

# 1KBW

**1KBW TALKS FOR  
ASPIRING FAMILY LAW BARRISTERS  
DOMESTIC ABUSE**

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# 1KBW TALKS FOR ASPIRING FAMILY LAW BARRISTERS

## DOMESTIC ABUSE

### 1KBW SPEAKERS



ANDREA WATTS

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MARTHA HOLMES

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## Programme

- » Chair – Andrea Watts (1KBW)
- » Non Molestation Orders – Martha Holmes (1KBW)
- » Occupation Orders – Andrea Watts (1KBW)
- » Forced Marriage – Charlotte McDonald (guest speaker)
- » Protection from FGM: Is the law in England and Wales adequate? Safia Yousaf (guest speaker)
- » Recent developments and the impact of Covid-19 – Sapna Jain (guest speaker)
- » Domestic abuse update and working with a Refuge – Bisma Hussain (guest speaker)

# NON-MOLESTATION ORDERS

MARTHA HOLMES (1KBW)

## WHAT ARE THEY?

A non-molestation order is designed to stop various kinds of abusive behaviour – which could involve harassment, physical, verbal and emotional abuse.

### The law

Non-Molestation orders are made under s42 of the Family Law Act 1996.

They are civil orders, but the breach of a non-molestation order is a criminal offence if the defendant is aware of the existence of the order and, without reasonable excuse, does anything prohibited by the non-molestation order.

A court can make a non-molestation order:

- After an application for an order has been made by a person who is associated with the respondent
- in any family proceedings to which the respondent is a party and the court considers that the order should be made for the benefit of any other party to the proceedings or and any relevant child even though a separate application hasn't been made

An 'associated person' is:

- a) someone they have been married to
- b) someone they are or have been in a civil relationship with
- c) someone they are cohabiting or have cohabited with
- d) someone they live or have lived in the same household
- e) a relative
- f) someone they have agreed to marry
- g) someone they have entered into a civil partnership agreement with
- h) someone they have had an intimate personal relationship with for a significant duration
- i) someone who is a co-parent or shares parental responsibility for a child
- j) someone who is a party in the same family proceedings

## **Wording of non molestation orders**

Non molestation orders are usually pretty formulaic and there is a pro forma that is often used by courts to draw up the orders. They can be adjusted and amended according to the particular circumstances of the case. The terms have to be precise and capable of being understood as a criminal offence is created if they are breached.

### Examples

The respondent may be forbidden to:

- use or threaten any violence towards the applicant and must not instruct, encourage or in any way suggest that another person should do so
- intimidate, harass or pester the applicant and must not instruct, encourage or in any way suggest that another person should do so
- come within 100m of the applicant's home address (there may be overlap with an occupation order here)
- communicate with the applicant whether directly or indirectly, whether orally, by telephone, text message, email, social media or any other means except through solicitors
- damage or attempt to damage or threaten to damage the property or contents of the family home and must not instruct, encourage or in any way suggest that another person should do so

## **Criteria**

Contained at s42(5):

The court shall have regard to all the circumstances including the need to secure the health, safety and wellbeing of the applicant and any relevant child.

- There must be evidence of molestation (*C v C (Non-Molestation: Jurisdiction)* [1998] 1 FLR 554, FD)
- The applicant (or child) must need protection and
- The judge must be satisfied on the balance of probabilities that judicial intervention is required to control the behaviour which is the subject of the complaint (*C v C* [2002] EWCA Civ 1625)

The order can be made for a specified period or until further order – this means until either the applicant or respondent applies to discharge it. This latter form of order should only be in exceptional circumstances. Usually, orders are for six months or one year. Three months is regarded as a minimum.

## **How do I get a non-molestation order?**

If you are making a free-standing application, you fill in an application form, supported by a witness statement, setting out the reasons why you need the order and what molestation has been suffered or is a risk of happening if an order is not put in place.

You can make an application 'ex parte' or without notice which means that the only the applicant is notified of the first hearing. This is in circumstances where the person making the application is worried that they will face repercussions if the respondent is aware that such an application is being made. The court has the power to make an order without notice where it is 'just and convenient' to do so; the witness statement must explain the reasons why no notice is being given. After the initial hearing, if an order is made without notice, the respondent has to be personally served with the order, application and witness statement and a full hearing should then be listed soon afterwards.

If the application is made on notice, the documents need to be personally served on the respondent at least 2 days before the hearing (unless permission has been given by the court to shorten or 'abridge' that time).

At the first hearing, the judge dealing with the case will normally hear briefly from the applicant and respondent (if they are there) before deciding whether to make an order. These court appointments are usually short (and sometimes dealt with on paper) and so there is normally not enough time for the judge to hear evidence from either of the parties or go into the case in detail.

In practice, it is a fairly low hurdle to cross to get an order, as, generally, non-molestation orders are largely concerned with preventing people from behaving in ways that they shouldn't be anyway. A non-molestation order is a way of reducing conflict between the parties in the short term and often this is sufficient to calm the situation down so that the parties can move on.

If the respondent wants to contest the making of a non-molestation order, the matter is then listed for a full hearing, where both parties have the opportunity to provide witness statements and usually give evidence (rather like a mini trial) and there is then court time provided for the judge to make a determination about the disputed facts.

