ISSN 2754-5709 (Print)
ISSN 2754-5717 (Online)

2025
ISSUE 2 SUMMER

FINANCIAL REMEDIES JOURNAL

www.financialremediesjournal.com
PUBLISHED BY CLASS LEGAL

CLASS LEGAL

FRJ Financial Remedies Journal

2025
ISSUE
2
SUMMER

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FRJ Financial Remedies Journal

@frjournal.bsky.social
LinkedIn Financial Remedies Journal

ISSN 2754-5709 (Print)
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For any queries regarding the Journal, email frjeditor@classlegal.com

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Chair's Column

HHJ Edward Hess

Chair of the Editorial Board,
Deputy National Lead Judge,
Financial Remedies Court

Transparency

The transparency debate – in the context of practices on anonymisation and rubrics – receives another punchy analysis from Sir Nicholas Mostyn in this issue of the journal in his article 'Re-multiplied Propagation'. The difficulty here is that most of the judgments identified in his article (at High Court Judge level or below, including some of my own) made decisions on anonymisation and rubric selection in the context of *The Transparency Reporting Pilot for Financial Remedy Proceedings: Guidance from the President of the Family Division* and in circumstances where no member of the press was present and nobody was arguing for other than anonymised publication. The President's Guidance expressly contemplates that a judgment may be published, indeed will ordinarily be published, in anonymised form, with an adaptable rubric threatening that publicly identifying parties by name may be a contempt of court. This is irrespective of whether or not there is a formal Transparency Order, indeed the guidance suggests that normally a Transparency Order will only be considered when a press reporter attends, which remains unusual. The view expressed by Sir Nicholas Mostyn is that, absent the existence of a formal Transparency Order, any form of rubric is a 'worthless bloviation' (an empty threat) and that anonymity should only be permitted where it is 'exceptionally necessary' after a full *Re S* analysis leading to a formal Transparency Order, even if there is no party present wishing other than for anonymised publication. He suggests that the President's Guidance (which currently remains a Pilot) is unlawful or that, at least, its lawfulness should be carefully considered before it is made permanent. For those caught between the approach of the President's Guidance (which may well represent the preferred outcome for many judges) and Sir Nicholas Mostyn's strongly expressed views on the lawfulness of the approach, it would surely be helpful for there to be, at some stage soon, some guidance on this issue from the Court of Appeal.

Pensions on Divorce where the pension is based outside England and Wales

In a world where financially successful individuals often move around the world to accrue their wealth, including their pensions, it is not surprising that a court in this jurisdiction will be required to confront the existence of pension assets not within the jurisdiction. At its simplest, the courts of England and Wales will not directly interfere with pension assets not within the jurisdiction, but the issue is much more complicated than that. With appropriate declaration of interests, may I commend the reader interested in this subject to the relevant chapters of the newly published *Pensions on Divorce: A Practitioner's Handbook* (Class Legal, 4th edn, 2025) and the second report of the Pension Advisory Group, *A Guide to the Treatment of Pensions on Divorce* (2nd edn, 2024). For a discrete and very helpful summary of the issues arising, readers will be very much assisted by this issue's contribution by Beverley Morris and Jonathan Galbraith, 'The Challenges of Dealing with Overseas Pensions on Divorce'.

Musicians going through divorces

When a successful musician goes through a divorce, the court is likely to be tasked with trying to place a value of their catalogue of work. The problem arose in *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), *CB v KB* [2019] EWFC 78 and *ED v OF* [2024] EWFC 297. The methodology for doing this is well summarised in Dom Christophers and Joshua Viney's excellent contribution 'The Approach of the Family Court to Musicians' Proprietary Interests'. It is far from straightforward. The authors are right to draw our attention to Bob Dylan's lyric in *Cry a While*: 'I might need a good lawyer'.

The young financial remedies barrister

It is nearly forty years ago that I did my first financial remedies case as a barrister – or ancillary relief case as it would then have been called. This world has changed beyond recognition since those days of paper briefs, hand-written orders and asset schedules, a general level of non-specialism and, of course, no Financial Remedies Court. Reading 'Second Six at the Financial Remedies Bar – A

Survival Guide' by Sophia Paraskeva and Fatima Ismail, however, I am reminded that some things have not changed, for example the injunction to be organised and efficient, polite and helpful, and to give proper attention to client care. Important also, is their emphasis on keeping up to date with the latest developments in financial remedies law. These authors can be commended in this respect for their active engagement in the excellent FRJ case summary team of young and aspiring financial remedies lawyers, where they have produced for the FRJ website some really helpful summaries of some important judgments and, again declaring an interest, they can of course be particularly commended for their endorsement of the proposition that all young financial remedies barristers should always take with them to court the *Dictionary of Financial Remedies* as a helpful and compact reference guide!

HHJ Edward Hess, Rhys Taylor and Polly Morgan with members of the FRJ Case Summary team at a reception in March 2025

Class Legal Financial Remedies Awards 2025

Financial Remedies Conference, 16 October 2025

Sir Nicholas Mostyn

Ten years ago, **Class Legal** staged its inaugural financial remedies conference, the **At A Glance Conference**. Retitled this year as the **Financial Remedies Conference**, it remains the finest such conference in the calendar. This year's, to be held on 16 October 2025 at Pullman London St Pancras, promises to be possibly the best yet with a stellar array of contributors.[1] There are still some tickets left. Snap them up now[2] to avoid being left out of what will surely be the highlight of the financial remedies year.

Class Legal continues to publish **At A Glance**, the 34th edition of which is about to hit the stands; **Financial Remedies Practice** now in its 14th edition; the **Dictionary of Financial Remedies** and the **Dictionary of TLATA and Inheritance Act Claims**; and the **Financial Remedies Journal (FRJ)**. Collectively these works are the essential *vade mecums* of every busy financial remedies practitioner. Their width and depth reinforce the specialist nature of financial remedy practice.

Class Legal and I believe that peer-based recognition continues to be more readily bestowed on family lawyers engaged in public and private children law, and that financial specialism continues to suffer from Cinderella status within the family law sphere. Indeed, it is not just us who believe this; we have received pleas from practitioners urging us to initiate some form of formal recognition of money practitioners.

In response, and at an exciting time for money practitioners, Class Legal has instituted its **Financial Remedies Awards**, the winners of which will be announced, and the awards presented, at the **Financial Remedies Conference** on 16 October 2025.

These will be the only awards in the entire legal calendar exclusively focused on financial remedies practitioners and their work.

There will be six awards in total:

- Financial Remedies Young Solicitor of the Year
- Financial Remedies Solicitor of the Year
- Financial Remedies Young Barrister of the Year
- Financial Remedies Barrister of the Year
- Financial Remedies Chambers of the Year
- Financial Remedies Firm of the Year

The panel of judges will comprise me, Rhys Taylor of The 36 Group and Sarah Hoskinson of Burges Salmon. In September 2025 they will announce a short-list of four candidates for each award.

The winners of the awards will be announced at a ceremony following the conference over drinks and canapes at Pullman London St Pancras on 16 October 2025. There will be no requirement, in contrast to other award ceremonies, for short-listed candidates to purchase an expensive dinner for a full table of guests, although tickets will be available separately for those not already attending the conference.

I believe that this initiative will redress the deficit of recognition of financial remedy practitioners and will honour its rainmakers and future stars.

Despite this exciting development I have been slightly disappointed by the limited number of nominations thus far received. So I have decided to make a plea to the financial remedies world to look around and ask themselves who are the rainmakers and future stars who should be honoured? Now is the time for our community in the family law universe to gain maximum recognition by this process.

So please do go to https://classlegal.com/pages/financial-remedies-awards-2025 and nominate your favoured practitioners.

Thank you,

Nicholas Mostyn

Notes

1 The conference programme can be seen at: https://classlegal.com/pages/conferences/fr-conference-2025

2 Tickets can be bought at: https://classlegal.com/pages/conferences/fr-conference-2025

Foreign Property Regimes and English Matrimonial Finance: Parity or Particularity?

Rebecca Carew Pole KC
1 Hare Court

Kyra Cornwall
1 Hare Court

Introduction

Since the landmark decision in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534, English law has recognised the legitimacy of pre-nuptial agreements. As family life becomes increasingly international, the courts regularly encounter a wide variety of agreements, including those signed abroad.

The most common form of foreign agreement is the election of a foreign matrimonial property regime, such as the French *séparation de biens* or the Italian *separazione dei beni*. These typically operate to exclude any sharing of assets during marriage and on divorce.

Should such an agreement be treated with the same weight as a bespoke English pre-nuptial agreement, negotiated with financial disclosure and specialist independent legal advice? The answer is less straightforward than it may seem.

The legal framework: *Radmacher* and the years that followed

Historically, pre-nuptial agreements were contrary to public policy, since marriage involved a duty to live together (*Cocksedge v Cocksedge* (1844) 14 Sim 244). However, by the late 20th century, courts began giving them increasing weight, as seen in *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, where the wealthy parties had independent legal advice, and *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298, albeit a postnuptial agreement in that case.

The turning point came in *Radmacher v Granatino*. This marked a seismic shift in the English courts' approach to nuptial agreements. The Supreme Court held that, a pre-nuptial agreement should be given *decisive weight* if:

> 'freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.'

Baroness Hale, dissenting in part, cautioned against assuming equal bargaining power and highlighted the potential for gendered disadvantage ([172]–[180]).

Three key principles emerged from *Radmacher*, which now guide judicial treatment of nuptial agreements:

(1) *Autonomy* – respect for individual decision-making by competent adults. To do otherwise just because the court knows best was said to be 'paternalistic and patronising'.
(2) *Understanding* – each party must have a full appreciation of the agreement's implications. Legal advice is not essential, but its absence may weaken the argument for enforceability.
(3) *Fairness* – an agreement must not lead to an unfair result at the time of divorce. The needs of any children and the financially weaker party remain a paramount. The fact of an agreement can alter what is fair.

The notion of *fairness* is shaped by various factors that may enhance or reduce the weight of the agreement, including the presence of disclosure, and the parties' understanding and intentions (see [68]–[83]).

These principles are now central to the judicial evaluation of agreements. Whilst they work coherently in the context of bespoke English agreements, their application to foreign marital property regimes – often executed without formal legal advice or negotiation, or as part of a default civil law framework – is more difficult.

In the years since *Radmacher*, the courts have grappled with how to treat agreements electing a foreign property regime. The resulting jurisprudence is nuanced and, at times, inconsistent.

In *Z v Z (No 2)* [2011] EWHC 2878 (Fam), [2012] 1 FLR 1100, Moor J considered a French couple who had signed a *séparation de biens* agreement before a notary. Unusually, the agreement included a clause addressing divorce. The wife accepted that it limited her claim to needs. The agreement was upheld in part; awarding the wife 40% of the £15m pot to meet her needs.

By contrast, in *V v V* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, Charles J gave more weight to an agreement that made no reference to divorce. After a short marriage, the

wife's outright needs award at first instance was reduced on appeal to a *Mesher*-style arrangement, acknowledging the existence of the agreement.

A more distinct line emerged following *B v S* [2012] EWHC 265 (Fam), [2012] 2 FLR 502, where Mostyn J differentiated between foreign marital property regimes and bespoke English agreements. His reasoning was later adopted by Roberts J in *Y v Y* [2014] EWHC 2920 (Fam) and Baker J in *XW v XH* [2017] EWFC 76. In *B v S*, Mostyn J observed:

> '[5] … there is a marked difference between a negotiated pre-nuptial agreement which specifically contemplates divorce and which seeks to restrict or influence the exercise of discretion to which the law gives access, and an agreement made in a civil jurisdiction which adopts a particular marital property regime. …
>
> [8] … a civil law matrimonial property agreement is different in character and objective to a "common law" pre-nuptial agreement which seeks to abrogate or influence the right to invoke a statutory discretion to redistribute fairly (or equitably) all the resources of the spouses following their divorce.'

Baker J expanded upon this in *XW v XH*, stating at [144] that for a nuptial agreement to have effect, the parties must have intended it to apply regardless of jurisdiction, and understood its terms and legal implications beyond the jurisdiction in which it is made. At [150] he noted:

> 'in some cases it will be appropriate for the court to uphold an agreement contained in the election of a matrimonial property regime, but in my judgment it will in many cases be more likely that the court will conclude that it would not be fair to hold the spouse to such an agreement, particularly where the election is made in a language with which he or she is not familiar and where the legal implications of the election are not made fully clear. Plainly, the court will be more likely to uphold an agreement which is contained in a bespoke document, in the language or languages which both parties understand, and when the legal applications, in particular on divorce, are clear.'

In *B v S* and *XW v XH*, the agreements were disregarded entirely. In *Y v Y*, limited weight was afforded – primarily to exclude non-matrimonial property from the sharing principle – although, functionally, this was not dissimilar to disregarding the agreement altogether.

The Court of Appeal refined the analysis in two key cases:

- *Versteegh v Versteegh* [2018] EWCA Civ 1050, [2018] 2 FLR 1417: the absence of legal advice is not fatal to enforceability. If an agreement was signed in a country in which they were commonplace, the absence of legal advice about its terms in England and Wales did not automatically mean that a party would be found to lack the necessary understanding. This is not a rejection of the value of legal advice entirely, but a recognition that its absence is not determinative.
- *Brack v Brack* [2018] EWCA Civ 2862, [2019] 2 FLR 234: the court confirmed that whilst an agreement excluding sharing is *likely* to mean that an award will be limited to needs, that is not inevitable. The claimant spouse may still receive an award in excess of need (i.e. based on sharing). An agreement does not oust the s 25 discretionary jurisdiction.

More recent cases involving French *séparation de biens* contracts and French couples have yielded varied outcomes:

- In *AD v BD* [2020] EWHC 857 (Fam), Cohen J gave the agreement no weight. Signed the day before the wedding, with no meaningful opportunity for consideration or advice, the wife was found not to have understood it.
- In *CMX v EJX* [2022] EWFC 136, [2023] 2 FLR 14, Moor J heard conflicting evidence about the execution of a *séparation de biens* agreement signed 2 weeks before the wedding before the wife's family notary. The husband said the notary had explained its significance; the wife claimed to have no recollection. The husband's account was preferred. The wife's full sharing claim (c. £12m) was reduced to an award of £9.46m – 45% of the liquid or 38.9% of the overall assets. Moor J observed that had the agreement sought to exclude needs – rather than merely omit reference to them – it would likely have been disregarded entirely.
- In *BI v EN* [2024] EWFC 200, Cusworth J upheld an agreement signed a week before the wedding before a consular official. Despite no legal advice or disclosure, the wife was highly educated and found to understand the agreement under French law. She received a needs-based award of £23m (20–26% of the total assets). Although the wife's award was greater than what she may have received in France under *prestation compensatoire*, it was substantially less than the 50% she would have received absent the agreement.

These cases suggest a shift in judicial attitude. The earlier decisions treated foreign property regimes as distinct in nature and purpose from bespoke English pre-nuptial agreements, but these more recent cases show a growing willingness to afford them weight – even where there was no specific legal advice, disclosure or contemplation of English proceedings. The focus appears to have moved to broader ideas of intention and general understanding.

Courts increasingly emphasise whether the agreement was 'commonplace' for parties of a particular nationality (*Versteegh*), but arguably this risks imputing knowledge based on background, rather than encouraging the examination of the specific facts of the case.

As *Radmacher* itself cautions (at [183]), the only relevance of foreign law is what it reveals about the parties' expectations and intentions at the time the agreement was signed. The growing reliance on cultural assumptions – e.g. that French nationals *must* understand the *séparation de biens* system, for example – may blur that careful line.

Foreign property regimes: nature and function

Marital property regimes from civil law jurisdictions – most often continental Europe – rest on legal and cultural foundations distinct from the fully negotiated, bespoke pre-nuptial agreements familiar to English practitioners. Recognising this is essential to any principled assessment of how such foreign instruments should be treated in English financial remedy proceedings.

In jurisdictions such as France, Belgium and Italy, matrimonial property regimes are not merely private agreements

between individuals; they are formalised legal frameworks often provided for by statute. Spouses may elect from various statutory regimes: e.g. *séparation de biens* (separation of property), *communauté réduite aux acquêts* (post-marital community of property) or *communauté universelle* (community of all property). A default regime applies in the absence of an election.

These regimes are not instruments of negotiated settlement in the English sense. They are often formalised before a notary but typically involve little individual negotiation or disclosure. A broadly standard-form contract is signed, often shortly before marriage, with minimal discussion beyond the statutory framework. The process is often brief and perfunctory. Independent legal advice is rare; parties frequently disagree over what was said in the notarial meeting.

In contrast, English pre-nuptial agreements are usually the product of individualised negotiation, often involving detailed disclosure and independent legal advice. Their efficacy, especially post-*Radmacher*, turns not merely on their formal validity but on the substantive fairness of their terms and the circumstances in which they were agreed.

Foreign marital regimes – though procedurally formal – do not always reflect informed, deliberate decision making. Parties are choosing between fixed legal options, not bespoke principles. Rather than opting out of discretion and into certainty (as English bespoke agreements attempt to do), parties electing a matrimonial property regime are choosing between predetermined sets of rules (*Marital Property Agreements*, Law Com No 198 (TSO, 2011)). It is a different exercise to the English bespoke agreement. In this way, the choice of a regime is different in kind from the negotiation of a contract. The fact that a regime was executed with the assistance of a *notaire* does not mean the parties had independent or comprehensive legal advice – especially when viewed through the lens of English notions of informed consent and contractual fairness.

The assumption of a 'cultural understanding' also complicates matters. In civil law systems, the election of a regime is often a routine part of wedding preparation. A party may agree to a regime without considering its long-term impact, especially if they did not expect to divorce under a discretionary regime or have little reason to believe that the arrangement will be determinative outside their home jurisdiction. The fact that the parties involved are French/Italian/etc should not automatically suggest that there has been a meeting of minds as to how these agreements operate.

Moreover, in many such systems, these regimes function primarily as *inter vivos* rules – governing asset ownership and liabilities during the marriage – rather than as comprehensive tools for post-divorce settlement. This can often be the central reason behind why one regime is chosen over another (e.g. an entrepreneur wanting to have a way to shield assets from their creditors by putting them into their spouse's name, behind the protective wall of a *séparation de biens* arrangement). The fact that the election of this regime will also have consequences on divorce may not be in the parties' minds at all at the time that they sign the document.

In short, these are not English pre-nuptial agreements in another language; they are different in purpose, process and perception.

Safeguards and understanding

One of the principal distinctions between the election of a matrimonial property regime and a bespoke pre-nuptial agreement lies in the *circumstances of their creation*. English law's readiness to give weight to nuptial agreements is grounded in procedural safeguards – designed to protect autonomy and understanding, while mitigating against undue pressure or ignorance. This is reflected in *Radmacher* and the range of factors enhancing or detracting from an agreement's weight (see [68]).

The Law Commission's 2014 report, *Matrimonial Property, Needs and Agreements* (Law Com No 343), proposed formal safeguards for 'Qualifying Nuptial Agreements' to be binding, including that:

- the agreement is contractually valid;
- it is made by deed and includes a statement acknowledging reduced judicial discretion;
- it is not made within the 28 days of the wedding;
- the parties exchanged material financial disclosure; and
- each received legal advice as to the rights and obligations they may be waiving (such as a claim to sharing).

The Commission emphasised that disclosure and legal advice – key for understanding – should not be waivable.

Though not enacted, these safeguards have become best practice and are routinely used as a benchmark when assessing enforceability under *Radmacher*.

Foreign marital property regimes rarely meet these criteria. They are often:

- executed before a single notary, without independent legal advice;
- finalised without financial disclosure;
- signed shortly before the wedding, sometimes just days in advance.

The absence of these safeguards raises legitimate concerns as to whether such agreements truly reflect informed consent – particularly when viewed through the lens of the English court's emphasis on fairness, autonomy and understanding.

Autonomy, fairness and the problem of parity

In her article 'Pre-nuptial Agreements – A Good Route to Autonomy?' [2024] 2 FRJ 163, Dr Sharon Thompson challenges the assumption that pre-nuptial agreements reliably reflect individual autonomy. She critiques what she terms 'the blind respect for neo-liberal autonomy' underpinning judicial reasoning post-*Radmacher*, arguing that this often benefits the economically stronger party.

Thompson highlights the psychological realities influencing decision-making in intimate relationships – *optimism bias* (the belief that the relationship will not end) and *bounded rationality* (difficulty in forecasting future consequences). As she argues, these dynamics may cause parties, especially the economically weaker one, to accept terms that are against their best interests, even absent overt pressure.

To suggest that such a spouse is adequately protected by the residual safety net of a needs-based award is, as Thompson argues, insufficient. Needs are assessed through

a discretionary lens, and often fail to reflect anything close to what would otherwise be a sharing entitlement.

These concerns are particularly acute in the context of foreign marital property regimes, signed shortly before the wedding, where the implications of excluding sharing are far-reaching and rarely understood in full. In *BI v EN*, for example, the parties signed a *séparation de biens* contract a week before the wedding, before a consular official. Despite no independent legal advice or disclosure, the court found the wife had full appreciation of its effect under French law. She received £23m to meet her needs – far less than the 50% she would have received absent the agreement.

This case illustrates the tension between *formal* autonomy (education, lack of coercion) and *substantive* autonomy. It is doubtful either spouse foresaw the scale of matrimonial wealth generated (*Radmacher* at [80]–[81]). Would the wife have signed the agreement had she known the divorce would occur in England, with vastly different rules? Her 'full appreciation' may reflect the technical requirements of *Radmacher*, but it sits uneasily with the outcome she ultimately bore.

Conclusion: parity or particularity?

The central question is whether foreign marital property regime agreements should be treated with the same weight as bespoke English pre-nuptial agreements. The short answer is that they should not.

While the courts rightly respect personal autonomy and intention, they must also remain alert to the differences in *form, context and function*. Foreign regimes are often standardised, executed without proper legal advice, disclosure or negotiation. To treat them as equivalent to bespoke English agreements is to risk mistaking procedural formality for substantive fairness.

Recent case-law suggests a growing willingness to impute understanding based on cultural familiarity. This risks diluting the fairness test established in *Radmacher*. It replaces scrutiny with assumption. Inferred consent is not the same as informed consent – especially where the consequences are profound.

As Dr Thompson observes, autonomy is not just freedom from coercion. It requires *meaningful participation* in shaping one's legal and financial future. Agreements signed days before a wedding, without full information or advice, often fall short of this ideal.

To treat the election of a foreign regime as equivalent to a bespoke pre-nuptial agreement risks attributing to it a level of intentionality and individualisation it may not possess. It is not enough to uphold these agreements out of respect for the legal custom of the foreign jurisdiction. The treatment of such agreements must be informed by an appreciation of their true nature – including the extent to which they were understood, accepted and relied upon by the parties, and their impact during the marriage.

In a jurisdiction committed to discretionary justice, foreign regimes are just *one factor* in the s 25 exercise – but not on equal footing with bespoke agreements that reflect English legal values and procedural safeguards. Anything more would risk injustice in the name of contractual consistency.

‘Feral, Unprincipled and Unnecessarily Expensive’ – A Guide to Intervenor Claims

Alexander Chandler KC

1 King’s Bench Walk

Introduction

Intervenor claims take us – family lawyers – out of our comfort zone.

As financial remedy (FR) specialists we are used to dealing with discretion and grey areas: the assessment of housing and income need, where to draw the line between marital and non-marital assets, how to reflect pre-marital contributions. The proverbial bad day in court may produce an outcome at the bottom end of a bracket but it generally won’t mean the entire claim is dismissed. And when things go really bad (or well) at court, the judge may come to a party’s rescue: the overarching objective, after all, is a fair outcome, and the court’s approach is not adversarial but ‘quasi-inquisitorial’, whereby, as with care proceedings, the court is not ‘… confined within the tramlines of adversarial pleadings’ (Baker LJ in *Re HW* [2023] EWCA Civ 149 at [37]), and the judge has a duty to independently ‘… investigate issues which he considers relevant to outcome even if not advanced by either party’ (Thorpe LJ in *Parra v Parra* [2002] EWCA Civ 1886 at [22]). Normally, each party will pay their own costs (FPR 29.3(5)).

By contrast, intervenor (IV) claims tend to be binary: the IV either can or cannot establish his interest in property. Where this involves a dispute of recollection but little documentary evidence, credibility can be pivotal, so a bad day in court – a witness who fails to come up to proof or whose reliability is undermined in cross examination – can mean the case is won or lost. Costs will generally follow the event – and IV cases can be very expensive indeed.

So, while IV claims involve challenging and interesting work, compared to the usual horse trading at an FDR, they are not for the faint hearted. They can go wrong, and spectacularly so.

How wrong can a case go? *Uddin v Uddin and Begum*

The title of this article comes from HHJ Wildblood KC’s judgment in *Uddin v Uddin and Begum & Ors* [2022] EWFC 75. Like many good judgments, its essence is contained in the very first line:

> ‘[1] These are feral, unprincipled and unnecessarily expensive financial remedy proceedings.’

Uddin is a lengthy judgment (200 paragraphs), but its essential facts can be stated briefly:

- H issued Form A in 2018. W issued a civil claim seeking declarations that H held beneficial interest in properties held by third parties, and a controlling interest in an Indian restaurant in Somerset (the New Chandni Restaurant, Burnham-on-Sea, for those who take an interest in these sorts of details).
- Anyone who has appeared in a combined Schedule 1 and TLATA claim will know how difficult it is to case manage a civil alongside a family claim, and so it proved in *Uddin*, which was initially allocated to the Business and Property Court, then to the County Court, and finally to the Family Court at Bristol where it was allocated to HHJ Wildblood KC.
- The litigation had by that stage accumulated seven respondents in addition to the husband and wife: including the legal owners and occupants of the two properties, in relation to the restaurant, a company and main its shareholder.

The judgment in *Uddin* contains the following pithy overview of the legal wranglings:

> ‘[7] … Before descending into the mass of detail in this case, I want to give an overview. Apart from the trust claims (which, as I explain, are meritless and misconceived), this case should have been simple. …
>
> [13] … I wish to emphasise that I have given repeated warnings, both during this hearing and in the pre-trial

> review in April that the pursuit of the trust claims could leave at least one party "wiped out" by the costs. Further, because of the arguments that were advanced at the hearing in April, that hearing should have given the wife cause to reflect very carefully about the trust case that she was arguing. The arguments that I have heard at this hearing, even in the closing speech on her behalf, showed that no heed had been taken to my warnings or to the obvious weaknesses in her trust case.'

It proceeds to get steadily worse for the applicant – and here we are only a tenth of the way into the judgment:

> '[24] (ii) … The case has been in and out of court due to procedural infighting. In relation to the trust claims the wife has never set out in any meaningful sense how it is that she seeks to justify the claims or the shares that she seeks in the two relevant properties (High St and 4 Morland Rd); for instance, the case of *Laskar v Laskar* [2008] EWCA Civ 347 (to which I refer later) has simply been ignored by her.
>
> (iii) The trust claims are hopeless. It is simply not necessary to descend into any form of lengthy analysis of the equitable principles of resulting and constructive trusts. In relation to both properties in issue (50–52 High St and 4 Morland Rd) there is no evidence that the husband made any direct financial contribution to the purchase of either property or to mortgage payments. There is no evidence of a common intention (express, implied or imputed) that he would have a share in them – quite the reverse, since it was the very clear intention that the legal title holders would be the beneficial owners of the two properties. From the start, the trust claims as presented bore the evidential difficulty of the wife (an outsider) seeking to establish that the holders of the legal title and the husband shared beneficial interests in properties that both title holders and the husband denied; that evidential reality has not been reflected in anything that I have heard on her behalf.'

This downward trajectory concludes in a brutal denouement for W's advisers:

> '[146] Regrettably, I think that it is extremely disappointing that the points that were made so clearly by the Respondent parties at the hearing in April about the applicable trust principles were not absorbed more carefully on behalf of the wife. The above passage shows a confusion of analysis between the law relating to constructive trusts and that relating to resulting trusts. The very short passage, cited as coming from *Jones v Kernott* (which it does not), is not a complete analysis of the law. No further arguments about the applicable law were advanced on behalf of the claimant. I have no bundle of authorities. No mention was made by the wife's counsel of *Laskar v Laskar* [2008] EWCA Civ 347 or *Marr v Collie* [2017] UKPC 17. No explanation has ever been given as to why the wife asserts the beneficial interests that she does. …
>
> [152] In my opinion the wife's trust claims have been unprincipled and have stuck rigidly to the contentions made at the outset of these proceedings without there being any sufficient analysis of the evidence as it is has come in or the law applicable to it. …
>
> [200] … these proceedings are a disgraceful example of how financial remedy proceedings should not be conducted. The wife may wish to take advice about why her case was presented in this way and why so much expense has been incurred.'

While *Uddin* was a very unusual (but compellingly readable) case, it is far from unique when it comes to reported case of IV claims going spectacularly wrong.

It is often overlooked that in *TL v ML* [2005] EWHC 2860 (Fam), perhaps the most cited of first instance FR decisions, the parties had incurred a total of £474,000 in costs in relation to assets worth £560,000. In *KSO v MJO* [2008] EWHC 3031 (Fam) the case imploded under the weight of the costs incurred in interlocutory squabbling: Munby J (as he then was) commented:

> '[80] The picture is deeply dispiriting. And it is not as if it is only the adults who suffer from the consequences of such folly. The luckless children do as well. The present case is a sobering, and for me deeply saddening, example. If, instead of spending – squandering – over £430,000 in costs, the wife and the husband had been able to resolve their differences at a more modest and, dare I say it, more seemly level of costs, there might very well have been enough left in the matrimonial "pot" to house the wife and children and to enable the children to remain at their school, whilst still leaving something more than a mere consolation prize over for the husband. As it is, it is hard to see much being left from the wreck, not least after the trustee in bankruptcy has had his costs, expenses and remuneration. It is difficult not to be reminded at this point of *Jarndyce v Jarndyce* (see the Appendix). And the wife and the husband – and for this purpose I refer to them as the mother and the father, for that is what they are – are faced now with the wretched and thankless task of trying to explain to their daughters how it has all come to this.'

A number of lessons can be learned from these sad cases:

- IV claims can be legally and procedurally complicated.
- The outcome turns not on broad discretion and the court's objective view of what might be fair, but whether the claimant (so to speak) has proven the various required elements of his case, to the civil standard. IV claims can be very expensive indeed, significantly more so than the originating FR proceedings between husband and wife.

A good rule of thumb for a family lawyer in an IV case, and also in TLATA, is given the complexities of the law ('the witches brew' per Carnwath LJ[1]), there's a sporting chance that someone in the case – a barrister, solicitor or judge – will get the applicable law wrong. So, if it isn't your opponents or the judge, it may be worth double checking your skeleton before sending it off. And in fairness to the judiciary, one of the quirks of this area of law is that the judge who hears the IV claim (which may turn on issues of constructive trust, etc) may have no jurisdiction to deal with a freestanding TLATA claim.[2]

So, with apologies to those of who are already well versed in the lore/law of IV claims, let's go back to basics.

What is an IV claim?

Financial remedy claims normally involve two parties: husband and wife, or in same sex cases, applicant and respondent.

Pursuant to FPR 9.26B, the Family Court can join a third party ('intervenor') either: (a) where it is 'desirable' to do so that the court can resolve all the matters in dispute; or (b)

there is an issue involving the new party and an existing party which is connected to the matters in dispute, or desirable to join to resolve that issue.

