

Domestic Abuse and the Family Court

The Rt. Hon. Sir Andrew McFarlane
President of the Family Division
and Head of Family Justice for England and Wales

I have now all but completed my tour round to each of the 52 DFJ ['designated family judge'] court centres in England and Wales. At the time of my visits over the past twelve months around 40% of these court centres have the benefit of a PSU, now 'Support Through Court', unit. I have no hesitation in reporting that there is a significant qualitative difference in the service offered to litigants in person between those centres that do have a unit and those that do not.

As is well known, the Family Courts are currently experiencing the highest recorded volume of private law cases and that very many of these now involve litigants in person. It is absolutely clear to me that the support and advice that is now available to the many litigants in person whose cases are heard at a court centre where there happens to be a Support Through Court unit is invaluable. Support Through Court currently cover 20 of the 52 DFJ court centres. It is my ambition to do all that I can to support 'Support Through Court' to expand the provision that it is able to offer so that, eventually, its services are available to every litigant in person in every court centre, should they wish to use them. It seems to me reasonable to invite each of the main private client Family Law firms and barristers' chambers to consider making a modest annual contribution to enable Support Through Court to achieve this goal and provide these extremely valuable facilities throughout England and Wales.

This conference focuses upon the conduct of private family law proceedings relating to children following the enactment of Legal Aid Sentencing and Punishment of Offenders Act 2012 ['LASPO'] by which legal aid was removed from all such cases, save for some proceedings in which an allegation of domestic abuse has been made. It is not my place, as a judge, to comment upon the policy drivers behind this legislation. We are currently in a period of pre-election purdah and it is therefore necessary to take particular care in this regard. I will therefore, if I may, leave any critique of the operation of LASPO to other speakers and have as the focus of my address a more general overview on the topic of domestic abuse allegations in family proceedings. I am grateful for the opportunity to do this and, in doing so, to address a wider audience at a time when there is a substantial level of Parliamentary and Press interest in the ability of the Family Court to deal appropriately with issues of domestic abuse.

Although I suspect the way that one person may behave towards another in the course of a close relationship may not have changed much, if at all, over the past fifty years or more, it is clear that society's understanding of the harmful nature of such behaviour has changed to a quite marked degree. That which we now, quite rightly, regard as 'domestic abuse' will undoubtedly have been taking place in plain sight forty or more years ago. But it was either not recognised as harmful to the adult victim or any children in the family in the way that is now fully accepted to be the case or, going back probably yet further in time, it was considered that what went on 'behind closed doors' in the course of a family relationship was a matter between the parties and not a proper concern of the state or the courts unless a criminal offence were to be committed.

I recall as a young barrister forty years ago regularly appearing on applications in the county court for 'a domestic violence' injunction under the Domestic Violence and Matrimonial Proceedings Act 1976. Here the key word which identified the court's approach was 'violence'. I hope not generalising in an unfair way, my recollection of these times was that the occurrence of a physical assault and any consequent injury was the court's sole focus. No physical assault; often no injunction. Physical assaults with only a minor injury, probably no injunction. Where the court was satisfied that the children were not in the room and did not directly see any assault, there was no concern about the impact on the children. A power of arrest, for example, could only be attached, under s 2, where the injunction sought to restrain 'violence' and the court was satisfied that there an occasion when 'actual bodily harm' had been caused.

Over a similar period, the understanding and acceptance of society and the relevant professionals has developed more generally with respect to the abuse of children. As it happens, this is a subject that I will address at greater length later this week in the first Butler-Sloss Lecture at Exeter University where my topic is 'If only we had known then what we know now'. To give you a snapshot of the point that I will make in that lecture, prior to 1970 society, and in particular the medical profession, did not accept and understand that some parents might physically injure their children. It was only in the 1970s that the phrase 'battered babies' came to be understood and accepted and it was only after that, a decade later in the 1980's, that the significant prevalence of sexual abuse was 'discovered'. Thereafter our understanding of emotional abuse, psychological abuse, factitious illness and other abusive circumstances followed.

