

Divorcing an abusive, controlling and financially dishonest husband – how does the Domestic Abuse Act 2021 help?

Solicitors will routinely advise when to consider domestic abuse in children proceedings. However, such advice is not so forthcoming when concerned with financial remedy proceedings or while trying to prove financial abuse following a [marriage or civil partnership breakdown](#).

It would be fair to say that generally, domestic abuse has been ignored in financial remedy proceedings as it rarely meets the high level required to constitute ‘conduct’ under s 25(2)(g) of the [Matrimonial Causes Act 1973](#).

As a reminder, in a divorce or dissolution matter the court shall have regard to section 25(2)(g) of the Matrimonial Causes Act 1973 (“MCA 1973”), which is:

“the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it.”

Patterns and issues of domestic violence are likely to be present in many financial remedy cases, but the details will be insufficiently known to the court in a significant number of cases. In addition, an abusive spouse might use financial proceedings as a controlling tool in their attempts to continue to exert control over the emotionally and financially weaker party, even after separation.

The long-awaited [Domestic Abuse Act 2021](#), now provides a definition for domestic abuse which is:

1. The behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if:
 - a) A and B are each aged 16 or over and are personally connected to each other, and
 - b) the behaviour is abusive.
2. Behaviour is “abusive” if it consists of any of the following
 - a) physical or sexual abuse;
 - b) violent or threatening behaviour;
 - c) controlling or coercive behaviour;
 - d) economic abuse; and
 - e) psychological, emotional or other abuse. It does not matter whether the behaviour consists of a single incident or a course of conduct.

Economic abuse:

In respect of “economic abuse”, this will refer to any behaviour that has a substantial adverse effect on B’s ability to:

1. acquire, use or maintain money or other property, or
2. obtain goods or services.

Examples of economic abuse will include:

1. depleting the abused party's finances;
2. damaging or destroying the abused party's property;
3. preventing the abused party from working or confiscating their wages;
4. limiting the abused party's access to funds or financial information;
5. arrangements so that the abused party is personally liable for loans, credit card debts, and impacting the abused party's credit rating ensuring the abused party is financially dependent upon them;
6. Refusing to provide the abused party with child support.

Other indications of economic or financial abuse could include:

1. the perpetrator having their legal fees paid from savings and income but refuses to allow the abused party to enjoy the same;
2. the perpetrator launching campaigns which causes a family company, which provides the sole income, controlled by the abused party to lose significant clients;
3. the perpetrator spending significant sums of money on holidays with the children on joint credit cards without the abused party's consent;
4. the perpetrator controlling or owning all of the assets and income;
5. the perpetrator upon separation, terminating the employment of various family members in a family business of the abused party, causing deep distress and financial difficulties;
6. the perpetrator refusing to provide financial support to the abused party forcing an application for interim maintenance (which is later settled before a hearing) causing emotional distress, anxiety and an increase in legal fees.

How an abusive party might conduct themselves during financial proceedings

In domestic abuse cases, if the abused party is the one who has issued proceedings (the applicant), the perpetrator (the respondent), might seek to exert continued controlling behaviour by refusing to cooperate and appropriately engage in the financial proceedings causing delay and additional legal fees for the abused party. Such conduct can also be exhausting and emotionally let alone financially draining which is a further form of abuse.

A study in 2017, found that women are more likely than men to compromise in their attempt to achieve an amicable settlement although legal representation does protect women in avoiding unfair outcomes.

Available evidence of domestic abuse in financial proceedings

Generally, within financial proceedings an abused party is unlikely to provide sufficient details of the domestic abuse to the court. This will follow advice from their solicitor, which is often unwelcomed advice, that abusive conduct is pursued in limited cases.

There should however be signs of domestic abuse before the court in the following forms, although untried in the financial proceedings. These will include:

1. A party being exempted from having to attend mediation prior to the issuing of proceedings

2. An injunction or undertaking under Part IV Family Law Act 1996 being in place or having previously existed, as disclosed in Form E's.
3. A reference to abuse in preliminary background information documents
4. As per the examples of economic abuse above.

Conduct in family financial proceedings

In the case of *Wachtel v Wachtel* [1973], conduct was considered by the family court and further summarised by Lady Hale in the widely reported case of *Miller v Miller* [2006]:

"[...] once the assets are seen as a pool, and the couple as equal partners, then it is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J in Wachtel v Wachtel [1973] Fam 72, at p 80, the conduct had been 'both obvious and gross'. This approach is not only just, it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases."

