President of the Family Division

PRACTICE GUIDANCE: NON-MOLESTATION INJUNCTIONS

UNDER THE FAMILY LAW ACT 1996

1. This Guidance replaces the *Practice Guidance Family Court - Duration of Ex Parte (Without Notice) Orders* issued on 18 January 2017.

CONTEXT

2. The purpose of this Guidance is to address some of the practical and procedural aspects of applications under s 42 of the Family Law Act 1996 ['FLA'], commonly known as Non-Molestation Injunctions.

3. The number of applications for FLA injunctions has been steadily increasing and has risen by about 50% over the past decade. Alongside this, the law relating to domestic abuse has continued to develop. The volume of applications requiring judicial consideration presents a significant challenge for the court's limited resources.

MERITS: WITHOUT NOTICE ORDERS

4. The test for whether a non-molestation injunction should be made *ex parte* (without notice to the respondent) is set out in the FLA 1996 at s 45;

s 45 — Ex parte orders.

(1) The court may, in any case where it considers that it is just and convenient to do so, make an occupation order or a non-molestation order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court.

(2) In determining whether to exercise its powers under subsection (1), the court shall have regard to all the circumstances including—

(a) 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;

(b) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately; and

(c) 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

(3) If the court makes an order by virtue of subsection (1) it must afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing.

(Subsections (4) and (5) not quoted here).

5. When deciding whether it is "*just and convenient"* to make an order without notice, the court's approach must be informed by a modern understanding of domestic abuse, including the definition set out at s 1 of the Domestic Abuse Act 2021 with its specific reference to controlling or coercive behaviour and psychological, emotional or economic abuse. It might, for example, be appropriate to make an order where the initial evidence suggests a pattern of coercive or controlling behaviour, and the court considers it is likely that the applicant could be further coerced or controlled into withdrawing the application; or where the court considers that the abuse (if proven) is likely to have had such an impact on the applicant that they are likely to be deterred from proceeding if the respondent is given notice of an application. These examples are not intended to be exhaustive as, in each case, the court should carefully consider the provisions of s 45(2) before deciding how to proceed.

6. The court must at all times balance the applicant's need for protection with the need to limit interference with the respondent's rights to that which is proportionate. Although FLA 1996 s 45 does not establish a test of

exceptionality, authority at High Court level (*R v R* [2014] EWFC 48 and *DS v AC* [2023] EWFC 46) has held that a FLA order should only be made without notice to the respondent in exceptional circumstances. Orders made without notice should not have the effect of barring a respondent from their home or place of work or other necessary location without very careful consideration and specific evidence to justify such an extensive infringement of the respondent's rights. Any order having that effect should be regarded as exceptional.

HEARINGS

7. Where an applicant seeks an initial order to be made *ex parte* (without notice to the respondent), the court may hold a without notice hearing (remote or attended). Alternatively, and in accordance with the overriding objective, the court may grant the order on paper (ie upon simply reading the application and supporting evidence) if satisfied that sufficient evidence has been provided to meet the merits test for a without notice order and if it is otherwise just and convenient to do so.

8. The court should not simply dismiss a without notice application on paper. On considering an application on paper where the applicant has requested it to be made without notice, the court has the options:
   i) to make the order in the terms sought;
   ii) to make the order in terms deemed necessary by the judge to protect the applicant; or iii) to hear further from the applicant so that the court can assess whether there is a risk of harm that justifies an *ex parte* order, as the application may not have set out the full picture. This approach is consistent with the principle that a party either seeking protective relief or making representations against such relief has a right to be heard at a hearing.

RETURN DATES

9. In all cases where an order is made without notice, s 45(3) of the FLA 1996 requires that the respondent has an opportunity to make representations relating to the order as soon as just and convenient at a full hearing. In order to ensure fairness, the court must list a hearing which the respondent should

attend. The return hearing should ideally be listed within 14 days, but volume of work may mean that a target of 28 days is all that can be achieved.

10. Experience shows that in some areas of the country, a substantial proportion of respondents do not attend return hearings. Where this occurs, local listing arrangements may need to be considered to make best use of available time. It is not necessary for the return date to come back before the same level of judiciary as the judge who made the *ex parte* order. Nonetheless, a return date must be fixed and must be specified in the *ex parte* order or the hearing notice sent alongside it. Giving the respondent permission to apply for a hearing date is not an adequate substitute, and itself may place an unmanageable burden on the court's administration.

11. Return dates should take place in person where possible, subject to the court's discretion to order a remote hearing. At a return date it is acceptable and consistent with the overriding objective for the court to explore with a respondent whether he/she is willing to submit to an injunction continuing in force with no findings of fact being made. If so, the order shall record that the court has made no findings of fact.