The seminal point to note is that, where an IV is joined for the determination of a disputed preliminary issue, such as who is the beneficial owner of property/shares, etc the FR court resolves those issues *not* on the basis of the discretionary principles that only arise between divorcing spouses (i.e. MCA 1973) *but* on the basis of the general law that applies between co-owners, typically involving a consideration of the principles of constructive trust, proprietary estoppel or resulting trust.

This was put most clearly by Nicholas Mostyn QC (as he then was, sitting as a DHCJ) in *TL v ML* [2005] EWHC 2860 (Fam):

> '[34] It is to be emphasised, however, that the task of the judge determining a dispute as to ownership between a spouse and a third party is, of course, completely different in nature from the familiar discretionary exercise between spouses. A dispute with a third party must be approached on exactly the same legal basis as if it were being determined in the Chancery Division.'

This is why IV claims can be such a culture shock for family lawyers. We work in an increasingly siloed legal world where FR practitioners normally steer clear of Chancery work (and vice versa), and where FR judges habitually make orders that depart from the parties' proprietary interests at common law. I once attended a Chancery Bar Association conference where the speaker was attempting to explain what an FDR was: the delegates' response was a mixture of bafflement and confusion.

As FR practitioners we don't normally have to concern ourselves with issues of beneficial ownership. With apologies for quoting myself, I attempted to summarise the position in *DDR v BRD* [2024] EWFC 278:

> '[1] The family court does not normally have to resolve issues of beneficial ownership between divorcing spouses.
>
> [2] In most financial remedy claims, a declaration as to the parties' equitable interests would be: "… of very little value … it simply adds confusion and trouble and achieves nothing" (*Fielding v Fielding* [1977] 1 WLR 1146, per Ormrod LJ). A claim for financial remedies should normally "… be determined within the four corners of the Matrimonial Causes Act and on the application of the statutory criteria there set out", not by reference to equitable interest (*Prazic v Prazic* [2006] EWCA Civ 497, per Thorpe LJ at [25])
>
> [3] In *Tsvetkov v Khayrova* [2023] EWFC 130, Peel J summarised the position as follows:
>
> > "… ordinarily, in financial remedy proceedings, it matters little as between a husband and wife in whose name an asset is beneficially held. The court has wide dispositive powers to adjust ownership as part of its overall determination of the fair outcome. An exception to this general proposition is where a third party [IV] asserts a beneficial interest …"'

When do IV claims arise?

Disputes over beneficial ownership

The most common scenario for the joinder of an IV is probably where there is dispute about the beneficial ownership of real property. A husband might assert in Form E that while he is the legal owner of a property, he holds it for his parents/uncle/brother, etc because they were too old/didn't have enough income to obtain a mortgage, so the family agreement is that it would be put in H's name. The wife in turn may say, that's the first I've heard of it, my in-laws are thick as thieves, and they said exactly the same when my brother-in-law went through his horrendous divorce.

This creates the classic scenario for an IV claim, whereby the First Appointment judge will be told (typically by H's representative) that H's family members want to be joined, so as to be heard in relation to the preliminary issue of their alleged beneficial ownership of property.

Other situations

The power to join a third party is not restricted to claims for beneficial ownership between family members. It can arise in other situations, such as: (a) where a spouse is declared bankrupt, an issue arises between the other spouse and the trustee in bankruptcy, e.g. *DDR v BDR (Financial Remedies, Beneficial Ownership and Insolvency)* [2024] EWFC 278; (b) where a third party seeks to recover monies that are owed by a spouse, e.g. *Bogolyubova v Bogolyubov and Privatbank* [2022] EWFC 199; or (c) in more exceptional situations, e.g. the extraordinary facts of the litigation funder case of *Simon v Simon and Integro Ltd* [2024] EWFC 160.

Why do we have IV cases?

Essentially, the point of an IV claim is to determine which assets come within the court's reach: if the beneficial owners of a property are third parties, then obviously it would not come within the 'marital pot' that falls to be redistributed in the main FR proceedings. The late lamented Val le Grice QC put it best when he submitted: '… the size of the cake should be ascertained before the knife is applied to it' *Gourisaria v Gourisaria* [2010] EWCA Civ 1019 per Hughes LJ at [12].

The legal font of the IV claim is the Court of Appeal's decision in *Tebbutt v Haynes* [1981] 2 All ER 238, which, frustratingly, has not been given a neutral citation or published online on BAILII or the National Archives. *Tebbutt v Haynes* was a case about issue estoppel. In the original ancillary relief proceedings, the court joined H's mother and aunt before making declarations as to beneficial ownership. Aunt proceeded to issue a fresh set of proceedings in the Chancery Division. Could she do this? No, held the Court of Appeal, obviously she couldn't.

- The court dealing with financial remedies (then 'ancillary relief') had to be able to establish what property came within its reach:

  > 'It is fundamental to the s 24 [MCA] jurisdiction that the judge should know over what property he is entitled to exercise his discretion. If there is a dispute between a respondent spouse and a third party as to the ownership of a particular

> item of property which stands in the respondent spouse's name, that dispute must be resolved before the judge can make an effective final order under s 24. There are only two ways of resolving such a dispute. Either the Family Division proceedings must be adjourned pending the trial of the claim in other proceedings, or the dispute must be decided in the s 24 proceedings by allowing the third party to intervene'

- Where the court had joined third parties, inquired into those disputed issues and reached findings of fact, those findings were conclusive – in other words, aunt could not just re-start the litigation in another Division:

> 'It seems to me that, under s 24 of the 1973 Act, if an intervenor comes in making a claim for the property, then it is within the jurisdiction of the judge to decide on the validity of the intervenor's claim. The judge ought to decide what are the rights and interests of all the parties, not only of the intervenor, but of the husband and wife respectively in the property. He can only make an order for the transfer, to the wife, of property which is the husband's property. He cannot make an order for the transfer to the wife of someone else's interest. So, in order to make an order under s 24, it must be within the jurisdiction of the judge to determine what are the various rights and interests in the property not only of husband and wife but also of any other persons who claim an interest.' (per Denning MR at 242)

The Court of Appeal contemplated two alternatives: (1) join the third party so that the (family) court can resolve the disputed issues of beneficial ownership (etc) preliminary to resolving the financial claims of the main parties (H and W); or (2) stay the FR proceedings pending the conclusion of ongoing proceedings which would determine those disputed issues.

Subsequent authority has established that the first alternative (joining a third party IV) is normally preferable: e.g. *Baker v Rowe* [2009] EWCA Civ 1162, in which Wilson LJ (as he then was) observed that it was normally 'convenient' for a third party to intervene as a party in the ancillary relief proceedings:

> '[23] … Ever since the decision of this court in *Tebbutt v Haynes* [1981] 2 All ER 238, it has been recognised as convenient that a third person who asserts a beneficial interest in property which is the subject of an application for ancillary relief following divorce should either be permitted as an intervenor, or ordered as a further respondent, to make his assertion within, and thus as a party to, the application, rather than that the existence or otherwise of his alleged interest be determined in separate proceedings in a separate court at a separate time, with the consequential risk of inconsistent decisions. It would be highly unfortunate, as well as unprincipled, if such a person, when joined as an intervenor or as a respondent only for convenience, were to find that, even were his assertion successful, a general rule against making any order for costs inter partes would operate against him.'

Joinder

An important caveat is that for the determination to be effective and binding, the third party IV must be joined as a party, in *Gourisaria v Gourisaria* [2010] EWCA Civ 1019, per Hughes LJ (as he then was):

> '[19] I have no doubt that, ordinarily, intervention, if it is accepted, is much the best means of achieving a decision on all material matters in a manner which binds not only the spouses but also any third party …
>
> [20] I also agree that a simple invitation to intervene is not by itself sufficient to produce an order which binds a third party who does not accept the invitation. That was the point which troubled Munby LJ. For my part, I respectfully agree with him and I particularly agree that neither *TL v ML* or *Rossi v Rossi* or any of the other cases go anywhere near suggesting otherwise. On the other hand, of course if an invitation to intervene is given and not taken up, that is undoubtedly something that the English court can and should take into account in deciding whether to proceed or not. There was in this case a plain means available to the brother to make his voice heard on the issue before the court, which was well advanced in considering the case. …
>
> [23] Accepting as I do the general proposition that it is highly desirable that issues between a third party and spouses should be resolved at the same time as the issue between the spouses, there will be some cases in which it simply cannot be done and there will be others where it could be done only at the cost of a price which ought not to have to be paid.
>
> [24] In all those cases, indeed in every case, the question is a case management one, it is a case specific one and it calls for the exercise of the judge's discretion.'

As to which party (H or W) is under a duty to ensure a relevant third party is joined, see *Fisher Meredith LLP v JH* [2012] EWHC 408 (Fam): the duty falls upon the existing party who supports the IV's claim (see Mostyn J, [42]–[44] and [49]).

Second alternative: staying the claim

As with all good things in life and law, there are exceptions, where FR proceedings are better stayed, e.g. where the disputed issue involves technical issues that might be more suitable to be heard at a specialist court, as recognised recently by the Court of Appeal in *Bogolyubova v Bogolyubov and Privatbank* [2023] EWCA Civ 547, where King LJ commented that: '[48] The dangers of second guessing the outcome of substantial future third party litigation was highlighted in *George v George* [2003] EWCA Civ 202'.

Where do IV claims arise?

An IV claim can arise anywhere. However, anecdotally, and for what it's worth, the majority of IV cases I've dealt with in practice have involved families who originate from the Indian sub-continent. I'm not qualified to express an opinion as to why so many IV cases involve Asian families, but I suspect a number of factors are involved: the importance of wider family ties beyond the nuclear family, the tradition of generous family support of newlyweds, the expectation in some families that newlyweds should live with the husband's family.[3]

How does (or should) an IV claim arise?

FPR 9.26B mirrors its civil counterpart (CPR 19.2), providing that a party may be joined where:

> '(a) it is desirable to add the new party so that the court can resolve all the matters in dispute … or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute … and it is desirable to add the new party …;'

As to the interpretation of this rule, in *DR v GR & Ors* [2013] EWHC 1196 (Fam), Mostyn J explained at [35] that:

> '(v) Under the first limb it must be clearly shown that an existing matter in dispute between the parties cannot be effectually and validly resolved without the joinder of the proposed new party.
>
> (vi) Under the second limb it must be shown that there is a separate dispute between a party and the proposed new party and that it is desirable to hear the matters together. The question of whether it is desirable to hear the matters together extends to the commonality of evidence as well as the saving of costs.'

The procedural rules about joining an IV

The following provisions are admittedly more honoured in the breach and are subject to the exception that the court can join a party of its own motion (FPR 9.26B(4)).

FPR 9.26B(5) confirms that the Part 18 procedure should apply whereby a proposed IV should:

(a) issue an application notice (FPR 18.4), stating what order is sought and why the application is being made, attaching a draft order (r 18.7);
(b) support the application with evidence setting out the proposed IV's interest or connection with the proceedings (FPR 9.26B(5));
(c) make the application on notice, served with at least seven days' notice (FPR 18.8(b)(i)).[4]

Court's discretion whether to join

The court accordingly exercises a discretion whether or not to join. No third party is entitled as of right to become a party in an FR case, causing untold delay and additional expenses (aka creating leverage for one spouse to wrest a better settlement). Whether it will be desirable to join a third party IV will depend on the facts. This point cannot be too strongly emphasised. In *Behbehani v Behbehani* [2019] EWCA Civ 2301, the Court of Appeal underlined the following:

> '[69] … It all depends on the circumstances … It would be wholly disproportionate to insist that, even where the wife is not seeking the transfer of the assets, all such persons should be joined to the proceedings and the issue of ownership determined before any financial remedies order can be made. There may be cases where joinder is appropriate in those circumstances, but it should certainly not be the rule.'

In some cases, the case for joining a third party may be overwhelmingly strong: the third party may have issued an application, set out a strong prima facie case, the issue at stake may be so pivotal to the FR proceedings that the case is going to be stuck until this issue (e.g. beneficial ownership) is resolved.

In others, however, the court might refuse a request to join an IV, e.g.:

(a) Where the disputed asset is of peripheral importance – e.g. an asset with limited net equity, or an asset which was inherited/non-marital in character.
(b) Where the case can be resolved (or at least, an effective FDR can take place) without needing to go down the line of an active IV claim, e.g. where the issues are narrow, or mainly concern points such as periodical payments.
(c) Where the subject matter of the IV claim can reasonably dealt without joinder, e.g. if a family member seeks to recover a loan, could he attend as a witness, upon the undertaking of one party to repay him back from any award. (NB the court has no power to make orders in favour of third parties: *Burton v Burton* [1986] 2 FLR 419, *Wodehouse v Wodehouse* [2018] EWCA Civ 3009).)
(d) Post-FPR 3.4(1A) and *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416, there might be a compelling case to stay the proceedings to allow non-court dispute resolution (to include the proposed IV's claim).

Where an IV is joined, what directions should be made?

TL v ML directions

The starting point has to be *TL v ML* where the court held as follows:

> '[36] In my opinion, it is essential in every instance where a dispute arises about the ownership of property in ancillary relief proceedings between a spouse and a third party, that the following things should ordinarily happen:
>
> (i) The third party should be joined to the proceedings at the earliest opportunity.
>
> (ii) Directions should be given for the issue to be fully pleaded by points of claim and points of defence;
>
> (iii) Separate witness statements should be directed in relation to the dispute; and
>
> (iv) The dispute should be directed to be heard separately as a preliminary issue before the financial dispute resolution (FDR).'

'Pleading'

In *A v A* [2007] EWHC 99 (Fam), Munby J (as he then was) underlined the importance of points of claim and defence in an IV claim:

> '[24] I do, however, entirely share the deputy judge's view that directions should normally be given for such issues to be properly pleaded by points of claim and points of defence. In the present case the muddle, confusion and ambiguities in the wife's case would have been more pitilessly exposed, and at a much earlier stage in the proceedings, had the presentation of her case been exposed to the intellectual discipline which is one of the advantages of any system of pleading. Moreover, if the wife had been required to plead her case everyone would have had a much clearer idea, and at a much earlier stage, as to exactly what she was or was not asserting and as to exactly what the husband and the intervenors were or were

> not saying by way of defence. As it was, matters were wholly unclear even as late as the first day of the final hearing.'

These documents should be directed to be filed sequentially, i.e. IV to file points of claim, *then* a defence from the party who will likely support the IV (e.g. husband, if claim is made by his family), *then* a defence from the opposing party.

Disclosure relating to IV claim

When the court at First Appointment wants to give a prospective IV the opportunity to apply to be joined, it should direct one party (typically the spouse who supports the IV's position) to serve: (a) Form A; (b) the relevant parts of the Form E, etc; and (c) a copy of the relevant part of the First Appointment direction.

In due course, the court may have to provide for disclosure of the documentation relied upon (e.g. declaration of trust, conveyancing file, etc). In some cases, something approximating to standard disclosure might be needed.

However, a point which is often lost in practice is that an IV should not receive wholesale disclosure of the FR papers (or a copy of the bundle). FR proceedings are confidential. Where an IV is joined, he will be entitled to any material relevant to the preliminary issue, but not more generally to the other material (e.g. relating to the parties' incomes, needs, outgoings, etc). Where the extent of the disclosure is in issue, the court can rule on the extent of disclosure pursuant to its case management powers at FPR Part 4. The point arose most recently in *Bogolyubova v Bogolyubov and Privatbank* [2022] EWFC 199 where Peel J joined the IV but directed that it:

> '[43] … shall not be entitled to disclosure of any documents within the financial remedy proceedings unless agreed by the parties or ordered by the court. I refuse the specific disclosure sought by PrivatBank which in my view is not necessary, particularly in the light of my primary decision.'

Witness statements

In many IV cases, witness statement can be put off until there has been an FDR. Query if they should they be exchanged simultaneously (as in FR proceedings) or sequentially (as in civil litigation).

Listing hearing before or after FDR

Contrary to the court's guidance in *TL v ML*, in many cases an FDR will be directed *before* the preliminary issue hearing and not *vice versa*. In a typical medium asset case, it may be preferable to bring all parties (including the IV) to an FDR to see if some sort of agreement is possible, before the costs have escalated all round. This, again, will depend on the facts in the case. Is it going to be possible to resolve the case with the IV issue still at large? Will the FDR judge/private FDR evaluator be able to give a helpful indication in relation to the IV claim?

In *Shield v Shield* [2013] EWHC 3525 (Fam) Holman J declined to make any general comments about the timing of an FDR but observed that it would have been desirable and proportionate on facts of that case to list an FDR before the preliminary issue hearing:

> '[17] I would have thought that in this case this was a particularly opportune moment to have assembled all concerned (not necessarily the husband himself if he was physically or mentally unfit to attend) in a forum such as an FDR and to have a sustained attempt to see if a resolution to this awful conflict could not be found at a stage when there may be high litigation risk for all concerned.'

At the preliminary issue hearing of *Shield v Shield* [2014] EWHC 23 (Fam) Nicholas Francis QC (as he then was, sitting as a DHCJ) observed:

> '[108] I note that there was no FDR in relation to the preliminary issue. Whilst, as been made clear in a number of cases, an FDR will not necessarily be appropriate to the resolution of a preliminary issue, I express the view that consideration should at least be given to the possibility of an FDR prior to the hearing of a preliminary issue. It may well have been the case here that the input of an experienced FDR judge might have helped to save this family from the course which it has taken.'

To what extent should the Civil Procedure Rules apply?

Not at all. Per Thorpe LJ in *Goldstone v Goldstone* [2011] EWCA Civ 39:

> '[39] … Of course the ultimate trial required the family division judge to apply the law of property and the law of sham just as his brother judge would do in the Chancery Division. Careful preparation for that trial was necessary. However, these impeccable directions do not require or permit the import of the CPR. In its essence the claim remains a claim by the wife against the husband. Ultimately it is a claim for discretionary relief. In this, as in many cases, there must be a preliminary issue trial to establish the extent of the assets over which the discretion is ultimately exercised. Here, as in many cases, the preliminary issue trial determines the claims and the rights of third parties. The preliminary issue trial is pendent on the originating application. It has no independent existence.'

However, while the full panoply of civil procedure such as costs budgeting, etc does not apply in an IV claim, the FPR and CPR share several common principles of good case management and the overriding objective. It is suggested that practitioners drafting points of claim and defence in IV claims should be mindful of civil requirement that such documents be 'concise' (CPR 16.2).

A brief canter through the law

The critical point, already made, in every IV claim is that the applicable law:

> '[66] … differs importantly from the law to be applied between the wife… [as to the former] the court is not performing a discretionary exercise but is determining issues of property law and associated fact. It is salutary for family practitioners to keep the distinction clearly in mind' (*Goldstone v Goldstone* (above), per Hughes LJ)

Accordingly, the determination of an IV claim involves the civil approach (has the party proven his/her case to the required standard of proof[5]) as opposed to the family approach (what is fair, applying a quasi-inquisitorial approach).

In cases concerning real property, the operative law will be the law of trusts. Where the subject property was acquired as a home (i.e. within the 'domestic consumer context'), the presumption will be that the legal owner(s) is

also the beneficial owner(s) and that the most appropriate tool of analysis will be the constructive trust (see *Stack v Dowden* [2007] UKHL 17 at [56]; *Abbott v Abbott* [2007] UKPC 53 at [4]).

There are, perhaps surprisingly, few reported cases which purport to summarise the essential components of a constructive trust (see *G v G* (*Matrimonial Property: Rights of Extended Family)* [2005] EWHC 1560 (Admin), [2006] 1 FLR 62 at [85]–[99] per Baron J, and *Montreuil v Andreewitch* [2020] EWHC 2068 (Fam) at [111] per Cobb J).

In a constructive trust claim between parties who come within the domestic consumer context, the court will presume that the legal owner(s) of property are also the beneficial owner(s), and the burden of proof will be on the party who asserts otherwise.[6] Accordingly, where property is co-owned without an express declaration of trust, the starting point is equal beneficial ownership; whereas with a solely owned property, the starting point is sole beneficial ownership. The standard of proof is the civil standard, i.e. balance of probabilities. If a party fails to discharge the burden of proof, the claim fails: there is no overarching duty of the court to consider the overall fairness of the outcome.

Where a property is acquired as an investment, these presumptions may not apply (*Laskar v Laskar* [2008] EWCA Civ 347). Equally, the court is not obliged to adopt a resulting trust approach with an investment property acquired by co-owners are domestically linked: see the Privy Council case of *Marr v Collie* [2017] UKPC 17. More generally, see publications such as the *Dictionary of TLATA and Inheritance Act Claims* (Class Legal, 3rd edn, 2025) for a more detailed summary of the legal principles that apply.

Costs

Family costs: the 'general rule' and the 'clean sheet'

By way of overview, there are two main costs regimes that apply in respect of family proceedings:

(a) The 'general rule' is that, presumptively, each party will pay their own costs. This is set out at FPR 28.3, and covers 'financial remedy proceedings', which is defined at FPR 28.3(4)(b). Under the general rule, each party pays their own costs, save where, applying the check-list of factors at FPR 28.3(7), a party's conduct warrants that they should pay the other side's costs. Only open offers are admissible on costs, save at the FDR (where without prejudice proposals are admissible).
(b) The 'clean sheet', where the court applies a broader discretion and may make such order as to costs as it thinks fit. The clean sheet applies in cases that fall between two stools; that are neither: (i) 'financial remedy proceedings' for the purposes of the (FR) general rule; nor (ii) civil proceedings that involve the (civil) general rule that the unsuccessful party normally pays the successful party's costs.
(c) In clean sheet cases, *Calderbank* ('without prejudices save as to costs') offers *are* admissible once judgment has been handed down.

The clean sheet applies to IV claims because they are not proceedings for an FR to which FPR 28.5 applies but proceedings 'about' or 'in connection with' them. In *Baker v Rowe* [2009] EWCA Civ 1162, Ward LJ explained at [35]:

> 'The orders might well have been made in ancillary relief proceedings but they were not orders for nor even in connection with ancillary relief. The rule must be construed purposively as my Lord explained in *Judge v Judge* … and in his judgment above. Proceedings between interveners do not come within the ambit of the rule. The judge making the costs order has, therefore, a wide discretion.'

The clean sheet has been interpreted in some cases, and by some judges, as involving a 'soft costs-following-the-event principle' whereby the fact that one party has been successful will be the decisive factor. In *Baker v Rowe* [2009] EWCA Civ 1162 at [25] per Wilson LJ '… the fact that one party has been unsuccessful and must therefore usually be regarded as responsible for the generation of the successful party's costs, will often properly count as the decisive factor in the exercise of the judge's discretion'. In *KS v ND (Schedule 1: Appeal: Costs)* [2013] EWHC 464 (Fam) at [21] per Mostyn J:

> 'It is certainly correct that by virtue of CPR 44.3(4) (which is applied to these proceedings by FPR 2010 rule 28.2(1)) the court has to consider the conduct of the parties; whether a party has been successful in whole or in part; and any admissible offers made by the parties (which, as I have pointed out, include *Calderbank* offers). These would be the first things to write on the clean sheet.'

In other words, contrary to the normal position in a FR claim (between H and W), the successful party or parties have a reasonable expectation of recovering the costs in an IV claim from the unsuccessful party. One might ask, since the court has been engaged in the equivalent to a civil claim ('A dispute with a third party must be approached on exactly the same legal basis as if it were being determined in the Chancery Division'[7]), why should the outcome be materially different on costs?

Some conclusions

Drawing together the main strands of this article:

(a) An IV claim involves the application of principles of trust law and property law, and not the exercise of a broad-based discretion.
(b) It is generally a good idea when acting for an IV to front-load the preparation by taking clear instructions at the outset and thinking very carefully at the outset about what needs to be proven.
(c) Bear in mind the detailed provisions of FPR 9.26B, which include that there 'must' be a Part 18 application, supported by evidence (save, where an IV is joined of the court's own motion).
(d) Some courts are, if anything, too willing to join an IV, bearing in mind the delay and increased costs that will ensue. The applicable procedural rules are too often overlooked, and in many situations the court does not weigh up the merits of delaying or refusing an application to be joined as an IV, either because NCDR should be tried, or the asset at stake is peripheral to the overall case.
(e) In terms of case management directions, *TL v ML* remains the seminal authority, and the applicable rules are the Family Procedure Rules (not the CPR). Be

careful when ordering disclosure of existing papers, not to infringe on the confidential nature of the FDR proceedings between H and W.

(f) Costs will generally be at large (i.e. will generally follow the event) since IV claims fall outside the scope of FPR 28.3!

(g) *Calderbanks* can – and should – be sent.

Notes

1 *Stack v Dowden* [2005] EWCA Civ 857 at [75].

2 I.e. the Family Court has no jurisdiction to deal with TLATA or Inheritance Act claims, President's Guidance: Jurisdiction of the Family Court (24 May 2021, per Munby P) § 13 (www.judiciary.uk/wp-content/uploads/2022/07/PFD-Guidance-Jurisdiction-of-the-Family-Court-May-2021.pdf). Accordingly, in courts such as the Central Family Court (which does not exercise county court jurisdiction) a judge can deal with an IV claim brought within FR proceedings but not a freestanding TLATA claim. There have been proposals to change this unintended quirk of the rules but to date TLATA and Inheritance Act claims remain exclusively 'Chancery business' (cf. Civil Court Structure Review by Briggs LJ (2016) § 11.4 (www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf)).

3 See *G v G (Matrimonial Property: Rights of Extended Family)* [2005] EWHC 1560 (Admin), in which Baron J held the family's evidence of Hindu custom as to communal living did not involve the acquisition of proprietary interest; also see [2005] Fam Law 764.

4 Cf. requirement for 14 days' notice where an application is sought for an interim order such as maintenance pending suit (FPR 18.8(1)(b)(i) and 9.7).

5 As Lord Hoffmann explained in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35 at [2]: 'If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened'.

6 *Stack v Dowden* [2007] UKHL 17 at [68].

7 *TL v ML* at [34].

Adverse Inferences: The Court's Approach to Valuing Overseas Assets Without Disclosure

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This article will consider the court's approach to adverse inferences in cases where there has been no, minimal or seriously deficient disclosure from one party, particularly in relation to overseas assets. Valuing overseas properties and businesses can be particularly challenging where there has been no engagement and/or no disclosure by the party in control of the overseas asset and the other party has little information about the asset.

Within this article, particular consideration will be given to the following cases:

- *AF v SF (Dynastic Trust: Needs Based Award)* [2019] EWHC 1224 (Fam).
- *XO v YO & Anor* [2022] EWFC 114.
- *Mahtani v Mahtani (Adverse Inferences) (No 2)* [2025] EWFC 35 (Fam).

In all three cases, the court drew inferences as to the value of overseas assets on the basis of limited documentary evidence, resulting, in two of the cases, in significant sharing (or quasi-sharing) based awards in favour of the compliant party.

The law

Parties in financial remedy proceedings are subject to the duty of full and frank disclosure of their resources. Where there has been non-disclosure, the court is entitled to draw adverse inferences against the non-disclosing party.

The court's duty to consider making adverse inferences can be traced back to the decision of Sachs J in *J v J* [1955] P 215, [1955] 3 WLR 72 and has been applied in numerous cases since. More recently, in one of Mostyn J's 'pulling the threads together' judgments, *NG v SG* [2011] EWHC 3270 (Fam), he gave the following guidance at [16]:

> 'Pulling the threads together it seems to me that where the court is satisfied that the disclosure given by one party has been materially deficient then:
>
> i) The court is duty bound to consider by the process of drawing adverse inferences whether funds have been hidden.
>
> ii) But such inferences must be properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the court is satisfied he has not got.
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> iii) If the court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in the broadest terms.
>
> iv) In making its judgment as to quantification the court will first look to direct evidence such as documentation and observations made by the other party.
>
> v) The court will then look to the scale of business activities and at lifestyle.
>
> vi) Vague evidence of reputation or the opinions or beliefs of third parties is inadmissible in the exercise.
>
> vii) The *Al-Khatib v Masry* technique of concluding that the non-discloser must have assets of at least twice what the claimant is seeking should not be used as the sole metric of quantification.
>
> viii) The court must be astute to ensure that a non-discloser should not be able to procure a result from his non-disclosure better than that which would be ordered if the truth were told. If the result is an order that is unfair to the non-discloser it is better that the court should be drawn into making an order that is unfair to the claimant.'

The most significant case on adverse inferences remains *Moher v Moher* [2019] EWCA Civ 1482, in which the Court of Appeal considered an appeal brought by the husband from an order based on the inference that he had sufficient funds to pay the order. The husband submitted that the first instance judge had erred by failing to adequately quantify the undisclosed assets (per *NG v SG* at [16(iii)], above). The appeal was dismissed.

At [86]–[91] Moylan LJ set out four principles to be applied in cases of non-disclosure:

(i) The court should seek to determine the extent of the financial resources of the non-disclosing party.
(ii) The court will be entitled to draw such adverse inferences as are justified having regard to the nature and

extent of the party's failure to engage properly with proceedings.

(iii) The court is not required to determine a specific figure or bracket for the undisclosed resources. There will be cases where this will not be possible.

(iv) The court is entitled, in appropriate cases, to infer that the resources are sufficient or are such that the proposed award represents a fair outcome. It is better that an order may be unfair to the non-disclosing party than is unfair to the other party.

In relation to the second principle, Moylan LJ stated at [88]:

> 'When undertaking this task the court will, obviously, be entitled to draw such adverse inferences as are justified having regard to the nature and extent of the party's failure to engage properly with the proceedings. However, this does not require the court to engage in a disproportionate enquiry. Nor, as Lord Sumption said, should the court "engage in pure speculation". As Otton LJ said in *Baker v Baker*, inferences must be "properly drawn and reasonable". This was reiterated by Lady Hale in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415, [2013] 2 FLR 732, at para [85]:
>
> > "… the court is entitled to draw such inferences as can properly be drawn from all the available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are."'

In relation to the fourth principle, Moylan J stated the following at [90]–[91]:

> '[90] (iv) How does this fit within the application of the principles of need and sharing? The answer, in my view, is that, when faced with uncertainty consequent on one party's non-disclosure and when considering what Lady Hale and Lord Sumption called "the inherent probabilities" the court is entitled, in appropriate cases, to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome. This is, effectively, what Munby J did in both *Al-Khatib v Masry* and *Ben Hashem v Al Shayif* and, in my view, it is a legitimate approach. In that respect I would not endorse what Mostyn J said in *NG v SG (Appeal: Non-Disclosure)* [2011] EWHC 3270 (Fam), [2012] 1 FLR 1211, at para [16](vii).
>
> [91] This approach is both necessary and justified to limit the scope for, what Butler-Sloss LJ accepted could otherwise be, a "cheat's charter". As Thorpe J said in *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)* [1994] 1 FLR 359, although not the court's intention, better an order which may be unfair to the non-disclosing party than an order which is unfair to the other party. This does not mean, as Mostyn J said in *NG v SG*, at para [7], that the court should jump to conclusions as to the extent of the undisclosed wealth simply because of some non-disclosure. It reflects, as he said at para [16](viii), that the court must be astute to ensure that the non-discloser does not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations.'

Peel J applied the guidance provided by Moylan LJ in *Moher* in *Ditchfield v Ditchfield* [2023] EWHC 2303 (Fam) and *Hersman v De Verchere* [2024] EWHC 905 (Fam). In the latter case, at [25], Peel J made clear that a court is entitled to draw adverse inferences from a party's deliberate failure to attend a hearing or be represented in addition to their non-disclosure, provided those inferences are properly drawn.