In the case of *S v S* [2006], which involved a review of conduct authorities, the judge held that the matters raised did not reach the 'gasp factor' but were more of a 'gulp':

"However, although the whole sad history of the marriage, which I have sketched, and which Judge Hughes made unavailing attempts to save, may leave me with what might be called a 'gulp factor', arising out of what each of these two parties did to each other, verbally and physically, I am not left with Mr Mostyn QC's 'gasp factor'. I do not conclude that the conduct of the Respondent...was such that it would be inequitable to disregard it in making my orders as to proper financial provision."

Selected examples of conduct reported in these financial cases

In the case of *OG v AG* [2020], the judge helpfully set out four types of conduct pleaded in financial remedy cases:

- (1) gross and obvious personal misconduct;
- (2) wanton and reckless dissipation of assets;
- (3) litigation misconduct; and
- (4) non-disclosure cases.

Gross and obvious personal misconduct

In the extreme, the gross and obvious conduct will have had a direct impact financially upon the abused party:

- *In Jones v Jones* [1975], the abused wife was attacked by her husband with a razor blade which caused her permanent disability. The wife was unable to work as a nurse. The Court of Appeal ordered the transfer of the matrimonial home to the wife.

In Hall v Hall [1984], the wife applied for financial provision. The husband raised conduct relating to matters alleged during the marriage. The judge held these to be irrelevant. After the parties had separated however, the wife stabbed the husband with a knife. The judge held that this was

conduct which should be considered in the financial proceedings and reduced the amount payable to the wife. The wife appealed. The Court of Appeal, in dismissing the appeal, confirmed that the judge had correctly held that the wife's conduct ought to be considered as a relevant factor. The incident was both obvious and gross.

In *Al-Khatib v Masry* [2002], the parties had been married for over 15 years. The wife issued financial proceedings against her husband, who was a wealthy Saudi businessman. The husband failed to engage in the matrimonial proceedings for several years. The husband had also, in contempt of court, abducted the children of the marriage to Saudi Arabia.

Due to the lack of full and frank financial disclosure by the husband, a judge issued the husband with an initial warning, namely that, in the absence of financial disclosure the court will draw the inference that the husband's total assets were as suggested by the wife and make an award as she sought – in the region of £24m.

At the hearing, on the issue of the husband's conduct, which included the husband providing deficient disclosure, not returning the children and refusing the wife any contact with their children, the judge awarded the wife financial provision as sought together with £2.5 million to enable her to pursue court proceedings in respect of the children. The judge held that there were compelling reasons to draw adverse inferences against the husband taking into account his serious and persistent litigation misconduct, dishonesty in seeking to avoid financial disclosure of assets, and his stance in relation to the children.

The case of H v H (Financial Relief: Attempted Murder as Conduct) [2005], illustrates how the court has dealt with domestic abuse in the extreme in a financial remedy case where the conduct was without question, gross and obvious.

The husband had been sentenced to 12 years' imprisonment. He had attempted to murder his wife in the presence of their children. As a result of the husband's conduct, the wife's mental health had been impacted. She was also forced to move from the family home and unable to work as a police officer since the incident. This directly impacted her earning capacity and furthermore, she would receive no financial support from the husband for the children due to his imprisonment.

The wife's needs were placed at higher priority to the husband's, and the wife was awarded almost three times more than the husband's share since the conduct was not merely a backdrop to the court's exercise; the conduct was likely to have an impact upon the children in later years which the wife would have to cope with. It was also held that it was necessary for the wife to be made as secure as possible, free from financial worry or pressure.

Interestingly in *FRB v DCA* [2020], a case which involved the paternity of a child – the court found that the wife's conduct in causing the husband to believe that he was the child's biological father did amount to conduct that was inequitable to disregard. However, in this case, the wife's award was not reduced as it was held that the husband had provided incomplete financial disclosure and the two 'behaviours' were effectively offset against each other.

Other aspects of conduct routinely seen in financial proceedings include:

1. the unknown disposal of matrimonial assets here and abroad;
2. litigating in an unreasonable manner and forcing high costs to be incurred; and
3. failing to provide full and frank disclosure in financial proceedings.

If we turn our focus to (a) – the disposal of assets.

Impact on award

In M v M (Financial Misconduct: Subpoena against Third Party) [2006], in breach of undertakings -being solemn promises to the court – the husband failed to provide full and frank financial disclosure and had also gambled away a significant amount of money.

The judge took into account the husband’s conduct as part of the court’s exercise. The court held that the husband’s conduct was a relevant factor to the overall decision and would not only have an impact legal costs. The judge ordered a clean break and departed from equality resulting in the joint assets being divided with the wife receiving 62.5%.

Add back of dissipated assets

- This concerns cases where one party has *wantonly and recklessly* dissipated assets which would otherwise have formed part of the matrimonial assets to be divided. For the dissipated assets to be ‘added back’ into the ‘matrimonial pot’, the court must be satisfied that there has been *wanton and reckless* dissipation of assets. This is a very high bar.

