

Impact of conduct

The extent to which conduct will give you an edge when arguing for a departure from equality, and what type of conduct will be taken into account

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Introduction

- Impact of domestic abuse on child arrangement cases
- On both outcomes and procedures
- Growing calls for greater recognition of effect of domestic abuse, including financial abuse, and coercive control in financial cases

Introduction

- NB financial remedy procedure
- Impact on costs
- Especially at interlocutory stage
- NB don't forget need to consider participation directions

Introduction

- FPR r 3A.2A – court must assume that participation etc will be diminished where **it is stated that** a party is, or is at risk of being a victim of domestic abuse carried out by a party
- If so, must consider whether necessary to make participation directions
- Definition of DA in 2021 Act includes economic abuse, ie behaviour having a substantial adverse effect on person's ability to acquire ... money

Thought experiment

- You are the judge
- Long marriage
- Assets £10m
- Agreed that sharing principle means 5m each
- Agreed that both parties' needs are more than met by having £5m each

Thought experiment

- A alleges long-term domestic abuse, including coercive and controlling behaviour
- A seeks departure from equality
- Do you award A more than 50%??

The background

- Prior to Divorce Reform Act 1969, matrimonial fault still had some role in fr cases
- No more: see *Wachtel* [1973] Fam 72 – no discount on maintenance for ‘guilty’ wife: p89H-90E
- But could have regard to conduct if ‘both obvious and gross’
- Confirmed by 1984 amendment to s 25 – only to be taken into account if inequitable to disregard

The background

- NB not result of Law Com 112
- Intended to confirm prior approach
- See Miller/ McFarlane at [145] – cf answer to short marriage argument in G v G [2004] 1 FLR 1011
- So high threshold had to be met before conduct even considered

The background: S v S 2007



The background

- Gulp vs gasp – S v S [2007] 1 FLR 1496, Burton J
- Total assets £7m, including subst pre-acquired properties
- J awarded W £3m – H got 60% of matr pty?

The background

- J declined to make any allowance re conduct
- Review of conduct cases at [38] re threshold:
- ‘taken leave of our senses’
- More than the ‘ordinary run of fighting and quarrelling in an unhappy marriage’
- ‘repugnant to justice’
- And what happens if threshold met?

The background

- Any adjustment requires justification
- Conduct could lead J to ‘very top end of the discretionary bracket applicable to the case’
- H v H (2005) per Coleridge J:
 - Court should not be punitive or confiscatory for its own sake
 - Conduct is a potentially magnifying factor when considering the other s 25 factors

The background

- Back to S v S
- 7 day case
- 4 days of evidence on conduct
- NB W argued (i) higher level of needs; or (ii) don't move away from 50% in H's favour on account of his contribution/ pre-acquired property
- W not seeking > 50% of the assets

The background

- Constant rows
- Originally 10 incidents on 'schedule' – others also dealt with in evidence
- Lots of occasions on which W assaults H, throws glasses at him etc, and in which H assaults W
- Incident 9 – W wakes H up at 2am several blows to head -> black eye

The background

- Incident 10 – 27.12.04 – did this meet the gasp factor?
- W discovers H rude to her friend; confronts him; spits at back of his head; W smashes valuable pots
- H lost his temper; flung her hard across hall
- W then yanked grandfather clock off the wall
- H then ‘absolutely furious’

The background

- H pursued her upstairs and into bathroom
- Smashed her head against shower post – J found this was reckless but not deliberate; hit her several times when W lying on the floor
- Jagged cut above bridge of nose to hairline
- Lot of blood – did not need stitches
- H pleaded guilty to assault -> abh

The background

- Judge's ultimate finding: despite H assaulting her and hitting her several times when W was lying on the bathroom floor: *the whole sad history of the marriage – arising out of what each of these parties did to each other, both verbally and physically*
- May leave me with gulp factor
- But not gasp factor
- Not conduct within s 25(2)(g)

OG v AG

- [2020] EWFC 52 [2021] 1 FLR 1105
- Mostyn J ‘summary’
 - Personal misconduct
 - Add back
 - Litigation misconduct (costs not s 25(2)(g))
 - Adverse inferences from non-disclosure

OG v AG

- Re personal misconduct
 - Gross and obvious
 - Only in very rare circumstances
 - Cases clearly indicate such conduct would only be reflected where there is a financial consequence as to conduct [34]
- Really?