Case examples

AF v SF (Dynastic Trust: Needs Based Award) [2019] EWHC 1224 (Fam)

In *AF v SF*, the husband failed to engage in proceedings. He filed a deficient Form E and no updating disclosure. In the latter stages of the litigation, he was found to lack capacity and was represented by the Official Solicitor. The court made various non-party disclosure orders to obtain details of the husband's resources in the United Kingdom. Due to the husband's failure to engage in the proceedings (despite maintaining capacity to handle his financial affairs), there was no evidence as to the value of the parties' holiday home in South America. The wife could do no more than guess the value of the property at £750,000.

Moor J stated at [63]:

> 'It has been said that it is up to the respondent to financial remedy litigation to open the cupboard door and show that the cupboard is bare. If he or she does not do so, the court can draw the inference that the cupboard is not bare. As explained in *Baker v Baker* [1995] 2 FLR 829, this is not an improper reversal of the burden of proof. It remains for the applicant to prove his or her case. A failure by the respondent to discharge the duty of providing full and frank disclosure can, however, lead the court to draw inferences that are appropriate.'

Moor J proceeded on the basis that the South American property was worth what the wife believed it to be worth without the need for documentary evidence (£750,000). The court also found that the husband retained £325,000 in his Monaco account which he said was in it in his Form E and had not provided updating disclosure for, and that there was an additional £723,018 in the husband's Monaco account. The majority of the husband's assets were non-matrimonial, and the wife's needs claim exceeded her sharing claim. The wife was awarded a generous needs-based award.

XO v YO & Anor [2022] EWFC 114

In *XO v YO*, HHJ Hess (sitting as a Deputy High Court Judge) considered how to value the parties' assets in circumstances where the husband's disclosure had been 'very obstructive and unhelpful'. The main assets available were a large number of businesses owned by husband in Nigeria. The husband had confirmed ownership of the companies but failed to provide any information as to their value. Neither the husband nor the main business (which was joined to the proceedings) attended the final hearing. The only documentary evidence available was some outdated information as to the turnover of one of the companies included in a staff handbook from 2010.

The husband was on notice as to the wife's position that the husband was likely to be earning £1m per annum and had assets in the hundreds of millions of pounds, as her position was detailed in her MPS statement and the court's judgment of 6 December 2021. The husband had not submitted any evidence to challenge the wife's position.

The wife's evidence of the value of the husband's busi-

nesses was based on her previous role as Group Managing Director for the business, her knowledge of the family's spending during the marriage and the information she had been told by people in the businesses. Her position at the final hearing was that the Nigerian businesses were worth approximately £200m. HHJ Hess noted at [51(i)]:

> 'Thus, the wife has more information than many wives in her position might have and this information, although not obviously of the quality which one might expect from an independent SJE accountant, is still helpful in the context of an otherwise blank canvass and, of course, the husband has not done what he could and should have done if he thought the wife was over-egging her claims, come to court and cause the wife to be cross-examined about what she was saying. He had the opportunity to do that; but chose not to take it.'

Although the husband did respond to the wife's assertion that his businesses were worth £200m, he failed to provide any evidence to support his position or provide any alternative valuation for the businesses.

In the absence of any evidence from the husband, HHJ Hess accepted the position advanced by the wife that the Nigerian businesses were worth c. £200m less 10% representing disposal costs (£180m net). In coming to this conclusion, he noted the following at [53]–[54]:

> '53. Mr Warshaw accepted that there was no mathematical calculation behind this figure. It is rather a broad assessment, taking into account all the matters I have set out above. He suggested that, if the husband had really believed that this was an outrageously high figure, he would have engaged with the court process to prove that he was correct. It is, he suggests, broadly consistent with the lifestyle of the parties during the marriage and the relatively small pieces of information which we do have. He has suggested that, applying the "cheat's charter" principles discussed above, this value should be accepted by the court.
>
> 54. I should say, before reaching a conclusion on this, that in his email to me of 20th September 2022, the husband strongly took issue with Mr Warshaw's valuation suggestion, saying: "According to the applicant the total assets in the case is worth £196,000,000 (without even scant documentation or proof). I am perplexed as to how many businesses in Nigeria are worth even £5,000,000. I shall neither admit nor deny whatever assertions the applicant may have cooked up from her imagination". The difficulty for me in placing any significant weight on this assertion is that it is made by somebody who has chosen to ignore and/or obstruct almost all of my disclosure and valuation directions and chosen not to come to court to cross-examine the wife or challenge any of her assertions in the proper way. He is absolutely the obstructive non-discloser that the judgments set out above on adverse inferences were designed to meet. He only has himself to blame if he considers the assessment to be incorrect.'

The parties also owned a holiday home in Miami, which the parties estimated in their Forms E was worth $3,105,695 (wife) and $4,567,143 (husband), respectively. Without providing documentary evidence, the wife stated in her section 25 statement that she had been recently told by an estate agent that the property was worth $9,000,000. The court accepted the wife's evidence of her proposed valuation on the basis that it was the 'best evidence' available and because it was probably against the wife's interest to for the property to be over-estimated in value.

XO v YO shows that where one party has failed to comply with their disclosure obligations, the court is entitled to rely on the other party's estimated value of the non-compliant party's assets, even where their estimation is 'rather a broad assessment' with 'no mathematical calculation behind [it]', provided the non-compliant party has had the opportunity to respond to the evidence and failed to do so.

The total net assets were found to be £195m, the main asset being the husband's businesses. The wife accepted that there was a non-matrimonial element to the husband's businesses, which he had inherited (though W had been contributed to them by virtue of her role within the business) and sought 30% of the total assets. HHJ Hess discounted the husband's business assets by 50% in recognition of their non-matrimonial source and awarded the wife a total of £51m, representing her share of the matrimonial assets. To reach this sum, the husband was to pay the wife a lump sum of £39m, in addition to £150,000 worth of costs and an additional sum for unpaid costs, maintenance and legal service orders.

Mahtani v Mahtani (No 2) (Adverse Inferences) [2025] EWFC 35 (Fam)

In *Mahtani*, the husband failed to engage at all in financial remedy proceedings and, before that, in proceedings brought by the wife for non-recognition of an Indonesian divorce. The court had no evidence or correspondence from the husband. The husband had breached orders to pay the wife MPS and an LSPO. The court was satisfied that the husband had been properly served with the court papers, including the bundle for the final hearing and notice of the final hearing by way of emails for which delivery had been confirmed. The husband had been warned on the face of the previous order of the consequences of not attending the final hearing. The court was therefore content to proceed with the final hearing in the husband's absence.

The husband was a businessman from a prominent family in Indonesia. The wife had lived in London with the parties' two children since the parties separated in 2016. The parties enjoyed a high standard of living in Indonesia during the marriage, living in luxurious properties, taking weekend trips to their luxury holiday homes, travel, staff, etc. The wife reported that the husband had continued to enjoy a luxurious lifestyle since separation. Meanwhile, the wife and the parties' children were living on benefits in unsuitable rented accommodation.

The husband provided no evidence as to his assets. The wife asserted that the husband owned two properties in Jakarta, which they had lived in during the marriage, and two holiday villas in other areas of Indonesia, which they had used regularly during the marriage and therefore were matrimonial. The wife estimated that the properties totalled $38m (c. £30m) in value, based on internet research and conversations she had had with friends and neighbours in Indonesia. In the absence of any evidence from the husband to challenge his asserted ownership of the properties or the estimated property values put forward by the wife, the court accepted the wife's proposed valuations.

James Ewins KC, sitting as a Deputy High Court Judge, noted that the wife was hampered in any attempt to seek

her share of the husband's business assets as a result of the husband's non-disclosure. The wife estimated that the husband's business interests and bank account contents totalled some $100,000,000 (c. £81m), however, this estimate was speculative and not capable of forming a specific adverse inference.

In considering whether to accept the wife's estimated valuation for the husband's non-proprietary assets, James Ewins KC considered the second and fourth principles outlined in *Moher*, at [49]–[50], as follows:

> 'I was, in effect, invited to adopt the rationale that the respondent *"would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative"*.
>
> Before acceding to that attractive submission, however, I remind myself that I am not required *"to make a specific determination either as to a figure or a bracket"* and that there are cases in which *"the court is 'unable to quantify the extent of his undisclosed resources'"*. I am permitted to draw inferences *"to the degree of specificity or generality deemed fit"* and, where appropriate, not to alight of a specific figure, but instead *"to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome"*. In doing so, I *"must be astute to ensure that the non-discloser does not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations"*.' (original emphasis)

James Ewins KC did not consider it necessary to determine the specific extent of the husband's wealth beyond his properties in light of W seeking only 50% of the net value of H's properties (£13.9m). In relation to the husband's other assets, the court accepted that he did have business assets which were likely to have significant value and generate a significant income, such that the highest award sought by the wife of £13.9m would not be unfair to the husband.

The court considered that a lump sum of £7.4m would be needed to meet the wife's needs. The wife's quasi-sharing award of £13.9m was higher than her needs award. James Ewins KC therefore awarded the wife a lump sum of £13.9m on a sharing basis. The husband was also ordered to pay the wife's costs on an indemnity basis and a worldwide freezing order made to assist with enforcement of the court's orders.

Conclusion and analysis

AF v SF, *XO v YO* and *Mahtani* all show that where there is no other evidence as to the value of international assets, the court can rely on the compliant party's estimated value for the given asset, even where it is based on little or no documentary evidence. It will be important to ensure the non-compliant party has had the opportunity to see and respond to the other party's evidence as to the estimated value of the assets. The assumption will be that the non-compliant party had the opportunity to produce evidence in response and failed to do so, so cannot truly disagree with it.

As can be seen in *XO v YO* and in *Mahtani*, adverse inferences as to overseas assets may form the basis of very significant sharing (or quasi-sharing) claims. It is not open to the non-disclosing party to complain about the extent of these awards in circumstances where they have failed to participate in the computation process. As HHJ Hess said in *XO v YO*: 'He only has himself to blame if he considers the assessment to be incorrect'.

The wives in *XO v YO* and *Mahtani* sought different outcomes in relation to their husbands' overseas business assets, which may be explained by the different situations they found themselves in. Mr O had accepted ownership of a number of business assets in his Form E and Mrs O had knowledge of the income generated by the businesses for the family during the marriage, had knowledge of the business from her work as Group Managing Director and had access to some (albeit outdated) documentary evidence as to the business' turnover. Mrs Mahtani had none of that information, there being no evidence as to the turnover of or income from any of the companies Mr Mahtani is involved with. Although Mrs O's valuation of her husband's companies was 'broad' and without mathematical calculation behind it, it was based on more than speculation, and therefore sufficient to lead to an adverse inference properly being drawn.

The result was that Mrs O was able to obtain an order for an award based on her receiving a 25% share of the husband's businesses (some £45m), while Mrs Mahtani was not, as to do so would be 'impermissible speculation'.

The next issue facing both of these wives whose husbands have placed themselves outside the reach of the English court is how they enforce payment of a lump sum in the millions of pounds when the payer and their assets are overseas in non-friendly jurisdictions. That issue is beyond the scope of this article.

Re-multiplied Propagation

Sir Nicholas Mostyn

In this article I shall refer to those financial remedy cases heard in private to which s 12 Administration of Justice Act 1960 does ***not*** *apply as* ***mainstream financial remedy cases****. As is well-known, s 12 imposes an automatic restriction on publishing the details of any financial remedy case which is mainly about child maintenance. The great majority of financial remedy cases are not protected by s 12.*

In 'Multiplied Propagation' (8 April 2024)[1] I analysed 24 mainstream financial remedy cases placed on Bailii/TNA in the 6 months from 30 September 2023 to 31 March 2024. Of these, 23 were published anonymously. Of those, only two gave a reason for anonymisation but in neither was there anything to suggest that a proper *In re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 balancing exercise was undertaken, or that a reporting restriction order had been made under s 11 Contempt of Court Act 1981. None of the other 21 judgments gave any reasons for anonymisation. Of those 21 judgments, seven had no rubric, leaving the reader entirely at sea as regards their reportability. The other 14 bore the standard rubric but without any explanation why it had been applied, whether the *Re S* exercise had been undertaken, or if a reporting restriction order (RRO) had been made. I concluded that none of the 23 judgments complied with the law. I said that 'they show that desert island syndrome is not merely alive and well but is positively thriving and going from strength to strength'.

I have now undertaken the same exercise for 60 judgments placed on Bailii/TNA in the year 1 April 2024 to 31 March 2025. Apart from two, these were all mainstream financial remedy cases. One was a contempt hearing which should have been heard in open court (No 3) but where the report does not say if it was. The other (No 32) was a Schedule 1 case covered by s 12 where the respondent was a famous footballer, Kyle Walker. It is included because the court exceptionally applied the open justice principle to its judgment.

Of the 60 cases, 12 were published using the parties' names, although some of these had partial anonymity imposed and 48 were anonymised.

This data shows that in terms of respect for the open justice principle things have generally gone from bad to worse, although a very recent development might suggest that if the tide is not turning, it may be reaching its peak.

Before I embark on the analysis, I set out again as shortly as possible the applicable principles. I have stated them many times before, but until recently it felt as though I was having a conversation with myself in an empty room.

Subject to statutory exceptions, the open justice principle applies as forcefully in the Family Court as it does in other courts: it is not 'another country' (*Scott v Scott* [1913] AC 417; *Tickle v BBC* [2025] EWCA Civ 42 at [46] per Sir Geoffrey Vos MR).

Mainstream financial remedy cases are heard in private in the Family Court (FPR 27.10), although the press and bloggers may attend (FPR 27.11). The general rule is that it is not a contempt to publish information relating to such proceedings merely because the case was heard in private (*Scott v Scott*, *passim*; *Pickering v Liverpool Daily Post and Echo Newspapers Plc & Ors* [1991] 2 AC 370 at 416 per Lord Bridge). A non-section 12 hearing in private does not cloak the proceedings in secrecy; it is merely a convenient way of conducting the hearing (*Scott v Scott* [1912] P 241 at 271 per Fletcher Moulton LJ: '[the rule] provides for privacy at the hearing. It has nothing to do with secrecy as to the facts of the case'). Journalists and bloggers who attend a mainstream financial remedy hearing held in private may publish anything they hear in that hearing, unless the court has made an RRO.

There are two types of anonymity order. There is the bare type which does no more than to withhold a name or names from the public. I shall refer to such an order as 'a withholding order'. The power to make such an order is an aspect of the court's general power to regulate its procedure. A withholding order does not, by itself, prohibit the publication of the withheld names or any other details regarding the proceedings (*PMC v A Local Health Board* [2024] EWHC 2969 (KB) at [47]–[50] per Nicklin J).

It is because such orders are toothless that the second type of anonymity order is normally used. It is framed as a form of RRO, breach of which would amount to a contempt. I shall refer to such an order as 'an anonymity RRO'.

Any kind of formal RRO must be made pursuant to an identified Act of Parliament. Neither the procedural rules nor the common law empowers such an order to be made; the power to make such an order must be found in legislation (*Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2019] AC 161 at [16]–[18] per Lord Sumption; *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190 at [67] per Lord Brown: 'if the court is to have the power to make orders against the public at large it must be conferred by legislation; it cannot be found in the common law').

Contrary to popular belief, in a mainstream financial remedy case that power will not normally be found in s 11

Contempt of Court Act 1981. Section 11 does not itself confer a free-standing power to grant an RRO. The power to do so is contingent upon the court having first, or at least simultaneously, made a withholding order. Once a court has withheld the name or information, s 11 provides an ancillary statutory power to impose an RRO which then prohibits publication of the withheld name or information (*In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697 at [31]; *A v BBC* [2014] UKSC 25, [2015] AC 588 at [59]). Clearly, the withholding and penal aspects can be conflated into one order. But if the names sought to be withheld have been used in proceedings in court or otherwise published by the court (e.g. in court lists or documents relating to the proceedings made available to non-parties), then there is no jurisdiction to make an order under s 11 (*R v Arundel Justices ex parte Westminster Press Ltd* [1985] 1 WLR 708 at 710H–711; *PMC* at [63]).

In every one of the 48 cases where anonymity was imposed the names would have been used in court, so s 11 would not be available.

In those cases attended by journalists or bloggers governed by the Transparency Reporting Pilot for Financial Remedy Proceedings (the Transparency Pilot)[2] – which now encompasses the entire country (see *below*) – it is inconceivable that the parties' names will not have been mentioned in court or otherwise publicly referred to by the time that the court comes to 'consider' making a transparency order. Indeed, para 12 of the Pilot Guidance states: 'Cause lists for all FRC Courts, including cases heard at the Royal Courts of Justice, will name the parties and state that the proceedings involve financial remedies'.

Therefore, s 11 will not usually be available to make an order under para 19 of the Guidance. The only other statutory power which can be invoked to make such a 'transparency order' would be s 6 Human Rights Act 1998 which makes it unlawful for a court, as a public authority, to act in a way which is incompatible with a Convention right. That provision could allow a *contra mundum* injunction under s 37 Senior Courts Act 1981 to be made to protect the Article 8 Convention rights to a private and family life. Per Nicklin J in *PMC* at [92]:

> 'an injunction under s.37, the purpose of which is to impose reporting restrictions, should only be granted if the applicant satisfies the Court (a) that there is no other jurisdiction available under which the Court can grant the reporting restriction sought; and (b) by clear and cogent evidence, that, without the order being made, the Court will be in breach of the duty not to act incompatibly with a Convention right under s.6 Human Rights Act 1998; and (c) that the *In re S* parallel analysis leads to the conclusion that such an order should be granted.'

For the reasons given above, it is very unlikely that in a mainstream financial remedy case the statutory power will be s 11. But even if it were, there would still have to be an application, supported by clear and cogent evidence, subjected to the full *Re S* balancing exercise undertaken very carefully and not casually or mechanistically. But if, as would seem to be much more likely, the statutory source is the Convention, then in addition to these requirements the court has to be satisfied that were the order not made, it would be in breach of the duty not to act incompatibly with a Convention right under s 6 Human Rights Act 1998. That is a high hurdle indeed and cannot be surmounted simply by affixing a rubric to the front of a judgment.

Thus, where the court is considering making a wide-ranging 'transparency order' under para 19 of the Pilot Guidance it should have in mind these severe limits to its jurisdiction, and where it has jurisdiction, on the exceptional nature of the relief sought and the clarity and cogency of the evidence needed to justify it.

My problem with the section in the Guidance headed **Transparency Order** (paras 19–25, and Annex II which provides the template for a final order) is that nowhere does it identify what power the court is exercising when it makes such an order. In contrast, a standard civil anonymity order will state on its face that it is made pursuant to s 6 Human Rights Act 1998, s 11 Contempt of Court Act 1981 and CPR 5.4C, 5.4D and 39.2(4). In *PMC* at [155] Nicklin J observed that the reference to CPR 39.2(4) was wrong and stated:

> 'The order should identify the correct statutory basis for the reporting restriction (not least so that it can be readily ascertained whether the restriction is automatically time limited – e.g. under s.39 Children & Young Persons Act 1933). The order should set out clearly what cannot be published. The terms of a reporting restriction, if made under s.11 Contempt of Court Act 1981, will closely mirror the information which the Court has directed must be withheld from the public. The order should also state for how long the restrictions are to last.'

In *Rosemin-Culligan v Culligan (Re Costs and Anonymity)* [2025] EWFC 26 at [41] MacDonald J correctly stated:

> 'The jurisdictional foundation on which the Court rests its decision whether to anonymise a judgment is s.6 of the Human Rights Act 1998.'

For the reasons I have given that is almost invariably going to be the case. Therefore, any final transparency order made pursuant to the Guidance has to be based on clear and cogent evidence that satisfies the requisite standards. None of this is recognised in the Guidance or in Annex II.

The Guidance states categorically at para 8 that it will adopt the recommendations contained within the report of HHJ Farquhar's group. In para 7 it records the main recommendation of the group that:

> 'In any case attended by a reporter, a Reporting Order should be made entitling the reporter to see the ES1 and position statements of the parties, and setting out what reporting is permitted in the case, whilst preserving the anonymity of the parties, and the confidentiality of their most private details. The suggested 2 core principles are that a reporter should be permitted to publish information relating to the proceedings save for the following:
>
> - The names and addresses of the parties (including any intervenors) and their children and any photographs of them;
> - The identity of any school attended by a child of the family;
> - The identity of the employers, the name of the business or the place of work of any of the parties;
> - The address of any real property owned by the parties;

- The identity of any account or investment held by the parties;
- The identity of any private company or partnership in which any party has an interest;
- The name and address of any witness or of any other person referred to in the hearing save for an expert witness.'

This is not a 'transparency' order. On the contrary it is a comprehensive, fierce, anonymity RRO. Although the Guidance says at para 19 that when a reporter attends 'the Court will **consider** making a standard Transparency Order in accordance with Annexe II', paras 7 and 8 can only mean that such consideration should normally result in the order being made. As shown above, this scheme imposes far greater secrecy on a mainstream financial remedy case than hitherto. How is this standardised anonymity reconcilable with the general rule in *Pickering*? Or with the ordinary rule in *Re S*? How can it co-exist with the balancing exercise mandated for the individual case in *Re S*? How can the court follow this Guidance simultaneously with Lord Neuberger's Practice Guidance [2012] 1 WLR 1003 which insists that anonymity orders can only be made exceptionally – when it is 'strictly necessary and only to that extent'?

One has to ask: If they were alive now, how would Lord Shaw and Lord Moulton describe the constitutionality of this scheme?

It will no doubt be said that the court has not got time when hearing a difficult case to jump through all these hoops. In such circumstances, the court can make a very short-term interim anonymity RRO to hold the ring pending a final decision on anonymity, for which purpose it does not need to have the clear and cogent evidence or to have undertaken the *Re S* balancing exercise needed for a final order: *R (Marandi) v Westminster Magistrates Court* [2023] EWHC 587 (Admin) at [82].

In the light of these observations, I regretfully conclude that in not one of the 48 cases where the judgment was published anonymously did the court effectively prohibit anybody from publishing anything in the judgment or from revealing the parties' identities. In none of the cases was there an application for an RRO identifying the statutory source of the power; nor was there any clear and cogent evidence justifying why anonymity was exceptionally necessary and explaining how, if the order were not made, the court would be in breach of its s 6 duty; nor was there any finding to that end. Apart from those five cases where a perfunctory and wholly inadequate balancing exercise was performed, there was in each of those 36 cases only a rubric by way of explanation and in seven cases nothing at all.

In contrast to the cases analysed in my previous article, the cases this time round display a bewildering variety of rubrics. Twelve different rubrics were used in an attempt to impose anonymity. They are set out in the Annex to this article. There are eight variants of the standard rubric. In six of them, the user has changed 'may be in contempt' to 'will be in contempt' – from mere possibility to certainty – a significant alteration in modality.

HHJ Hess used no fewer than five variants when seeking to impose anonymity (No 6 – variant 4; No 17 – variant 6; No 18 – variant 5; Nos 44 and 47 – variant 7; and No 49 – variant 8) and in four of them made that modal change.

Regardless of such changes, none of these rubrics achieves enforceable anonymity. If someone publicly identified the parties in one of these cases, they could not be held to be in contempt of court. These rubrics are, with respect, worthless bloviations which should be abandoned forthwith.

Mainstream financial remedy judgments can of course be published with redactions. That may prevent the redacted information being discovered. However, such redactions will not prevent the information being publicly revealed, perfectly lawfully, if it can be discovered. Only an anonymity RRO can prevent that. A rubric, even a rubric using a modal verb threatening a finding of contempt, does not and cannot act as some kind of proxy for an anonymity RRO.

Consider Rubric Variant 2 used in Case No 2 in the table below. It is not merely minatory in tone. It contains an explicit command that the anonymity of the parties and their children must be strictly preserved. This edict must be complied with by the whole world, including all arms of the media, without limit of time. It ends with an explicit threat – a breach **will be** (not may be) a contempt of court. Anyone reading the rubric who did not understand the law would think that they would face penal consequences if they breached such a fierce command.

Mrs Scott was not just threatened, but actually charged, with contempt for breaching a comparably worthless secrecy edict. Lord Shaw of Dunfermline at 476 saw this not only as 'an encroachment upon and suppression of private right' but as 'the gradual invasion and undermining of constitutional security'. Under our constitution everyone is under the law; and the court is the guardian and enforcer of the law. I agree with Lord Shaw that for the court knowingly to bandy about such worthless nonsense undermines the very foundations of our constitutional security.

In the KBD, a party will make a decision right at the start of the case whether to seek anonymity and if so, will make the necessary application. If granted, the anonymity RRO is placed on the judiciary website, so that there is complete transparency about which cases have been made secret.

I now turn to the 60 cases which are tabulated as follows:

	Name of case	Judge	Rubric	Any text in judgment as regards publication or terms of rubric
1	*DH v RH* [2024] EWFC 79 and *DH v RH (No 4) (Costs)* [2024] EWFC 114	MacDonald J	Variant 1	None
2	*TY v XA* [2024] EWFC 96	Moor J	Variant 2	None
3	*Brown v Brown* [2024] EWFC 181 (B)	DJ Dodsworth	None	None Note: these were contempt proceedings which should have been heard in open court

	Name of case	Judge	Rubric	Any text in judgment as regards publication or terms of rubric
4	*CH v TH (Financial Proceedings)* [2024] EWFC 135 (B)	HHJ Willans	Standard	An inadequate anonymisation balancing exercise was undertaken
5	*KFK v DQD* [2024] EWFC 78 (B)	Recorder Taylor	Variant 3	None
6	*UD v TQ* [2024] EWFC 119 (B)	HHJ Hess	Variant 4	None
7	*AN v NO* [2024] EWFC 94	Sir J Cohen	Standard	None Note: this was a divorce jurisdiction dispute seemingly heard in private notwithstanding FPR 7.30(1)
8	*Copinger-Symes v Copinger-Symes & Anor* [2024] EWFC 415	HHJ Hess	No prohibition	
9	*C v S* [2024] EWFC 109	Peel J	Standard	None
10	*NA v LA* [2024] EWFC 113	N Allen KC	Standard	None
11	*V v W (Jurisdiction: Dissolution of Pacte Civil de Solidarite)* [2024] EWFC 111	Poole J	Standard	None Note: this was a CP dissolution jurisdiction dispute seemingly heard in private notwithstanding FPR 7.30(1)
12	*NT v RY* [2024] EWFC 213 (B)	DJ Jolly	Standard	None
13	*AH v BH* [2024] EWFC 125	Peel J	Standard	None
14	*EC v JC* [2024] EWFC 175 (B)	DJ Hatvany	No rubric, but still anonymised	
15	*MR v EF* [2024] EWFC 144 (B)	Recorder Taylor	Variant 3	An inadequate anonymisation balancing exercise was undertaken
16	*P v Q, R and S (Claim against Assets of Extended Family) (Rev1)* [2024] EWFC 164 (B)	DJ Veal	Standard	An inadequate anonymisation balancing exercise was undertaken
17	*RM v WP* [2024] EWFC 191 (B)	HHJ Hess	Variant 6	None
18	*RN v TT* [2024] EWFC 264 (B)	HHJ Hess	Variant 5	None
19	*TI v LI* [2024] EWFC 163 (B)	N Allen KC	Standard	An inadequate anonymisation balancing exercise was undertaken Note: this was a divorce jurisdiction dispute seemingly heard in private notwithstanding FPR 7.30(1)
20	*WXT v HMT (Leave to Claim Financial Relief following Overseas Divorce)* [2024] EWFC 136 (B)	HHJ Vincent	Standard	None
21	*BI v EN* [2024] EWFC 200	Cusworth J	Standard	None
22	*DR v ES & Ors* [2024] EWFC 176	Francis J	Standard	None
23	*ED v OF* [2024] EWFC 297	Cusworth J	Standard	None
24	*HJB v WPB (Financial Remedies – Separation Agreement – Application to Show Cause)* [2024] EWFC 187	HHJ Vincent	Standard	None
25	*IN v CH* [2024] EWFC 233	S Trowell KC	Standard	None
26	*KV v KV* [2024] EWFC 165	Peel J	Standard	None
27	*Loh v Ardal Loh-Gronager* [2024] EWFC 241	Cusworth J	Standard	None Note: the standard rubric used prevents identification of all members of the family, but they are named in the judgment
28	*N v J* [2024] EWFC 184	Peel J	Standard	None
29	*Rotenberg v Rotenberg & Ors* [2024] EWFC 185	Peel J	No rubric	
30	*Simon v Simon* [2024] EWFC 160	Peel J	No rubric	
31	*BP v AP (Financial Remedies and Final Hearing)* [2024] EWFC 206 (B)	HHJ Vincent	Standard	None
32	*Goodman v Walker* [2024] EWFC 212 (B)	HHJ Hess	Judgment may be published	Note: although a Sch 1 case, no anonymity, but some minor restrictions
33	*HW v WB (Financial Remedies; Treatment of Post-nuptial Agreement)* [2024] EWFC 328 (B)	DJ Phillips	Standard, (although leave changed to permission)	None
34	*LI v FT (Maintenance Pending Suit: Costs)* [2024] EWFC 342 (B)	DDJ Harrop	Standard, although (leave changed to permission)	None

	Name of case	Judge	Rubric	Any text in judgment as regards publication or terms of rubric
35	*NM v PM* [2024] EWFC 199 (B)	DDJ Nahal-Macdonald	No rubric, but still anonymised	
36	*VS v OP (Litigation Misconduct, Quasi-Inquisitorial Approach and Inferences)* [2024] EWFC 190 (B)	Recorder Chandler KC	No rubric, but still anonymised	
37	*A v R* [2024] EWFC 218 (B)	DJ Dodsworth	No rubric, but still anonymised	
38	*B v B* [2024] EWFC 311 (B)	DJ Dinan-Hayward	Standard	None Note: H's litigation conduct was deplorable
39	*Dickason v Dickason* [2024] EWFC 285 (B)	HHJ Sweeney	Standard – but parties named	None Note: judgment summons heard seemingly in private (rubric says so)
40	*A v M (No 2)* [2024] EWFC 214 and *A v M (No 3)* [2024] EWFC 299	Sir J Cohen	Standard	None Note: the parties could not have expected secrecy after my remarks in round 1
41	*Williams v Williams (Rev1)* [2024] EWFC 275	Moor J	Partial	A subpoenaed witness was not named but otherwise no anonymity
42	*DDR v BDR (Financial Remedies, Beneficial Ownership and Insolvency)* [2024] EWFC 278	A Chandler KC	Standard	None
43	*FC v WC (Declarations Relating to Dissolution of French PACS)* [2024] EWFC 291	HHJ Vincent	Standard	None Note: declarations as to status should surely be heard in open court
44	*EL v ML* [2024] EWFC 421 (B)	HHJ Hess	Variant 7	None Note: I do not understand what the rubric means
45	*V v V (Financial Remedy Hearing)* [2024] EWFC 255 (B)	HHJ Willans	None	None, but still anonymised
46	*Re S (Financial Provision – Application of Standish and the Issue of Costs)* [2024] EWFC 436 (B)	DJ Goodchild	No rubric, but still anonymised	None
47	*WW v XX* [2024] EWFC 330 (B)	HHJ Hess	Variant 7	None Note: I do not understand what the rubric means
48	*TO v GA (Financial Remedies: Deferred Sale)* [2024] EWFC 405 (B)	DDJ Harrop	Standard, although leave changed to permission	None
49	*XY v XX* [2024] EWFC 387 (B)	HHJ Hess	Variant 8	Seeks views on publication, gives provisional view that should be anonymised – which is what must have happened
50	*ON v ON* [2024] EWFC 379	HHJ Booth	Standard	None
51	*PM v RM* [2025] EWFC 11	J Warshaw KC	Standard	None
52	*Rosemin-Culligan v Culligan* [2025] EWFC 1 and *Rosemin-Culligan v Culligan (Re Costs and Anonymity)* [2025] EWFC 26	MacDonald J	No prohibition	
53	*SM v BA (Legal Services Payment Order)* [2025] EWFC 7 and *SM v BA (No 2: Maintenance Pending Suit)* [2025] EWFC 28	N Allen KC	Standard	An inadequate anonymisation balancing exercise was undertaken
54	*Collardeau v Fuchs & Anor* [2025] EWFC 36	Poole J	Partial 2	Children may not be named
55	*Mayet v Osman (Appeal – Costs of Non-Molestation Order)* [2025] EWFC 24	Poole J	Partial 2	Children may not be named
56	*Chugh v Chugh* [2025] EWFC 42	N Allen KC	No prohibition	
57	*TA v SB* [2025] EWFC 61 (B)	HHJ Muzaffer	Standard	None

	Name of case	Judge	Rubric	Any text in judgment as regards publication or terms of rubric
58	*G v S (Family Law Act 1996: Publicity)* [2024] EWFC 231 (B)	HHJ Reardon	Standard	See article[3] about this decision
59	*FI v DO* [2024] EWFC 384 (B)	DJ Crisp	No rubric, but still anonymised	None Note: this is the case where the principal issue was the family dog
60	*V v V* [2024] EWFC 380 (B)	HHJ Booth	Standard	None Note: this was an appeal

Of the 48 anonymised judgments:

- Twenty-seven bore the standard rubric but gave no explanation for its imposition. Of these, three were disputes about status (Nos 7, 11, 19) which on any view should have been heard in open court as being governed by Part 7 or being analogous to such business.
- Nine bore variants of the standard rubric (Nos 1, 2, 5, 6, 17, 18, 44, 47, 49), suggesting that the judge made the positive decision to alter the default wording provided by the judicial judgment generator, but still gave no explanation for its imposition.
- Seven were anonymised but bore no rubric prohibiting identification of the parties or family members (Nos 14, 35, 36, 37, 45, 46, 59). It is assumed that in these cases the court was not seeking to impose any kind of enforceable secrecy on the judgment.
- In only five (Nos 4, 15, 16, 19, 53) was a form of balancing exercise carried out. In each case the exercise was perfunctory and wholly inadequate. None identified any of the requirements or necessary findings for making an effective reporting restriction order.