A key watershed with respect to 'domestic violence', as it was then still called, came with the Court of Appeal decision in the case of *Re L and others (Contact: Domestic*

Violence) [2000] 2 FLR 334, a decision of the Court of Appeal presided over by the then President of the Family Division, Dame Elizabeth Butler-Sloss, sitting with Lord Justices Thorpe and Waller, which established authoritatively that which we all now take to be blindingly obvious, namely that children can be profoundly negatively affected, in short ‘emotionally abused’, by simply living in a household where domestic abuse takes place whether or not they have directly witnessed any particular incident of violence.

The court in *Re L*, with the benefit of advice in a joint report from two eminent child psychiatrists, Dr Glaser and Dr Sturge, held that there was a need for a change in the approach of family courts to issues of domestic violence. Dame Elizabeth [as she then was] said this:

‘The family judges and magistrates need to have a heightened awareness of the existence of and consequences (some long term) on children of exposure to domestic violence between their parents or other partners. There has, perhaps, been a tendency in the past for courts not to tackle allegations of violence and to leave them in the background on the premise that they were matters affecting the adults and not relevant to issues regarding the children. The general principle that contact with the non-resident parent is in the interests of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence has occurred. It may not necessarily be widely appreciated that violence to a partner involves a significant failure in parenting – failure to protect the child’s carer and failure to protect the child emotionally.’

In the ensuing two decades, up to the present day the understanding of professionals and the courts has developed further to a marked degree.

I am confident that every judge and every magistrate undertaking family law proceedings now fully understands that the emotional and psychological harm that may be inflicted by one adult in a close relationship upon the other and upon their children

can be of far greater significance than any particular physical injury that any of them might sustain on one occasion or another, and that this significant harm can occur even where there has been no incident of violence at all. Living in close family circumstances with an individual who exhibits domineering, coercive or bullying behaviour is a 24/7 experience. Even when things may be relatively quiet within the household, needing to tread on eggshells at every turn and living on tenterhooks lest there may be a further eruption must be and is enormously damaging. Those in such families are 'groomed' by the abusive member to keep quiet and endure their behaviour, rather than leave or complain to outsiders. At every turn, what I am describing is a wholly negative and most harmful environment in which to live.

Happily, not everyone, indeed, one hopes most people, will not have had direct experience of such behaviour. Although professionals and the courts now fully accept a wider and more sophisticated definition of domestic abuse than was the case a decade and more ago, that may not be the case in society at large.

Last month the then MP for Canterbury, Rosie Duffield, earned a standing ovation in the House of Commons after recounting the abuse that she was forced to endure from her fiancé. She described being subjected to a campaign of coercive control which became progressively psychologically abusive towards her. She said: 'Abuse isn't only about those noticeable, visible signs. Sometimes there are no bruises. Abuse is very often all about control and power.'

Rosie Duffield's address to the House of Commons was as brave as it was important. Those listening were given a first-hand account of circumstances that will be familiar to every family judge and magistrate in the country.

The fact that society in general may be a step or two behind the professionals who work in this field and the judges who try these cases, was, in part, demonstrated by the immediate impact that Ms Duffield's words had on those who heard her and the prominence that her account was, rightly, given in the press and media in the days that followed. One specific example of this that caught my ear occurred during a phone-in on the BBC Radio 2 Jeremy Vine show where caller after caller reported, with a seeming degree of surprise, that they too had experienced a non-violent but profoundly abusive relationship on a par with that described by Ms Duffield.

Ms Duffield's important speech and the significant reaction to it demonstrated to me that society as a whole still has a distance to travel in understanding and accepting the corrosive harm that can be done to individuals who find themselves drawn into a coercive controlling relationship. I am equally clear that our understanding of these matters today is no more than that; it is our current understanding. We are bound to learn more and gain further insight in the years to come, just as we have done in the forty years since my time in the county court applying for 'domestic violence' injunctions.

The Domestic Abuse Bill, which was on its journey through the stages of parliamentary scrutiny when the election was called, has attracted widespread cross-party support. The Bill contains a number of important provisions, not least crystallising in statute for the first time a broad definition of 'domestic abuse' in these terms:

'Behaviour is "abusive" if it consists of any of the following—

- (a) physical or sexual abuse;
- (b) violent or threatening behaviour;

- (c) controlling or coercive behaviour;
- (d) economic abuse (see subsection (4));
- (e) psychological, emotional or other abuse;

and it does not matter whether the behaviour consists of a single incident or a course of conduct.’

