



## Scott Schedules after RE: H-N and Others [2021]

The guidance upon the use (or not) of Scott Schedules remains limited post [re H-N and Others \(children\)\(domestic abuse: finding of fact hearings\)\[2021\] EWCA 448 \(Civ\)](#), [re JK \(A Child\)\(domestic abuse: finding of fact hearing\)\[2021\] EWHC 1367 \(Fam\)](#) and most recently [re K v K \[2022\] EWCA Civ 468](#). Definitive guidance is needed for the benefit of professionals advising lay clients.



## Background – why the need for definitive guidance

Scott Schedules are historically used as an aid to ‘marshall’ the allegations for determination either prior to a Finding of Fact or to assist the court in establishing whether a Finding of Fact hearing is necessary and proportionate.

Although some guidance has been forthcoming it allows for slippage, and there is a lack of consistency of application by the courts. Family practitioners need to know definitively when and how Scott Schedules are to be used. The current position is not useful when a client needs robust advice.



## Domestic abuse

Domestic abuse is defined in Practice Direction 12J 2A, and ‘has the same meaning as that set out’ in the [Domestic Abuse Act 2021](#). Of particular note for the purposes of this article, coercive and controlling behaviour is defined by the [Family Procedure Rules PD 12 J](#) as:

### Coercive behaviour

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



**CHLOE BOOTH**

**Year of Call: 2019**

**Barrister**

Cobden House Chambers

19 Quay Street

Manchester

M3 3HN

[www.cobden.co.uk](http://www.cobden.co.uk)

Cobden House Chambers

19 Quay Street

Manchester

M3 3HN

[www.cobden.co.uk](http://www.cobden.co.uk)

[family@cobden.co.uk](mailto:family@cobden.co.uk)

0161 833 6000



## Controlling behaviour

*“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.”<sup>1</sup>*

In *re H-N*, the court highlights *“the harm that can be caused to children by coercive and controlling behaviour”<sup>2</sup>*.

Physical or sexual abuse and violent/threatening behaviours are relatively easily identified. However, controlling and coercive behaviour together with economic abuse and psychological, emotional or other abuse is not so. (Usefully, the legislation is instructive as *“it does not matter whether the behaviour consists of a single incident or a course of conduct.”*)

Thus if domestic abuse is alleged, in accordance with PD 12 J the court has to consider if a Finding of Fact hearing is necessary. This hearing is to establish whether the abuse alleged has occurred and if it has put the child/ren at risk, or if that that alleged abuse impacts or has impacted upon the child as set out at paragraph 31 of *re H-N*.



## Finding of Fact and relationship to Scott Schedules

A Finding of Fact hearing must be necessary and proportionate (*PD 12J PD 17(h)* and *Re H-N*). The hearing’s purpose is confined to the impact upon the alleged abuse on the child for the following reasons <sup>3</sup>:

---

<sup>1</sup> FPR PD 12 J and *Re F v M* para 103

<sup>2</sup> *Re H-N* para 19

<sup>3</sup> 12J PD 16

“Finding of fact and relationship to Scott Schedules”



- to provide a factual basis for a welfare report;
- to assist the court's assessment of the factors set out in paragraphs 36 and 37 of PD 12 J;
- to provide a basis for an accurate assessment of risk;
- before it can consider any final welfare-based order(s) in relation to child arrangements.
- before it considers the need for a domestic abuse-related activity, (such as a Domestic Violence Perpetrator Programme).

In assessing whether a Finding of Fact should be directed, the court should consider Paragraph 17, PD 12J(a)-(h)<sup>4</sup>:

- the views of the parties and of CAFCASS or CAFCASS Cymru;
- whether there are admissions by a party which provide a sufficient factual basis on which to proceed;
- if a party is in receipt of legal aid, whether the evidence required to be provided to obtain legal aid provides a sufficient factual basis on which to proceed;
- whether there is other evidence available to the court that provides a sufficient factual basis on which to proceed;
- whether the factors set out in paragraphs 36 and 37 of Practice Direction 12J can be determined without a fact-finding hearing;
- the nature of the evidence required to resolve disputed allegations;
- whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court;

---

<sup>4</sup> Together with the overriding objective and the President's Guidance as set out in 'The Road Ahead' (June 2020)

“In assessing whether a Finding of Fact should be directed, the court should consider Paragraph 17, PD 12J(a)-(h)<sup>1</sup>”



- whether a separate fact-finding hearing would be necessary and proportionate in all of the circumstances of the case.

Once the Court concludes that a Finding of Fact hearing is necessary, directions are then required to manage the determination of the allegations.

It is generally at this point that the court will consider directing the use of a Scott Schedule to ‘marshall’ the disputed allegations of abuse. However, it should be the case that at DRA decisions are made as to what allegations fall to be determined – but as we all know, there just isn’t the time to do so. It’s argued therefore, that the use of a Scott Schedule is a casualty of a lack of court time, and the arguments against their use will remain circular whilst the courts remain under-resourced. Further, the identification and analysis of the behaviour complained of is often difficult, and time consuming for lawyers, and the Scott Schedule is perceived as a ‘neat’ way to organise the allegations.