Of the 12 non-anonymised judgments:

- One was a contempt case arising out of FR proceedings (No 3).
- Two actually used the standard rubric but nonetheless named the parties (Nos 27 and 39). The former was a decision of Cusworth J. The latter was a judgment summons which according to the rubric was decided in private. These are virtually impossible to understand.
- Four had been previously reported using the parties' names (Nos 29, 30, 54 and 55).
- Three were reported openly without any dispute (Nos 8, 41, 56).

Only two gave rise to a contest about anonymity which was resolved in favour of openness (Nos 32 and 52). The former was a Schedule 1 case covered by s 12 where the respondent was a famous footballer, Kyle Walker. In that case different considerations applied to those in a mainstream financial remedy case as there were automatic statutory reporting restrictions which had to be disapplied. The decision of HHJ Hess to publish the judgment only redacted in the most minor degree is much to be applauded.

It is astonishing that in the year there was only one mainstream financial remedy case where the court properly applied the law in favour of openness: *Rosemin-Culligan v Culligan* [2025] EWFC 1 and [2025] EWFC 26. Whether this heralds a turning of the tide remains to be seen. One can only hope.

Contrary to what the Master of the Rolls said in the *Tickle* case the Family Court is, sadly, 'another country' when it comes to the application of the open justice principle. That was described by Scarman LJ in *In re F* [1977] Fam 58 as our equivalent of the First Amendment to the US Constitution. That great judge ranked the principle as one of the most important in our constitution, yet the family judiciary seems largely blind to it.

In his second judgment in *Rosemin-Culligan v Culligan* MacDonald J was faced with an argument by counsel for the secrecy-seeking wife that the question should be approached in accordance with the provisions of the Transparency Pilot. In a curious numbers game, she also relied on statistics showing that of 44 published cases heard in the Family Division or Family Court in November 2024 in only three were the parties named, and none was a financial remedy case. Further, of 38 published cases thus heard in December 2024, in only one, a financial remedy case, were the parties named, and that had been the subject of been extensive press coverage. These arguments got nowhere. MacDonald J at [39]–[42] held:

> '39. Ms Faggionato's diligent and detailed survey of the naming conventions applied to recent published decisions in the Family Division and Family Court (which, it might be said, tends to somewhat blur the line between the citation of authority by counsel, which is permitted, and the giving of evidence by counsel, which is not) does not change the position. Indeed, it further emphasises the importance of not taking a blanket approach to the issue of anonymisation based on perceived "policies" and the need to adhere to the principled approach set out above.
>
> 40. Each case will turn on the application of that principled approach to the particular facts of the case. As such, to suggest that because a large number of cases are anonymised in any given period all cases should be anonymised is to succumb to a logical and legal fallacy and falls into the very trap that the jurisprudence indeed warns against. …
>
> 41. The jurisdictional foundation on which the Court rests its decision whether to anonymise a judgment is s.6 of the Human Rights Act 1998. The process by which it resolves whether to exercise that jurisdiction is having regard to and balancing the interests of the parties and the public as protected by Arts 6, 8 and 10 of the Convention considered in the particular circumstances of the case, being the rights most likely to be engaged in respect of financial remedy proceedings. This is the approach that has been repeatedly confirmed by the higher Courts, even in those authorities that are traditionally cited in opposition to publication, most notably *Lykiardopulo v Lykiardopulo* and *Clibbery v Allan.* In the context of the cardinal principle of open justice, in deciding whether to permit anonymi-

> sation this is the approach that must be adopted in each case.
>
> 42. It is important to be clear that the foregoing authorities, including the decisions of Mostyn J in *Xanthopoulos v Rakshina* and *Re PP (A Child: Anonymisation)*, do not purport to proscribe a fixed outcome on the question of anonymity in every financial remedies case. Rather, they emphasise in the context of cardinal legal principles of very longstanding that the Court must address the question of anonymity specifically and on a principled basis, applying the test established by the case law to the particular facts of the case. Having undertaken the required balancing exercise in this case, I am not satisfied that there is any justification for anonymising the judgment.'

This judgment appears to accept, implicitly, that the Transparency Pilot is not compliant with the law.

In about 2013 Holman J began hearing every single case in public. Mr Farmer of the Press Association was present at very many of his hearings. Cases not protected by s 12, or by s 97 Children Act 1989, were fully reported. I started publishing unredacted all my judgments in non-protected cases in 2020. Although Holman J and I received submissions that to allow such cases to be published and reported fully would give rise to all manner of perils, no such consequence was ever drawn to our attention. Further, neither of us was ever appealed to the Court of Appeal for doing so. It is impossible to resist the conclusion that opposition to open justice is just a lazy trope which its supporters have been unwilling to put to the test by taking the matter to the Court of Appeal.

The writing of the text above was completed on 5 April 2025. On 11 March 2025 (but not placed on Bailii/TNA until a date after 5 April 2025) Trowell J published his judgment in *X v Y* [2025] EWHC 727 (Fam). That was a financial remedy appeal where the wife challenged a decision by the first instance judge to refuse to reopen a judgment given on 14 December 2023 which had not been the subject of an order when the husband's father died on 3 January 2024. Trowell J dismissed the appeal. His judgment does not mention the existence of any minor children, nor does it give any other reason why it should be anonymised. Yet it was anonymised, and prominently displays a modified version of the standard rubric stating:

> 'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.'

The standard rubric has been altered so that 'may be in contempt' became 'will be in contempt' – mere possibility became certainty – a significant change in modality.

If this were a first instance judgment the usual criticisms would be made. Why is it anonymised? Was an RRO made? If not, what does the rubric mean? But this was an appeal. FPR 30.12A(3)(a) and PD 30B, para 2.1(a) are clear that the court should make an order for the hearing to be in public. While PD 30B, para 2.1(b) then goes on to state that the court should normally impose reporting restrictions in the terms of the standard order located at www.judiciary.uk/publication-jurisdiction/family-2/ (which link does not work), para 2.3 states that in a financial remedy appeal where no minor children are involved, the court will not normally impose reporting restrictions.

So, to be clear, in a financial remedy appeal, where no minor children are 'involved' (which must mean that the provision for such children is the subject of the appeal and not merely that that parties have children), the court should ordinarily (and without any application having been made) make an order, without any reporting restrictions, for the appeal to be heard in public. The consequence of such an order would be, to state the obvious, that the judgment would bear no rubric and would not be anonymised.

Thus, for appeals from the Family Court to the High Court we can see that these Rules and these Practice Directions explicitly insist on the application of the open justice principle, a constitutional imperative of the utmost importance. These Rules and these Practice Directions derive their authority directly from Parliament under ss 75–82 Courts Act 2003.

Yet the judgment of Trowell J does not refer to any order made under para 2.1. It does not refer to any children. It does not say that the hearing was in public. It would appear that both counsel, the wife's solicitor, and the judge collectively overlooked the existence of FPR 30.12A(2) and (3) and PD 30B, paras 2.1–2.3, with the result that the open justice principle was not upheld.

It is extremely dispiriting that time and again such basic errors are still being made.

On 27 January 2025 FPR 12.73A and 14.14A together with PDs 12R and 14G came into force. These converted the Transparency Pilot for public and private law children cases into permanent provisions.

In 'A View from The President's Chambers: April 2025' Sir Andrew McFarlane P stated:

> 'As will be well known, on 27 January the "Transparency Pilot" ceased to be a pilot when provision for all Family Court centres to make Reporting Restriction Orders was established as part of normal business by the introduction of Practice Directions PD12R and PD14G. For those courts not previously in the pilot, the change will at first only involve public law and financial remedy cases …'

The reference to financial remedy cases is presumably to the rolling out, as mentioned above, in December 2024 of the Transparency Reporting Pilot For Financial Remedy Proceedings to cover all of England and Wales.[4]

I respectfully suggest that before the Rule Committee converts that (now national) Pilot to permanency, it very carefully considers the lawfulness of: (a) the Pilot's terms which impose anonymity routinely in all cases where a reporter attends; (b) the terms of the rubric to be used where a 'Transparency Order' is made; and (c) the terms of the rubric to be used where a judgment is to be anonymised.

ANNEX

The standard rubric, created by the judgment generator

'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of Court.' (**standard**)

Note: sometimes 'leave' is manually replaced by 'permission'.

The recommended rubric in the Transparency Reporting Pilot for Financial Remedy Proceedings

'This matter was heard in private. The judge gives permission for this version of the judgment to be published. In no report of, or commentary on, the proceedings or this judgment may the parties or their children or their addresses be identified. *[In this case a Transparency Order has been made on — — which continues in effect.]* All persons, including representatives of the media and legal bloggers must ensure that the terms of this rubric *[and the terms of the Transparency Order]*, are strictly observed. Failure to do so may be a contempt of Court.' [Adapt as appropriate] (**TRP Rubric**)

Variants

'This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of Court.' (**Variant 1**)

'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. Nevertheless, the parties and their children must not be identified by name or location. Their anonymity must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of Court.' (**Variant 2**)

'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of any child and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Unauthorised publication of the judgment will be a contempt of Court. The names of the parties and any children must not be disclosed in public without the Court's permission.' (**Variant 3**)

'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published, but no other. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of Court.' (**Variant 4**)

'This judgment was delivered in private. The judge has given leave for this version of the judgment (but no other) to be published. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of Court.' (**Variant 5**)

'Nobody may be identified by name or location. The anonymity of everyone other than the lawyers must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of Court.' (**Variant 6**)

'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published, but no other version.' (**Variant 7**)

'The judge has given leave for this version of the judgment (but no other) to be published. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of Court.' (**Variant 8**)

Rubrics prohibiting some but not all publication

'This judgment was delivered in public. The judge has given leave for this version of the judgment to be published. The parties can be named as can any other individual not anonymised in this version. On the other hand, those individuals and entities that are anonymised must not be identified by their real names. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of Court.' (**Partial 1**)

'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the children of the Applicant and First Respondent may not be named. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of Court.' (**Partial 2)**

Rubrics allowing full publication

'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published.' (**No prohibition**)

Notes

1 Available at https://financialremediesjournal.com/content/multiplied-propagation.9fff7cd167f048419eb67e5e9414238d.htm
2 Available at www.judiciary.uk/wp-content/uploads/2023/12/Reporting.PilotScheme.Final_.President.pdf
3 Sir Nicholas Mostyn, 'Absence of Authority' (1 September 2024), available at https://financialremediesjournal.com/content/absence-of-authority.307fdb3cd2384741a13a0c4274f62d68.htm
4 Available at www.judiciary.uk/guidance-and-resources/financial-remedies-transparency-pilot-notice/

Is Duxbury Dead?

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The Spring 2025 issue of this journal led off with the eagerly awaited, 21-page Final Report of the Duxbury Working Party ([2025] 1 FRJ 3). As one would expect from its distinguished authors, the report is engaging, well written and skilfully argued, albeit that for reasons I shall advance hereafter its conclusion – that we need to go on using the Duxbury model – is wrong.

Credit where credit is due, however. The Working Party's concession, that the Duxbury tables should no longer be based on whole-of-life factors, is a huge step forward and one that I predict will radically alter the way we practise in financial remedy cases, especially those involving big money.

I'm going to preface this article with two basic rules of common sense that apply to the whole gamut of commerce and should govern our thinking when dealing with family finances:

(1) a bird in the hand is worth two in the bush; and
(2) higher returns come at the cost of higher risk, also known as the 'risk-return trade-off'.

Let me explain.

- *A bird in the hand*: that is, it is often worth taking what you can while you can, rather than waiting in hope of a bigger reward. According to this universal principle, people will happily discount a future income stream into a present lump sum. Jam today or jam tomorrow? This illustrates the *time value of money*.
- *Higher returns = higher risk*: a defect of the standard Duxbury model is that it favours younger recipients. A wife in her 40s, with long years of life ahead, will scoop a much bigger award than a wife in her 70s who, ironically, is in need of far greater security. This is known as the 'Duxbury paradox'. It is the exact opposite of what we should expect from a well-tooled capitalisation program. The risks and returns are mismatched, thus skewing the results.

Before proceeding, let me take a quick tour of the relevant history.

History

The Duxbury model was born at a time when big money was starting to flow into London, consequent on the deregulation of the Stock Exchange in 1986. The City's prestige as a financial hub was growing rapidly. Into this mix Parliament (by inserting MCA 1973, ss 25A and 31A) gifted new powers to family judges to commute maintenance for capital. Hardly surprising, therefore, that the accountancy profession (in the person of Tim Lawrence FCA) should come up with a new gizmo enabling them to do so. It quickly caught on, and was soon commercialised in the pages of *At a Glance* and in *Capitalise* software.

However, the assumptions underlying maintenance were very different from what we know today, as the Working Party (hereafter WP) acknowledges. Then, divorce affected only a minority of the population, and it was still believed that marriage was for life, creating lifelong dependency. So it made sense to have whole of life provision. The contrast with today, where women's earning power is vastly improved, and marriage is (at least in law) a contract terminable at will, could hardly be more stark. But a second point is that, among judges, there was a trajectory towards higher awards for wives, anticipating the *White* and *Miller* watershed. That is why Ackner LJ in *Duxbury* (1987) could characterise W's cohabitation as 'irrelevant'; because indeed the object was to give her more, not less.

Now that *White* sharing has become the norm, it is no longer necessary to resort to expedients like Duxbury to justify a transfer of capital from A to B. Rather, spousal maintenance, if required at all, can be judged on its own merits; and it will be a rare case where it extends beyond 5 years. Moreover (and here I fully agree with the WP), any capitalisation must be on the basis of an exact commercial equivalent. Otherwise you are simply robbing Peter to pay Paula.

Relevant law

- There is no room for discrimination between husbands and wives (*White*). Thus I agree with the WP that it is no longer appropriate to have separate tables for male and female recipients.
- The purpose of maintenance is solely to meet needs: *SS v NS* [2014] EWHC 4183 (Fam). Taken with the injunction in s 25(2)(a) to rebuild earning capacity, this means that orders will seldom, if ever, be varied

upwards by the court above and beyond CPI inflation; thus relegating decisions like *Hvorostovsky v Hvorostovsky* [2009] EWCA Civ 791 to the scrapheap of history.

- A husband is not an insurer for his wife, nor vice versa: *North v North* [2007] EWCA Civ 760; *A v M* [2021] EWFC 89 at [58] per Mostyn J.
- Nominal orders are rarely, if ever, enlarged: *AJC v PJP* [2021] EWFC B25, DDJ Hodson; *A v M*. Hence they have no real value in commercial terms.

Is Duxbury fit for purpose?

If we accept the WP's view (at para 43) that the object of Duxbury is to substitute a lump sum for a stream of periodical payments *with all the variability and uncertainty that come with such a stream*; and that otherwise the order should be financially neutral for both parties; then we need to square up to the abject failure of the model to do what it is supposed to do.

One chestnut in this area is the recipient's prospects of remarriage and cohabitation, which are and always have been stubbornly ignored by the courts. Instinctively we know this is wrong; yet the WP continues to defend the practice, saying for example at paras 62–63 (emphasis added):

> 'More sophisticated modelling tools, such as Capitalise, can factor in a variety of other circumstances … *those considerations must plainly exclude entirely subjective criteria such as re-marriageability …*'

It is difficult to see why prospects of remarriage should be seen as 'entirely subjective' when relevant statistics exist. For example, data extrapolated from ONS Series FM2 No 34, table 4.17 suggest that a high proportion of wives aged 30 and over at marriage have been previously divorced (see Table 1).

While this does not tell us how long people wait before getting married again, it indicates that the present practice of ignoring marriage prospects is not only counter-intuitive but plain wrong. The result, inevitably, is that a Duxbury lump sum over-compensates the payee by a significant margin.

When you factor in other eventualities ignored by the model (prospects of cohabitation, the payer losing his job, etc), it is readily apparent that the Duxbury model, as an exercise in neutrality, is not fit for purpose.

The real rate of return (or RRR)

After a long trawl through the reasons why, and conceding that its report has no legal status, the WP opines that the current built-in discount rate of 3.75% is the best that can be devised, and accordingly (subject to one major proviso to which I shall return) recommends its retention.

This is unsatisfactory from a number of standpoints. First, it is highly subjective. For instance, it is built around the idea of an investment portfolio containing 60% equities and 40% bonds (or perhaps 50% of each). Whilst a 60/40 weighting may appeal to, say, a middle-aged investor with a modest appetite for risk, younger recipients are likely to take more chances in hope of higher returns, and thus to go for 80/20 or even 100% equities; while an older recipient, in search of security, is likely to do precisely the opposite. Secondly, and linked to the first point, Duxbury imposes a 'one size fits all' solution, instead of allowing people to think for themselves.

Going back to first principle, Duxbury is about translating a future income stream into a present lump sum, such that the one equates to the other. Many people would prefer a cash sum now to an uncertain, ongoing income stream. How far they are prepared to forgo the one for the other determines the rate of discount, expressed in annual terms. You don't need *Capitalise* or *At a Glance* to calculate this. Instead, there is a simple formula to be found in any Excel or Google spreadsheet, viz *PV(rate, term, payments)*, where 'PV' = 'Present Value', 'rate' = the chosen discount rate, 'term' = the duration of the order, and 'payments' = the quantum of the maintenance order.

Applying this formula to, say, a periodical payment of £30,000 pa over a 10-year period at a discount rate of 4% pa, it can be seen in seconds that the capital required is precisely £243,326.87, or £243k to the nearest thousand. Moreover, a table such as that laid out in Appendix 5 to the WP Report, producing a range of lump sums for a variety of situations, can be produced by an experienced spreadsheet user in less than 30 minutes. What is the point, then, of a published table or piece of commercial software that does the same thing?

Nor is it a problem for Excel to calculate the present value of a series of cash flows that change over time. For example, suppose the court imposes a 'step-down' order for a wife, starting at £30,000 pa for the first 5 years, then £20,000 for the next 5, then £10,000 for the last 5. Here the equivalent lump sum, at 4% pa discount, is found in an instant by the *NPV* ('Net Present Value') formula, that is to say, *NPV(rate, value1, value2 …)*. The answer is £248,645.95. Clearly, using this formula will enable you to devise bespoke solutions at minimal effort and zero cost.

		W previous marital status		H previous marital status	
W age at marriage	**Total**	**Divorced**	**%**	**Divorced**	**%**
All ages	132,562	26,718	20.2%	27,330	20.6%
20–24	48,550	1,485	3.1%	4,543	9.4%
25–29	35,177	6,046	17.2%	6,891	19.6%
30–34	17,834	7,436	41.7%	6,079	34.1%
35–39	8,560	5,515	64.4%	4,186	48.9%
40–44	4,318	3,333	77.2%	2,531	58.6%
45–49	2,153	1,776	82.5%	1,464	68.0%
50 and over	1,492	1,112	74.5%	983	65.9%

Table 1: Prospects of remarriage

Allowance for management charges?

Perhaps in a gesture to those of its number, or its consultees, who believe that Duxbury awards are too low, the WP proposes that allowance should be now made within the model for the incidence of portfolio management charges, at the rate of 1% of the fund up to £1m and 0.5% thereafter.

With respect, this is wrong in principle, for a number of reasons. First, maintenance recipients in higher income brackets will generally include an allowance for financial advice within their budget. Secondly, the reason you employ a manager is to boost investment returns. The cost of doing so should therefore justify itself. Thirdly, it is up to the recipient how they invest the money: they may (for instance) choose to buy a larger residence, which will incur zero management charges and may prove a handy, tax-free investment. Or they may choose to invest in tracker funds through a platform that charges only 0.7%; and so on. Again, anyone in receipt of a large lump sum should utilise their 'earning capacity' to acquire knowledge and experience of investing.

The problem with making an allowance within the model for management charges is that it dramatically increases the payout, and therefore the dependency of the recipient, contrary to the whole thrust of the legislation. So much is admitted by the WP. For example, at para 174 it says (emphasis added):

> 'Reworking the calculation at paragraph 146 above by allowing an additional deduction for management charges *increases* the initial fund required to £789,484 (an *increase of c, £207,000 or +35.5%*)'

Query why there should be any increase at all, and why the payer should be the one who has to pick up the tabs.

Pension

Similar comments apply to the WP's idea (contrary to the position hitherto) of excluding the receipt of state pension from the Duxbury calculation. Of course, if the object is merely to capitalise a short-term order between now and retirement, then pension is irrelevant. Otherwise every source of income needs to be taken into account; although I agree it can be done at a later stage of the calculation (if the court remembers to do so).

Taxation

It is not understood why, under Duxbury as conceived, the payer should have to compensate the recipient for the incidence of tax. How people arrange their tax affairs is a matter for them. As it is, the model contains too many moving parts and is therefore prone to error (as the WP freely admits). It is also highly subjective in that it supposes the recipient will invest in a certain way, to produce a mixture of income, capital gains and 'churn', and be taxed accordingly. It is vulnerable, moreover, to changes in fiscal policy at government level. Lastly, because the calculation is complex, the model has to rely on an iterative process that starts (and ends?) with guesswork.

In the real world, where discounting is commonplace, it is hard to imagine anyone operating in this way. For example, commercial properties are valued as a function of yield; businesses on a multiple of pre-tax profits (EBITDA); patents on the likely earnings from royalties; and so on. In none of these instances is the tax status of the parties of any relevance.

Personal injury awards are different because here the objective is to compensate the victim, pound for pound, for the loss of future earnings after tax. The tortfeasor becomes an insurer for the victim; and indeed, most PI claims are handled by insurance companies. That is not how family courts work.

Table 2 shows how a DCF calculation, carried out on an Excel spreadsheet, compares with the WP's proposed model at Appendix 5 of the Report. For ease of comparison I adopt (but dissent from) its recommendation that management charges be deducted from the RRR. The net discount rate therefore, for illustrative purposes only, is 2.75%. That aside, it can be seen that the differences between one model and the other – to do with tax treatment – are purely marginal until one gets into higher numbers; and so can safely be ignored.

Term	£30,000	Duxbury	%D	£40,000	Duxbury	%D	£50,000	Duxbury	%D
3	85	84	-1.5%	114	112	-1.5%	142	141	-0.8%
4	112	111	-1.1%	150	148	-1.1%	187	186	-0.5%
5	138	137	-1.0%	185	183	-0.8%	231	229	-0.7%
6	164	163	-0.5%	218	218	-0.2%	273	272	-0.4%
7	189	188	-0.4%	252	251	-0.2%	314	314	-0.1%
8	213	212	-0.4%	284	284	0.1%	355	356	0.4%
9	236	236	-0.1%	315	316	0.3%	394	396	0.5%
10	259	260	0.3%	346	347	0.4%	432	435	0.7%
11	281	283	0.5%	375	378	0.7%	469	473	0.8%
12	303	305	0.6%	404	408	0.9%	505	511	1.1%
13	324	327	0.9%	432	437	1.1%	540	548	1.4%
14	345	348	0.9%	460	466	1.4%	575	584	1.6%
15	365	369	1.2%	486	494	1.6%	608	619	1.8%
16	384	389	1.3%	512	521	1.7%	640	653	2.0%
17	403	409	1.5%	537	548	2.0%	672	687	2.3%
18	421	429	1.8%	562	574	2.1%	702	720	2.5%
19	439	448	2.0%	586	599	2.2%	732	753	2.8%
20	457	466	2.0%	609	624	2.4%	761	785	3.1%

Table 2: DCF and 'New' Duxbury compared

What rate of discount?

I have no grouse with keeping the standard rate at 3.75% as such (although 4% would be simpler), so long as it is recognised that people have widely differing appetites for risk at different ages. A 40-year old wife, for example, may be far more adventurous with her portfolio than a 70-year old hoping to live quietly for the remainder of her years. Factors such as these suggest that courts should be able to choose from a menu of discount rates – say from 2% to 12% – in order to reflect the personal characteristics of the applicant, including age and disability if any. Relevant also is the rate of return on capital that the couple have been used to generating in the past. I return to the proposition that higher returns = higher risk. Why should the wife of an entrepreneur, who has enjoyed double digit returns for many years, be shielded from risk for the rest of her life by the adoption of an artificially low discount rate? And vice versa, if H is the maintenance dependant.

Conclusion

(1) There is nothing in the Duxbury iterative model that cannot be achieved more simply and cheaply by the use of standard spreadsheet functions like *PV* and *NPV.*

(2) Except (perhaps) in the case of payees past retirement age, the temptation to hone the rate of discount down to 2.75% or some other figure should be resisted. People should be expected to work their capital, not to be cosseted in cotton wool for the rest of their lives.

(3) Factors such as the impact of tax on the recipient, and the components of an investment portfolio, should be ignored as essentially subjective and not corresponding to the real world of business deals. Swapping income for capital is a straightforward commercial transaction, running on well-known lines.

(4) In the last analysis, the question is not how to safeguard the payee from risk, but 'What lump sum would he or she accept in lieu of ongoing periodical payments?' Seen like that, many of the complexities of the Duxbury model fall away and it becomes an exercise in rudimentary arithmetic.

(5) It is time to recognise that Duxbury is dead and needs to be given a decent burial.

What's in a WhatsApp: Can a WhatsApp Message Transfer a Property?

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The decision of Deputy Insolvency and Company Courts Judge Frith (the judge) in *Reid-Roberts and Burke v Mei-Lin and Gudmundsson* [2024] EWHC 759 (Ch)[1] is one of the first published cases since the decision of the Court of Appeal in *Hudson v Hathway* [2022] EWCA Civ 1648, [2023] KB 345 to deal with what constitutes a disposition of a beneficial interest in land by means of signed writing.

This case centred on communications by WhatsApp, and an argument that there had been an effective transfer of a beneficial interest in the former matrimonial home by a series of WhatsApp messages. In this case, that argument failed. Nevertheless, the case raises some interesting issues about what amounts to a disposition, and the manner in which a message sent by WhatsApp might be 'signed', so that the message amounts to 'signed writing' for the purposes of s 53(1)(a) and (c) Law of Property Act 1925 (1925 Act).

The facts

The applicants were the trustees in bankruptcy of the husband Mr Gudmundsson (Mr G), and they applied for an order for sale of what had been the matrimonial home of him and Ms Mei-Lin (Ms L). By the time of the trustees' application, Ms L and Mr G were divorced. Ms L was still living in that home with the two children of the marriage, aged 14 and 10. The children and Ms L had suffered psychological trauma owing to Mr G's abusive and violent behaviour during the marriage. Mr G's business in banking and investment management had failed, and he was subsequently made bankrupt, apparently owing several million pounds, and had been sentenced to two terms of imprisonment (14 months for contempt of court, and 12 years for fraud offences).

Ms L and Mr G separated in 2016 after a 10-year relationship and 7-year marriage. In 2017 Ms L began divorce and financial remedies proceedings. By March 2018, the Family Court had made an order for the children to live with her and spend time with Mr G subject to a drug-testing regime. In December 2018, there were discussions about a possible settlement of her application for financial remedies. These included an exchange of emails and WhatsApp messages on 3 December 2018, as detailed below. Those did not lead to a concluded agreement and the financial remedy proceedings continued.

On 20 February 2019 the financial remedy hearing ended, with judgment expected for 6 March 2019. Judgment was, however, delayed on account of the judge's pressure of work. It was almost ready to be handed down by 22 September 2019, but at that point the court was told by Ms L's lawyers of certain developments, including Mr G's business being closed down and him being sent to prison. The court therefore sought further submissions. Mr G asked for more time. During that time, he had a statutory demand served on him, followed by a bankruptcy petition, and he was made bankrupt on 26 February 2020. The judgment was eventually handed down on 4 March 2020 – some 13 months after the substantive hearing. It was only at the March 2020 hearing that Mr G deigned to tell the court and Ms L that he had been made bankrupt 2 weeks earlier.

The Family Court judge had decided that the entire equity in the family home – held in joint names and owned in equal shares – should be transferred to Ms L. However, because of the bankruptcy, the order for transfer into Ms L's sole name was ineffective: Mr G no longer owned a half share – his share now belonged to his trustees in bankruptcy. Ms L was also awarded her costs, but those costs had not been paid and she was left to claim in his bankruptcy.

Subsequently, Ms L applied to annul the bankruptcy, but her application was dismissed with costs. At that point, in March 2021, Ms L told the court, through her counsel, that the house would be put on the market straight away. However, the house remained unsold, and so in February 2023 the trustees applied for an order for sale and a declaration that the equity was owned in equal shares by them and Ms L. That application came before the judge on 23 February 2024.

Ms L had always been seeking to argue that she should not have to give up possession, relying on the 'exceptional circumstances' proviso in s 335A Insolvency Act 1986. Under s 335A(3), 'the court has to assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations'. The mere fact that the other co-owner would not be able to house herself and the children with her half share of

the equity is not an exceptional circumstance: something more is needed to defer sale.