DP v EP

- DP v EP [2023] EWFC 6 10.01.23
- HHJ Reardon – trial 4 days + reserved judgment + costs hearing
- ‘Conduct; Economic Abuse; Needs’

DP v EP

- W 49 property consultant
- H 59 builder
- H functionally illiterate – great reliance on W for many aspects of day to day life
- NB day 4 because W recalled when H's lawyers reviewed bank statements and queried W's evidence; otherwise would have finished in 3 days

DP v EP

- Big picture
- Assets c £1.46m
- H earned £50k pa gross, mtg capacity £99k
- W earned £61k pa gross, mtg capacity £180k
- Both parties' housing needs in range 550k-650k

DP v EP

- So 50/50 right?

DP v EP

- Er no
- H said W's conduct (i) add back; (ii) undisclosed assets; and (iii) economic abuse amounting to s 25(2)(g) conduct, meant 63:37 split [£920k vs £529k]
- W said 50/50 but on her figures it worked out c 45:55, with her at £664k and H £795k

DP v EP

- H's case – throughout marriage W siphoned off funds and used them to accrue assets about which he knew nothing
- His illiteracy allowed W to do this, and she exploited his vulnerability
- H assumed W was managing their joint assets for the benefit of both of them, and trusted her to do this

DP v EP

- On the law, J cites Miller, OG v AG, H v H
- Says Mostyn J wrong in OG v AG to confine personal misconduct within s 25(2)(g) to conduct where the impact is financially measurable
- There are several cases where conduct had no such impact but was taken into account

DP v EP

- J made findings on five ‘sample’ allegations of conduct
- H said these were representative of wider pattern of behaviour on W’s part
- (1) W bought a property jointly with colleague, lied about it to H, and said to have been bought out by co-owner just before separation
- *J found W knew this unilateral action would be seen by H as breach of trust*

DP v EP

- (2) Were did sale proceeds of this property go in 2018? Did W invest in speculative property investment and lose money?
- *J found W removed £60,000 from the assets in a deliberate attempt to put them out of H's reach*

DP v EP

- (3) Money in joint HSBC Jersey account – H said it should have £100k++ in it (his inherited property sold for c £350k), but only £30k left
- *J found that £30k deliberately diverted by W without H's consent*
- *J found W hid bank statements to stop him finding out what happened*

DP v EP

- (4) Rent from jointly owned Dubai property
- H said where did rent from 2012 go?
- W's explanation all over the place
- *J found at least £100k missing funds*

DP v EP

- (5) W tried to sell jointly owned flat
- W got quite a long way down this process before failing to go ahead because she needed H's signature!
- *J found this was a deliberate attempt to sell joint property without H's knowledge or consent – gross breach of his trust*

DP v EP

- In summary:
- W repeatedly over several years sought to remove assets so that H would not be able to access them
- No finding that W held further undisclosed resources, but
- *It is more likely than not that W had removed other funds over the years, so that the total assets now are less than they would have been but for W's conduct*

DP v EP

- J applied the gasp factor
- Said it was present
- Breach of trust/ profound sense of betrayal
- Amounted to economic abuse within s 1 DAA 2021
- Takes the case ‘out of the ordinary’
- Conduct within s 25(2)(g)

DP v EP: disposal

- J says asset pot in fact £1.51m (combination of findings/ add-back)
- 50:50 would mean £755k (albeit W's actual would be £680k on account of add-back)
- Says 53:47 is fair outcome – H: £802k, W notionally £708k (in reality £633k)
- NB general finding that W's conduct over years likely to have depleted family assets (to extent not capable of quantification)

DP v EP: disposal

- NB needs are 'elastic' [158]
- W still able to house herself at top of range, even though would need mortgage (unlike H)

DP v EP: disposal

- Costs: W ordered to pay 75% of costs since June 2022 (trial started 28.09.22) when work started in earnest on fr case, standard basis
- To be assessed, but not more than £40k

Seales v Seales

- Decision of Master Bell [2023] NIMaster 6
- H 66, W 56, 19 year marriage
- H convicted of murder of Mr S 12y ago: in prison
- H had involved his sons in the murder
- W had serious mental health problems, symptoms akin to PTSD
- H in person, W had leading counsel

Seales v Seales

- The murder had led to W being social pariah
- The murder had deprived W of support of her sons while H imprisoned (because H had involved them in the murder)
- W had received death threats (either in retaliation for murder of Mr S or at H's initiative)
- H tried (&failed) to prove he had not murdered Mr S

Seales v Seales

- Clear medical evidence of W's condition
- W was frequently beaten
- W was subject to coercive control over many years
- This control prevented W from becoming financially independent -> increased level of vulnerability