## The difficulties with identification of coercive and controlling behaviour

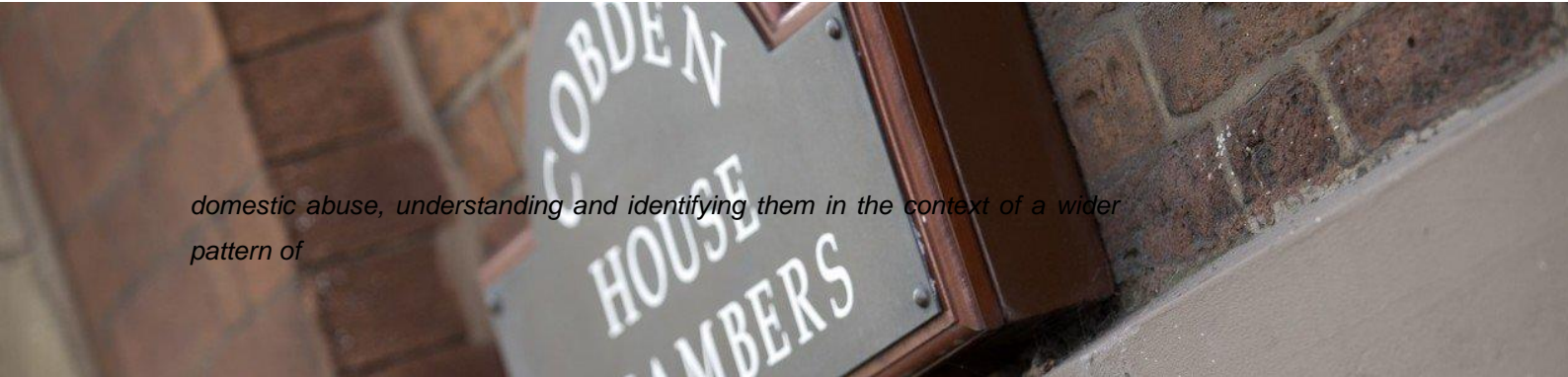
Examples of such behaviour are identified at paragraph 60 of *F v M*, but strongly caveated by: “*key to this particular form of domestic abuse is an appreciation that it requires an evaluation of a pattern of behaviour in which the significance of isolated incidents can only truly be understood in the context of a much wider picture*”<sup>5</sup>.

However, in his analysis Hayden, J says that: “...*Though some of the behaviours I have been evaluating are sadly all too familiar to those involved in investigating*

---

<sup>5</sup> *Re F v M* para 60

“Examples of such behaviour are identified at paragraph 60 of *F v M*”



*domestic abuse, understanding and identifying them in the context of a wider pattern of*

*behaviour presents a continuing challenge. At the risk of labouring the point too heavily it is crucial to evaluate individual incidents in the context of the wider forensic landscape.”<sup>6</sup>*

It is suggested that the practitioner can gain a ‘*broader understanding*’ (a ‘*paradigm*’ example) by considering Section 76 of the Serious Crime Act 2015, which creates the offence of controlling or coercive behaviour in an intimate or family relationship.

Thus, as coercive and controlling behaviour is indicated by a pattern of behaviour not a timetable of individual incidents, it is said that Scott Schedules are an inappropriate corollary.

Scott Schedules will fail to assist the court in a necessarily more cerebral and nuanced analysis. Which (in instances of coercive and controlling behaviour) is the analysis of a cohort of behaviour patterns, not a timetable of things said to be done. Re H-N endorses this view.

But Hayden, J in F v M goes on to note that he does “*not discount the possibility that there will be cases when they have real forensic utility. Whether a Scott Schedule is appropriate will be a matter for the judge and the advocates in each case unless, of course, the Court of Appeal signals a change of approach*”. This creates real tension in any purported guidance, and creates questions where there should be answers.

---

<sup>6</sup> *Re F v M* para 102

“It is suggested that the practitioner can gain a ‘*broader understanding*’ (a ‘*paradigm*’ example) by considering Section 76 of the Serious Crime Act 2015, which creates the offence of controlling or coercive behaviour in an intimate or family relationship”



Limited assistance was provided by re H-N, where it was said that judges should have allegations confined to Scott Schedules, when a more ‘granular’ assessment was required. This was reconsidered and affirmed in the more recent re K v K<sup>7</sup>. Therefore the remaining questions to be answered are:

1. when is a broader approach required?
2. Is ‘broader approach’ interchangeable for ‘forensic need’?
3. if a narrow approach is required then is a Scott Schedule necessary in any regard?
4. what if there is a middle-ground approach that is required, and what identifies such a middle ground, bearing in mind that the court must adopt a binary approach (re B [2008] UK HL 35, [2009] AC 11)?

PD 12 J sets out the meaning of the behaviours which result in the necessity for a Finding of Fact hearing, but not a mechanism to identify or marshal them. The case law on Scott Schedules and when they will be appropriate, is intractable.