The issues for the judge

However, counsel for Ms L, instructed through Advocate/the Bar Pro Bono Unit, also raised a new point. He argued that the email and WhatsApp messages in December 2018, prior to the financial remedy final hearing, had amounted to a disposition of Mr G's interest in the family home to Ms L. There were three main issues for the judge to decide:

(1) First, was it open to Ms L to run the argument of the disposition of that interest? The judge held that it was – there was no estoppel, and had been no formal admissions that she had only a 50% share that were binding on Ms L.
(2) Secondly, if so, had there been a disposition of Mr G's interest to Ms L under s 53(1)(c) 1925 Act?
(3) Thirdly, if that argument failed, were there exceptional circumstances under s 335A(3) 1986 Act, allowing the court a discretion not to order an immediate sale, and if so, how should that discretion be exercised? The judge found there were exceptional circumstances, and deferred sale until 2032 when the younger child would be 18.

The second issue was described as the *Hudson v Hathway* issue, namely whether the WhatsApp and email messages amounted to a disposition for the purpose of s 53(1)(c) 1925 Act. In any case where this issue arises, there are two questions: first, does the communication amount to a disposition, and secondly, is any such disposition effected by signed writing? The judge referred to *Hudson* at [32], where Lewison LJ distinguished between executory contracts for the sale of interest in land, which are governed by s 2 Law of Property (Miscellaneous Provisions) Act 1989 (1989 Act), and transactions which amount to an immediate disposition of an interest in land, which are governed by s 53(1)(c) 1925 Act.

Hudson v Hathway was a cohabitation/TLATA dispute – the parties were not married. Mr Hudson had sent emails to his former partner, Ms Hathway, by which it was said he had disposed of his interest in their former family home. Mr Hudson wrote his name at the end of each of these emails: 'Lee'. The Court of Appeal in *Hathway* concluded that: (1) the emails together amounted to an immediate disposition of his interest (by way of a release of his rights as a beneficial joint tenant), and not merely an agreement or willingness to transfer at a later date; and (2) emails were 'writing', and his name written at the end of the email was a signature, having been added with the intention to authenticate the document.

The communications in this case

By WhatsApp:

(1) Mr G: 'I suggest that the responsibility of taking care of the kids goes to u 100%, then I can sign over my share of southcote road to u without any complications as I don't need any accommodation in London.'
(2) Mr G: 'Please let me know that u r happy with this and we can then close the financial part of the divorce this week.'
(3) Ms L: 'with some monthly maintenance then ok.'
(4) Mr G: 'It goes without saying the monthly maintenance for the kids in accordance with CMS.'
(5) Ms L: 'Are you saying I have full custody of kids?'
(6) Mr G: 'Yes that is what I was saying, moving out of London for good and out of the kids life.'
(7) Ms L: 'I will take house and full custody of kids. And my paintings [in] Iceland should be returned then is done.'

By email:

(8) Ms L: 'Dear adudun. I will have full custody of kids and take the house. This week we shall finish the paperwork According to what we agreed. You are welcome to visit kids and I will never stop you seeing them. Just to let you know. Please email your lawyer and me the confirmation of the arrangements ASAP So I can tell my lawyer this has been agreed to proceed ASAP. Kind regards Hsiaomei'
(9) Mr G: 'Hsiaomei, For avoidance of doubt this is not agreed. I sent this in relation to your "offer" that I could use a bedroom in southcote when I have the children …'
(10) Ms L: 'Hi Audun Clearly in you offer there is nothing mention about the room. I have accepted your offer and you should honour your word. My reply to your offer is – yes I will take this offer have the house and have kids 100% Kind regards Hsaio Mei'
(11) Mr G: 'Hi Hsiaomei Why don't you just keep the house in London and the kids move with me to Iceland. You can visit them as much as you as want going forward. It's your call whether you want to spend more time on trying to agree on solution or not. All the best, Audun Mar Gudmundson'

The reader can see that there was the hint of a deal – in the context of 'the financial part of the divorce' – that Ms L would get the house, child maintenance per the CMS, and full responsibility or 'custody' of the children. But even so it appeared to be subject to 'paperwork' (see (8)). By (9) it appears that they were at cross-purposes as Mr G seemed to be under the impression that he was to have the use of a bedroom in the property when seeing the children. Messages (10) and (11) further show the lack of agreement. In our view, looking at these messages as a whole, they do not show the requisite intention on the part of Mr G to effect an immediate disposition of his interest in the property. Instead they show steps towards an agreement – which would need confirming, and then 'paperwork' to be finished.

The judge considered that the WhatsApp messages did show an intention on Mr G's part to release his share of the property to Ms L [62]. However, he held that they did not amount to a disposition because of *Xydhias v Xydhias* [1999] 1 FLR 683. In that case, the Court of Appeal decided that the settlement of financial remedies proceedings does not, in general, give rise to a contract enforceable in law. Indeed, the only way of rendering a deal enforceable was to convert the concluded agreement into an order of the court. The trustees submitted that the negotiations had been on a 'subject to contract' basis. This was an unfortunate expression since that is not a term in general use in

financial remedies practice. Nevertheless, the judge held that *Xydhias* was authority to the effect that, whilst the parties to divorce proceedings can engage in negotiations to resolve issues in relation to property adjustment orders, any agreement they reach would have to be approved by the judge having the conduct of the matter, which would then be recorded in an appropriate court order [71]. He opined that, had the parties not been involved in divorce proceedings, the messages might well have amounted to a disposition [70].

As to the requirement that there be 'signed' writing, the judge appeared to proceed on the basis that the WhatsApp messages were signed – at [66], he considered that, although they did not conclude with Mr G's name:

> 'his name is in the header to the messages for the purpose of identifying [him] as the sender and authenticating the message as originating from him. His name is intended to confirm that the message comes from him, which is the purpose of the "signed" requirement in s 53(1)(c), according to Nugee LJ' (*Hudson v Hathway* at [181])

Although at [66(e)] there was reference to the possibility that the header to such messages can be altered by the recipient, there was no suggestion that this had been done in this case.

Analysis

On the two questions that arise in a 'disposition by signed writing' case, we have already expressed our view that these messages did not show a confirmed intention to dispose of an interest without more ado, but were simply steps towards a possible deal or future disposition. As to the *Xydhias* point, we respectfully suggest that the judge was wrong to consider this was of any validity or relevance. If it had been suggested that the parties had reached a comprehensive compromise of their financial remedies litigation, *Xydhias* does make it clear that no such compromise is binding or effective until approved by the court. In addition, if the parties had, independently of any financial remedy litigation, attempted to agree contractual terms for the future disposition of a beneficial interest in land, there could be no contract unless the strict requirements of s 2 1989 Act were met.

However, if the messages had showed an intention to dispose without more ado, we cannot see how *Xydhias* would stop the disposition being effective – after all, a party can transfer an asset by deed (or indeed by such suitable mechanism as applies to that asset) during the pendency of financial remedy proceedings and such a transfer will be effective. A court which is applying property law in this context (usually the bankruptcy court) is seeking to ascertain the beneficial ownership of property, i.e. whether there has been a valid transfer. If the relevant property law formalities had been complied with, *Xydhias* could not deprive the transfer of legal effect just because there was no overall compromise at the time of the transfer. The existence of pending financial remedy proceedings does not prevent the parties from making valid property dispositions, whether of land or personal property.

As to the second issue, the difference between this case and *Hudson v Hathway* is that none of the WhatsApp messages were signed off or ended with any part or representation of Mr G's name. Does the fact that there is a 'header' mean that the message is signed? The judge appeared to say as much at [66]. In fact, if you receive a WhatsApp message in a thread from a single individual, their name, as recorded in the recipient's contacts, appears at the top of the screen. If you receive a WhatsApp from someone in a group, the name of the group is at the top of the screen, and the name of the sender (again as recorded in the recipient's contacts) appears at the beginning of the message.

The issue with extrapolating from the name contained on the screen with a WhatsApp message is that this name is determined by the recipient, not the sender of the message. As such, Ms L could just as easily have saved Mr G's number into her phone under a nickname (as many people do with their former partners), and that nickname would have appeared as the 'header' to the messages from him. On that basis, the header is arguably the least relevant aspect of a WhatsApp message for the purposes of whether a message is intended to be authenticated and therefore 'signed'.

There is a strong argument that WhatsApp messages are inherently more trustworthy and authentic than other forms of communication. After all: (1) the messages are sent from an account linked to an individual mobile telephone number; (2) the messages have to come from a specific device which has use of or access to that account or telephone number; and (3) the messages are end-to-end encrypted. If the touchstone of 'signed writing' is the 'intention to authenticate', WhatsApp satisfies that requirement far more than the following forms of communication which have, over the years, been accepted as being signed writing for legal purposes:

- The name on a telegram form (*Godwin v Francis* (1869–70) 5 CP 295) – since by its very nature a telegram sent in the 1800s was not only using a much more basic technology, but also on many occasions was a written message entered by a professional telegram operator, as opposed to the author of the actual words.
- The name on a rubber stamp (*Goodman v J Eban Ltd* [1954] 1 QB 550) – since there is no way to know who actually pressed the stamp into the piece of paper, and a rubber stamp is very easy to replicate/forge.
- A SWIFT message with no footer or signature (*WS Tankship II BV v The Kwangju Bank Ltd* [2011] EWHC 3103 (Comm) at [155]) – since the 'output message header' that the SWIFT system generates, and that the High Court found acceptable authentication, is far less sophisticated than the encryption key sent via WhatsApp.
- A faxed letter with a copy of someone's signature – since that is capable of forgery with arguably less technical expertise than that required to hack or fake a WhatsApp message.
- An email sent with an automatic email footer (*Neocleous v Rees* [2019] EWHC 2462 (Ch)) – since most email accounts can be accessed from any device in the world that has internet access and are therefore arguably easier to 'hack' than the WhatsApp app on one particular mobile telephone.

- Typing the name of a law firm, not the name of any individual, at the end of an email (*Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 WLR 2953) – since that does not communicate who in fact has 'authorised' the document.
- An individual name typed at the end of an email (*Hudson v Hathway*) – since, as has been set out above, it is often easier to access someone else's email account than it is to access their WhatsApp app.

Because most people who communicate by WhatsApp are known to each other and have made a conscious decision to add the other to their contacts book, it is hard to see how one could send a message using WhatsApp and not expect the recipient to be confident that it is you sending the message, intentionally, with the knowledge that the recipient knows the message is authentically from you.

However, does this 'pre-authentication' satisfy the requirements of s 53 1925 Act? The law requires that the document said to constitute the disposition be signed. That can be satisfied by the *inclusion* in the document of the person's name or part of it or some representation of it. The automatic inclusion of the name at the foot of the email, i.e. within the text of the document, was held to satisfy the signed writing requirement in *Neocleous v Rees*. However, email headers are not part of the document, and (to use an analogue analogy) part of the envelope might identify the sender and recipient, but would anyone say that a hard copy document was signed because the name of the sender was on the envelope in which it was sent? Likewise, the name of the sender on headed notepaper is not 'signed writing' for the purposes of s 53.

Conclusion

This appears to be the first case following *Hudson v Hathway* in which the signed writing issue has arisen in the domestic context. In fact, as in most such cases, the messages were not immediate dispositions but attempts to negotiate. This case (and *Begum v Miah* [2024] EWHC 697 (Ch) – in which a signed document providing that a property 'will be transferred in due course' was held not to amount to a disposition but an agreement for a future transfer) illustrates that the floodgates spectre raised in *Hudson v Hathway* is illusory – separating couples simply do not, as a rule, make unilateral unconditional transfers of property by email or other forms of electronic communication. 'Honey, I've just given you the house' will not be appearing at a cineplex any time soon.

The debate about WhatsApp is more nuanced. There are some decent arguments for the judge's view that a WhatsApp message which does not contain any part of the sender's name is nevertheless signed by the sender. However, despite what we have called above 'pre-authentication', we query if this will suffice. The view more consistent with the authorities is that the message itself must contain some part or representation of the sender's name in order to be signed by the sender.

Notes

1 www.bailii.org/ew/cases/EWHC/Ch/2024/759.html

The Approach of the Family Court to Musicians' Proprietary Interests

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In 2001 Bob Dylan wrote 'I always said you'd be sorry and today could be the day, I might need a good lawyer, Could be your funeral, my trial'. The bard is often right. Where a financial remedy case involves a musician, it is likely that they will hold some form of proprietary interest in the music they have created. This can create a complex position in fact and law.

Notably, musicians are statistically more likely to end up in financial remedy proceedings than other stars. In 2022, the Marriage Foundation concluded that, across the spectrum of celebrity couples, musicians' marriages fared the worst – some 60% were reported to end in divorce.[1]

Below, we set out a broad simplification of those proprietary interests, the relatively few reported cases that have involved musicians and some issues that can arise.

A beginner's guide to proprietary interests in music

A musician's proprietary interest will follow how the musician has participated in the creation of the music: in broad terms, one or a combination of: (1) songwriter; (2) performer and (3) recording artist.

Any musician who writes their own music will own the copyright (or a specified part of the copyright) in the piece of music they have created. They are the owner because they will be credited with either: (1) writing all of a particular work; or (2) contributing to the writing as part of a group of songwriters of a particular work. As the owner of that copyright, the musician has a number of different rights, including:

- the right to authorise the reproduction of the works either with (synchronisation right) or without (mechanical right) visual images;
- the right to authorise distribution of the works;
- the right to rent or lend the work to members of the public; and
- the right to make an adaptation of the work or to do any of the above in relation to an adaptation.

The musician can also allow or prevent someone from doing all or any of the above.

Nearly all musicians will have in place commercial arrangements for third parties to exploit these rights on their behalf to generate an income. In most cases that arrangement is a temporary one (e.g. a 3- or 5-year term). In some (albeit rare) cases, it is permanent. The income from that bargain will either be paid directly to the musician or, as is commonplace, into a company owned and controlled by the musician.

The above rights manifest themselves in different ways, however for a musician they mainly fall into two categories:

(1) Publishing rights, also known as the 'publishing side'. This is the exploitation of the underlying composition of a particular musical work. By way of example, in 2020 Bob Dylan permanently sold his songwriting catalogue to Universal Music for a reported sum of approximately $300m. Universal Music could now produce a new version of the album 'Highway 61 Revisited' if it so chose.

(2) Recording rights, also known as the 'master side'. This is the exploitation of the recording(s) that have been made of a particular musical work. After having sold his songwriting catalogue as above, 2 years later Bob Dylan permanently sold his master recordings to Sony Music Entertainment in a deal estimated to be worth between $150m and $200m. After the deal, Sony Music Entertainment would receive an income when the album 'Highway 61 Revisited' was purchased or downloaded.

Famously, the recording rights to Taylor Swift's first six studio albums were owned by Scooter Braun. As the creator, Swift still owned her publishing rights and so re-recorded the works as 'Taylor's version', the recording rights of which she then owned, effectively cutting Braun out.

For the publishing and recording rights, a royalty is paid out at a certain rate for a certain type of exploitation. It will depend on the contractual relationship between the rightsholder and the company tasked with exploiting that right (e.g. a publishing company).

There is an additional category known as 'neighbouring rights', which as the name suggests are rights designed to

protect those 'neighbours' to the copyright holder. For a musician, this means giving protection for a specific performance of their work (e.g. a radio broadcast). Whilst not as traditionally valuable as the publishing or recording rights, they should not be overlooked and, as below, are still the subject of scrutiny in financial remedy proceedings.

The above is, very much, an overview. This is a complicated area and, where you are acting in a case with a musician, you should strongly consider obtaining specialist advice (see the *McCartney* case below). In many cases, including the reported cases we consider below, the valuation of the proprietary rights can be in issue. As was recently highlighted by Cusworth J in *ED v OF* [2024] EWFC 297, these valuations are vulnerable to the normal risks associated with a valuation (*Martin v Martin* [2018] EWCA Civ 2866; *Versteegh v Versteegh* [2018] EWCA Civ 1050). In this instance they are definitely more of an 'art' than a 'science' (*H v H* [2008] EWHC 935 (Fam), [2008] 2 FLR 2092).

Cases concerning music and publishing rights

We consider the three key financial remedy cases where one of the parties has been a musician:

(1) *McCartney v Mills McCartney* [2008] EWHC 401 (Fam).
(2) *CB v KB* [2019] EWFC 78.
(3) *ED v OF* [2024] EWFC 297.

McCartney v Mills McCartney [2008] EWHC 401 (Fam)

Here, the husband, Sir Paul McCartney was a member of the Beatles. He was, as Bennett J acknowledged, world famous. The judge commented: 'He is, musically speaking, extraordinarily talented. He composes, sings, and plays musical instruments. He is and has been for many years famous throughout the world'. The wife, Heather Mills McCartney, was previously a TV presenter, model and public speaker. The parties had married in 2002 and separated in 2006. They had a child together in 2003.

The judge found that Sir Paul's wealth amounted to approximately £400m. Both parties instructed their own experts to value Sir Paul's current interests and the value of his interests in 2000. Sir Paul instructed Mr Alan Wallis, a director of Ernst and Young. Heather Mills McCartney instructed Timothy Allen of Lee and Allen. The judge accepted Mr Wallis' evidence. The judge commented:

> 'Mr Wallis is in a different league of expertise to Mr Allen. Mr Wallis told me he has 25 years experience in musical and media work. In stark contrast Mr Allen, a forensic accountant mainly concerned with claims for damages and with share valuations, candidly admitted that he had never valued a catalogue.'

The detail of the dispute between the experts was limited in the judgment to the multiplier used (see [123]). At [126] the judge surveyed the expert's evidence over the level of research carried out over the sale of music catalogues and the varying market for these.

In his final determination, the judge put significant weight on the reality that Sir Paul's wealth had been generated prior to the parties' marriage, stating:

> '[311] In my judgment, in this case the needs of the wife (generously interpreted) are not simply one of the factors in the case but are a factor of magnetic importance. In a case where the vast bulk of the husband's enormous fortune was made not only before their marriage but also indeed before the wife and husband even met; where the "marital acquest" (if such there has been) is of a very small amount compared to the total assets; where the compensation principle is not in any way engaged; where the marriage is short and where the standard of living lasted only so long as the marriage; where the wife is now and will be very comfortably housed; and where Beatrice's needs are fully assured, surely fairness requires that the wife's needs (generously interpreted) are the dominant factor in the S.25 exercise. Any other radically different way of looking at this case would, in my judgment, be manifestly unfair.'

What do we draw from this? Primarily that having the right expert in your camp is critical. Mr Wallis' experience clearly rose to the fore when set against Mr Allen's. Having an established, experienced expert upon whom one can rely, perhaps even from Form E stage or before, is undoubtedly of great assistance. Secondly, whilst it was relatively clear in the *McCartney* case when he had made his music (and that consequently his wealth was pre-matrimonial), it is, of course, vital to understand when your client's music/wealth was created. This can be factually nuanced.

CB v KB [2019] EWFC 78

This was a decision of Mostyn J. The parties began a relationship in 1998, married in 2003 and separated in 2017 (a 19-year relationship). The parties had six children. The case is probably most commonly known for the proto-version of the *James v Seymour* calculation. The husband is a bass player in a well-known band. The husband had joined the band in 1994. In 1999 the band signed its first record deals with companies in the USA, Europe and Australia. It released its first album in 1999. At the time of the judgment, the band had made a further six albums. The judge commented that the band had been extremely successful. The majority of the band's songs were written by another band member – 'LS'. The judge described LS as the 'kingpin' and 'rain-maker'. The husband had written only three of the band's songs.

Mostyn J identified five different income streams:

(1) The husband's publishing rights in respect of the three songs he had written. The parties had a narrow disagreement over this and the judge took a value of c. £55,000.
(2) Equitable remuneration (also known as neighbouring rights) in respect of broadcasts of the band's songs on radio and TV.
(3) An agreement between the husband and LS that the husband receive 8.33% of LS's publishing rights. The judge described this as having a 'significant element of gratuity' as there was no obligation on LS to do this. This agreement was to be formalised into a contractual arrangement.
(4) The husband's one-third income share of the band's recording rights.
(5) The husband's share of ticketing and merchandising income generated by touring.

In valuing the above, Mostyn J had the benefit of four separate experts who were described as 'excellent': (1) Mr V (for the husband – an accountant, but also the band's business manager); (2) Mr Stephen Marks (for the wife, an accoun-

tant); (3) Mr Stuart Burns (the single joint expert (SJE), an accountant); and (4) Mr David Greene (for the husband, an accountant). Mostyn J heard evidence from all four accountants, with Mr Burns and Mr Greene giving their evidence jointly, a technique known as 'hot-tubbing'. The experts all agreed that: (1) a discounted cash flow method was the most reliable to value streams 1 and 3; and (2) a traditional 'multiplicand-times-multiplier' method was appropriate for streams 2 and 4. Mostyn J determined that it was not necessary to value stream 5 (it related to income generated from future touring, was therefore not matrimonial and repeated his analogy of the footballer only being paid if he plays football).

Where considering the multiplicand-times-multiplier method, Mostyn J noted that it was not helpful to use the examples of large sales of catalogues by the likes of major labels and publishers (the judge gave examples such as Warner, Universal and BMG) when valuing individual artists' catalogues. This will obviously differ from case to case as the 'bigger' the artist, the more valid an analogue it might be, but as Mostyn J put it, 'it is like using the accounts of Tesco to value the village shop in Ambridge'. Further, the income received under stream 3 had 'a significant element of gratuity to it' and should be discounted (after a deduction of the non-matrimonial element) by 25%.

As with *McCartney*, *CB v KB* highlights that the scope and quality of the expert evidence available to the court is critical. However, where *McCartney* was focussed on an overall value and, consequently, which part of that value was matrimonial, *CB v KB* provides helpful guidance on which valuation method could be more appropriate for each respective stream, the judge concluding in the case that:

(1) the publishing rights were to be valued using a discounted cash flow method;
(2) the recording and neighbouring rights were to be valued using the multiplicand-times-multiplier method; and
(3) the ticketing/merchandising income would not be ascribed a capital value (on the basis that it relates to future work).

ED v OF [2024] EWFC 297

This was the decision of Cusworth J. The parties had a 16-year relationship. There were two children and the husband was a songwriter and producer, said to have made music for 'some of the biggest musical acts currently working and touring'. He was therefore distinct from Sir Paul McCartney and the husband in *CB v KB*, who were both performers. The parties had accepted that the bulk of the husband's musical interests were matrimonial. Those interests were held across a number of limited companies. The parties did not agree the value of the companies.

The parties instructed Mr Paul Simnock, a consultant at MGR Weston Kay, to value the companies. Unhelpfully, all of the figures in the judgment have been redacted which makes it virtually impossible to follow. Mr Simnock applied a discounted cash flow model to the recording, publishing and producer rights. To undermine Mr Simnock's conclusions, the husband relied upon an offer that was received, but not accepted, to purchase the husband's catalogue. The judge concluded that, whilst offers were a useful 'test' against SJE valuations, Mr Simnock's conclusions were the most reliable evidence. Whilst doing so he identified pitfalls with expert valuations (see the cases of *Versteegh*, *Martin* and *H v H* above). Mr Simnock also set out an anticipated income from the catalogue. He calculated it on the basis of the average of the last 5 years plus the unexpired copyright term. To produce this calculation he relied on a range of revised projected growth rates for the music industry prepared by a well-known consultant to his firm.

The expert was also tasked with considering the tax position and whether the husband would be caught by the 'anti-phoenix' Targeted Anti-Avoidance Rule (TAAR) on a liquidation and distribution which would cause distributions to be taxed at the dividend tax rate of 39.35% (rather than the then 20% capital gains tax rate) if he engaged in a similar trade within 2 years of his receipt of his distributions and if one of the main purposes of the winding up was the avoidance or reduction of a charge to income tax. The expert acknowledged that there was some risk of this. Cusworth J gave the husband the option to either buy the wife out within 2 years (in which case the TAAR risk was his own) or wait until the expiry of an agreement he had with 'Big Co' (a company that had entered a joint venture with him and consequently bought him out in 2019), at which point any TAAR liability would be shared 49% to the wife, 51% to the husband (i.e. in proportion to their company shareholdings).

As above, *ED v OF* again reinforces the importance of an appropriately qualified expert, perhaps to a greater degree than the preceding cases simply because the court only had the benefit of one expert (as opposed to two in *McCartney* and five in *CB v KB*). The task for the judge was not therefore to weigh up differing expert opinions, but instead to measure a theoretical valuation (the expert's report) against an actual offer. Whilst it did not appear to weigh heavily in the judge's decision, it is notable that the expert did not follow the valuation methods of the individual streams per *CB v KB* (i.e. he used a discounted cash flow methodology for all the streams, not a combination as set out above).

This case also considers in greater detail issues of liquidity and tax. The TAAR risk identified by the husband was a significant factor in the overall award and future cases could see a greater focus on this point.

Points to consider

If we draw the threads together from the above cases, where you are involved in a case or a pre-nuptial agreement where one of the parties is a musician:

(1) Understand, with expert assistance, what rights the musician has and how they are held. This is likely to be central to the case.
(2) Obtain expert advice in respect of the value of those rights. Prepare for a dispute in respect of that expert advice and pick the right expert (not only as an SJE, but in 'your corner').
(3) Be mindful of the fragility of the value in those rights. The case law emphasises that this is an 'art' rather than a science. The income stream methodologies identified in *CB v KB* can at best be described as a guide or starting point, rather than a rule or presumption. Is the musician a 'one hit wonder'? Will the catalogue perform well over time? Often the underlying value

may in part be attached to the popularity of the person or the genre. A band member is particularly exposed here. Imagine if another member of the band (not one of the parties) commits a crime. The value of the rights may plummet and this would have nothing to do with the parties.

(4) Take specialist tax advice from an accountant with experience in the music business. The structures used by musicians are often complicated and the applicable rate of tax can be uncertain and whether the asset is caught by TAAR.

(5) Consider carefully whether the proprietary right is matrimonial or not. It may not be possible to draw a clear line in the sand but useful indicators could include the date a piece of music was registered with a rights collection agency or, for example, the date of registration of the copyright (which is not a requirement in England and Wales, but is in other jurisdictions such as the USA).

Notes

1 https://marriagefoundation.org.uk/research/rock-n-rollers-twice-as-likely-to-divorce/

Two Heads, Better than One? *BR v BR*, in Light of *BR v BR (No 2)* and *Vince v Vince*

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In his judgment in *BR v BR* [2024] EWFC 11, [2024] 2 FLR 217, Peel J emphasised at [17](i) that '[w]herever possible' the instruction of a single joint expert (SJE) is the 'default position' and at [17](ii) that a 'high degree of justification' is required for two parties to instruct their own experts.

By the time of the final hearing however, in *BR v BR (No 2)* [2025] EWFC 88, the parties had incurred the considerable costs of three experts. And in *Vince v Vince* [2024] EWFC 389, Cusworth J referred to the benefit of having had three experts instructed in the case.

This raises various questions: what benefits can multiple experts bring? In what sort of cases? And at what point is Peel J's high bar cleared? In this article, I take a closer look at the guidance given by the judges in these cases and suggest that in the right cases two party-instructed experts, rather than an SJE can, perhaps counterintuitively, be an efficient and cost effective option for the court.

BR v BR: a high bar

In *BR v BR*, Peel J considered whether it was appropriate for the court to allow each of the parties to appoint their own business valuation experts. This is the standard approach in commercial cases, but it is not the usual way forward in the Family Court, where, pursuant to the Family Procedure Rules 2010, the instruction of an SJE is the norm.[1] Peel J stated at [7] that there was 'no doubt' that expert evidence on value, tax, and liquidity was 'necessary to assist the court to resolve the proceedings' – i.e. satisfying the test set out at FPR 25.4(3) – and set out as above that '[w]herever possible, a SJE should be directed rather than giving permission for two or more experts to be solely instructed. This is the default position' [17](i).

Peel J thereafter said that 'the bar for departing from the default position is set high. A high degree of justification is required to persuade the court to do so' [17](ii).

At [18] he gave several non-exhaustive reasons why the default position should be the instruction of an SJE. These include:

(1) *cost*: it will usually be cheaper to instruct a single expert, rather than two, and that issues of proportionality are always relevant, even in so-called 'big money' cases;
(2) *consistency of instructions*: the court retains control over the 'remit, instructions and provision of information' to the SJE, whereas there is a risk that party-instructed experts may receive different instructions, different information and different questions leading to a 'significant risk' that the court will be faced with reports which are not just different in their conclusions, but based on different information, questions and instructions. Peel J could have added to this that even with the instruction of an SJE the court may pursuant to FPR 25.12(3) permit the parties to give separate instructions to an SJE (but if this permission is given, when the instructions are given to the expert they must be sent to the other party at the same time);
(3) *access to information*: the SJE is able to decide what documents they need and request them, which has the added benefit of removing the need for long questionnaires addressing company disclosure/matters;
(4) *questions to the SJE*: there is no prevention of party-instructed experts either assisting in the written questions to the SJE pursuant to FPR 25.10. Likewise, they can assist with the preparation of their cross-examination at final hearing; and
(5) *Daniels v Walker applications*: the appointment of an SJE does not preclude subsequent applications to adduce further evidence, although Peel J commented that, in his experience, instances where there is a 'legitimate justification for additional sole expert evidence will be rare'.

A checklist, but for all cases?

There can be no doubt that, in the vast majority of cases,

costs and proportionality will mean that it is right that only one expert will be instructed and appointed. But what about so-called 'big money' cases when the value of the business is large, often the central issue of computation in the case, and likewise often potentially hugely complicated?

In the author's view, sometimes in such cases the instruction of an SJE can be a false economy, and, perhaps counterintuitively, more expensive and time consuming, rather than less.

Somewhat ironically, *BR v BR* [2025] EWFC 88 – the final hearing in the same case – shows why that might be. By the time of the final hearing, the SJE costs exceeded £1m, and in addition, the wife had spent approximately £1.9m on corporate lawyers and shadow accountants (out of a total of c. £3.54m), and the husband approximately £310,000 (out of a total of c. £1.54m). Peel J considered the discrepancy of over £1.5m in the husband and wife's expenditure on corporate lawyers and shadow experts was at [106] 'too great to be ignored' and made a costs adjustment he considered necessary to reflect this.

In total then, £3.2m had been spent in expert costs in valuing business interests which the judge at [91] concluded had a value of approximately £220m, after notional costs of sale of 3% had been taken into account. The author considers it unlikely that such high levels of costs would have been incurred had each of the parties instructed their own experts from the outset. In short, in 'big money' cases, two experts may be cheaper than three.