Twice, thus far, in this short address I have expressed full confidence that every judge and magistrate hearing family proceedings will already be applying this broad and sophisticated definition of domestic abuse. I can be confident to that degree for two basic reasons.

Firstly, the family judiciary has since 2008 been obliged to approach issues of domestic abuse in accordance with a Practice Direction [‘PD12J’] which was first issued in that year. The Practice Direction is kept under constant review and was updated in both 2014 and 2017. The definition of domestic abuse in PD12J is in these terms:

“domestic abuse” includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment’

Although the words are formulated in a different order, the definition of domestic abuse in the Domestic Abuse Bill precisely mirrors that which is already in use in the Family Courts in PD12J.

The terms of PD12J are currently under renewed review by the Private Law Working Group that was established at my invitation and by a MOJ Panel on domestic abuse. Both of the Working Group and the Panel are due to produce final reports around the turn of the year.

The second basic reason that leads me to express a high degree of confidence in the family judiciary's understanding of domestic abuse arises from the sheer volume of cases that are heard. This year the Family Court nationally is expected to sit for 91,000 sitting days. Whilst a significant proportion of the work undertaken will be public law proceedings, issued by local authorities, a good proportion of these, in common with private law proceedings, not infrequently include allegations of domestic abuse.

So far as private law applications between parents as to the arrangements for their children, in the year to end July 2019 the number of private law applications made to the Family Court in England and Wales was 120,433. What proportion of these cases will include allegations of domestic abuse?

In 2016 CAFCASS¹ in partnership with Women's Aid undertook research into the prevalence of domestic abuse allegations within proceedings concerning the welfare arrangements for children under Children Act 1989, s 8². This was a small-scale study and its result needs to be taken with caution, but the project identified that 62% of the cases included allegations of domestic abuse. Separate work by CAFCASS, looking at a broader data sweep suggests that a figure of around 60% may well be sound. This is by no means a precise measurement, and I do not put it forward as such. It may be

¹ Children and Family Court Advisory and Support Service

² <https://www.cafcass.gov.uk/2017/07/25/cafcass-womens-aid-collaborate-domestic-abuse-research/>

an underestimate or an overestimate, but even if it is an overestimate of the order of ten or fifteen per cent, even then the Family Court is dealing with a very large number of cases in which domestic abuse is a live issue. If the 60% proportion is about right, if this is applied to the current annual total of 120,000, this would suggest that some 72,000 private law cases per year include allegations of domestic abuse.

It therefore must follow both from the clear requirements of PD12J and the sheer volume of work that the judges and magistrates who hear these cases do so with their eyes wide open to the importance of the issue, the breadth of the definition and the need to determine whether the allegations are proved or not with an appropriate degree of time and care. To undertake that evaluative task is, of course, why the judge or the magistrates are in the room in the first place; it is what they spend much of their working day doing. They in the courtroom to judge, on the evidence and applying the civil standard of the balance of probabilities, whether the alleged abusive behaviour is proved and, if it is, then to undertake a risk assessment as to the consequent need for orders to protect the children and/or adults who have been or may be abused.

These are difficult cases. Often 'what goes on behind closed doors' does, indeed, go on behind closed doors. The court may be faced with the word of one adult party against the other. In that context, evidence from third party sources, for example the police, other agencies, family members or neighbours achieves importance. Garnering that material takes time, particularly where the parties are acting as litigants in person and the ensuing court hearing may be measured in days rather than hours.

Often allegations of domestic abuse will not be the only issues of concern in a case. Not infrequently, there may be cross allegations that the parent with the care of the child

has been alienating the child against the other parent. At the end of the process the judges and the magistrates will make their determination in accordance with the evidence and, so far as future arrangements are concerned, by affording the welfare of the children paramount consideration. In that regard, it is important to stress that a finding of some abusive behaviour, significant though that may be, does not, of itself, in every case determine whether the perpetrator should or should not have any further involvement in the life of his or her children.