The Domestic Abuse Act 2021 sets out a statutory definition of domestic abuse, but not a test to find such abuse, and again, does not set out a mechanism by which to identify such abuse.


So where are those who advise left? Re J-K (a child)(domestic abuse finding of fact hearing) [2021] EWHC 1367 is instructive and applies the guidance in Re H-N. It is now suggested ( note the non-mandatory wording) that:

1. once it had been determined that a finding of fact hearing was necessary then there should follow:
  - i. in addition to the witness statements, concise statements of each party including a summary of the nature of the relationship;
  - ii. a list of domestic abuse that the evidence is said to establish;

---

<sup>7</sup> Re J- K para 18-22

“The Domestic Abuse Act 2021 sets out a statutory definition of domestic abuse, but not a test to find such abuse, and again, does not set out a mechanism by which to identify such abuse”

- 
- iii. a list of key specific incidents said to be probative of a pattern of coercion and/or control;
  - iv. a list of any other specific incidents so serious that they justify determination irrespective of any alleged pattern of coercive and/or controlling behaviour.
2. The court would need to know which specific allegations listed at 1(iv) were admitted or disputed with no necessity for formal responses to the other sections of the statements.



## The difficulties

Re J-K does not use mandatory wording (“*should*” not “*must*”) and did not address the issue in re F-M as to when a ‘*forensic analysis*’ would be necessary. It is clear, certainly to the members of the Family Team at Cobden House Chambers, that Scott Schedules are still ordered for use in matters that are not characterised by a need for ‘*forensic analysis*’. There is a clear need for guidance as to what circumstances will attract the need for ‘*forensic analysis*’

Scott Schedules have traditionally been used as a ‘go to’ to decide what matters need adjudicating upon in an attempt at expediency. However, once a Finding of Fact is listed (often many months later), contact for one parent is unlikely to progress until a determination is made. However if more time was listed for DRA’s further precious Court time would likely be mitigated further down the line. Further, it would assist in earlier resolution of issues such as intractable contact disputes, in the best interests of the child, which may obviate the need for anything like a Scott Schedule or an alternative.

PD 12 J 19 defers to the use of Scott Schedules but isn’t instructive as to when they should be used. Further PD 12 J promulgates that there can be a single occurrence of CCB, which creates a further unhelpful tension with the case law.

“Scott Schedules have traditionally been used as a ‘go to’ to decide what matters need adjudicating upon in an attempt at expediency”



Frequently, judges confine the number of allegations allowed. If a pattern of behaviour is to be established, confining the allegations to time periods or a number is not useful in that exercise (however, will help to focus the minds of the parties, but often resulting in frustration).

A final difficulty (and perhaps the biggest reason for clinging on to Scott Schedules) is that Scott Schedules are quite an appealing tool where there is no necessary nexus between individual incidents (as per the single occurrence scenario per PD 12J), or the evidence to prove the facts alleged is not complex or nuanced.



## The alternatives

It is suggested that courts should be prepared to list DRA's for longer, and with a view to assisting the parties to narrow the issues as much as possible. Of course that's blue-sky thinking but given the judicial concerns of Scott Schedules something has to be done. If it is indeed the case that the assessment of CCB requires a broad approach, one that cannot be confined to a list, something has got to give.

Another alternative which seems to be adopted in some courts, is a document akin to the 'threshold' document. The difficulty with such a document is that many solicitors do not routinely draft thresholds and so would need training or guidance.

In recent months, practitioners at Cobden House have seen a cohort of judges ordering a Scott Schedule and narrative witness statement. That may indicate an attempt to embrace the guidance as far as possible, but also demonstrating an intransigence that is probably rooted in the lack of definitive guidance.

“Courts should be prepared to list DRA's for longer to narrow the issues”





## Conclusion

There is an urgent need for a fit for purpose method of identifying and adjudicating upon allegations of domestic abusing in accord with [PD 12J](#). There is an urgent need for a united approach of the Court and professions so all parties clearly understand when Scott Schedules should be used and ordered.

It is anticipated however that there will be amendments in the PD to move away from the use of Scott Schedules, but there is no indication as to when. There is an urgent need for guidance now.

In the meantime, if instructing solicitors need assistance or training with the drafting of the 'threshold'-type documents referred to earlier, or general advice on the case law, Scott Schedules or any other issues arising within the scope of domestic abuse, please do get in touch with [Christina](#) or [Declan](#) on 0161 833 6000.

“It is anticipated however that there will be amendments in the PD to move away from the use of Scott Schedules, but there is no indication as to when. There is an urgent need for guidance now”



Cobden House Chambers family department are Peter Buckley (1972), Deanna Hymanson (1988), David Maddison (1995), Lisa Wilson (2009), Jasmin Shingler (2014), Eve Horren (2015), Suzanne Hargreaves (2015), Sophie Kenny (2017), Julie Doyle (2019), Chloe Booth (2019) and Callum Hurley



Cobden House Chambers

19 Quay Street

Manchester

M3 3HN

[www.cobden.co.uk](http://www.cobden.co.uk)

[family@cobden.co.uk](mailto:family@cobden.co.uk)

0161 833 6000