In such cases, it is the author's opinion that there are valid counterarguments for each of Peel J's checklist points:

(1) *cost*: in addition to the SJE, both sides in a complex case will usually have their own 'shadow' expert to advise on valuation issues generally and specifically on the SJE's report and the drafting of written questions. This results in three experts being instructed, as opposed to two (if no SJE is instructed and the court condones party-instructed experts);

(2) *consistency of instructions*: party-instructed experts could, either by agreement or by order (based on the author's understanding of the overriding objective and the court's case management powers, as set out in FPR 2010 Part 1), be instructed on the same basis as an SJE and with an agreed set of questions that the two experts are required to answer. That is, it could still be open to the court to determine the central question(s) upon which it requires expert assistance, for example, the capital value and liquidity of a business;

(3) *access to information*: it follows that both opposing party's instructed experts could also be provided with the same set of information, on the same basis (i.e. by agreement or the court's case management powers). Just as with communications between the SJE and the instructing parties, if all information provided to one expert is also provided to the other, then both opposing experts will be singing from the same hymn sheet. Indeed, a party-instructed expert is often going to be best placed to question and interrogate the other's interpretation of a given set of facts. And, if the situation does arise where one expert refers to information not provided to the other, the party-instructed expert – being closest to the detail – will be best placed to identify those instances. Further, and if one were thinking creatively, and the court's powers of case management are construed widely, one could easily imagine a scenario where the party-instructed experts were directed to hold an initial joint meeting, before the preparation of their reports, to identify and agree what information they required and would rely upon;

(4) *questions to the SJE*: the lengthy and often expensive process of asking 'clarifying' written questions of an SJE (and where there is often a dispute about whether questions put by one party can properly be so described) can likely be avoided altogether, and in its place, the process of the two experts embark on a joint expert process, by which they meet and work together to narrow the areas of agreement and disagreement. Such a process creates a real and meaningful opportunity for both cost and time savings and, if a valuation can be agreed ahead of the final hearing, then so much the better, saving valuable court time;

(5) *Daniels v Walker applications*: a challenge by one party to an SJE's report (or part thereof) by way of a *Daniels v Walker* application can leave the other party with a sense of injustice, because what was initially an equally balanced approach (the SJE 'being ever-mindful of the need to walk straight down the middle of the road' to quote *Vernon v Bosley (Expert Evidence)* [1996] EWCA Civ 1310, [1998] 1 FLR 297 per Thorpe LJ at p 302, as cited by Mostyn J in *Gallagher v Gallagher (No 2) (Financial Remedies)* [2022] EWFC 53 at [46]) is now unbalanced. That is, the SJE finds themselves in a position of dealing with one party's arguments (e.g. for a lower value) without considering the other side's counterarguments (e.g for a higher value). Indeed, this is what Mostyn J referred to in the case of *E v L* [2021] EWFC 60 (Fam), [2022] 1 FLR 952 when he referenced at [13] the need 'to maintain equality of arms' and allowed both parties to appoint their own experts, in addition to the SJE.

Two heads better than one: shoring up fragility?

In *Vince v Vince* (also reported as *DAV v KV*) Cusworth J was faced with deciding on the value of the husband's interest in an integrated energy business. The court had appointed an SJE, and both parties had also instructed their own expert accountants. By the commencement of the final hearing, those three experts (of which I was one, having been appointed by the wife) had narrowed any remaining issues between them to a sufficient extent by agreement, such that Cusworth J did not have to hear evidence from any of them [1].

Cusworth J stated that, whilst he was mindful (at [14]) of the 'inherent fragility' of such valuations, he nevertheless considered it positive that 'the accountants' views have largely converged, a fact which shores up to some degree the habitual fragility of such valuations' [16]. He went on: 'all three experts have now produced valuations which are now appreciably within the same bandwidth, so that there is a greater measure of certainty here than there is in relation to cases where the court is left to select from the views of competing accountants' [18].

Given that in the circumstances of *Vince v Vince*, Cusworth J found solace in three experts (rather than one),

it follows surely that the same logic applies, and two (rather than one) would also have been of assistance to the court in reducing 'habitual fragility', given that if their views were not similar from the outset, they are likely (although, I accept, not always) to converge after the experts have met and prepared a joint statement. By FPR 25.16 the court may, at any stage, direct a discussion between experts and may direct that following such discussion they must prepare a statement for the court and, interestingly, the court has the express power at sub-rule (2) to 'specify the issues which the experts must discuss'.

Conclusions

I therefore suggest that *Vince v Vince* and *BR v BR* demonstrate that, notwithstanding the 'default position', there are cases where two party-instructed experts, rather than the instruction of an SJE, may be appropriate in certain cases. Although as Peel J rightly stated in *BR v BR* issues of costs and proportionality must *always* be borne in mind, this may not always mean the default position is the right one, although these concerns are always likely to weigh more heavily and be more pertinent in lower value cases. The benefit of two opposing experts in 'big money' cases from the start may also reduce the risk for costs on the scale of *BR v BR*, however rare an occurrence such figures may be.

Notes

1 See, for example, FPR 2010 PD 25D, para 2.1: 'Wherever possible, expert evidence should be obtained from a single joint expert instructed by both or all the parties ("SJE")'.

Bad Behaviour and Broken Bonds: A Comparison of Conduct in 1973 and 1975 Act Claims

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Introduction

Fifty years ago, the Inheritance (Provision for Family and Dependants) Act 1975 (1975 Act) was enacted in an expansion of the court's statutory powers for financial provision on death.[1] Two years earlier, Parliament had enacted the Matrimonial Causes Act 1973 (MCA 1973) to alter the court's statutory powers for financial provision on divorce. The government chose not to enact the Law Commission's recommendation that all family provision claims, both on divorce and on death, be assigned to the Family Division.[2] The Chancery Division (now part of the Business and Property Courts)[3] and the Family Division both have jurisdiction in 1975 Act claims, with the result that two Divisions are interpreting similar provisions dealing with meeting family needs depending on whether the claim arises on divorce or on death. Below the High Court, the county court not the Financial Remedies Court deals with 1975 Act claims. We examine the difference in the jurisprudence as a result.

Both Acts include conduct as part of the circumstances that the court should take into account when determining the award. Unlike the high test of conduct that is 'inequitable to disregard' in the MCA 1973, the language of the 1975 Act permits consideration of conduct that is considered merely 'relevant', paving the way for the court to weigh in the balance a much wider range of behaviour in determining a 1975 Act claim. The two sections now read as follows:

- s 25(2)(g) MCA 1973, '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*' (emphasis added);
- s 3(1)(g) 1975 Act permits consideration of 'any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court *may consider relevant*' (emphasis added).

The lack of a principled approach to quantifying poor conduct on the value of the award is often cited as the reason why the Financial Remedies Court cannot take conduct into account. That objection has not so far gained traction with the Business and Property Courts considering 1975 Act claims.

In this article, we take a detailed look at how conduct has been approached in the Business and Property Courts, with a view to both assisting a practitioner dealing with a 1975 Act claim with conduct issues, as well as seeing what the two jurisdictions could learn from each other.

The 1975 Act in overview

The 1975 Act permits the court to make a financial award in favour of a limited category of claimant, including a surviving spouse, as well as other limited categories of claimant such as cohabitants, children and dependants, where the deceased's will (or the result on intestacy) fails to make reasonable financial provision for that claimant.

All claimants other than spouses are limited to provision for maintenance (defined in the case law as provision to meet their everyday expenses of living). For surviving spouses, reasonable financial provision under the 1975 Act means such financial provision as 'would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance' (s 1(2)(a)). Spousal claims may therefore be approached more generously in making provision beyond maintenance needs, and the court has to consider what the surviving spouse would have received on divorce (s 3(2)), although this is neither 'a floor nor a ceiling' to the claim.

Section 3 sets out the matters that the court must weigh when deciding whether the deceased's estate has made 'reasonable financial provision' for the applicant and, if not, how much provision should be granted, including considerations such as the financial needs and resources of the relevant parties and the size of the estate. In addition to the general provision at s 3(1)(g) requiring consideration of the 'relevant' conduct of any person, there are other specific conduct-related considerations that the court is expressly directed to have regard to including contributions made by spousal claimants (s 3(2)) and cohabitee claimants (s 3(2A)) and the extent to which the deceased has assumed respon-

sibility for the maintenance of certain categories of claimant (s 3(3) and (4)).

Conduct under the MCA 1973

We are not going to dwell on how the Financial Remedies Court approaches conduct in this article, as the topic has been set out comprehensively in a previous articles.[4] In summary, at High Court level and below, the approach has been set out by Peel J in *Tsvetkov v Khayrova* [2023] EWFC 130 and *N v J* [2024] EWFC 184. These two authorities make clear that in order to establish conduct, the party must:

(1) prove the facts relied on;
(2) establish that those facts meet the conduct threshold, which is high or exceptional; and
(3) usually establish that there is an identified (even if not always measurable) negative financial impact of the alleged wrongdoing – whilst the statute does not specifically refer to a financial consequence, Peel J has indicated that cases that take account of conduct that does not have a financial consequence will be vanishingly rare.

If those elements are established, the court will go on to consider how conduct should impact on the outcome of the proceedings taking into account the balancing exercise with the other s 25 factors.

The court's approach to conduct under the 1975 Act

It is impossible within the scope of this article to exhaustively list the 1975 Act cases in which conduct has been a relevant factor. We highlight below some of the key decisions. Our focus here is on conduct that the court has considered relevant under s 3(1)(g), rather than issues such as contributions to the family made by cohabitees and spouses.

Before we consider the cases in detail, it is worth drawing out a few observations that can be gleaned from the decision of the Supreme Court in *Ilott v Mitson*.[5] The decision is the leading case on the 1975 Act and is primarily of relevance to evaluating claims brought by maintenance-standard claimants, rather than spousal claimants. Nonetheless, there are a number of important observations made in *Ilott* that have broad relevance to the topic at hand, as follows:

- *Testamentary freedom*: the Supreme Court at [18] endorsed the comment of Oliver J in *Re Coventry (Deceased)* [1980] Ch 461, at 474–475 that 'an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases'. Whilst the deceased's wishes may be overridden, they are part of the circumstances of the case to be assessed in the round with other relevant factors [47].
- *Limitations of conduct considerations*: conduct is relevant, but 'care must be taken to avoid making awards under the 1975 Act primarily rewards for good behaviour on the part of the claimant or penalties for bad on the part of the deceased' [47].[6]
- *Moral claims*: financial need was recognised to be a 'necessary but not a sufficient condition for an order' in favour of a claimant limited to provision for maintenance [19] – i.e. something more than financial need will usually be required to justify an order. The court noted that the presence or absence of a moral claim, whilst not a *sine qua non* for provision, will 'often be at the centre of the decision under the 1975 Act' [20].
- *The focus is on objectively assessing outcomes, rather than the deceased's reasons*: '[T]here can be a failure to make reasonable financial provision when the deceased's conduct cannot be said to be unreasonable. The converse situation is still clearer. The deceased may have acted unreasonably, indeed spitefully, towards a claimant, but it may not follow that his dispositions fail to make reasonable financial provision for that claimant, especially (but not only) if the latter is one whose potential claim is limited to maintenance.' [17].
- *No need to quantify the claim and then apply a discount*: 'The Act requires a single assessment by the judge of what reasonable financial provision should be made in all the circumstances of the case. It does not require the judge to fix some hypothetical standard of reasonable provision and then either add to it, or discount from it, by percentage points or otherwise, for variable factors. To the contrary, the section 3 factors, which are themselves all variables and which are likely often to be in tension one with another, are all to be considered so far as they are relevant, and in the light of them a single assessment of reasonable financial provision is to be made.' [34].

We return to some of these points in our analysis below.

Evaluating estrangement

Estrangement in parent–child relationships is a persistent conduct-related theme in the case law concerning adult children, for the obvious reason that people do not generally disinherit children with whom they enjoy a good relationship. Examples of cases involving adult children where estrangement or conduct played a central role in the outcome are set out below.

Ilott

The claimant, Heather Ilott, had been entirely disinherited by her mother, Mrs Jackson, who left her entire estate to animal charities. Both women contributed to the estrangement, but the district judge at first instance found that Mrs Jackson bore the larger share of the blame. This, coupled with Heather's constrained financial circumstances, justified an award in her favour but the long period of estrangement and lack of expectation meant that provision should be limited (£50,000 from an estate of c. £486,000). The Supreme Court found that the first instance judge had been entitled to approach matters as he had. Lord Hughes, giving the lead judgment with whom the rest of the justices agreed, and Lady Hale, who gave a short supplemental judgment, both considered that other judges might legitimately have concluded that no provision at all should be made for the claimant given the very long and deep estrangement. Here, Mrs Jackson's conduct weighed in favour of provision but simultaneously the resulting long period of estrangement was a depressing factor on the award.

Wright v Waters [2014] EWHC 3614 (Ch)
The conduct of the claimant daughter, Patricia Wright, consisted of refusing to return £10,000 which her mother had transferred to her for investment and writing her mother a letter telling her she was 'not fit' to be called a mother and disowning her. That conduct was held to outweigh all factors in her favour so that it was objectively reasonable for no financial provision to be made for her from her mother's net estate of c. £138,000.

Wellesley v Wellesley & Ors [2019] EWHC 11 (Ch)
The deceased, the 7th Earl Cowley, left only a £20,000 legacy out of a £1.3m net estate to his adult daughter, Tara Wellesley, with the remainder and residue split among his spouse and other children/stepchildren. The estrangement between Tara and her father had lasted most of her adult life. The court considered that Tara chiefly bore the blame for this state of affairs, her behaviour including drug abuse and a 'bohemian lifestyle' that affronted her father's strict moral code. Her responsibility for the extremely long estrangement outweighed the factors in favour of making additional provision for her.

Beneficiary misconduct

The court can also use conduct under s 3(1)(g) 1975 Act to increase the claimant's award, if the behaviour of the beneficiary defendants is especially reprehensible. The court may also factor in relative culpability in deciding where the burden of meeting the award should fall as between the beneficiaries.

Re Lloyd George Clarke [2019] EWHC 1193 (Ch)
In *Re Clarke*, the widow's pressing care needs, due to a stroke suffered after her husband's death, and serious misconduct by one of the deceased's daughters led to a significantly enhanced award under the 1975 Act. The marriage between the deceased and his widow, Matilda, had lasted between 13 and 16 years. The deceased's primary asset was the matrimonial home, worth approximately £1.38m, which he left to his daughters from an earlier relationship, Vinette and Heather, subject to a non-binding wish that they permit Matilda (who was now 82 years old) to continue to live there. Matilda was left a one-third share of the (minimal) residue estate.

Vinette had engaged in extensive misconduct, including misappropriating funds from her father's accounts, obtaining a lasting power of attorney when he lacked capacity, ignoring disclosure orders, and failing to attend trial. The court found she had misappropriated sums beyond those provable on the banking evidence and drew adverse inferences accordingly. Heather, though less culpable, had also received funds and failed to engage with proceedings.

Deputy Master Linwood did not disregard the daughters' interests entirely, citing Mr Clarke's testamentary freedom. Matilda was awarded a lump sum of £731,000 to meet her nursing care needs. He noted that were it not for the poor conduct of the daughters, the residue after making provision for Matilda's care needs would have been split three ways between the daughters and Matilda. Instead, he reallocated part of the daughters' entitlements to Matilda in line with their respective wrongdoing, so that Matilda on top of her one-third share of residue received £80,000, forfeited from Vinette's share (a sum which was double the provable misappropriation to reflect non-disclosure), plus £1,000 forfeited from Heather's share

The Deputy Master commented that had Matilda remained in good health and the spirit of Mr Clarke's wishes been followed by the daughters – so that she would be living in the property and would have a share of residue of c. £20,000 – that may well have amounted to reasonable financial provision [229].

Overall, Matilda received around 77% of the net estate outright, as compared to less than 2% under the will. While the lump sum representing the majority of the award was attributable to her care needs, the further reallocation of residue went beyond restitution – had the daughters been ordered to repay the misappropriated sums to the estate, a portion would have been returned to them when the residue was shared. Instead, they forfeited the benefit from those sums entirely. Additionally, the judge treated the gift of the property to the daughters as lapsing, so that the surplus proceeds fell into residue to be shared equally between all three women. This repositioned Matilda's expected £20,000 share of residue to around £185,000 before the additional forfeiture — a redistribution not explicitly justified by needs, or the divorce cross-check, but seemingly driven by the daughters' misconduct and failure to engage with the litigation.

Applicant misconduct

Re Snoek [1983] 13 Fam Law 18
The marriage, which lasted for c. 17 years to the date of the petition (the date of separation is not mentioned) initially functioned well. The court accepted that the widow, Finola Snoek, had once been a good mother and supportive of her husband's photographic business. However, over the final years of the marriage her behaviour had become 'atrocious and vicious'. The judge cited repeated incidents where she threw objects, punctured car tyres, wrote abusive letters to the husband's business colleagues and friends, and physically attacked her husband and others. Mr Snoek sought injunctions to restrain her from threatening or assaulting him or damaging his property. She largely ignored the orders, leading to contempt proceedings and her committal to prison. Her conduct had continued when Mr Snoek had been terminally ill. Mr Snoek left nothing to his wife. Finola, aged 45 by the date of the trial, brought a claim under the 1975 Act, arguing for total ownership of the modest estate (valued at c. £40,000).

Wood J applied s 3(1)(g) analogously to the approach to conduct in the decided cases concerning s 25 MCA 1973. Applying *Armstrong v Armstrong*,[7] he held that the test for the relevance of conduct was whether it would offend a reasonable person's sense of justice if no effect was given to the conduct in deciding the relief. On the facts 'with hesitant steps', the judge awarded Finola the sum of £5,000, concluding that a larger sum would not be fair, just or reasonable. Wood J concluded that her conduct had 'not quite' cancelled her earlier contributions. What she would have received but for her conduct is not spelt out, but this would seem to be a case where conduct depressed the outcome leading to an award of 12.5% (a low result, notwithstanding the case pre-dating the *White* 'yardstick of equality').

Land v Land [2006] EWHC 2069 (Ch)

This case is a striking example of the court trying to balance both good and bad conduct. The claimant was the (adopted) adult child of the deceased. He had lived with the deceased since he was very young, he had limited education and had given up his job as a labourer to care for the deceased. It is clear he that he was a vulnerable person, although he did not have a formal diagnosis of a developmental disorder. The claimant was convicted of the deceased's manslaughter because of his poor care provided in the final months of the deceased's life; including failure to get her medical attention and eventually leaving her lying in her own excrement and urine, causing severe infected bed sores. The claimant was therefore deprived of her estate which was left to him in her will, pursuant to the forfeiture rule.[8] The court balanced the claimant's good and bad conduct towards the deceased, noting that, although in the last 2 months of her life the claimant's conduct became culpable and blameworthy, he had essentially faithfully discharged his family obligation for a considerable period. He had already been punished by the criminal courts for his conduct, as well as by the forfeiture rule, and should not be punished again by being refused provision under the 1975 Act. The judge awarded the claimant the house to meet his housing needs, and £1,000 from the residue.

Barron v Woodhead [2008] EWHC 810 (Ch)

In *Barron v Woodhead*, the applicant, Mr Warwick Barron, was a 73-year-old widower. He had been declared bankrupt and was alleged to have disposed of assets, including to his late wife, Ann Waite, to avoid the claims of his creditors. The parties had separated 2 years before Mrs Waite's death after a relationship inclusive of pre-marital cohabitation of c. 15 years, but they had not divorced. Both were heavy drinkers and there was evidence of domestic violence on both sides.

Mrs Waite left him nothing in her will, dividing her estate of c. £315,000 between her two children of an earlier marriage. Mr Barron sought reasonable financial provision under the 1975 Act. The court concluded that no provision at all was an objectively unreasonable outcome. Whilst stating that Mr Barron's conduct was not relevant to decrease the award (having regard also to the allegations of violence on both sides) and distinguishing *Re Snoek*, HHJ Behrens concluded nonetheless that it was not appropriate for there to be a substantial additional capital award in excess of his needs because: (i) the husband had plainly dissipated funds; (ii) any money given to the wife had been given for the husband's own purposes; (iii) and he had made no financial claim against the wife in the years following the separation. The court's primary concern was ensuring that Mr Barron had a roof over his head. Mr Barron was awarded a life interest in £100,000, to be used to purchase a home with any surplus was to be invested to produce an income, and an additional lump sum of £25,000 to defray moving expenses and to provide a cushion. Ostensibly, Mr Barron's conduct did not reduce the award. However, it may be observed that outright provision of only c. 8% of the estate, plus housing on a life interest, is much lower level of provision than might otherwise be expected following a relatively long marriage.

Jassal v Shah [2021] EWHC 3552 (Ch)

Jassal v Shah is a rare example of a case where the court expressed its disapproval of the claimant's conduct, by applying a percentage reduction to her award.[9]

The claimant, Srendarjit Jassal, sought provision from the estate of her late partner, Fiaz Shah. It was part of Srendarjit's case (relevant to explaining their living arrangements) that she had committed benefit fraud in collusion with Fiaz, by claiming housing benefit at properties owned by Fiaz. The judge concluded that her misconduct in defrauding the State with the connivance and probable encouragement of the deceased should reduce but not defeat her claim. Having assessed her needs as requiring c. £485,000 out of an estate of c. £1m, a 20% discount (rounded down to £100,000) was applied to the award that the court was otherwise minded to make 'to mark the court's concern at such serious and longstanding conduct' [67]. This is an unusual case in that the conduct in question did not concern the claimant's treatment of the deceased but was morally reprehensible conduct by both the claimant and the deceased towards the State. As a result, the claimant received a sum less than that otherwise assessed as being required to meet her needs as a form of penalty imposed by the court. It is not obvious that this was what Parliament had in mind in enacting s 3(1)(g), and it is hard to imagine the Financial Remedies Court penalising a party in the same way.

Sim v Pimlott [2023] EWHC 2296 (Ch)

Valerie Sim claimed under the 1975 Act against the £1.2m estate of her late husband, Dr David Sim, who died amid ongoing and bitter divorce proceedings. This was a long relationship of some 35 years. Valerie made serious allegations of domestic abuse including rape against Dr Sim and had obtained non-molestation and occupation orders shortly before Dr Sim's death in a nursing home.

His will left her £250,000 on condition that she waived any claim under the 1975 Act and vacated the family home (registered in Dr Sim's sole name). A further £125,000 was offered if she relinquished her share in a jointly owned Dubai property (valued at c. £130,000). Regardless of those conditions, she was also given a life interest in the residuary estate (c. £600,000 after payment of legacies to grandchildren), but this was subject to the trustees' overriding powers.

HHJ Hodge KC found her a poor witness, rejected her abuse allegations, and criticised her conduct in Dr Sim's final months—especially her refusal to care for him, which he viewed as exaggerated and 'wholly unacceptable.' He upheld the forfeiture clause, finding the will's conditional gifts reasonable, and concluded that the forfeited £375,000 (including £125,000 to relinquish property she already owned of equivalent value) plus a life interest had constituted reasonable provision in the circumstances. Despite the long marriage, the outright capital provision for Valerie had been forfeited by her claim reducing her to a life interest only. The judge varied the will only to require trustees to set aside £400,000 to buy Valerie a home for life, since the family home would have to be sold to pay legacies to the grandchildren.

It is difficult to unpick the precise impact of conduct on the outcome of the case. The judge stated that 'I cannot ignore the way in which the claimant conducted herself towards her husband towards the end of his life' but did not expressly address the impact of this consideration, although

his assessment of Valerie's conduct and the failed allegations appears to have coloured his view. We find the outcome in *Sim* striking. The judge may not have been helped by the fact that Valerie represented herself. He appears not to have been referred to prior decisions such as *Re Snoek* and *Barron* in which the court has taken an approach consistent with the MCA approach to conduct. The result is far below what Valerie would have been entitled to on divorce, where the conduct issues (if entertained at all) would have been unlikely to impact on the outcome.[10] We suggest that the case should be treated as turning on its own particular facts.

Deceased's conduct

There are surprisingly very few cases in which the deceased's conduct has been held to have an impact on the award. In *Ilott*, Mrs Jackson's unreasonable treatment of her daughter was a tipping factor in favour of the claim. In a similar way, in the county court decision of *Nahajec v Fowle*, a modest provision of £30,000 from an estate of c. £265,000 was made where the claimant daughter was found not to be at fault for the estrangement with her 'stubborn and intransigent' father.[11]

Unwarranted conduct allegations

Lest it be imagined that it is a conduct free-for-all in the Business and Property Courts, we should temper enthusiasm for running conduct cases by noting first that cases involving a successful conduct element represent only a very small element of the 1975 Act case law. Moreover, unsuccessful conduct allegations may have costs consequences, so they are high risk. For example, in *Wooldridge v Wooldridge*,[12] unsubstantiated allegations of financial impropriety and dishonesty were a contributing factor in ordering the unsuccessful spouse to pay costs on the indemnity basis.

Discussion and conclusions

The Financial Remedies Court no longer strays into assessing the relative blameworthiness of the parties for the breakdown of the marriage and has been keen to eschew any idea that it is a court of morals.[13] In contrast, under the 1975 Act, issues such as estrangement between the deceased and the applicant, their respective culpability for the breakdown of the relationship, or whether an applicant can demonstrate a 'moral' claim for provision are common themes.

From the above cases, we draw the following general conclusions:

(1) Conduct issues may shape outcomes under the 1975 Act: sometimes decisively as in *Wright v Waters*.
(2) The decision in *Jassal* suggests that relevant conduct under the 1975 Act is not restricted to the parties' conduct towards each other or the deceased.[14] That seems like an odd outcome to family lawyers, because the Financial Remedies Court does not engage in penalising parties for their wider conduct.
(3) Claimant misconduct is most likely to have an impact on claims pursued by maintenance-standard claimants, especially adult children, where the need to demonstrate something more than necessitous financial circumstances invites scrutiny of the quality of the relationship and the search for some additional factor such as a moral claim to justify provision.
(4) Claimant misconduct is less likely to eradicate claims by spouses and cohabitants, as demonstrated by *Re Snoek*, *Barron* and *Jassal*. *Sim v Pimlott* may be regarded as an outlier, but nonetheless demonstrates that outcomes under the 1975 Act can be quite different to outcomes under the MCA 1973.
(5) Reciprocal misconduct on the part of the deceased can temper the impact of claimant misconduct – a feature of *Ilott* and *Barron*.
(6) Beneficiary misconduct appears capable of elevating a claimant to a greater level of provision than might have been expected under the MCA 1973 – as for example in *Re Clarke*.

The Business and Property Courts covet a wide discretion and have not attempted to find a formulation, or set of principles, that lend themselves to ready analysis of the impact of conduct on a claim.

On the contrary, as we have noted, the Supreme Court has specifically said that judges do not need to fix a standard or provision and then discount when considering a 1975 Act claim. In this respect, there is accordance between the approaches under the 1975 Act and under the MCA 1973. The Court of Appeal in *Clarke v Clarke*,[15] considering a matrimonial appeal, rejected counsel's submission that the court should indicate what would have been awarded but for conduct, then quantify the misconduct in cash and then deduct one from the other saying:

> '[T]he statute defines the judicial task and I am against further elaboration or overlay. There may be cases in which such an exercise would be appropriate in the judgment. There will certainly be cases where it will not. There may be cases in which a judge may adopt such an exercise while feeling his way towards a result.'

Pursuant to either Act, the case law indicates that conduct is factored in on a discretionary holistic adjustment to the financial outcome, rather an award and then deduction. The key distinctions between the two regimes in our view are:

(1) the wider categories of conduct that may be taken into account under the 1975 Act;
(2) the lower threshold in terms of the severity of the conduct that may be taken into account; and
(3) the lack in the 1975 Act case law of the guardrails and procedural rigours that the Financial Remedies Court applies to weed out conduct cases that fall below the bar.

The result of all of this is that it is especially difficult to look at the authorities and advise litigants of the likely impact of conduct on their 1975 Act claim with certainty.[16]

One justification for the differing approach for conduct between the 1975 Act and under the MCA 1973 is the principle of respecting testamentary freedom. Whilst the Supreme Court in *Ilott* was at pains to point out that the question is not whether the deceased's testamentary decision was a reasonable one, inevitably the background to why the deceased failed to make greater provision for the claimant will be part of the story. There is a sentimental and cultural dimension to testamentary freedom that attracts wider public support. Many people view a will as the

deceased's 'last word', a final opportunity to express their approval or disapproval of those closest to them – one only has to look at the below the line comments in the *Daily Mail* on probate and 1975 Act claims to see much of this sort of thinking. Additionally, there are far fewer 1975 Act claims per year than financial remedy claims on divorce.[17] Consequently, there is not the same pressure to find readily applicable principles in order to reduce the court burden when it comes to this category of litigation.

A troubling strand of the case law from the financial remedy practitioner's perspective is the possibility, as for example in *Sim v Pimlott*, of very divergent outcomes under the 1975 Act than would have been expected on divorce.[18] There is a good deal to be said on this topic and we hope to return to this in a subsequent article. Confining ourselves to our current narrower focus on the topic of conduct, we consider that there should be parity between the treatment of spousal conduct in claims on divorce and on death. Whilst according due regard to testamentary freedom, a strong case can be made for distinguishing between spousal and non-spousal claims when it comes to the relevance of conduct. The majority of people would agree that a person should be at liberty to disinherit an undeserving child. In most cases, a spouse will have made substantial financial and non-financial contributions to the marriage, and it should require exceptional circumstances for conduct to override these contributions on death every bit as much as on divorce. Notwithstanding the lower statutory threshold of 'relevant' conduct, there is scope for alignment of spousal claims on divorce and death through application of the divorce cross-check (reinvigorating the *Re Snoek* approach).

One issue that we consider is likely to contribute to inconsistency of outcome between the approach taken to spousal claims on divorce and on death is choice of venue. The Chancery Guide urges 'careful thought' as to whether a claim should be commenced in the High Court, and, if so, whether it should be commenced in the Chancery Division or the Family Division.[19] This guidance may be thought not to go far enough. In practice, most 1975 Act litigation, including claims by surviving spouses, is dealt with by civil litigators and claims continue to be issued in the civil courts, partly due to the lack of alternative in lower value claims, but possibly also based on an aversion to using the Division that is less familiar to the lawyers involved. 1975 Act claims in the county court are likely to be heard by civil circuit judges, who may not financial remedy ticketed.

There is presently no means of issuing 1975 Act proceedings in the Central Family Court, nor, it seems, any means of transferring them to the Central Family Court. Historically, District Judges of the Principal Registry of the Family Division held jurisdiction to hear 1975 Act cases (and so *Ilott* was heard at first instance in the PRFD), but this jurisdiction has sadly fallen into abeyance. In the meantime as practitioners, we can do something about this and in the interest or promoting consistency of outcome, we can issue either in the Family Division, where the value of the assets justifies, or otherwise in a county court centre which exercises concurrent Family Court jurisdiction and press for the matter to be listed before an FRC ticketed judge.

Until the statutory framework is reformed or the topic is reviewed by the Court of Appeal, outcomes on death may continue to diverge from outcomes on divorce. Until then, careful thought as to forum – and as to how we frame and argue these cases – is the best that we can do to improve outcomes for clients.

Notes

1 The first statute conferring jurisdiction on the courts to make financial provision for eligible persons was the Inheritance (Family Provision) Act 1938, which created the power to provide maintenance for dependants out of the deceased's estate. The scope to make provision for former spouses was introduced by the Matrimonial Causes Act 1965. Both of those earlier statutes were revoked upon the coming into force of the 1975 Act on 1 April 1976, which extended the categories of claimant and widened the powers of the court to meet their needs

2 The Law Commission (Law Com No 61), *Family Law: Second Report on Family Property, Family Provision on Death*.

3 The Business and Property Courts comprise the Chancery Division, the Commercial Court and Admiralty Court and the Technology and Construction Court. Outside the Rolls Building there are seven Business and Property Courts District Registries (in Birmingham, Bristol, Cardiff, Manchester, Liverpool, Leeds and Newcastle) where Chancery Division High Court business is conducted.

4 See in particular the FRJ blog '*N v J*: the Last Word on Domestic Abuse as Conduct?'.

5 *Ilott (Respondent) v The Blue Cross & Ors (Appellants)* [2017] UKSC 17.

6 See *In re Jennings, deceased* [1994] Ch 286 where a claim by an independent adult child capable of supporting themselves was refused notwithstanding the deceased's behaviour in failing to maintain them as a child.

