New Park Court

Family Briefing

Leeds

16 Park Place
Leeds
LS1 2SJ

DX: 26401 Leeds Park Square
T: +44 (0)113 243 3277
E: clerks@newparkcourt.co.uk

Newcastle

3- 7 Broadchare
Newcastle-Upon-Tyne
NE1 3DQ

T: +44 (0)191 232 1980
E: clerks@newparkcourt.co.uk

New Park Court

'She has a very calm, measured approach, combined with a great eye for detail. Her judgement and assessment of cases is spot on and her advice to clients always clear and understandable. Judges warm to her manner.'
Legal 500

Family Briefing

by Eleanor Fry

A tenacious advocate, Eleanor Fry deals with a broad range of complex and sensitive matters in the criminal and family jurisdictions, often with cross-jurisdictional aspects.

Why we should sit up and take notice before applying for Non-Molestation Orders without notice

1. The *Legal Aid, Sentencing and Punishment of Offenders Act 2012* ("*LASPO*") brought about significant limitations and exclusions to the provision of legal aid in, *inter alia*, private law family proceedings; these changes and their impact on the administration of, and access to, justice have been the subject of much debate over the past decade and an article of this length and nature could not begin to do justice to them all.

2. However, one consequence of the preservation[1] of legal aid for certain applicants who can be said to be victims of domestic violence (or to be at risk of domestic violence) is that applicants for Non-Molestation Orders under section 42 of the *Family Law Act 1996* ("*FLA*") now frequently have the benefit of legal aid in cases in which the respondent is unrepresented and unable to access advice.

3. There is no question that this was a necessary preservation. Many of those who are subject to and/or at risk of domestic abuse are among the most vulnerable in society and therefore ought to have access to justice to ensure that they are protected where necessary. However, this inequality of arms is now a common occurrence in the Family Court and whilst District Judges (and Deputies) are used to dealing with litigants in person and to striving to ensure fairness and adherence to the relevant legal test(s), there remain certain duties upon legal representatives acting in those circumstances, not least of which is to ensure that the legal test is met by the evidence underpinning any application they file and is outlined properly at any hearing.

[1] Under paragraph 12, Part 1, Schedule 1 of *LASPO*

4. Pursuant to s42 of the *FLA*, a person may bring an application for a non-molestation order against an "associated person" (a family member, cohabitant, ex-partner, etc.[2]) to prevent "molestation" by that person of the applicant and/or a relevant child. In deciding whether to grant the order, and if so in what form, the court will have regard to all of the circumstances of the case, including the "need to secure the health, safety and well-being" of the applicant or relevant child[3]. Whilst there is no legal definition of molestation, it was considered by Ormerod LJ in *Horner v Horner* [1983] 4 FLR 50[4] to include "any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court."

5. In other words, a key consideration should be whether a court order is actually necessary to protect the applicant from the conduct complained of. Rather than focussing solely on the conduct itself, the court will need to consider how this particular applicant/relevant child is affected by it, or rather the "harassment, alarm or distress caused by it"[5]. Family lawyers will of course be familiar with the concept of controlling and coercive behaviour and how abusive behaviours which may appear minor to some may in fact be calculated to cause, and succeed in causing, significant distress in the particular circumstances of that relationship (although for the purposes of a non-molestation order application, there is no need for the molestation to have been specifically intended to cause alarm/distress[6]).

6. In the case *of DS v AC [2023] EWFC 46,* determined in March of this year, drawing from both statute and case law within the particularly helpful paragraphs 23-24, Lieven J summarised the various principles of applications for *ex-parte* non-molestation orders, which should act as a reminder to us all:

23. *a*. "*On a without notice application the court must consider whether there is a risk of significant harm attributable to the Respondent if the order is not granted immediately, s.45(2)(a);*

b. And whether the Applicant would be deterred or prevented from making the application if the order is not made immediately; s.45(2)(b);

c. A without notice order should only be made in exceptional circumstances and with proper consideration for the rights of the absent party, R v R [2014] EWFC 48 at [1];

d. The Court should use its powers under the FLA with caution, particularly at a one -sided hearing, or necessarily on a paper consideration without the other party having notice, R v R at [1];

[2] Specific definition within section 62 of the *FLA*
[3] Section 42(5) of the *FLA*
[4] at p.51G
[5] Re T (A Child) [2017] EWCA Civ 1889
[6] Supra

e. "molestation" does not imply necessarily either violence or threats of violence, but can cover any degree of harassment that calls for the intervention of the court, Horner v Horner [1983] 4 FLR 50 at 51G;

f. The primary focus of the court should be upon the "harassment" or "alarm and distress" caused to those on the receiving end, Re T (A Child)[2017] EWCA Civ 1889;

g. There does not have to be a positive intent to molest, Re T at [42].

24 *It is important that these principles are applied properly, and orders are not simply granted by default. In particular, it is important for all concerned to note that a without notice application should only be made in exceptional circumstances where there is a risk of significant harm. If a without notice application is made, then the statement in support must expressly deal with why the case is exceptional and what the significant risk alleged is. There can be no doubt that far too many such applications are made where there is no reasonable basis to grant the application without notice."*

7. It really is incumbent, therefore, upon legal representatives to ask ourselves whether a without notice application is appropriate in the circumstances. As to, "proper consideration for the rights of the absent party" at paragraph 23(c) of *DS v AC*, we must bear in mind that a party seeking a without notice injunction bears a duty of full and frank disclosure to the court of all matters that have a bearing on the prospects of the application. As Carr J (as she then was) stated in *Alexander Tugushev v Vitaly Orlov* [2019] EWHC 2031 (Comm) at [7], "The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make". This infers an obligation upon legal representatives at drafting stage and before any court hearing to probe the instructions given to them and ask those questions arising which could lead to undermining answers, thereafter ensuring that the information is presented fairly.

8. Our duties do not end there, however. There is also a duty, where appropriate of course, to ensure that any resultant order is drafted accurately[7] and that the provisions are workable; as Peter Jackson J (as he then was) said in *R v R*[8], "(t)his consideration applies with special force when a breach of the order will amount to a criminal offence"[9]

[7] R v R [2014] EWFC 48
[8] [2014] EWFC 48
[9] Pursuant to section 42A of the FLA