

# 1KBW

1KBW TALKS FOR  
ASPIRING FAMILY LAW  
BARRISTERS

DOMESTIC ABUSE PROCEEDINGS

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# 1KBW TALKS FOR ASPIRING FAMILY LAW BARRISTERS

## DOMESTIC ABUSE PROCEEDINGS

### **Programme:**

- » Chair – Anna McKenna QC (1KBW)
- » An overview of domestic abuse in family proceedings – Nicholas Anderson (1KBW)
- » Non-molestation and Occupation Orders - Mercedes Cooling (guest speaker)
- » Coercive and controlling behaviour – Katy Halliday (guest speaker)
- » Forced Marriage – Allana Bennison (guest speaker)
- » FGM Protection Orders – Andrea Watts (1KBW)
- » Vulnerable Witnesses – Clara Parry (guest speaker)
- » Q&A with the panel

# An overview of domestic abuse in family proceedings

Nicholas Anderson (1KBW)

- » The rise of domestic abuse as an issue in family proceedings
  - Practice Direction 12J
- » Special Measures
- » Practice and procedure in a remote world
- » Committals

# Non-molestation and occupation orders

## Mercedes Cooling (guest speaker)

### Protection under Pt IV of the Family Law Act 1996

1. Non-molestation orders
2. Occupation orders

*Note - both can be made 'without notice' under S.45(1) if just and convenient to do so. Factors to be considered can be found in S.45(2).*

#### 1. Non-Molestation Orders

- s42 FLA 1996 - court can order of its own motion (S.42(2)(b)) or can be applied for by a range of 'associated persons' (S.42(2)(a)).
- Associated persons listed under S.62(3).
- Factors the court shall have regard to (S.42(5)).
- Includes the “need to secure the health, safety and wellbeing of the applicant and of any relevant child.”
- Duration of order (S.42(7)).

#### 2. Occupation Orders

- Status of applicant is important (s33 & 35-38 FLA 1996) - determines whether they can apply for an order, the provisions of any order granted, factors court take into consideration and duration of any order.

#### Applicant has an existing right to the home

- Found in s33 FLA 1996 - certain conditions need to be satisfied to demonstrate this right.
- If satisfied, s33(3) states what the applicant can apply for in the occupation order.
- s33(7) - balance of harm test - 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 it 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 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
- s33(6) - discretionary test - the court shall have regard to all the circumstances eg housing needs, financial resources, likely effect of making or not making the order and conduct of the parties.
- s47 FLA 1996 - power of arrest can be attached to an occupation order.

# The evolution of coercive and controlling behaviour

Katy Halliday (guest speaker)

## » Definitions

- Family Procedure Rules > PD12J

“**Coercive behaviour**” means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim.

“**Controlling behaviour**” means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

## » Legal background

- Section 76 of the Serious Crime Act 2015 – Coercive behaviour and controlling behaviour are created as offences.
- Domestic Abuse Act 2021 – Scope of coercive behaviour and controlling behaviour is extended.

## » Case Law

- Re H-N [2021] EWCA 448 – Four conjoined appeals
- F v M [2021] EWFC 4 – Mr Justice Hayden
- A Child (Application of PD12J) (No 2 - Findings of Fact) [2022] EWFC B5 (12 January 2022)

# Forced Marriage

Allana Bennison (guest speaker)

## Definition

Where one or both people do not (or in cases of people with learning disabilities or reduced capacity, cannot) consent to the marriage as they are pressurised, or abuse is used, to force them to do so; a form of domestic abuse and/or child abuse

## Relevant Legislation

- » Section 12(1)(c) of the Matrimonial Causes Act 1973
- » Forced Marriage (Civil Protection) Act 2007
- » Anti-Social Behaviour, Crime and Policing Act 2014

## Case Law (Defining Duress)

- » *Szechter v Szechter* (1971) – ‘a genuinely held fear caused by threat of immediate danger... to life, limb or liberty’
- » *Hirani v Hirani* (1983) – any threats / pressure that destroyed the reality of consent to marriage
- » *NS v MI* (2006) – ‘subtle, insidious, pervasive and powerful’
- » *Singh v Singh* (1971) – cultural expectations alone are not sufficient

## Forced Marriage Protection Orders (FMPOs)

- » What is a FMPO? An injunction
- » Who can apply for a FMPO? A victim or potential victim, a friend or relative, or other third-party.
- » How to apply? Applicants must fill in a Form FL401A (victim) or Form FL430 (third-party), ensure the perpetrator is served a copy of the application, and prepare a witness statement.
- » What can a FMPO do? Prohibit someone from contacting the victim, forbid someone from taking any steps to cause or permit the victim from undergoing any ceremony or betrothal of marriage, etc.
- » What happens if a perpetrator breaches a FMPO? It is a criminal offence attracting up to 5 years imprisonment.