7 1 May 1974, Court of Appeal (Civil Division) transcript No 137 of 1974.

8 The forfeiture rule is a rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing. Forfeiture Act 1982, s 2 empowers the court to modify the effect of that rule.

9 Overturned on appeal solely in relation to the court's inclusion of litigation costs as part of the substantive award: *Jassal v Shah & Anor (Re Estate of Fiaz Ali Shah – Inheritance (Provision for Family and Dependents) Act 1975)* [2024] EWHC 2214 (Ch).

10 In the subsequent costs hearing ([2023] EWHC 2298 (Ch)), Mrs Sim's conduct, both in bringing the case and ignoring a Part 36 offer resulted in an order that the defendants have their costs on the standard basis up to the date the Part 36 offer expired and on the indemnity basis thereafter.

11 *Nahajec v Fowle (in his capacity as executor of the estate of Nahajec, deceased and as beneficiary of the estate)* [2017] Lexis Citation 270.

12 [2016] 3 Costs LO 531.

13 *OG v AG* [2020] EWFC 52.

14 The decision in Jassal was appealed. Permission to appeal was granted (and the appeal was allowed on this aspect of the decision) only in relation to the master's inclusion of costs as part of the substantive award, instead of separately assessing costs at the conclusion of the proceedings under the CPR.

15 [1999] 2 FLR 498.

16 In fact the very broad discretion under the 1975 Act is a problem when advising clients generally – see further the judgment of Lady Hale in *Ilott* lamenting the unsatisfactory state of the law and lack of guidance as to the factors to be taken into account.

17 The MOJ statistics for the Business and Property Courts show that 590 cases of all types were issued and allocated to the

probate list (including not only contentious probate, but also 1975 Act cases and estate administration disputes) were issued in 2024. It has not been possible to find a further breakdown, or information on the number of county court cases issued. Over 45,000 financial remedy applications were issued in the same period, however data is not available as to the breakdown between the Family Division and the Family Court.

18 The impact is exacerbated by the difference in cost regime pursuant to the CPR and the FPR. As long ago as 2012, Briggs J in *Lilleyman v Lilleyman* [2012] EWHC 1056 (Ch) expressed 'a real sense of unease at the remarkable disparity between the costs regimes enforced, on the one hand for inheritance act cases (whether in the Chancery or Family divisions) and, on the other hand, in financial relief proceedings arising from divorce'.

19 See Chancery Guide at 23.31 and Peel J's comments in *Kaur v Estate of Karnail Singh & Ors* [2023] EWHC 304 (Fam) at [2]–[8] on the procedural anomalies, although we must point out that contrary to what is said at [2], 1975 Act claims are not 'probate claims' as defined at CPR 57.1(2) and consequently CPR 57.2 which stipulates where probate claims must be issued does not apply to 1975 Act claims. 1975 Act claims can be issued in any county court centre, not only those with a Chancery district registry. 1975 Act claims are further specifically excluded from the definition of specialist work of the type undertaken in the Business and Property Courts by CPR PD 57AA, para 4.1 and are not required to be dealt with by judges specialising in business and property work. The county court has unlimited jurisdiction in 1975 Act matters: County Court Act 1984, s 25.

‘You Want Me to Do What Now?’ – The Return-to-Work Question and the Quiet Cost of Executive Marriage

Ceri Griffiths

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Introduction – the question that reveals the gap

She hadn’t written a CV in 20 years.

Hadn’t needed to.

When her ex’s career took off, they moved every few years. She held everything else together while he earned the money. But ‘everything else’ was a lot. A job that never ended, never paid, and never came with recognition, until now, when it’s being questioned.

Because now, as part of the divorce, she’s being asked to outline her ‘return-to-work plan’.

Where does she even begin?

Her old job barely exists. Her experience feels irrelevant. Her confidence is low, her network is gone, and her head is foggy from grief, stress and the start of menopause. She’s being asked to project her future earning potential while still trying to remember who she is, and while negotiating against someone who never had to step off the career track in the first place.

And yet the expectation persists that she should rebuild. That she must, as a matter of fairness. That if he has to part with wealth, she must show a path to self-sufficiency, quickly.

In recent years, this expectation has sharpened. There is a new tone in the air. Five years of maintenance should be enough, the thinking goes. The idea had been bubbling under the surface for a while, but Baroness Deech’s proposal gave it a kind of weight. Since then, in my experience, it’s been repeated often – sometimes by a spouse’s legal team, sometimes even by their own – as if it’s simply how things are done now.

It’s folded into conversations about fairness, about moving on, about not creating long-term financial ties. A clean break is best. A capable woman will bounce back, or so the narrative goes.

But behind this narrative sits a disconnect.

Because the court may see a woman who hasn’t worked in decades and ask, ‘What’s your plan?’

But it rarely sees the woman who gave up decades of work so her husband could fly.

The gap is wide between what’s assumed and what’s actually true. And that’s the gap we need to talk about.

Throughout this article, I use ‘she’ because this dynamic, where one party steps back from paid work to support the family and the other’s career, most often applies to women. But the broader principle applies regardless of gender. The core issue is not biology, but circumstance, the party who supported the system being asked to justify their worth only when it ends.

The silent career swap: when one career is chosen, and one is lost

In many executive marriages, there’s a moment, sometimes spoken, often implied, when the decision is made: *his* career will lead. And hers … won’t.

It happens gradually. A job she loves is put on pause for the first relocation. Then comes the second. Then the third. With every move, her sense of professional identity gets softer at the edges. The LinkedIn profile is left untouched. The references fade. The time since her last role stretches.

But what grows in its place is something else entirely, the scaffolding that holds the whole family together.

She builds homes, carves out new communities, finds the right schools, soothes the kids through every transition. She becomes the social secretary, emotional barometer, project manager, caregiver. She doesn’t stop working, she just stops being paid.

And now, years later, that contribution has no line item in the ES2.

Instead, she’s asked how she’ll become financially independent. She’s told to produce a return-to-work plan. She’s asked to quantify her potential.

What gets missed is that her potential has already been spent, not wasted, but used, poured into the life they built together. It enabled his promotions, his travel, his rise. But now, when it matters, that contribution is invisible.

The truth is, for many women, the divorce settlement is the first time their contribution is held up to the light, and the first time they realise how easily it can be disregarded.

A client of mine once said, 'I didn't leave my career. I traded it'. And yet no one seems to remember what it bought.

A professional world that moved on without her

The expectation seems simple enough, re-enter the workforce. But re-enter *where*, exactly?

For women who've been out of paid employment for 10, 15, or even 20 years, the world they once worked in no longer exists in the same form. Industries have transformed. Digital skills are assumed. Professional roles that once provided a viable route back – part time PA work, project support, middle management – have either been automated, restructured or made so competitive that returning newcomers simply don't make the shortlist.

Even women with impressive qualifications face this. A woman who once worked in publishing finds the entire landscape now ruled by digital marketing and algorithmic targeting. A civil servant who managed regional teams now finds entry level admin roles asking for software experience she doesn't have.

And in many cases, she's not just behind, she's priced out of the retraining she'd need to catch up.

This is where the return-to-work narrative becomes especially hollow. It fails to account for the actual conditions of the job market. It assumes that opportunity is waiting, that confidence is the only missing ingredient, and that effort equals access. But in reality, many of the roles available are low paid, precarious or fundamentally incompatible with caring responsibilities.

Even if she does secure work, and many do, her starting salary rarely justifies the pressure that was placed on her. It may be £20,000. Perhaps £35,000 after a few years. Maybe £50,000 in time, if the stars align. But in the context of a high-net-worth divorce, where the family budget once exceeded £300,000 a year, these numbers don't even register. They aren't life changing. They don't meaningfully reduce the need for maintenance. And they certainly don't close the gap between his ongoing wealth trajectory and hers.

Yet the court asks the question anyway.

In lower income divorces, this question may be economically essential. But in high-net-worth worth cases, it's often symbolic, a way of testing intent, not changing outcome. And it's time we acknowledged that distinction.

Because when the court insists on a return-to-work plan that will, in practice, barely move the financial dial, we're no longer talking about equity. We're just measuring effort for effort's sake.

No one wants to be the one to say it. But this isn't real. It isn't working. It isn't even close.

It's the Emperor's new clothes.

Reform or retreat? The rhetoric behind the return-to-work plan

The return-to-work plan might not be openly demanded in every case, but it's quietly shaping expectations anyway. So where did this idea come from?

The roots go deeper than any one person or policy. Over the past decade, there's been a noticeable shift in tone around spousal maintenance, particularly following the case of *SS v NS* [2014] EHWC 4183 (Fam), where Mostyn J set out a series of principles that are widely seen as having tightened expectations. Since then, the idea of a clean break has gained momentum, especially in high-net-worth divorces.

It's against that backdrop that Baroness Deech's 2019 Divorce Bill landed. Her proposal to cap maintenance at 5 years, and her call for greater individual responsibility, gave cultural weight to an idea that was already taking hold.

Her argument? That the current legal framework encourages dependency and sends the wrong message, that 'getting married to a well-off man is an alternative career'. She suggests that modern relationships should start from a place of equality, and end with a presumption that each party will move forward on their own two feet.

The Bill, to be clear, still allows for discretion. Clause 5 permits maintenance to extend beyond 5 years where necessary to avoid 'serious financial hardship'. So, technically, things can still remain bespoke.

But that's not how it lands.

What's emerged, even in the absence of new legislation, is a shift in tone. There's now a subtle but growing presumption, particularly in high-net-worth divorces, that 5 years of maintenance should be enough. That returning to work is a given. That needing more time or support is a mark of failure, or at best, a temporary weakness to be swiftly overcome.

The danger in the narrative is that it collapses in context. It assumes that because most women now work, and because short marriages with modest assets make up the majority of divorces, a uniform approach will produce faster and fairer outcomes.

But for women in high-net-worth marriages, the reality is more complex.

They often stepped back from careers not because they lacked ambition, but because the structure of the marriage demanded it. Multiple relocations. Solo parenting. A partner with an intense or public-facing career. These women didn't see the marriage as a shortcut, they simply made sacrifices no one else was in a position to make.

And while the current law already allows for those contributions to be recognised and valued, the cultural shift toward fixed timescales and performance-based fairness risks undermining that progress.

Because even when flexibility remains on paper, it becomes harder to claim in practice, especially in an environment where the return-to-work plan has quietly become a test of legitimacy.

Burnout, grief and midlife collapse: the hidden cost behind the performance

By the time she's asked to write a return-to-work plan, she's already running on empty.

It's not just the divorce that exhausts her; it's the accumulation of years spent holding the whole system together. Moving cities, rebuilding social networks, managing the household logistics, being the consistent parent, while he focused on his career. Her work was invisible but relentless, and it came without time off, validation or a pension.

Now, just as life unravels, she's expected to start a brand-new path forward. While she's in shock. While she's trying to hold her children steady. While she's navigating a system that seems more interested in what she might earn someday than in everything she's already done.

And for many women, there's another layer, peri menopause.

It's not something many people talk about in divorce proceedings, but they should. Because hot flashes and hormone swings are the tip of the iceberg. Many women experience debilitating fatigue, brain fog, panic attacks and disturbed sleep, all of which make it harder to think clearly or advocate for themselves. Research shows that peri menopause is a leading reason that women are leaving the workforce, so imagine being told that despite your symptoms, it's time to start looking for work again?

This isn't emotional overwhelm. It's neurological. Cognitive. Physical. I've sat with women who used to lead teams, run departments, run entire families with ruthless efficiency, who now feel incapable of answering a straightforward questionnaire without confusion.

It's not because they aren't competent, it's because of peri menopause. But they are still expected to deliver clarity, strategy, vision. And they're being quietly judged if they can't.

This is not resistance to work.

It's a woman who has spent everything she had, emotionally, physically, psychologically, and is being told that rebuilding is simply a matter of effort.

We need to stop measuring her future potential while she's still sifting through the rubble.

The fairness gap no one talks about: media, perception, and the 5-year myth

Beyond the legal framework and emotional strain of divorce, there's another invisible player influencing her next steps, the court of public opinion.

Because even when the law allows for discretion, and even when her lawyers understand the nuances of her case, there's another force at large, the cultural narrative about who deserves what can overshadow everything.

This narrative is powerful, persistent and dangerously oversimplified. It shows up in headlines about 'gold diggers' and 'meal tickets for life'. It suggests that any woman who isn't visibly rebuilding fast enough must be taking advantage. That wealth belongs to the person who earned it in the traditional sense, and that anyone else is just trying their luck.

It's not just that this narrative is wrong, it's that it reshapes how women behave.

They know they're being watched, talked about, judged. Not just by strangers, but by family, friends and sometimes their own professional team. So, they get ahead of it. They tone down their requests. They apologise for their lifestyle. They position themselves as 'not that kind of ex-wife'.

And that's how the fairness gap widens, quietly. Not just in settlement figures, but in mindset. In how confidently a woman feels able to say, 'this is what I need'. Because when support is treated as suspect, women don't feel safe asking for it, even when the law entitles them to.

Increasingly, this discomfort has crystalised around the idea of the 5-year career plan.

It isn't always official or explicit. It doesn't even need to be widely endorsed.

Its power comes from something subtler, the anxiety it creates about perception, quietly turning into an unspoken benchmark that defines whether a woman is seen as reasonable, or greedy.

But here's the thing, the 5-year plan is not always rooted in possibility.

It's often rooted in optics.

It's a way to prove she's doing her part.

It's a defence mechanism, not a financial strategy.

And so, just like that, the return-to-work plan becomes less about her, and more about them. About how she'll be perceived. About how quickly she can end the shame of needing support. And how far she can distance herself from the stereotype.

This isn't what fairness looks like.

This is survival mode in a system that doesn't fully believe her contribution counts.

And until we shift the tone – not just in courtrooms, but in the culture around divorce, we'll keep mistaking performative progress for meaningful equity.

The ideological shift no one wants to admit

I'm not a lawyer. I come to this as an outsider, someone who sees, day after day, what these decisions mean in real lives.

And from that position, it's hard to not notice a shift. Quiet, ideological, but real. A growing discomfort with long-term maintenance. A leaner tone creeping into negotiations. A cultural pull toward the idea that everyone should move on quickly and stand on their own two feet.

If family law swings on a pendulum, it feels like we've moved far from the kinder and more realistic days of *C v C* [2018] EWHC 3186 (Fam) and *Flavell v Flavell* [1996] EWCA Civ 649, and into something harsher. And maybe it's unfashionable to say this, but I think *Waggott v Waggott* [2018] EWCA Civ 727 was wrongly decided.

Because when I look at that judgment through the lens of family life, not just legal theory, it doesn't feel fair. It treats future earning potential as something clean and quantifiable, detached from the years of sacrifice that shaped it. It treats the family as though it no longer matters once the marriage ends.

And that approach, however neat on paper, lands disproportionately hard on the women I work with.

I wonder how long it will be before the Supreme Court is forced to confront that truth? Before we have another *White v White* moment.

One that resets the conversation, not just about how we divided money, but how we value what was given to earn it.

What needs to change? A more honest framework for fairness

If we want fairer outcomes in high-net-worth divorces, we need to start by acknowledging that this group of women exists.

The ones who traded their earning power for family stability.

The ones who enabled someone else's success.

The ones who quietly stepped back, because the structure of the marriage demanded it.

They don't fit the story we like to tell about modern relationships, that everything is equal now, that women don't step back anymore. So instead of being recognised as a group with specific needs, they are left out of the conversation entirely.

If we can't name their reality, we can't design a fair response.

Because yes, some women will go on to build new businesses, careers and income streams.

But many will not, not for lack of talent or will but because they've already given that energy to a system that quietly demanded it and now offers little in return.

We need to stop treating the return-to-work plan as an option equally available to everyone and start recognising the specific reality of women whose work made someone else's success possible.

So what needs to change?

We need to stop designing solutions around the people who stayed in the race and start accounting for the ones who built the track.

Instead of asking, 'How quickly can she earn again', we should be asking 'What did it cost her to support this life, and what would true equity look like now?'

Next, we need to recognise rebuilding as a process, not a quick fix.

That may include:

- Time-limited maintenance that actually allows for recovery and retraining.
- Practical support for requalification, education or entrepreneurship.
- An honest discussion of age, caregiving responsibilities and market realities.

But more than anything, the tone needs to change.

The unspoken assumption, that she will return to full financial independence within 5 years, isn't written into law. It's not universal. But in many high-net-worth divorces, it lingers beneath the surface. It can be referenced, suggested or simply felt, quietly shaping the tone of discussions and setting the bar for what she's expected to prove.

It's a tactic. A tone-setter. And it's fundamentally adversarial.

Because that's the deeper issue here, divorce law is still framed as you versus me. And in that dynamic, the return-to-work plan becomes just another tool of positioning, a way to argue, minimise or prove a point. Not a genuine inquiry into what will help both parties move forward with dignity and fairness.

If we want better outcomes, we need to stop using her recovery as a negotiation strategy.

Because the truth is, many of these women weren't dependent as the way the word is often used: passive, weak or unwilling.

They were economically reliant, yes, but as part of a family system that functioned *because* someone stepped back.

They weren't less than. They were essential.

And now, all they're asking for is recognition for the position they're actually in, not the one the system assumes they should be in.

We already know this return-to-work plan doesn't fit everyone.

We've seen how little it moves the financial dial.

We've seen how it pretends not to notice that women like her still exist.

But still the expectation persists.

Still the plan is presented like a solution.

But the truth is, we've seen this story before.

The clothes were never real.

Partnering Up: Partnership Law and Financial Remedy Proceedings

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The Department for Business & Trade's most recent Business Population Estimates suggested that there are approximately 356,000 ordinary partnerships currently trading within the United Kingdom, generating a turnover of just under £1 billion. The majority of these are small enterprises involving either no or fewer than ten employees.

It is therefore likely that partnerships will feature in financial remedy (FR) cases with some frequency. Either one or both parties may be a member of a partnership from which they draw an income or could be entitled to capital.

However, in our experience, whilst both partnership law and partnership accounting practices are substantive specialities in their own right, there is much less familiarity with them amongst those who are involved in FR cases than other areas of civil law which can arise in FR proceedings.

This article is therefore aimed at providing an introduction to some of the issues which may arise to help give readers confidence as to where to start when assessing these cases.

Introduction

What is a partnership?

The Partnership Act 1890 (PA) defines a partnership as the relation which subsists between persons carrying on a business in common with a view to profit.[1] 'Business' has an extremely wide definition including 'every trade, occupation, or profession'.[2] There are a number of cases exploring the outer parameters of what is meant by 'in common' and 'a view to profit'.[3] A dispute might be whether two relatives are carrying out a business in common or whether it is merely a business of one of them assisted by another.

Whilst a partnership shares some characteristics with both companies and unincorporated associations, it should be thought of as a category in and of itself. The partnership is somewhat more than a simple contractual relationship between the partners. It imposes upon the partners continuing personal and commercial relationships under both common law and the PA.[4]

Partnerships can be any size, and some are very large organisations. However, what tends to set them apart from limited companies is the lack of separation between ownership and management; they are rarely just investments.

Types of partnerships

The most common type of partnership in England and Wales is an *ordinary partnership* which arises in the circumstances considered below. Such partnerships do not need to be incorporated or registered and generally lack legal personality. This means they cannot hold property in their own name, relying instead on one or more of the partners to hold it on trust.

As a result, if the only two partners are the parties themselves, it is unlikely that the court will need to explore partnership law in detail to resolve the FR proceedings between them, instead tacking the underlying assets directly.[5]

Less-common is the *limited partnership* (LP), established by the Limited Partnership Act 1907. They have some popularity as investment vehicles. Unlike ordinary partnerships they must be registered with Companies House.[6] The principal difference between an LP and an ordinary partnership is that an LP will contain an additional category of partner, known as limited partners, who have limited liability and are excluded from management functions. It seems likely that these will be treated like other investment assets in FR cases.

A third type is the *limited liability partnership*, incorporated under the Limited Liability Partnership Act 2000. They, too, must be registered. However, despite their name, they are not strictly partnerships, though many partnership considerations apply due to the nature of the relationship between the members. Instead, they are incorporated bodies in which the partners enjoy limited liability in return for much of the regulation applied to companies.

Other jurisdictions have devised many variations of partnership and so caution and specialist advice will be needed on encountering one.

In the remainder of this article, when referring to a partnership we mean an ordinary partnership, unless otherwise indicated.

How might a partnership arise?

No specific formality is required for the formation of a partnership. Whilst written partnership agreements are best practice and common in many areas (e.g. amongst professional partnerships such as those formed between solicitors, accountants, GPs or pharmacists or some agricultural partnerships), they are not a pre-requisite. Instead, a partnership may arise informally or even unintentionally from conduct.

In determining whether a relationship is that of a partnership or not, the court is directed to consider a number of rules. These are set out in s 2 PA. The most important of these is that receipt by a person of a share of the profits of a business is, subject to some exceptions, *prima facie* evidence that they are a partner in the business.

One of the exceptions which is significant in FR cases can be found in s 2(1). This provides that joint or part ownership of property, and the sharing of profits generated by it, does not, of itself, generate a partnership. The effect of this is that if one of the parties jointly owns one or more investment properties with others, they are unlikely to be in a partnership arrangement, even if they share the profits of that investment.

Partnership agreements

Ideally, each partnership will be governed by a comprehensive written partnership agreement which will give definitive answers to many of the questions that arise in FR cases, such as how the partnership's income, assets and capital should be shared between the partners and the process for leaving or dissolving the partnership.

However, there is no general requirement to draw up a partnership agreement and it is not uncommon for family partnerships to operate without one. In this case the partnership will be governed by the statutory framework of the PA; the agreements the court can imply by the partners' conduct; and common law.

Indeed, this flexibility extends further: even where a partnership agreement has been executed, the partners may deviate from this by unanimous consent. Again, whilst this consent may be recorded by formal written amendments to a partnership agreement, there is no obligation to do so, and such amendments may instead be inferred from the partners' course of dealing.[7]

As a result, compared to businesses incorporated as companies, looking at what has happened in practice can be particularly important. A divergence from what is provided for in the partnership agreement could reflect an amendment by conduct rather than a breach of the agreement.

Partnership accounts

Partnership accounts pose particular problems to the FR lawyer. There are two principal challenges. First, best practice for partnership accounting is unintuitive. Secondly, best practice is often not followed. As a result, even if formal accounts have been prepared by a regulated accountant (who is often more used to dealing with limited companies), they may not shed much light on the questions which the Family Court will need to ask.

The partners' accounts

In an ideal world, partnership accounts should provide two separate accounts for each partner: a capital account and a current account.

The *capital account* represents the partner's net contribution to the capital of the business. As such, it is a fixed amount that will not vary merely as a result of the business trading. It represents the sum that the partner would be entitled to receive on dissolution of the partnership were the partnership's assets equal to the sum of the partners' capital accounts at that moment. In the event that an asset is revalued during the course of the partnership, the result may be a capital profit or loss that may be reflected in the capital account balance.

At the inception of the partnership, a capital account could include, for example, cash or the cash value of any land or machinery which is invested in the business. It is not necessary for the contributions to be equal and it may be possible that the entire partnership capital is held by one person.

Adjustments to the partnership capital may only be made with the consent of the partners. As a result, a partner cannot generally realise the sums in his capital account without agreement.

As the partnership trades, sums may be added to the capital accounts but this, too, must be by agreement. A common difficulty arises with undrawn profits. They may be added to a partner's capital account or not. If they are, then the effect of this capitalisation is that a partner may not draw the sums without the agreement of the other partners[8] or dissolving the partnership. If they are not, the partner may be entitled to draw them forthwith.

The *current or drawings account* should record the partner's money within the business which has not been capitalised. In the simplest scenario, it will show an annual credit for the partner's share of the profits and then debits as the partner withdraws it (or, more likely, debit drawings on account of profits anticipated in that year, with credit for profits at the end of the year). If a partner does not draw the full amount, then the balance may be carried to future years or be capitalised and so debited from the current account and credited to the capital account. Similarly, drawings which exceed the partner's entitlement may result in the current account showing a negative balance at the end of a year and an obligation to repay the over-drawings within a certain time period.

The partnership's accounts

In addition to the partners' accounts, the partnership as a whole will usually provide accounts, too, often in more familiar forms of a balance sheet or asset account and profit and loss account.

The balance sheet or asset account is perhaps the more important document since it should reflect the value of the combined assets of the partnership. In an established business, this may not represent the true value of the assets and liabilities as, by accounting convention, it will include assets at the lower of cost and net realisable value rather than actual market value, and certain assets, such as goodwill, are not included at all. In that case, the difference between the two can reflect an additional fund, which may only be realised on a dissolution and is usually shared between the partners in accordance with the way in which

the profits are divided rather than how the capital is to be divided.[9] If a partner is entitled merely to be repaid the balance on their capital account when they leave then they may lose out on their fair share of surplus assets.

Common problems with accounts

It is not uncommon for there to be no separate current and capital accounts for each partner or for there to be a single capital account for the whole partnership. As a result, it may not be clear to the court what sums might be available to the partner immediately and what has been capitalised and so can only be realised on dissolution or retirement. Similarly, if the partners' capital accounts have not been separated, then the court will need to look to external evidence to make an assessment as to whether the intention was for the capital to be shared jointly between the parties or not.[10] If it is joint, then the usual equitable principles of the sharing of jointly owned property would apply at dissolution. If not, then the court will need to determine how the partners agreed for it to be shared.

Reconstructing accounts

Since there is no general obligation on an unincorporated partnership to produce accounts in accordance with best practice or, indeed, any accounts at all, it may be necessary to instruct a forensic accountant, at an early stage, to rebuild them.

In theory, there should be no difficulty in obtaining the underlying financial information for this exercise since there is a statutory right of inspection of the partnership books by any partner[11] and an obligation to render true accounts.[12] In practice, however, the lack of formality can make it almost impossible to reconstruct accounts going back many years.

Care will need to be given as to the letter of instruction since, as set out above, the partnership agreement may be inferred from conduct. There should therefore be complete clarity as to whether the accountant is being invited to reconstruct accounts from an agreed position as to the division of capital and profits or, instead, should report to the court as to what inferences might be drawn as to the nature of the agreements from what has taken place.

Partnership property and third parties

A self-contained area of dispute which may arise in FR cases is where property, usually land, is legally held by one party but it is claimed that it belongs instead to a partnership and is therefore not available for distribution by the court. Because partnership property must be held by one or more of the partners (due to the lack of separate legal personality) it can be difficult to determine whether the intention was that it be held on trust.

This is conceptually similar to claims by third parties that property in the name of a party is in fact held by them on an unregistered trust. However, the legal principles are not governed by equity but rather the statutory tests under ss 20 and 21 PA. These provide:

> '20 Partnership property.
>
> (1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement. …
>
> 21 Property bought with partnership money.
>
> Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.'

The questions that therefore arise are:

- For property which pre-dated the partnership, was it brought into the partnership stock or acquired on account of the firm?
- For property which post-dates the partnership, was it bought by money belonging to the partnership and, if so, is there a contrary intention?

Documentation may resolve this dispute. If the partnership capital accounts account for certain property, it is likely that the property was brought into the partnership stock. Alternatively, if there are express declarations of trust (e.g. on the TR1) indicating ownership is held in another way, then that may be determinative.

If not, the court will need to look to what other evidence is available but is encouraged to exercise particular caution in trying to infer or imply agreements and limit such inferences to what is absolutely necessary to give business efficacy to what has happened.[13] For example, simply because a partnership uses a partner's land for trading purposes, that does not necessarily imply that such land has been brought into the partnership. It may, instead, be merely using it. Equally, inclusion of property in the annual accounts (even if it is clear precisely what the scope of that property is) is not determinative.

There are a large number of cases exploring these issues which it may be helpful to consult when faced with a dispute of this nature. For example, *Merryman v Merryman* [2024] EWFC 58 (B) – a rare example of an FR case which considered the PA – or *Wild v Wild & Ors* [2018] EWHC 2197 (Ch).

Procedure

The procedure set out in *TL v ML & Ors (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 which is familiar from third-party 'intervention' cases should apply to disputes of this nature.

The partnership as a source of capital

The first question which often arises in FR cases involving a partnership is whether capital may be extracted from the business to, for example, provide for a housing or other fund to one party.

Many of these issues are the usual ones encountered in any cases where there is an income generating asset:

- if it is sold to generate capital, this may adversely impact the parties' income needs;
- alternatively, if it is not sold but credited to one party's side of the matrimonial balance sheet, it may represent an unfair distribution of the copper-bottomed vs illiquid or risk-laden assets.[14]

However, there are some additional partnership-specific considerations.

Valuation

The difficulties in valuing business assets in FR proceedings are well known and the general considerations will apply to partnerships as much as they do to companies.[15] These include the fact that the partnership may in fact have no capital value at all if it is just a conduit for income from partners providing professional or similar services.

Whilst a partnership may be valued by any of the usual methods (e.g. a market or income basis), it is likely that an asset basis will be most appropriate in FR cases since there are significant difficulties with selling unincorporated partnerships which are inextricably linked with the partners who operate them. It is likely to be an exercise in double-counting to look to a party's income from a partnership as both an income stream and creating their value in the partnership.[16] An asset basis, by contrast, will show what the partner is likely to receive on dissolution of the business.

Once the partnership has been valued, the proportion of the assets that a partner will receive on dissolution[17] is calculated as follows: once the partnership's debts have been paid, each partner will receive, first, their capital account balance followed by a net share of any remaining assets, distributed in accordance with how profits are shared, set off against any sums they owe the partnership.

Realisation

When considering businesses within FR proceedings, the court has three practical options: leave it unsold but fix its value for the matrimonial balance sheet; order it be sold; or divide the asset *in specie* (sometimes called '*Wells* sharing').[18]

For a partnership, the first option, of course, remains available. It is perhaps the simplest method of dealing with the value of the partnership, particularly if only one party is a partner and it is agreed that the business should continue to trade.

As to selling a share of the partnership, this remains legally possible, subject to any express provision within the partnership agreement. The share may be sold either to another partner or a third party. However, the effect of such a sale to a third party only entitles the assignee to receive the share of the profits to which the assigning partner was entitled and does not grant a right to the assignee to interfere in the management of the business.[19] As a result, it may not be a realistic option.

In those circumstances, perhaps the most likely route for extracting capital from a partnership by sale is to dissolve it.[20] This process can be straightforward in the case of a partnership where there is no written partnership agreement. Such a partnership is a partnership-at-will and may therefore be dissolved simply by notice.[21]

In other cases, the procedure should be found within the partnership agreement, although the court retains the power to dissolve a partnership for five specific grounds, including that it is 'just and equitable' to do so in the circumstances of the case.[22] Whilst there appears to be no authority on the point, the definition of 'court' within the PA is wide and includes 'every court and judge having jurisdiction in the case'. It is therefore at least arguable that the Family Court could exercise this power, having joined the remaining partners, in order to give effect to its powers under s 24A MCA and avoid satellite litigation in the High Court.

Formally, the dissolution of a partnership should result in the sale of the assets and their distribution, although some of the partners may instead apply for an order that they are permitted to buy the share for a fixed price determined by the court.[23] In practice, if a buy-out is possible and likely, it may be achieved by negotiation.

Lastly, since a share of a partnership may be assigned, subject to any explicit provision in the partnership agreement, it appears there is no principled reason why the share could not be shared between parties, in the form of *Wells* sharing. The usual disadvantages of this as to the lack of a clean break will apply.