In a recent blog, barrister Lucy Reed made the following observation which neatly summarises the context within which this work is undertaken³:

“Judges are not superhuman. Those who demand that they should magically find out the objective truth as they see it may be disappointed. They do their best on the information available – but real lives and relationships are messy and subjective, rarely reliably captured in objective contemporaneous records, and often reimagined or reinterpreted (for entirely understandable reasons) by those who have lived them.”

The detailed provisions in CA 1989, s 1 [s 1(2A), (2B), (6) + (7)] establish a default position which is that, unless there is some evidence to suggest that the involvement of a particular parent in their child’s life would put the child at risk of suffering harm whatever the form of involvement, there is a presumption that, unless the contrary is shown, involvement of that parent in the life of the child will further the child’s welfare.

³ <http://www.pinktape.co.uk/page/2/> - Why Procedural Rules are important: ‘Judges are not superhuman’

In undertaking an evaluation of whether the future behaviour of a parent who has been found to have been abusive in the past would put their child at risk of suffering harm, the stance of, and reaction of, that parent to the findings of abuse will be of particular importance.

In every case the court will strive to produce a bespoke outcome which best meets the welfare needs of the child or children. Given the very broad definition, a finding of 'domestic abuse' on its own will not determine the contact issue. As a very wise judge, Sir Alan Ward, observed in 1990 in every case 'there is a spectrum of abuse and an index of harm'. These are complicated and difficult cases. The burden on the judges and the magistrates is to do their best to evaluate where on that spectrum their findings of abuse may sit and where, on the index of harm, the future risk to the child can be calibrated.

And so, the task of the court is not only to look at the past and determine, on balance, what has or has not happened, but also to exercise foresight and evaluate the risk for the future. All Family judges and magistrates strive to fix upon future arrangements that are sufficient to protect each child whose case comes before the court. The very large volume of cases coming through the Family Court indicates that this exercise in foresight is soundly based but, inevitably, some judgments will be seen, with hindsight, to have been unsound with the outcome, in some cases, having the most tragic of consequences. In my role as Head of Family Justice I am the opposite of complacent. Any thought of complacency is both inappropriate and untenable. I suspect that that is also the view of every Family judge and magistrate. These are anxious decisions and the responsibility placed on the Family judiciary is a significant one; it is to strike the

balance between safety and, where appropriate, maintaining a child's relationship with both parents and both sides of their wider family.

The delicate balance that falls to be struck in each individual case is mirrored nationally in the submissions that are regularly made to me and to other agencies from both sides of the parental equation. On the one hand, respected and well-informed groups such as Women's Aid express sustained concern to the effect that the courts are, in some cases, failing to protect the victims of abuse and their children. On the other hand, equally respected and well-informed groups such as Families Need Fathers, draw attention to the failure of the courts, in some cases, to maintain a relationship between children and both of their separated parents without good reason.

At least two national newspapers are currently running campaigns aimed at highlighting the perceived failures of the Family Justice system in this regard. They and other media agencies are undoubtedly right to do so, and I welcome the focus brought to bear on this work. There is, however, currently an inevitable difficulty in such campaigns. In almost every case the journalists will have little more information than an account given to them by one or other parent. Whilst a growing number of Family Court judgments are published, they are published anonymously and the judgment in the particular case that has been referred to the media may either not be published or, if published, not readily identifiable as being the judgment relating to the parent who is speaking to the journalist. From my perspective, when reading such media reports, which I can assure you I do, I am left, having read the worrying headline and short account in the paper, with an inability to identify the individual parent or children concerned and no ability, therefore, to call for the court file to see what has happened in the particular case.

This is a wholly unsatisfactory position from the point of view of the complainant parent, the journalist, the public at large and the justice system. The important questions by these and other media campaigns cries out for a thorough independent research project. A starting point would be for the researchers to take up each and every case that has been properly highlighted in the Press and then be allowed access to the court file, the orders made and, particularly, the statement of the reasons given by the judges and the magistrates for making any court order. I and the Family judiciary as a whole would readily cooperate with such research, so that if mistakes have been made or, more worryingly, if the system as a whole is at fault, that can be seen to be the case and immediate steps may be taken to enhance the safety of victims and children in the future.