basis for welfare decisions in continuing or future proceedings.

If the period following the publication of *Re H-N* has seen substantial changes of practice in the Family Court, then that must cast doubt on the Court of Appeal's central conclusion that the system was functioning, and fit for purpose, as it stood previously. Whilst the decision in *Re H-N* may not have set out to be disruptive, its effects, albeit perhaps inadvertent, have been to highlight a need for a changed approach to domestic abuse, one which appears to be taking root with judges of the Family Court and the Family Division of the High Court.