Seales v Seales

- On law, cites Miller, OG v AG, H v H, & S v S
- Says there is a high threshold in Art 27(2)(f) [equiv of s 25(2)(g)]
- But gasp factor overstates it and raises threshold higher than it should be
- **Clear obligation on the court to recognise cases of coercive control because it would be inequitable to disregard that coercive control**

Seales v Seales

- Decision: net assets c £970k
- H had given away property to sister and sold for only £75k – no add back ???
- 75:25 split as W asked (?overall): 729k vs 243k
- Value of current matr home unclear
- No analysis of either party's needs, including W's future income needs, or H's housing needs on release

Seales v Seales

- Despite H's litigation conduct
- Eg FDR adjourned 5x on account of his non-compliance
- Failure to disprove conviction
- H ordered to pay £50k, ie 30% only of W's costs

G v G

- Another decision of Master Bell: G v G (Needs, Discovery and Coercive Control) [2024] NIMaster 5
- Agrees with himself in Seales: proven coercive control of itself is s 25(2)(g) conduct
- No finding of coercive control in this case
- W got 100% of equity in fmh because H had a business, and H had no housing needs because living with a partner!

G v G

- Conduct not pleaded; no coercive control alleged
- But duty on court, where 'red flag' of specific control raised (eg restricting access to money) to consider whether there is a more widespread coercive control, even if none pleaded - ? Adjourn for fact- finding??
- Floats idea of instructing a domestic abuse expert
- We all need to develop diagnostic skills to recognise what is and what is not coercive control

G v G

- Refers to *Haskell v Haskell* [2020] EWFC 9, a decision of Mostyn J, based entirely on needs, containing a finding of insidious coercive control
- Because Mostyn J said he had had regard to all s 25 factors
- Master Bell said although he had not explicitly referred to s 25(2)(g) conduct, *Haskell* was first recorded for case in which coercive control was taken into account as conduct ??

Australian approach

- Australian ‘property matters’ law v different
- Focus on contributions – not assumed to be equal
- Kennon (1997) says where domestic abuse by B has made A’s contributions more arduous, this can be factored in to adjust contribution-based entitlements
- Exceptional but that does not mean rare

Australian approach

- ALRC 135 in 2019 recommended statutory tort of family violence
- Initial govt response 2021 undecided, but later rejected
- Draft Bill 2023: new principle 2 re case management decisions – proceedings are to be conducted in a way that will safeguard parties against family violence

Australian approach

- Draft Bill 2023 proposes amendments to require court to consider
 - effect of any family violence on ability to make contributions,
 - the effect of any economic or financial abuse
 - the effect of any family violence on the current and future circumstances of the parties

Tsvetkov v Khayrova

- Peel J cites OG v AG
- Says [43] where party asserts conduct, they must prove:
 - Facts relied on
 - Those facts meet the conduct threshold
 - There is an identifiable (even if not quantifiable) negative financial impact generated/ caused by alleged wrongdoing

Tsvetkov v Khayrova

- Procedurally:
 - Conduct must always be pleaded as such
 - Party must (a) state with particularised specificity the allegations; (b) state how the allegations meet the conduct threshold; (c) identify the financial impact caused by conduct
 - Court can prevent conduct from being relied on

TK v LK [2024] EWFC 71

- Decision of Recorder Allen KC (as DHCJ)
- Casts doubt on Peel J's summary in *Tsvetkov*, especially re need for financial effect
- Conduct in case – M committed offence against child of parties, now in prison for 19y term
- Conduct did in fact have financial consequences!
- Rare eg of outright transfer in Sched 1 case

The upshot

- What did coercive control add in Seales?
- What did the economic abuse finding in DP v EP add?
- Query division 53:47 in DP v EP reflected J's sense of fairness having regard to unquantified amount of assets having gone south over the years?

The upshot

- In most cases, just about enough to meet needs, albeit at a reduced standard than during the marriage
- Conduct within s 25(2)(g) allows the court to give greater priority to needs of one party as opposed to the person guilty of conduct
- But very difficult territory – conduct of itself without financial impact versus the contribution over years of blue collar drudgery

The upshot

- The danger is increased costs – findings of fact
- Unlike child arrangements, there won't be a separate fact-finding
- So resolution is delayed
- Prospects of settlement vastly reduced
- Will it be worth it??

Tweak the thought experiment

- You are the judge
- Long marriage
- Assets £10m
- Agreed that *W* needs (absent pna) would result in award of £4m
- But pna, with no vitiating factor, means she should get £2m

Tweak the thought experiment

- A alleges long-term domestic abuse, including coercive and controlling behaviour, all after date of marriage
- A says unfair for B to be able to rely on pna in light of domestic abuse
- Do you award A more than £2m?

The end!

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