

Dealing with domestic abuse during the COVID-19 pandemic

Due to the COVID-19 pandemic, on March 23rd during a Government briefing, the UK was placed into a “lockdown”. There is strong evidence to suggest that, in the period immediately following this, levels of domestic abuse increased significantly, with Refuge - the UK’s largest domestic abuse charity - reporting a 700% increase in calls to its helpline in a single day.

The Government imposed “lockdown” is now beginning to be eased, and the window of opportunity for victims of domestic abuse to seek help has therefore been widened. It has been claimed that domestic abuse support services are bracing for a tsunami of referrals in the coming weeks.

Non-molestation orders

The law can be used to assist victims of domestic abuse in various ways. This is primarily done through the use of non-molestation orders, under the Family Law Act 1996 (“FLA 1996”).

A non-molestation order is defined in s.42 FLA 1996 as an order prohibiting the respondent from “molesting” the applicant (or relevant child). Molestation is not defined in the FLA 1996, but molestation has been found to have occurred in the following cases:

- *Davis v Johnson [1979] AC 264:* Violence or threats of violence;
- *Horner v Horner [1982] 2 WLR 914:* Harassment, intercepting another in the street and sending threatening letters. Any harassment that justifies the intervention of the court;
- *Johnson v Walton [1990] 1 FLR 350:* Sending partially nude photographs of another to the press to cause distress.

A non-molestation order can be used to prohibit actions, such as:

- Violence or threatening violence to the applicant or their property;
- Contacting the applicant directly or indirectly;
- Visiting a home address, place of work or places the applicant is known to frequent;
- Posting about the applicant on social media.

Only “persons associated to one another”, as defined by s.62(3) FLA 1996, are eligible to apply for non-molestation orders. This includes anyone who is related, married/civil partners, engaged, cohabiting or in an intimate relationship of a significant length.

Whilst only associated persons can apply for a non-molestation order, their prohibitions can also be used to protect “relevant children”. This includes children who are living with or might live with either party to proceedings or whose interests the court consider relevant (s.62(2) FLA 1996).

Non-molestation orders made for protection of children may, if justified, affect child arrangements. This can also be the case if a non-molestation order is obtained by the parent or long-term carer of a child against another.

Under s.42A(1) FLA 1996, breaching a non-molestation order is a criminal offence. The maximum sentence is 5 years custody.

The Court will have regard to all the circumstances of the case, as well as the need to secure the health, safety and wellbeing of the applicant or relevant child (s.42(5) FLA 1996).

The following three principles should be considered before a non-molestation order is granted:

- There must be evidence of molestation (*C v C [1998] 1 FLR 554*);
- The applicant or relevant child must need protection;
- Judicial intervention is necessary to control the respondent's behaviour that is subject to complaint (*C v C [2001] EWCA Civ 1625*).

A non-molestation order lasts for a specified period of time or until further order (s.42(7) FLA 1996).

Orders are typically made for 12 months, it is possible for them to last longer than this but the court would require very clear reasoning and is highly dependant on the circumstances.

It is possible for a non-molestation order to be granted on an "ex-parte" basis (without giving the respondent notice of the hearing) under s.45(1) FLA 1996. This provision benefits victims of domestic abuse who require immediate protection. Ex-parte applications are particularly beneficial during lockdown, when victims of domestic abuse may only have a limited window of opportunity to seek assistance.

In determining whether to grant a non-molestation order on an ex-parte basis, the Court should have regard to all of the circumstances, specifically including all the factors listed in s.45(2) FLA 1996:

- 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;
- whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately;
- 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.

Further relevant guidance regarding granting ex-parte non-molestation orders can be found in Practice Guidance issued by Sir James Munby, the then President of the Family Division.

Applications & Procedure

Applications for a non-molestation order should be made on Form FL401. There is a fee of £75 for this application, although it is possible to claim Legal Aid for assistance with a non-molestation order.

Form FL401 includes a section for an applicant to tick if they wish for the application to be dealt with on an ex-parte basis, and also a section for them to tick which confirms how the applicant and respondent are associated.

An application should include a detailed witness statement, setting out:

- Evidence of non-molestation;
- Application of the evidence to the legal test contained within s.42(5) FLA 1996;

- Evidence that the application should be dealt with on an ex-parte basis (if necessary);
- How the prohibitions sought will protect the applicant or any relevant children.

It is also good practice to include a draft order, setting out the exact prohibitions sought.

COVID-19

It is important to stress to any potential applicants that the courts are currently able to deal with applications for non-molestation orders, and have been able to do so throughout the COVID-19 lockdown.

In *COVID 19: National Guidance for the Family Court*, Sir Andrew McFarlane, President of the Family Division, it is stated that applications for non-molestation orders where there is only a limited amount of evidence should be held remotely.

Non-molestation orders were identified as “*work that must be done*” by Mr Justice MacDonald in *Version 4 of The Remote Access Family Court*.

The *Interim Practice Guidance for Cleveland, Durham and Northumbria* states that without notice, non-molestation applications should be heard remotely, either by Skype for Business or BT Meet Me. The interim guidance also highlights and confirms the importance of a detailed witness statement at this stage, as the court will not hear live evidence as a matter of course. Additionally, the guidance sets out that a return hearing, to challenge the order made without notice, should be held remotely within 14 days of the original hearing.

In *Re A [2020] EWCA Civ 583*, the Court of Appeal set out that the following factors are likely to influence the decision to hold a remote contested hearing:

- i) *The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?*
- ii) *Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;*
- iii) *Whether the parties are legally represented;*
- iv) *The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;*
- v) *Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;*
- vi) *The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;*
- vii) *The scope and scale of the proposed hearing. How long is the hearing expected to last?*
- viii) *The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;*
- ix) *The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;*
- x) *Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.*

The various strands of guidance, taken together, suggest that remote hearings will be suitable for the majority of applications for non-molestation orders as evidence will not ordinarily be heard at ex-parte hearings, return hearings, any directions hearings or pre-trial reviews.

A contested final hearing, where evidence is to be heard and tested, will be less likely to be suitable for a remote hearing. The complexity of the issues to be resolved will be relevant in this regard. Another relevant factor is that respondents are often litigants in person, some may want to appear in person or may have limited access to technology. Similarly, applicants who are vulnerable or scared may not feel comfortable without their legal representative physically by their side.

Due to the easing of the lockdown measures, Teesside Combined Court Centre is beginning to open for in-person and "hybrid" hearings in a very limited capacity. This re-opening is being undertaken in accordance with Government social distancing guidance. This means that only one family judge will be sitting, and they will be dealing with a backlog of public law matters.

District Judge's ordinarily hear the bulk of applications for non-molestation orders. Unfortunately, due to the size of the court rooms, it is not possible to socially distance in District Judge's Chambers at Teesside Combined Court Centre.

Therefore, it is likely that applications for non-molestation orders will continue to be held remotely, until social distancing measures are substantially relaxed. It is important to stress to potential applicants that whilst it may be some time before a contested final hearing can be heard, any interim orders will offer the same protection to them and are enforced in exactly the same way.

For practitioners, having a clear account from the applicant, including any evidence the applicant expects will support this, will be beneficial. Even as lockdown is eased, getting this information can be difficult and should be obtained as early as possible.

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