FINANCIAL REMEDY: DOMESTIC ABUSE & CONDUCT

JULY 2024

N v J [2024] EWFC 184

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DOMESTIC ABUSE

The **Domestic Abuse Act 2021** Section. 1 defines 'domestic abuse' as behaviour from one towards another that is considered "abusive".

S. 1(2) defines behaviour as 'abusive' if it consists of: physical or sexual abuse; violent or threatning behaviour; controlling or coervice behaviour; economic abuse; physical, emotional or other abuse. This can be a single incident or a course of conduct.

Economic abuse is defined in S. 1(4) as any behaviour that has a substantial adverse effect on a person's ability to acquire, use or maintain money or other propert; or obtain goods or services.

CONDUCT

Matrimonial Causes Act 1973 S. 25(2)(g) says that the Court shall have particular regard to the conduct of each party if it is such that it would be inequitable, in the opinion of the Court, to disregard it.

Generally they can be considered in cetegories of: **Financial Conduct**, **Personal Conduct**, or **Litigation Conduct**.

For a conduct argument to be successful, generally it must meet the 'gasp factor' test as per **S v S [2006] EWHC 2793 (Fam)**.

DOMESTIC ABUSE & CONDUCT IN FINANCIAL REMEDY PROCEEDINGS

Conduct has long been a hot topic in financial remedy proceedings, and with the Efficiency Statement emphasising the necessity of efficiency in financial remedy proceedings, it is more important than ever that relevant conduct is identified and explored with the Court at the earliest possible opportunity.

All too often conduct is an elusive point that is raised in Box 4.4 of a Form E but quashed, more often than not by withdrawal, at a First Appointment. If not withdrawn at a First Appointment then it may be that the Judge refuses to allow the matter to be pursued any further, in an effort to avoid antagonistic and inflammatory questions in a questionnaire, and to focus on the true purpose of the proceedings: to provide a fair settlement for both parties to move on with their lives.

Domestic abuse is a matter that is regularly lost in this process. This is particularly prevalent in non-High Net Worth cases, or cases that have concurrent Children Act 1989 proceedings that are ongoing or having just been finalised. When should domestic abuse be considered conduct for financial remedy purposes?

Whilst **Practice Direction 12J** makes it clear that it only relates to matters involving child arrangements and children, the **Domestic Abuse Act 2021** does not make such a distinction. The definition as per Section. 1 of the Act is one that should be adopted by practitioners, whether it is a matter involving children or not.

Conduct can generally be categorised into financial, personal or litigation conduct, all of which can be elements of domestic abuse. It is well established that domestic abuse can take the form of an isolated incident or a pattern of behaviour over a period of time as per **H-N & Ors (Children)(Domestic Abuse: Finding of Fact Hearings) [2021] EWCA Civ 448**. More often than not, domestic abuse by way of a pattern of behaviour falls into multiple categories here; litigation conduct being an example of post-seperation abuse, something that Courts are becoming increasingly aware of an vigilant towards.

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Lewys is a specialist Family Law barrister at Cathedral Chambers and accepts instructions in all areas of Chambers' practice.

Lewys has developed a busy financial remedy practice, dealing will First Appointments, Financial Dispute Resolution Hearings, and Final Hearings.

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Having completed a law degree at Aberystwyth University and studying Children's Rights and Juvenille Justice at Utrecht University, Lewys completed the Bar Professional Training Course at Cardiff University before being Called to the Bar by the Honourable Society of Grays Inn.

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DOES PRACTICE DIRECTION 12J APPLY TO FINANCIAL REMEDY?

No, as set out in PD12J Paragraph. 1, but this doesn't mean that domestic abuse shouldn't be considered.

So, should domestic abuse be pleaded as conduct? Until the case of **N v J [2024] EWFC 184** this was somewhat of an open ended question and it may be that parties could be forgiven for including domestic abuse in Box 4.4 of the Form E and not pursuing it any further.

However, Mr Justice Peel has now made it clear that domestic abuse as a form of conduct should for all intents and purposes be considered in the same breath as any other conduct issue considered. This can be taken as meaning that the same 'gasp factor' test as set out in **S v S [2006] EWHC 2793 (Fam)** should be applied.

What is the logic for this? Well it still stands, as per paragraph 39 (iv) of **N v J [2024] EWFC 184** that the conduct alleged must have a material impact on the outcome of proceedings; and that in the vast majority of cases a 'fair' outcome is achieved by reference to the factors in Section 25 **Matrimonial Causes Act 1925** without the need for a forensic examination of conduct.

Clearly for conduct to be pursued, parties neeed to identify a financial consequence to the alleged conduct. It could be argued that this somewhat flies in the face of the approach to domestic abuse in other aspects of the family justice system; but for now it appears the correct criteria for measuring fairness is the Section 25 factors. Peel J says at paragraph 39 (i).

"The high bar to conduct claims established […] is undisturbed by the recent focus on domestic abuse in society and the family justice system"

This would suggest that in reality there is no change to the approach taken by the Court.

Though, Peel J accepts at paragraph 39 (ii) that the factors do not specifically refer to a 'financial consequence' so it is not impossible that domestic abuse without a financial consequence will be considered, but this will likely be 'vanishingly rare' [paragraph 39 (ii)].

It is still unclear how this impacts, if at all, on cases where findings of domestic abuse have been made in concurrent applications relating to children.

For now at least, it appears that unless there is a financial consequence then it is not an issue the Court will need to heavily concern itself with.

As the justice system, and society as a whole better understands and safeguards against domestic abuse, we will have to wait to see whether there is further evolution of its role within financial remedy proceedings. At present however, it should give litigants further assurance that the very high bar to pursuing conduct remains very much in place. •

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