In Practice

Non-molestation orders revisited

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Applications for non-molestation orders ('NMOs') have increased year on year since 2013. However, the coronavirus pandemic has led to a further steep rise. The most recent Ministry of Justice statistics on the work of the family court, covering July to September 2020, show a 26% increase in domestic violence remedy orders from the year before, and the highest quarterly number of applications since the time series began at the start of 2009. Of these, NMOs accounted for 82% of applications.

The lockdown situation brought with it warnings of increased domestic violence, with victims having less opportunity to leave abusive partners. These concerns seem to be borne out by the Office of National Statistics report *Domestic abuse during the coronavirus (Covid-19) pandemic, England and Wales November 2020*. Police recorded crime data show an increase in offences flagged as domestic abuse related during the pandemic and a general increase in demand for domestic abuse victim services. It is perhaps, then, an appropriate time to revisit NMOs and consider the relevant case law.

What are NMOs?

An NMO is designed to stop various kinds of abusive behaviour which could involve harassment, physical, verbal and emotional abuse. They prohibit a person from molesting another person who is associated with the respondent and/or from molesting a relevant child.

NMOs are made under s 42 of the Family Law Act 1996 ('FLA 1996'). They can be ordered if a free-standing application is made for an order (whether in other family proceedings or without any other family proceedings being instituted) by a person associated with the respondent or if, in any family proceedings to which the respondent is a party, the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child, even though no such application has been made.

Significant changes were introduced to NMOs, with the Domestic Violence, Crime and Victims Act 2004 ('DVCVA 2004'), which came into force on 1 July 2007. These changes extended the original definition of 'associated persons', to incorporate ten different categories covering a range of familial and intimate relationships and criminalised the breach of NMOs. Further, the procedure for accepting undertakings as an alternative to an order was changed so that undertakings are now restricted to circumstances where it appears to the court that the respondent neither threatened nor used violence against the applicant or relevant child. Additionally, the amendments made by the DVCVA 2004 meant that whilst an NMO with an exclusion requirement is a criminal offence, an occupation order made under s 33 of the FLA 1996 remains within the confines of the civil court.

The criminalisation of NMOs was designed to send a clear message to perpetrators that harassment or violence against an ex-partner is unacceptable. Crucial to this, of course, is ensuring that breaches are enforced. However, recent research by Lis Bates, at the

Centre for Policing Research and Learning at the Open University, published in June 2020, looking at the impact of these changes, suggests that there is some confusion amongst the police over their powers to enforce a breach of an NMO.[1] Additionally, there was evidence that some police forces do not have adequate records of protection orders, particularly NMOs, and are not systematically recording them. This may in part be because many applicants for NMOs are not legally represented and so, once an order is made, no further steps are taken by them. Although PD 36H, issued by the then President Sir James Munby in July 2018, proposed that the issuing court emails a central police address to notify them of the order and protocols have been drawn up by individual police forces, there still appears to be a lack of systematic communication.[2] This is particularly problematic since, if the police have not had formal notice that an order has been served, they have no powers to enforce it. Although s 42A(2) is clear that a person can be guilty of an offence under this section 'when he is aware of the existence of the order' rather than the specific contents, the likelihood of the police and the CPS pursuing a breach is, in practice, dependent on the amount of evidence that the respondent can bring to show that the applicant was aware of the existence of the order and the terms of the order to negate a 'reasonable excuse' defence. This has meant, in practice, that there is an increasing divergence between the enforcement of restraining orders issued in criminal proceedings and civil-issued NMOs, which has led to a shift towards greater responsibility about decision making and enforcement being in the hands of the police.

Issues around effective service of NMOs have come to the fore during the pandemic, when problems with personal service during lockdown meant that there was a judicial divergence of opinion around the country about what amounted to proper service and whether alternative methods of service could be used. To tackle the problem, the Family Procedure Rules committee made recommendations that have been incorporated into Practice Direction 36U, which came into effect on 3 August 2020 and is due to cease to have effect on 3 May 2021. This clarifies that the court can order an alternative method of service of both applications and orders under Part 4 of FLA 1996.

What is molestation?

The term molesting is not defined in the FLA 1996 but has been considered in various cases.

In *Horner v Horner* (1983) 4 FLR 50 Ormerod LJ said, at p 51G:

> '. . . I have no doubt that the word "molesting"… does not imply necessarily either violence or threats of violence. It applies to any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court.'