## **Undertakings**

If the respondent does not agree with the making of non-molestation order, he/she may offer to give undertakings to the court as an alternative. Undertakings are promises to the court. If they are breached the applicant would have the right to return to the family court to complain and seek punishment by committal proceedings, but they do not enable a person breaching an order (or suspected or doing so) to be arrested by the police. Undertakings can therefore be a compromise – providing the applicant with a marker that the respondent needs to behave themselves whilst for the respondent, avoiding the risk of arrest. Undertakings can be given without admitting that allegations the applicant is making are true. Undertakings cannot be accepted by the court where it appears that the respondent has used or threatened violence against the applicant or a relevant child.

# OCCUPATION ORDERS

ANDREA WATTS (1KBW)

## The Legislation – Family Law Act 1996:

### 1. *Section 33(3)*

(3) An order under this section may –

- a) enforce the applicant's entitlement to remain in occupation as against the other person ('the respondent');
- b) require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;
- c) regulate the occupation of the dwelling-house by either or both parties;
- d) if the respondent is entitled as mentioned in subsection (1)(a)(i), prohibit, suspend or restrict the exercise by him of his right to occupy the dwelling-house;
- e) if the respondent has home rights in relation to the dwelling-house and the applicant is the other spouse or civil partner, restrict or terminate those rights;
- f) require the respondent to leave the dwelling-house or part of the dwelling-house; or
- g) exclude the respondent from a defined area in which the dwelling-house is included.

2. *Section 33(7):*

If it appears to the court that the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent if an order under this section containing one or more of the provisions mentioned in subsection (3) is not made, the court shall make the order unless it appears to the court that -

- (a) the respondent or any relevant child is likely to suffer significant harm if the order is made; and
- (b) the harm likely to be suffered by the respondent or the child in that event is as great as, or greater than, the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the order is not made.

3. *Section 33(6):*

In deciding whether to exercise its powers under subsection (3) and (if so) in what manner, the court shall have regard to all the circumstances including -

- (a) the housing needs and housing resources of each of the parties and of any relevant child;
- (b) the financial resources of each of the parties;
- (c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3) on the health, safety or well-being of the parties and of any relevant child; and
- (d) the conduct of the parties in relation to each other and otherwise.

4. *Section 63 – Interpretation of Part IV*

“harm” –

- (a) in relation to a person who has reached the age of eighteen years, means ill-treatment or the impairment of health; and
- (b) in relation to a child, means ill-treatment or the impairment of health or development; “health” includes physical or mental health; “ill-treatment”

includes forms of ill-treatment which are not physical and, in relation to a child, includes sexual abuse;

(3) Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child.

### Case Law

5. **Chalmers v Johns [1999] 1 FLR 392** – does the evidence establish significant harm under s33(7)? If not then move on to consider discretionary test under s33(6).
6. **G v G (Occupation Order: Conduct) [2000] 2 FLR 36** – *“This was not a case in which the wife had suffered any violence at the hands of the husband. It has been said time and time again that orders of exclusion are draconian and only to be made in exceptional cases. Add to that the judge's assessment that the friction between the parties was only the product of their incompatible personalities”*
7. **G v G (Occupation Order) [2011] 1 FLR 687** - no physical violence but the Husband was found to be verbally abusive, domineering and controlling and was pressurising the Wife withdraw the suit for divorce. The order was made under s33(6) and the availability of alternative accommodation was an important feature.
8. **Dolan v Corby [2012] 2 FLR 1031** – limited findings of verbal abuse - *“Exercising discretion under s33(6) is not a matter of considering the behaviour of the parties and awarding occupation of the property in question to the one who has behaved less inappropriately. All the circumstances must be considered, of which conduct is only one.”*
9. **Re L (Occupation Order) [2012] 2 FLR 1417** – The Court found the situation between the parents was untenable and the children had been exposed to “acrimonious and unpleasant wrangles.” - *“There is .. no authority establishing that a spouse can only be excluded from the home if reprehensible conduct on his or her behalf is found.”*



# FORCED MARRIAGE

CHARLOTTE MCDONALD (GUEST SPEAKER)

## Forced Marriage

- What is so-called 'honour-based' abuse?
- Difference between a marriage being arranged or forced.
- Absence of consent and capacity (***The Marriage Act 1949***).
- Abuse extends beyond physical or verbal. It can include other forms such as coercion, 'gaslighting' and financial abuse.
- Forced Marriage can lead to further domestic abuse.
- Not limited to one country, community or religion.
- Can take the form of not wishing to enter a marriage and being forced to do so or being unable to leave a marriage (marital coercion).

## Forced Marriage in the UK

- Law divided into civil and criminal:
  - Civil;
    - ***Forced Marriage (Civil Protection) Act 2007***;
      - Forced Marriage Protection Orders (FMPO).
  - Criminal;
    - ***Anti-social Behaviour, Crime and Policing Act 2014***;

- Breaching an FMPO.
  - Forcing someone into a marriage.
  - Balance of acts that 'should' be criminal and the effectiveness of an act being criminalised.
- Bills:
  - Domestic Abuse Bill 2020;
  - Marriage and Civil Partnership (Minimum Age) Bill.