12. An *ex parte* order must have a fixed end date, which shall be clearly set out on its face. It is not sufficient merely to specify a return day.

13. The *ex parte* order itself can be for a substantial period, such as 6 or even 12 months, but the return date must be listed within 28 days at most. The period of the order is a matter for the discretion of the judge, who will also want to consider how soon a fact-finding hearing is likely to be listed, if the application is contested.

ORDERS AND REMEDIES

14. The court should bear in mind the need for clarity, proportionality and enforceability when making an order.

15. Where short form standard orders are available the court may wish to adopt these, particularly for the benefit of unrepresented litigants. An example of a simplified *ex parte* order appears at Annex 1.

16. Additional case management matters such as Family Advocacy Scheme wording for advocates' attendance and directions for the next hearing (other than the date and place) should not appear in the body of the injunction order but in a separate annex or a separate case management order where required.

17. Injunctive orders should be proportionate to the parties' circumstances. For example, it is unlikely to be appropriate to bar all communication, particularly where the parties have children or are engaged in divorce or financial/children proceedings. Orders must not have the effect of forbidding the respondent from serving evidence in response to the application.

18. If the court decides to exclude the respondent from a geographical area, the order should specify a named road or roads or a clearly defined area and avoid the use of expressions such as '100 metres from the applicant's home'. The use of maps, which can become detached, should likewise be avoided unless they are embedded into the body of the order.

19. An order made without notice must contain a statement of the right to make an application to set aside or vary the order under rule 18.11 in accordance with FPR 18.10(3). The phrase 'liberty to apply' is not sufficient for this purpose. The order must spell out that the respondent is entitled, without waiting for the return day, to apply to set aside or vary the order. If the respondent does apply to set aside or vary the order the court must list the application as a matter of urgency, within a matter of days at most.

20. The order must make it clear that (a) it was made in the absence of the respondent and that the court has considered only the evidence of the applicant and (b) the court has made no finding of fact. Where the evidence is written, it must be identified in the order. Where, exceptionally, the court has received oral or other evidence (e.g., a photograph) that evidence should be recorded on the face of the order or reduced to writing and served with the order.

UNDERTAKINGS

21. Before accepting undertakings, Judges and practitioners are reminded that s 46 (3A) of the FLA 1996 provides that the court shall not accept an undertaking under subsection (1) instead of making a non-molestation order in any case where it appears to the court (a) that the respondent has used or threatened violence against the applicant or a relevant child, and (b) for the protection of the applicant or child, it is necessary to make a non-molestation order so that any breach may be punishable under s 42A.

SERVICE

22. Personal service of injunctive orders is the starting point in all cases, whether by court bailiff or by the applicant using a process server. Both bailiffs and process servers must provide a certificate of service on court form FL415 with sufficient detail to explain how service has been effected.

23. Permission for any other type of service must be ordered by the court if personal service cannot be effected. No formal application is necessary for a bailiff to refer the matter back to a judge if they cannot effect service, and judges should extend the same concession to requests by applicant representatives for permission to serve by other means, rather than requiring a formal application.

24. If the court is continuing the terms of a without notice order unaltered on a return date and the respondent does not attend, this order should be served by post as the respondent will already have been personally served with the without notice order.

25. If the terms of the without notice order are altered on the return date, the respondent should be personally served whether or not he/she attended the hearing.

26. If the respondent attends, it may be helpful to record on the face of the order that the court has explained the terms of the order to the respondent and the respondent has understood these. This should not affect service of the return date order as outlined above.

CASE MANAGEMENT

27. Courts should put in place a system for identifying parallel proceedings under the FLA and private law proceedings under the Children Act 1989 where allegations of abuse are made between the same parties, and should aim to have at least one case management hearing bringing together the two sets of proceedings at an early stage. The court should avoid duplication, and factual findings and evidence should normally be disclosed from one set of proceedings into the other. Courts considering PD12J will have regard to any factual matrix that has already been the subject of determination in FLA proceedings when deciding whether further fact finding in children proceedings is necessary.

28. When giving directions for fact finding under the FLA, courts should keep in mind the provisions of FPR Part 3A and Practice Direction 3AA with respect to vulnerability, and the rules/practice direction relating to prohibition of cross-examination in certain circumstances by litigants in person. The approach set out in *Fact-finding hearings and domestic abuse in Private Law children proceedings – Guidance for Judges and Magistrates* dated 5 May 2022 should also be applied to FLA case management.

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President of the Family Division

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