This rather circular definition was also alluded to by Sir Stephen Brown, then President of the Family Division in *C v C (Non-Molestation Order: Jurisdiction)* [1998] 1 FLR 554 said at 556H:

> '. . . there is no legal definition of "molestation". Indeed, that is quite clear from the various cases that I have cited. It is a matter which has to be considered in relation to the particular facts of particular cases. It implies some quite deliberate conduct which is aimed at a high degree of harassment of the other party, so as to justify the intervention of the court.'

Lady Justice Hale (as she then was) gave some further assistance in *C v C* [2001] EWCA civ 1625, when she held that a non-molestation injunction was justified in circumstances where the conduct complained of 'was calculated to cause alarm and distress to the mother' and 'that

1 No Longer a civil matter? The design and use of protection orders for domestic violence in England and Wales, Journal of Social and Welfare and Family Law, 42:2, 133–153

2 PD 36H – Pilot Scheme Procedure for Service of Certain Protection Orders on the Police

is the sort of behaviour, in my judgment, which does call for the intervention of the court.'

More recently, McFarlane LJ said in *Re T (A Child) (Non-Molestation Order)* [2017] EWCA Civ 1889, [2018] 1 FLR 1457 at [42]:

> 'When determining whether or not particular conduct is sufficient to justify granting a non-molestation order, the primary focus, as established in the consistent approach of earlier authority, is upon the 'harassment' or 'alarm and distress' caused to those on the receiving end. It must be conduct of 'such a degree of harassment as to call for the intervention of the court' (*Horner v Horner* (1983) 4 FLR 50 and *C v C (Non-Molestation Order: Jurisdiction)* [1998] 1 FLR 554).'

NMOs provide the judge with a wide discretion to consider the particular facts of a case and establish whether 'molestation' is made out. With a greater recognition of controlling and coercive behaviour, it is likely that the impact on the victim of what may appear in other instances to be innocuous behaviour, but which is abusive or causes distress to an individual, will be crucial in considering whether a court should intervene.

In the case of *Re T*, an NMO was made against the mother of a child in foster care. She had taken steps to contact the child which had been intercepted and so there had been no direct interaction with the respondent and the applicant or the relevant child. Nonetheless, an order was needed to achieve the protection of the child in circumstances where the mother's conduct was found to be 'positively harmful'; this was more than sufficient to justify the court exercising the powers under s 42.

The scope of NMOs has expanded over time and provide judges with a wide discretion to determine what amounts to molesting behaviour and create a criminal offence in the process.

How long should orders last?

Generally speaking, an NMO is designed to deal with an immediate situation of harassment or abuse; often this relates to a crisis arising from the breakdown of a relationship and the NMO is designed to reduce the temperature by prohibiting behaviour that might cause problems or inflame the situation further. This was confirmed by Slade LJ in *Galan v Galan* [1985] FLR 905 when he stated that 'normally an order for a short, fixed period will be the appropriate order, if any, for the court to make.' However, NMOs can also be used in more chronic situations, as explained by Hale LJ (as she then was) when she gave lead judgment in the case of *Re B-J (Power of Arrest)* [2000] 2 FLR 443 at [29] and [33]:

> 'A non-molestation order is indeed sometimes, even often, designed to give a breathing space after which the tensions between the parties may settle down so that it is no longer needed. But in other cases, it may be appropriate for a much longer period, and it is not helpful to oblige the courts to consider whether such cases are "exceptional" or "unusual" . . . There are obviously cases, of which this is one, in which the continuing feelings between parties who separated long ago are such that a long term or indefinite order is justified.'

Cobb J reflected on these remarks in *Manjra v Shaikh* [2020] EWHC 1805 (Fam), [2021] 1 FLR 106 when considering whether to discharge or continue an NMO that had been made for an indefinite period some years before. Cobb J concludes that the FLA 1996 contemplates first and foremost that an order may be made for a specified period, or until 'further order'; it has been for some time good practice for orders to stipulate an end date and that date is likely to be no more than 12 months following the making of the order. He highlights that with the amendments to the FLA 1996 introduced by the DVCVA 2004, creating a criminal sanction for breach of an NMO, the gravity of creating a long-lasting order was accentuated.

There may still be circumstances where the court is entitled to conclude that an NMO for a longer or even indefinite period is justified, but this will be exceptionally. Cobb J suggested that these would be in cases where the court takes the view that, on the facts, the requirement for protection from abuse has no foreseeable 'end date'; perhaps because of evidence of persistent molestation after the initial injunctive order. However, to justify the continuation of an order the applicant would need to satisfy the court that continued judicial intervention is required and cannot simply rely on incidents that triggered the original order being made.