# FGM Protection orders

Andrea Watts (1KBW)

- » What is FGM?
  - WHO classification - 4 major types
  - No medical benefit - not a religious requirement or obligation - short and long term health implications
  - Global issue - UNICEF estimated 200 million girls/women alive today had been subjected to FGM
  
- » Response in the UK
  - FGM unit established by the Home Office
  - Criminal legislation - Prohibition of Female Circumcision Act 1985 and Female Genital Mutilation Act 2003
  - Family legislation - Serious Crime Act 2015 introduces the FGM Protection Order
  
- » Application for FGMPO
  - Court can make order of its own motion or on the application of the girl/any relevant third party
  - Orders can include such prohibitions, restrictions or requirements or other terms as the court considers necessary - wide ambit and little guidance in the Act
  - Can cover conduct in this jurisdiction and anywhere abroad and may include aiding, abetting, procuring, encouraging, conspiring to commit, and attempting to commit, and can be made against any person who is, or may become, involved in such forms of conduct.
  - Breach of an order is a criminal offence - can punish as contempt (max 2yrs) or criminal offence (max 5yrs)
  - July to September 2021 only 9 applications and 13 orders made - in total 510 applications and 730 orders since their introduction in July 2015
  
- » Recent cases
  - AB v AN & Anor [2020] EWHC 2048 (Fam)
  - Re C (Female Genital Mutilation and Forced Marriage Fact Finding) [2019] EWHC 3449 (Fam)
  - Re A (A Child: Female Genital Mutilation: Asylum [2019] EWHC 2475
  - Re X (FGMPO No. 2) [2019] EWHC 1990 (Fam)
  - M (Female Genital Mutilation Protection Order - No Order on Application), Re [2019] EWHC 527 (Fam)
  - X (A Child FGMPO) [2018] EWCA Civ 1825
  - A Local Authority v M & N (Female Genital Mutilation Protection Order - FGMPO) [2018] EWHC 870 (Fam)
  - Re Z (A Child) (FGMPO: Prevalence of FGM) [2017] EWHC 3566 (Fam)

# Vulnerable Witnesses in family proceedings

Clara Parry ( Guest Speaker)

## *Re C (Female Genital Mutilation and Forced Marriage: Fact Finding) [2019] EWHC 3449 (Fam)*

- Part 3A and PD3AA of the Family Procedure Rules 2010: *"Vulnerable Persons: Participation in Proceedings and Giving Evidence"*
- Rule 3A.7: When deciding whether to make one or more participation directions the court must have regard in particular to—
  - (a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of—
    - (i) any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or
    - (ii) any members of the family of the party or witness;
  - (b) whether the party or witness—
    - (i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;
    - (ii) has a physical disability or suffers from a physical disorder; or
    - (iii) is undergoing medical treatment;
  - (c) the nature and extent of the information before the court;
  - (d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;
  - (e) whether a matter is contentious;
  - (f) the age, maturity and understanding of the party or witness;
  - (g) the social and cultural background and ethnic origins of the party or witness;
  - (h) the domestic circumstances and religious beliefs of the party or witness;
  - (i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act;
  - (j) any characteristic of the party or witness which is relevant to the participation direction which may be made;
  - (k) whether any measure is available to the court;
  - (l) the costs of any available measure; and
  - (m) any other matter set out in Practice Direction 3AA



- Where Rule 3A.7(d) refers to questions of abuse, this includes any concerns arising in relation to any of the following-
  - a) domestic abuse;
  - b) sexual abuse;
  - c) physical and emotional abuse;
  - d) racial and/or cultural abuse or discrimination;
  - e) forced marriage or so called “honour based violence”;
  - f) female genital or other physical mutilation;
  - g) abuse or discrimination based on gender or sexual orientation; and
  - h) human trafficking.

Re C (Female Genital Mutilation and Forced Marriage: Fact Finding) [2019] EWHC 3449 (Fam)

- Fact-finding in the context of welfare proceedings for the mother’s sister (11 years old) and the mother’s daughter (31 months old)
- Allegations:
  - FGM
  - Forced marriage
  - Domestic abuse
  - Sexual abuse
  - Coercive and controlling behaviour
- Mother vulnerable for the following reasons:
  - Overall cognitive ability in the extremely low range
  - Learning disabilities
  - PTSD
  - Depression
  - General anxiety
  - Physical Health Issues

How do courts deal with a vulnerable witness?

- **FPR 3A.4 (1)** The court must consider whether a party’s participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.
- **FPR 3A.5 (1)** The court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.
- **FPR PD3AA 5.2** When the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence there shall be a “ground rules hearing” prior to any hearing at which evidence is to be heard, at which any necessary participation directions will be given-

- a) as to the conduct of the advocates and the parties in respect of the evidence of that person, including the need to address the matters referred to in paragraphs 5.3 to 5.7, and
- b) to put any necessary support in place for that person.

The ground rules hearing does not need to be a separate hearing to any other hearing in the proceedings.

- **FPR 3.8 (1)** The measures referred to in this Part are those which—
  - (a) prevent a party or witness from seeing another party or witness;
  - (b) allow a party or witness to participate in hearings and give evidence by live link;
  - (c) provide for a party or witness to use a device to help communicate;
  - (d) provide for a party or witness to participate in proceedings with the assistance of an intermediary;
  - (e) provide for a party or witness to be questioned in court with the assistance of an intermediary; or
  - (f) do anything else which is set out in Practice Direction 3AA.
- **FPR PD3AA 5.5** The court must consider whether to direct that-
  - a) any questions that can be asked by one advocate should not be repeated by another without the permission of the court;
  - b) questions or topics to be put in cross-examination should be agreed prior to the hearing;
  - c) questions to be put in cross-examination should be put by one legal representative or advocate alone, or, if appropriate, by the judge; and
  - d) the taking of evidence should be managed in any other way.