The case of *MAP v MFP (Financial Remedies: Addback)* [2015], demonstrates the difficulty caused by the criteria of ‘*wanton and reckless*’ dissipation, and how the court considers that a party should ‘take their spouse as they find him or her’.

In this case the husband was described as having a flawed character due to his addiction to drugs and prostitutes. He spent significant sums of money in payment for his addiction which reduced the amount available to be divided.

The judge however held that the husband had not overspent. The judge, surprisingly for many held that the husband could not prevent himself from doing so because of his flawed character, which concerned his addiction to drugs and prostitutes and his ‘obsession with perfection’. Although the expenditure was morally culpable and irresponsible, it was not deliberate or wanton dissipation.

Coercive and controlling behaviour

The above selected cases demonstrate that extreme cases of domestic abuse amounting to gross and obvious personal misconduct are more likely to be accepted as conduct and have an impact upon the financial settlement.

The Domestic Abuse Act 2021, has now included coercive and controlling behaviour as a form of domestic abuse. The issue of coercive and controlling behaviour in Children Act cases was highlighted in *Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021].

The case questioned the court’s approach to fact finding hearings and in particular, the use of Scott Schedules. These have been routinely used for many years to determine patterns of domestic abuse and coercive control. The outcome of this case shows that that the use of Scott Schedules are more likely to be a potential barrier to fairness and good process rather than being of assistance to the court. This is because a Scott Schedule prevents a court from having the required overall picture of the wider context and fails to show a pattern of coercive and controlling behaviour during, and after breakdown of, a relationship. The schedule instead provides a list of specific dated, timed and factual incidents. Coercive and controlling behaviour has a cumulative impact upon an abused party, and this is unlikely to be apparent from a Scott Schedule.

We currently have no equivalent practice direction or court form as in Children Act proceedings which should be considered or completed when there are allegations of domestic abuse in financial remedy applications, which should be referred to either at or before the first appointment.

Is paragraph 4.4 of the Form E sufficient to appreciate the dynamics of, and overall context of why a marriage has broken down and the abusive and dishonest conduct one might have been subjected for many years?

Where do we go from here?

To summarise, conduct arguments as described in *OG v AG*, amounts to either or a combination of:

1. gross and obvious personal misconduct;
2. wanton and reckless dissipation of assets;
3. litigation misconduct; and /or
4. non-disclosure.

To date, as practitioners our advice to clients in financial proceedings will include:

1. avoid asserting blame;
2. conduct arguments in financial remedy proceedings are taken into account in exceptional cases;
3. to request that there be an 'add back' of dissipated assets, these have to be 'wanton and reckless';
4. overall, the court will be concerned with meeting the financial needs of each party; and
5. if a conduct argument is accepted by the court, it could have an impact upon the size of the financial settlement in favour of the abused party and / or penalise the other party by way of a cost order.

Financial abuse can cause significant harm, regardless of whether it is a one-off incident or a series of incidents over several years. It will also have a significant impact upon the well-being of the abused party and their dependents. Added complications of cultural and religious expectations of the wider family and community, can have a devastating impact upon the abused party's willingness and confidence to pursue conduct arguments which could overall affect their financial security and future.

Time will tell how the courts will now deal with allegations of domestic abuse with its new definition in financial proceedings. With the advent of no-fault divorce next year, which some abused victims might want to initially opt for, to escape an abusive marriage as easily as possible, practitioners will need to weigh up carefully:

1. the need to raise blame and conduct,
2. when to raise it and how, and
3. what impact if any would this have in financial proceedings.

This is against the balancing act of:

1. encouraging settlements in the most cost effective and least confrontational manner,
2. considering out of court options which provides privacy, which is desired by many separating couples, and

3. ensuring that their client's safety, ability to participate and receiving the appropriate financial award is not compromised.

Kim Beatson specialises in all aspects of family law; including divorce, ending a civil partnership, ending cohabitation and agreeing child arrangements. However, Kim has particular expertise in facilitating complex financial settlements for both married and cohabiting couples.

Kim is also an ADR Group Accredited civil and commercial mediator and is particularly enthusiastic about the benefits of mediation for resolving cohabitation and contentious probate disputes.

If you wish to discuss your circumstances with Kim in confidence, seek legal advice, and find out how she might be able to help, you can contact her at kbx@anthonygold.co.uk.

Link to blog: <https://anthonygold.co.uk/latest/blog/divorcing-an-abusive-controlling-and-financially-dishonest-husband-how-does-the-domestic-abuse-act-2021-help>