### **Cases**

- Work of the Forced Marriage Unit (FMU) and statistics;
  - What these figures show, and what they do not.
- Shafelia Ahmed, Banaz Mahmod and Samia Shahid.

# PROTECTION FROM FGM: IS THE LAW IN ENGLAND AND WALES ADEQUATE?

SAFIA YOUSAF (GUEST SPEAKER)

## (1) Definition and Context

- Baroness Hale in *Fornah v Secretary of State for the Home Department* [2006] UKHL 46; [2007] 1 AC 412, at [94]: “... the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment within the meaning, not only of Article 3 of the European Convention on Human Rights”

## (2) Statute

- The Female Genital Mutilation Act 2003 (c.31) extended sections (1)-(3) to FGM undertaken overseas and increased the maximum penalty from 5 to 14 years’ imprisonment.
- Section 5A and Schedule 2 of the Female Genital Mutilation Act 2003 provides for the family court’s authority to impose the civil remedy of a Female Genital Mutilation Protection Order (‘FGMPO’), as amended by The Serious Crimes Act 2015.
- Section 5B of the Female Genital Mutilation Act 2003 was amended in 2015 to include a duty on all healthcare professionals and teachers to notify the police in the event FGM appears to have been carried out on a girl under 18.
- The Serious Crimes Act 2015 part 5 section 70(1)-(2)(c) extended the protection from FGM to UK citizens and permanent residents to those habitually resident in the UK.

### (3) Key Cases

- Re X (A Child) (FGMPO) [2018] EWCA Civ 1825

... The re-hearing (allowed): Re X (Female Genital Mutilation Protection Order No.2) [2019] EWHC 1990 (Fam)

- Re A (A Child: Female Genital Mutilation: Asylum) [2019] EWHC 2475 (Fam)

The Rt Hon Sir Andrew McFarlane at [53], “**there is no jurisdiction for a family court to make a FGM protection order against the Secretary of State for the Home Department to control the exercise of her jurisdiction with respect to matters of immigration and asylum.**”

... On appeal (dismissed): A (A Child) [2020] EWCA Civ 731

### (4) Issues

- The rate of detection (<https://www.gov.uk/government/collections/family-court-statistics-quarterly>)
- Is there a deterrent effect in the legal context?
- Harmful impacts of stigmatisation (<https://www.bbc.co.uk/news/uk-england-bristol-47507859>)

### (5) The Way Forward

- Community Engagement (<https://www.forwarduk.org.uk/violence-against-women-and-girls/female-genital-mutilation/>)

### (6) Further Reading

- Hibo Wardere, *Cut: One Woman’s Fight Against FGM in Britain Today* (Simon & Schuster UK, 2016)
- Barnado’s National FGM Centre (<http://nationalfgmcentre.org.uk/>)
- Rule 25.4(3) Family Procedure Rules in the context of the family court’s statutory function described in paragraph 2 of schedule 2 of the FGMA 2003.
- Re Z (A Child)(FGMPO: Prevalence of FGM) [2017] EWHC 3566
- Re CE (Female Genital Mutilation) [2017] 1FLR 1255

# RECENT DEVELOPMENTS THE IMPACT OF COVID 19

SAPNA JAIN (GUEST SPEAKER)

## Impact of Covid-19

(1) A sharp increase in reports of domestic abuse:

- (a) [The “shadow pandemic”: Executive Director of UN Women, Phumzile Mlambo-Ngcuka](#)
- (b) [Home Office preparedness for Covid-19 \(Coronavirus\): domestic abuse and risks of harm within the home \(Home Affairs Select Committee, 2020\)](#)

(2) An exception for leaving the home:

- (a) [The Health Protection \(Coronavirus, Restrictions\) \(All Tiers\) \(England\) Regulations 2020](#) (came into force: 2 December 2020)
  - a. Schedule 1, Part 1, s.3(6)(c)
  - b. Schedule 2, Part 1, s.4(6)(c)
  - c. Schedule 3, Part 1, s.4(5)(c)
  - d. Schedule 4, Part 1, s.2(7)(c)
- (b) [Coronavirus Guidance – “National Lockdown: Stay at Home” \(published 4 January 2021\)](#)

(3) Guidance for family proceedings where domestic abuse has been proved or may be an issue:

- (a) [Family Justice Council, “Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings” \(published 10 November 2020\)](#)

(4) Further reading:

- (a) [#ItStillMatters campaign](#)

## Legislative update

(5) Domestic Abuse Bill 2019-21

# DOMESTIC ABUSE UPDATE AND WORKING WITH A REFUGE

BISMA HUSSAIN (GUEST SPEAKER)

## **(1)** The Domestic Abuse Bill

- a. Exploring the definition of Domestic Abuse; and
- b. Why there should be a wider definition than the Bill proposes.

## **(2)** The recent landmark hearings in the Court of Appeal

- a. How the Court of Appeal is now looking at the law on Domestic Abuse; and
- b. How it is approached in Family Law courts.

## **(3)** Working at a Domestic Abuse refuge