Wording of NMOs

The importance of ensuring that the terms of an order must be precise and capable of being understood have been emphasised in case law; there are clear analogies between NMOs and the criminal cases of *R v P* [2004] EWCA Crim 287 and *R v Boness; R v Bebbington* [2005] EWCA Crim 2395 dealing with ASBOs, where civil injunctive orders create serious criminal consequences if breached. It is essential if an NMO is to be enforceable and fair to the respondent that the terms of the order are clear.

The terms of NMOs are often formulaic and in some courts a tick box is used to provide a menu for the judge to choose the terms to be included. In *PF v CF* [2016] EWHC 3117, the first instance judge had included the standard wording that the respondent 'is forbidden to use or threaten violence against the wife and must not instruct, encourage or in any way suggest that any other person should do so.' However, no finding was made that there had ever been violence or the threat of violence in this case. Both parties had included in their draft orders injunctions preventing the use or threat of violence and Baker J concluded that the judge had been 'inadvertently led' into making an order that was not supported by the findings and should thus be amended to delete this part of the order. It must be ensured that the orders made are justified by the behaviour complained of.

In *Re C3 and C4 (Child Arrangements)* [2019] EWHC B14 (Fam) (1 August 2019), the applicant sought an extension and renewal of NMOs. These had originally been related to conduct towards the applicant described by Keehan J as 'truly appalling' and the judge dealing with the matter had made orders lasting 3 years. However, there had been no further incidents since the order was made and the applicant instead now relied on the respondent's conduct of litigation and repeated applications to the court as grounds for an extension. Keehan J concluded that this was not appropriate; there is no authority to support the principle that a non-molestation injunction can be made to prevent a parent commencing litigation: that is solely the purpose and objective of s 91(4) of the Children Act 1989. The applicant's application was therefore dismissed.

Ex parte orders

Under s 45 of the FLA 1996 the court is given the power to make non molestation orders even though the respondent has not been given notice of the proceedings. In determining whether to exercise its powers, the court shall have regard to all the circumstances including:

(a) Any risk of significant harm to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately;

(b) Whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately; and

(c) Whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved in effecting substituted service.

It is extremely unusual for the court to have the power to create a criminal offence in circumstances where the respondent is unaware of the application and prevented from being able to participate in the decision-making process creating the order.

Unsurprisingly, this has led to Presidential Guidance, now contained in *President's Practice Guidance: Family Court – Duration of Ex Parte (Without Notice) Orders* [2017]. Two points of principle are clear from the President's Guidance. Firstly, an ex parte (without notice) injunctive order must never be made without limit of time. There must be a fixed end date. It is not sufficient to specify a return day and specify precisely when the terms expire which normally be no more than 14 days after the date the order was made. Secondly, whilst most orders will be of short duration, in appropriate cases, the order can be for a longer period such as 6 or 12 months provided that the order specifies a return day within no more than 14 days.

Despite this guidance being in place in similar form since 2014, the case of *Re W* [2016] EWHC 2226 (Fam) revealed that a without notice non molestation order had been made for a period of one year, with provision for it to be considered at a further hearing on a date to be fixed by the court officer on request of the respondent, clearly flouting the guidance.

In *R v R (Family Court: Procedural Fairness)* [2014] EWFC 48, [2015] 2 FLR 1005, Peter Jackson J allowed an appeal against an ex parte non molestation order and highlighted the following:

> '(1) The default position of a judge faced with a without notice application should always be "Why?", not "Why not?". As has been repeatedly stated, without notice orders can only be made in exceptional circumstances and with proper consideration for the rights of the absent party.
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> (2) The court should use its sweeping powers under the Family Law Act 1996 with caution, particularly at a one-sided hearing. Where an order is made, it is the responsibility of the court (and, where applicable, the lawyers) to ensure that it is accurately drafted. This conclusion applies with special force when a breach of an order will amount to a criminal offence . . .'

It appears from anecdotal evidence that the coronavirus pandemic has had a significant impact on the operation of ex parte orders, with local variations about how they are dealt with, whether return dates are being listed within 14 days and whether orders are more routinely being made for longer durations because of listing delays. Contingency arrangements have been put in place to make sure injunction applications are prioritised and victims of domestic abuse receive protection as soon as possible, but it is queried whether this is at the expense of the respondents being given a fair opportunity to contest the making of orders that can have criminal repercussions. Hearings are now routinely dealt with remotely and in some cases initial NMOs are made on paper without a hearing. It remains to be seen what impact these changes may have in the longer term once the emergency footing of the coronavirus pandemic is lifted. It may be necessary for further consideration to be given at that stage as to whether the right balance is being struck between ensuring access to and enforcement of protective measures for victims of domestic violence and the rights of respondents to engage effectively in and challenge the NMO process.