The partnership as a source of income

If the partnership is not to be dissolved or sold, then the court may look to it as a source of income. Partners may draw an income from a partnership in a number of different ways.

Share of profits

The share of profits represents the most traditional way in which income is drawn from a partnership.

Unlike a dividend paid by a company, the share of profits which each partner is entitled to is usually set by agreement amongst the partners rather than by reference to each partner's share of the partnership capital. This may be set out in the partnership agreement but if it is not, it may be inferred by conduct. In the event that that is not possible, the court will fall back on the statute, which provides a rebuttable assumption that profits will be shared equally.[24]

Due to the flexibility as to how profits are shared, it may be that one partner holds the majority of the capital in the partnership but will only take a small share of the profits. There may be legitimate reasons for this, such as if the partner has contributed land to a farming partnership but takes no part in the day-to-day farming. However, practitioners should be alive to agreements being structured artificially to minimise the divorcing partner's share and whether submissions should be made that the foreseeable future income will be higher, once proceedings have been resolved.

Additionally, as with any profit-dependant income, the sums are likely to fluctuate from year to year but care should still be taken to check they have not been artificially depressed during and immediately before the FR proceedings.

Salary

In addition to sharing profits, the partners may agree that some or all of them may receive a fixed sum each year. This may be common if, for example, only some partners are carrying out the day-to-day work of the business. This is usually called a 'salary' but may be better thought of as a fixed or prior share of the profits. It should not be confused with 'salaried partners', who are employees merely held out as partners and receive a guaranteed payment for their work.

Drawings

Drawings are sums paid by the partnership to a partner. These are often regular monthly payments, but may in addi-

tion be other sums paid to them or on their behalf for which they will have to account. The usual question is whether the partners have agreed for them to be debited against the partner's capital account so that they only crystallise at dissolution or may be paid from incoming profit shares, affecting the balance on their current accounts.

Conclusions and further reading

An article of this nature can only scratch the surface of partnership law and provide a general introduction to a complex subject. We therefore think it is essential that, before any advice is given or arguments are deployed in court, practitioners should consult the specialist literature. The main textbook is *Lindley & Banks on Partnership*[25] but there are a number of other general and specialist works.

Notes

1 PA, s 1(1).
2 PA, s 45.
3 See Roderick I'Anson Banks, *Lindley & Banks on Partnership* (Sweet & Maxwell, 21st edn, November 2024), Chapter 2.
4 *Hurst v Bryk* [2002] 1 AC 185 at 194 per Lord Millet.
5 Similarly to the lack of usual need to resolve and declare the parties' equitable interests in property. See *DDR v BDB (Financial Remedies, Beneficial Ownership and Insolvency)* [2024] EWFC 278.
6 Limited Partnership Act 1907, s 5.
7 PA, s 19. It is generally thought possible to exclude this provision by express wording in the partnership agreement that any amendments should be in writing.
8 See, e.g. *Heslin v Hay* (1884) 15 LR IR 431.
9 PA, s 44(b)(4).
10 *Hopper v Hopper* [2008] EWCA Civ 1417 at [22].
11 PA, s 24(9).
12 PA, s 28.
13 *Miles v Clarke* [1953] 1 WLR 587 at 540.
14 See, e.g. *HO v TL* [2023] EWFC 215 at [26].
15 See, e.g. Duncan Brooks KC, 'Businesses in Financial Remedy Claims' [2024] 1 FRJ 3.
16 See, e.g. *Smith v Smith* [2007] EWCA Civ 454 at [30].
17 Before tax and subject to anything to the contrary in the partnership agreement.
18 *Martin v Martin* [2018] EWCA Civ 2866 at [93].
19 PA, s 31.
20 There are also some complicated considerations in respect of NHS GP Practices due to a statutory prohibition on sale of goodwill: *Rodway v Landy* [2001] Ch 703.
21 PA, ss 26(1) and 32(c).
22 PA, s 35.
23 Usually called a '*Syers v Syers* order' after the case reported at (1875–76) LR 1 App Cas 174 HL.
24 PA, s 24.
25 See n 3 above.

Smoke and Mirrors: Shams and Illusory Trusts in Divorce Proceedings

Rachel Bale

3PB

The existence of so-called 'sham' or 'illusory' trusts in divorce proceedings often leads to complex and intellectually engaging work for family and chancery lawyers. Identifying such trusts can significantly impact the value of the matrimonial pot and the eventual financial distribution. Remedies are typically pursued through interim applications under s 37 Matrimonial Causes Act 1973 (MCA 1973) and/or s 423 Insolvency Act 1986 (IA 1986).

This article explores the legal principles for identifying sham and illusory trusts and offers practical advice for practitioners on strategy and evidentiary steps.

Back to basics: key players in a trust

As with all trust arrangements, the following roles are central:

(1) Settlor: the party who entrusts the property.
(2) Trustee: the party to whom the property is entrusted.
(3) Beneficiary: the intended recipient of the property.
(4) Protector: a person(s) appointed to monitor, oversee or exercise a degree of control over the trust by the trustees.

Further, financial remedy practitioners ought to be aware of the three certainties for the creation of a valid trust, namely:

(1) certainty as to the intention of the settlor to create a trust (also known as certainty of words), the trust property being intended to be kept separate from other property of the trustee;
(2) certainty as to the *subject matter* to which the trust is to attach;
(3) certainty as to the 'objects' (or more simply, persons) who are intended to benefit.

The difference between a 'sham' and an 'illusory trust'

Sham

'Sham' is a concept of general application; it is not specific to the law of trusts. The canonical definition was provided by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802:

> 'I apprehend that, if [this popular and pejorative word] has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create…
>
> … For acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.'

The essential ingredient for identifying such a sham is the parties' intention to mislead and this ought to be a 'common intention' between the settlor and trustee. This is crucial, as whatever a settlor might have intended when a trust was created, and whatever may have happened since, a trust would *not* be a sham if either the original or subsequently appointed trustees had not been party to it at the time of their appointment.[1]

Illusory trust

As for illusory trusts, one definition can be: 'used to describe a purported trust the terms of which provide that the property must be held for beneficiaries but simultaneously allocate so many powers to the settlor that the arrangement cannot take effect as a trust in [the beneficiaries'] favour because they have no meaningful rights in respect of it'.[2]

Essentially, the key ingredient in establishing whether a trust is illusory is how much control and/or powers a settlor retains under the trust, so that the beneficiaries may be seen to be prejudiced. Namely, there is an 'illusion' of a valid trust but in actual fact the settlor is simply reserving powers to him- or herself.

In family cases, this often arises when one party claims trust-held assets should be included in the matrimonial pot, depending on the roles of the parties – settlor, beneficiary or trustee.

The distinction between sham and illusory is somewhat sophisticated, but the latter often requires less of a focus on

'fraudulent' or dishonest behaviour of a party and more whether the terms of the trust allow the trustee to stray beyond the powers afforded within the bounds of a valid trust.

As pithily defined by Grahame Young, a barrister at Francis Burt Chambers, Perth, Australia in his breakdown of New Zealand Supreme Court case *Clayton v Clayton* [2016] NZSC 29:[3]

> 'A sham trust is one where as a matter of *construction* the terms of the document would establish a valid trust, but the *intention* of the relevant parties is that they will not be bound by those terms but hold the property for or at the direction of the settlor.
>
> An illusory trust is one where the *intention* of the parties is that they will be bound by the terms of the document, but as a matter of *construction* those terms do not establish a valid trust.'

Note, however, that the terminology is not without criticism – both the Supreme Court justices in *Clayton* and Birss J in a later UK case *Mezhdunarodniy Bank v Pugachev* [2017] EWHC 2426 (Ch) questioned the utility of the term 'illusory'.

Who bears the burden of establishing such a document/trust and to what standard?

For both issues, the burden of establishing that a document is a sham or illusory – i.e. that it was executed with the common intention of misleading third parties as to the rights and obligations (if any) which the parties thereto actually wished to create – rests on the party making that allegation: *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 per Neuberger J at [68].

This is why particular care ought to be taken in investigating matters before the making of an application – the burden is a high one to prove for the applicant.

As clarified by Mostyn J in the case of *Bhura v Bhura* [2014] EWHC 727 (Fam) at [9], whilst the standard of proof is set at the balance of probabilities, clear evidence is required to satisfy such a test. He stated:

> 'Because a degree of dishonesty is involved in a sham there is a very strong presumption that parties intend to be bound by the provisions of agreements into which they enter, and intend the agreements they enter into to take effect. However, this does not elevate the standard of proof, which is set at the balance of probability. Nonetheless the test is a stiff one and there is a requirement of very clear evidence given the seriousness of the allegation.'

Care must be considered before raising such allegations of sham documents in financial remedy proceedings for the above reason, and there are numerous examples where the case has not been made out, such as in *A v A* [2007] EWHC 99 (Fam) and *ND v SD (Financial Remedies: Trust: Beneficial Ownership)* [2017] EWHC 1507 (Fam), where Roberts J set out the importance of distinguishing between motive and intention. At [67] he clarified that even an artificial transaction which was put in place for the purpose of asset protection would not necessarily be cast aside as a sham if all the parties to the transaction genuinely intended the agreements incorporated into the document in which they appeared to take effect.

See also the approach taken in *Joy v Joy-Morancho & Ors (No 3)* [2015] EWHC 2507 (Fam), where W's legal team had chosen not to run the case on a sham trust basis for fear of failing to meet the stringent test; however, Sir Peter Singer (sitting as a Judge of the High Court) instead found that the case collusively advanced by the husband was a 'rotten edifice founded on concealment and misrepresentation and therefore a sham, a charade, bogus, spurious and contrived. It could further be described as fraud'.

What evidentiary steps ought to be taken to establish the existence of such a trust?

Sham

As helpfully set out by Rajah J in *Islam v Islam & Ors* [2024] EWHC 1082 (Ch) at [140]:

> 'Determining whether the parties have a shamming intention is not a question of construction of the impugned document, but a matter on which extrinsic evidence is admissible to prove or disprove the existence of the requisite subjective intention.'

The court is not restricted therefore simply to the document but will be looking at all available evidence to determine the state of mind of the parties and to determine what their intentions were at the time.

Such evidence could include:

- other documents supporting the 'sham document', e.g. in the instance of transfer of shares, any communications to other shareholders about such a transfer;
- minutes of meetings (be it commercial or familial context);
- accounts of witnesses present at the time of such a document being created.

Practitioners will want to take particular notice of the following, as potential 'warning signs' of a sham document:

- amendments to or creation of trust documentation either during proceedings or just prior to issuing;
- timing of transactions taking place just before proceedings;
- any agreements/amendments being created in secret without the opposing spouse's knowledge;
- unusual haste in creating a trust document, particularly if done without the benefit of legal advice;

Illusory trust

The focus here is on the control retained by the settlor and how the trust was administered in practice. Practitioners should examine:

- trustee discretion (or lack thereof);
- past transactions under the trust (e.g. asset purchases, appointments);
- any deviation from the trust's formal structure.

What are the consequences of identifying such a trust?

Sham

Essentially, a sham is a void instrument, as it is predicated on the basis of fraud. However, the consequences that flow from this vary, as stated by Rajah J in *Islam*, concluding that

'a document, agreement or provision is a sham or pretence does not make it void, or of no effect, for all purposes … the Court has some flexibility as to what the consequences should be … because where there is a sham the illegality principle is engaged' (at [144] and [219]).

On this point, practitioners ought to be mindful about the potential implications of the principles in *Patel v Mirza* [2016] UKSC 42 where illegality is engaged, especially if your client is attempting to rely on the document that is found to be a sham. Namely, 'no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act', as the court will generally not allow a party to profit from their wrongdoing. However, the court will also need to address public policy issues and whether overall it would be disproportionate to refuse relief of the party, weighing up the seriousness of their conduct.

Given the nature of shams, a client's credibility is always going to be called into question, and it can have a devastating impact on their financial remedy claim – either by way of overall distribution or, more likely, in cost consequences.

Ultimately, in the context of financial remedy proceedings, the main practical consequence of the court finding a sham and the trust being void is that the property will be made available to third parties, for example creditors and spouses.

Illusory trust

An illusory trust is typically re-characterised as a bare trust. The supposed trustee becomes a nominee, and the beneficiary obtains an immediate and absolute right to the assets.

In a divorce, if the husband or wife is the sole beneficiary, the trust assets may be treated as matrimonial property and become available for distribution.

Potential applications

MCA 1973, s 37

It may be possible to set aside a disposition of an asset into trust if the court is satisfied that the disposition was made with the intention of defeating the other party's claims for financial relief on divorce/dissolution pursuant to MCA 1973, s 37(2).

Further, s 37(5)(a) MCA 1973/Sch 5, Pt 14, para 75(4)(a) Civil Partnership Act 2004 creates a presumption that any disposition made within the 3 years preceding the application for financial relief was made with the intention to defeat the other party's claims, if the disposition would in fact have that consequence. Such a disposition is termed 'reviewable' and the court may be asked to review the disposition and, if justified, set it aside. Such an application may be made before or after an order has been made by the court in the main financial proceedings. The third party to whom the disposition has been made will have to be joined as a party to the proceedings.

A freezing injunction may also be obtained under s 37(2)(a) MCA 1973 for an avoidance of disposition order within financial remedy proceedings to prevent a reviewable disposition or other dealing with property, where the court is satisfied that it is about to be made, or that property may be transferred out of the jurisdiction, with the intention of defeating a claim for financial relief. Practitioners may also wish to make a separate application to the High Court (Family Division) under s 37 Senior Courts Act 1981 for a *Mareva* freezing injunction to be granted, which will prevent a respondent from dealing with the whole or part of their assets (i.e. by moving assets abroad or dissipating them) while legal proceedings are ongoing.

As an aside, it is worth noting that such a freezing injunction may also be granted by the English court in support of matrimonial proceedings taking place elsewhere, pursuant to s 25 Civil Jurisdiction and Judgments Act 1982. In such an application the court will consider three factors:

(1) Whether the making of an order would interfere with the management of the case in the primary court.
(2) Whether there is a danger that such an order would give rise to inconsistent orders.
(3) Whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction.

IA 1986, s 423

An application of this nature is often plead in the alternative to the above. It enables a trust document to be set aside on the basis that the transfers of the assets into the trusts (known as transaction at an undervalue (TUV)) were carried out with the intention to prejudice the interests of a party's creditors.

Essentially, a party enters into a TUV with another where:

- they make a gift or receive no consideration for the transaction;
- the consideration for the transaction is marriage or the formation of a civil partnership;
- the consideration for the transaction, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by it.

An order shall only be made if the court is also satisfied that the TUV was entered into for the purpose of:

- putting assets beyond the reach of a person who is making a financial remedies claim against them; or
- otherwise prejudicing the interests of such a person in relation to the claim they make.

Despite this being an Insolvency Act provision, it happily does not require substantive formal insolvency proceedings and can be applied for in the family courts (although please note most applications of this nature would be required to be made in the High Court (Family Division)).

In terms of relief, the courts have wide discretion 'and may make such order as it thinks fit' so long as the order seeks both to:

- restore the position to what it would have been if the transaction had not been entered into; and
- protect the interests of victims of the transaction.

While the court's discretion is necessarily wide, s 425 IA 1986 sets out a list of some possible remedies which can be useful for practitioners to cite when making their applications and drafting their orders.

The most commonly used remedy is for the transaction to simply be undone, by transferring the property back to the transferor.

Practical guidance for practitioners

When faced with the potential existence of either a sham document or an illusory trust, great care must be taken in pleading this/making the above applications.

In either case, the applicant is usually alleging an element of fraud and as such the evidential threshold is high. Further, there are high cost consequences of an unsuccessful application as:

(1) preliminary hearings of this nature fall outside the 'no order to costs' regime; and
(2) an unsuccessful application is likely to result in an order for indemnity costs.

As such, here are some questions to consider before advising your client to embark on a potentially costly exercise:

- *Value and proportionality*: Are the trust assets material to the overall claim?
- *Liquidity*: Will these assets actually produce a financial benefit? For example, if dealing with a transfer of shares in a small family-run business owned with three other directors – what's the likelihood of the applicant actually receiving said funds?
- *Jurisdiction and enforcement*: Can any resulting order be enforced abroad?
- *Alternative approaches*: Could dissipation arguments (e.g. add-back) be more suitable?
- *Pleadings and procedure*: Is the case sufficiently prepared for formal points of claim, defence and witness evidence?
- *Third-party involvement*: Are offshore trustees or other beneficiaries necessary parties? Will they submit to the jurisdiction?

Conclusion

Claims involving sham or illusory trusts can be pivotal in financial remedy proceedings, but they require careful handling due to their complexity and the high burden of proof involved. When approached strategically, with thorough investigation and clear evidence, these claims can significantly impact the outcome of a divorce or dissolution, potentially unlocking assets that may otherwise remain out of reach for clients.

However, practitioners must remain mindful of the risks – particularly the potential for substantial costs and credibility damage if an application fails. By ensuring a proportionate approach, clear pleadings, and an understanding of the practical implications, legal professionals can effectively navigate these intricate issues and safeguard their client's interests.

Notes

1 *A v A* [2007] EWHC 99 (Fam), Munby J. This case provides a comprehensive breakdown of the interaction between 'shams' in a family context and is a recommended starting point for family practitioners looking for guidance in this area.
2 *Underhill and Hayton – Law of Trusts and Trustees* (Lexis Nexis, 20th edn, 2022) at 8.1.
3 G Young, 'Sham and illusory trusts – lessons from *Clayton v Clayton*' (2018) 24 (2) *Trusts & Trustees* 194.

The Role of Opt-out Agreements in Cohabitation Reform

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There is a significant measure of agreement amongst both academics and practitioners that making financial remedies available to cohabiting couples on an opt-in basis will not work.[1] It will do little to help those in religious only marriages who are left exposed upon separation. It will do little to help those who mistakenly believe they have legal recourse because of the common law marriage myth. Neither will it help couples aware of their options under the law, but who cannot agree, or simply never get around to opting in. In all these scenarios, where the opt-in does not work, it is the most economically vulnerable cohabitants who lose. They would be no better off than under the current, ineffective web of property and trusts law, which for many, could mean poverty.

The alternative is a system of financial remedies that cohabitants may opt *out* of. This was proposed by the Law Commission in 2007 and was also endorsed by the Women and Equalities Committee in 2022.[2] But what does opting out entail? This article explores the nature and scope of opt-out agreements. It first looks to the Scottish experience, where opt-out agreements are currently possible under the law. It then turns to the need for opt-out agreements to have safeguards and looks to the insights that nuptial agreements can provide for cohabitation agreements in this regard.

Opt-out agreements in Scotland

In contrast to the absence of a regime for cohabitants in the rest of the United Kingdom, there is some financial relief available to cohabitants on relationship breakdown in Scotland. The Family Law (Scotland) Act 2006 introduced remedies for cohabitants on separation and death. The basis of relief is to redress unequal outcomes, accounting for economic advantage and disadvantage, as well as the economic burden of caring for children. There is no requisite minimum period of cohabitation to be eligible for relief; cohabitants simply must have lived together as spouses or civil partners. Relief, however, is limited to payment of a capital sum, and applications are time-barred to one year after the parties cease to cohabit. Thus, while better than England and Wales, provision still does not redress serious financial hardship, and the scope of claims is inflexible.[3]

Key to Scotland's current provision is the possibility for cohabitants to opt out of it. The context of opt-out agreements in Scotland is very different from that of cohabitation agreements south of the border, for the purpose of such agreements is to disapply or waive any claims to financial remedies on separation. Essentially, parties are opting out of a (limited) right to ameliorate relationship-generated disadvantage on relationship breakdown.

This has echoes of how nuptial agreements operate in England and Wales. Provision for separating cohabitants in Scotland differs greatly from the wide range of remedies available to divorcing spouses in England and Wales. However, while the specifics of what is being opted out of are different, the general gist of each agreement is to prevent the economically disadvantaged partner from making future claims (or, in the case of a nuptial agreement in England and Wales, from doing so in an unbounded way).

It is perhaps surprising then that there are no particular formality requirements for opt-out cohabitation agreements in Scotland. As Jo Miles et al have observed,

> 'Scots law is apparently content to allow an individual to waive a pecuniary claim without imposing any particular formality requirements for doing so or subjecting that decision to closer scrutiny than the general law would afford.'[4]

Opt-out agreements in Scotland are thus treated like any other contract and there is no family law jurisdiction to set them aside.

There are evidently some concerns about there being no special family law oversight of an agreement which could represent a lesser income-producing partner signing away her future right to be compensated for relationship-generated disadvantage. And so, in addition to cohabitation law more generally,[5] this was reviewed by the Scottish Law Commission in its 2022 report.[6]

Reform was proposed whereby an agreement could be varied or set aside for being unfair or unreasonable at the time it was entered into. This would provide the court with limited power to check the fairness and reasonableness

Current Scots law	Scottish Law Commission (2022)	Law Commission of England and Wales (2007)
No specific formalities (ordinary law of contract applies). No power to set aside agreements (except for normal contractual grounds).	No specific formalities (ordinary law of contract applies). The court must make an order consistent with the terms of the agreement unless it has been varied or set aside. The court could vary or set aside an agreement if it was unfair or unreasonable at the time it was entered into. No provision to account for change in circumstances after agreement signed.	No need for independent legal advice. The court could vary or set aside an agreement if its enforcement would cause manifest unfairness. Court could consider: 1. the circumstances at the time the agreement was entered into 2. change in circumstances at the time of enforcement (provided change not foreseen at time agreement made).

Table 1: Opt-out agreements: from fewest to most safeguards

(terms which are not defined by the Commission's Bill) of the agreement at a particular moment in time. The Commission also decided not to suggest any specific formalities beyond standard contract law. Furthermore, should a cohabitation contract *later* become unfair or reasonable, the court will not be able to vary it or set it aside, and will be required to make an order consistent with its terms. It would therefore be the responsibility of the couples themselves to vary an agreement according to changing circumstances.

When comparing these recommendations with both the current law in Scotland and proposed reform in England and Wales, the different potential powers for the court to adjudicate cohabitation agreements is apparent. The reform proposed by the Law Commission of England and Wales in 2007 is contingent upon the introduction of an opt-out scheme of financial remedies for cohabitants.[7] As shown in Table 1, a notable difference between the reform proposed in Scotland from that in England and Wales is the latter's provision to account for changes in circumstance.

Note: in addition to opting out of financial remedies, in all cases agreements may also clarify redistribution of assets in the event of relationship breakdown.

This difference might appear to be more significant in theory than in practice. The Law Commission for England and Wales stipulated that a change in circumstance must not be foreseeable. However, some circumstances might be entirely foreseeable yet nevertheless produce economic hardship. For instance, person A and person B decide to enter into a cohabitation agreement when they begin cohabiting, which opts out of financial remedies but does not make provision in the event of one party sacrificing career opportunities to care for children. This type of change in circumstance might be considered foreseeable, and therefore according to the Law Commission's recommendations, would not fall within the remit of relevant change in circumstances.

There may also be unintended consequences and inequalities arising from the Scottish Law Commission's decision to limit the fairness and reasonableness check to the time the agreement was entered into. The potential impact this could have on parties to cohabitation agreements will inevitably depend upon the context in which the contract is signed. A couple may make different decisions regarding their agreement depending on whether they create it 2 years or 15 years into their relationship.

As a result, if there is to be an opt-out system in England and Wales, careful consideration will need to be given to safeguards to prevent exploitation and injustice.

The importance of safeguards

It is often said that the law treats cohabitants as if they were strangers. And so, if there is reform that recognises the reality of family life for cohabiting couples, it would be rather counter-intuitive if the agreements opting out of financial remedies were based upon contractual principles that apply in the normal course of business.

It is vital to consider appropriate safeguards for opt-out agreements in the event of reform. The imbalance of power between couples making intimate agreements is well documented. Research repeatedly shows that wealth allocation is linked to the way power is distributed between parties entering intimate property agreements such as cohabitation contracts, as well as gendered power within relationships more generally.[8]

In short, it may be said that cohabitation contracts can theoretically promote autonomy, but whether such contracts realistically facilitate the exercise of autonomy on the part of both parties depends upon whether there is equal bargaining power in the relationship.

Cohabitation agreements have the potential to build safeguards for cohabitants weakened financially on separation after years of mingled assets, interdependency and unpaid labour, inequalities that are often gendered. And opt-out agreements do not simply have to opt out of a system of financial remedies. They can also provide scope for clarifying what the parties do want to do with their assets in the event of relationship breakdown. Agreements can provide a sense of security; a plan for what will happen in the event of serious illness, death and even retirement. Some commentators have therefore suggested that cohabitation contracts ought to include a background section outlining the intentions of the parties and the purpose of the agreement, and this is currently practised by some lawyers in England and Wales.[9]

The inclusion of a clause stipulating why the parties decided to enter the agreement provides potentially valuable insight into why couples enter cohabitation agreements in this jurisdiction. Even more, it requires the parties to be explicit with one another and to put in writing what they perceive the purpose of the agreement to be. And so,

recognising the value of this potential to include the parties' intentions is important. For if a scheme of financial redistribution is introduced for cohabitants in England and Wales with the mere ability to opt out, this practice of providing a background or rationale for the agreement may be lost. This context is often lost for other contracts such as nuptial agreements too, where the purpose is assumed: to determine the division of assets in the event of death or divorce.

Lessons from nuptial agreements

Unlike cohabitation agreements as they are now,[10] nuptial agreements operate to avoid the discretionary decision-making power of a judge to consider the parties' circumstances and determine an outcome that is fair, or sometimes to focus the exercise of discretion within narrower bounds. However, they can provide insight into opt-out agreements. While still different contextually, the core purpose of both nuptial agreements and opt-out agreements is to protect property in the event of relationship breakdown. Since nuptial agreements have routinely been given effect in England and Wales since 2010, there is much more case-law and research on how the economically vulnerable party can be protected. Nuptial agreements must satisfy the *Radmacher* test,[11] whereby an agreement must be fair when made and not unfair at the time it is given effect. In practice, satisfying this test means significant weight is attached to legal advice and disclosure during the drafting of the agreement, and whether the agreement will meet the parties' needs on relationship breakdown.[12]

The second, fairness-based prong of the *Radmacher* test operates as a substantive safety net, enabling the court to ensure that, despite changed circumstances over the course of the relationship, the needs of the parties are still met. This contrasts starkly with the Scottish Law Commission's suggestion that while agreements must not be unfair or unreasonable at the time of drafting, no safeguards are necessary at the time the agreement is brought into effect.

Yet as my research suggests, safeguards at the time of enforcement can be a very important means of ensuring fairness at the drafting stage.[13] In a study on unreported nuptial agreements with barristers and FDR evaluators, I was told more than once that the fairness requirement for nuptial agreements could be used to convince the wealthier party to be more reasonable:

> 'you can say to them, you can't screw them into the ground like this. It's not going to work, because the court will let them out at the other end. So, you're going to have to, for example, put more money on the table, because otherwise this isn't really worth the paper it's written on. If you say [in the agreement] you go away with absolutely nothing, regardless of children and lifestyle and everything, the court's not going to think that's fair. So, you can use that at the beginning to say to your … client, you need to put more into this, or it needs to be sort of more locked into a reasonable approach. And that generally works.'

From this perspective, having a safeguard that ensures consideration of the effect of the agreement on enforcement is one of the only sources of power currently available to the lesser monied party, because it provides her with leverage to negotiate, while incentivising the financially stronger spouse to agree to more equitable terms.

But – as in the case with opt-out agreements in Scotland – if there is no fairness safeguard, there will be individuals who cannot be persuaded to negotiate a reasonable opt-out agreement, and the consequences for the financially vulnerable party could be dire.

Application to opt-out agreements

There is no reason why safeguards similar to those applied to nuptial agreements cannot be applied to opt-out agreements. The specifics of these safeguards would depend upon the framework of financial remedies put in place for unmarried cohabitants. However, it makes sense to require at least two. First, independent legal advice. This can help ensure parties understand the contract and provide proper disclosure, and vitally, that they are aware of the consequences of waiving any financial protection that a general scheme for cohabitants may provide. Furthermore, legal advice can help cohabitants entering cohabitation agreements to be encouraged not to act according to their own self-interest, but instead to be equally empowered to agree to guarantee mutual financial benefits on separation. Competent advice can also help safeguard against exploitation, although the experience of nuptial agreements shows that such agreements are nevertheless still tainted by power imbalance.[14] Still, imposing legal advice as a requirement could be an important means of helping the lesser monied party to refuse to accept (unquestioningly) what the other party wants and to refuse to give in to terms that will disadvantage them.

Secondly, cohabitation agreements could borrow from the law on nuptial agreements and include a minimum level of protection, whether this is that the parties cannot be left in a predicament of real need while the other party enjoys a sufficiency or more,[15] or that the parties cannot contract out of meeting one another's needs if they have a child. It is well documented that Schedule 1 provision under the Children Act 1989 creates indefensible economic inequalities between parents and children based upon marital status.[16] And if reform is taken forward on the basis that the law can no longer facilitate this sort of discrimination, then it is critical we do not reintroduce this discrimination through an opt-out agreement.

An established irreducible minimum could be combined with an opt-out agreement being invalidated by the birth of a child, since statistically, parenthood is one of the greatest sources of financial inequality in family life.[17]

Future possibilities

There are many varied relationship dynamics within the category 'cohabitant', and so the purpose of any cohabitation agreement depends, of course, upon its context. This includes the economic circumstances of the parties, the relationship between the parties, and how that relationship changes between the time the agreement is signed and the point of separation.

Despite this variation, intimate relationships tend to be characterised by economic interdependence. Yet because there is no regime of property distribution on relationship breakdown that appreciates this dynamic, the law is letting down families and exacerbating economic inequality. Cohabitation agreements alone cannot provide redress.

Some are sceptical about the need for reform in England and Wales given that cohabitation agreements already present an option for autonomous self-protection.[18] However, contract law is a wholly ineffective substitute for the law's failings, particularly given the widespread and deeply embedded belief in the common law marriage myth, combined with the fact that so few cohabiting couples create agreements.[19]

Nevertheless, exploring the possibilities for cohabitation agreements as part of potential future reform is important and worthwhile. These contracts need to be viewed as living instruments, that can document the broader context of parties' decisions. In this way, they have the potential to account for changes in circumstances and can record the parties' intentions at the time of drafting. This potential might be more limited for opt-out agreements, especially if the contract simply disapplies a scheme of financial remedies without making alternative arrangements. But it is important to learn both from Scotland and from nuptial agreements in England and Wales, so that appropriate safeguards can be built into reform.

Much has changed since the Law Commission's 2007 report. New research and broader comparative experience[20] mean there is now no excuse for neglecting to consider the operation of opt-out agreements in the event of reform. Simply providing for opt-out agreements that waive all protection and with no safeguards beyond normal contract law is unjustifiable given what we know about how power is exercised within intimate relationships. Indeed, failing to learn from Scotland's mistakes is inexcusable. If the law *is* finally going to stop enacting this fallacy of treating cohabitants as strangers, it must also avoid letting such intellectual dishonesty through the back door. And so, it is crucial that opt-out agreements attached to future reform treat the parties as intimate partners, and not business partners.

Notes

1 This article is based upon a paper presented at Forsters LLP, London, on 18 March 2025. I am grateful to Dr Andy Hayward for organising this event, to Joanne Edwards for hosting, and to the Leverhulme Trust for funding support. Parts of this article also appear in S Thompson, 'Cohabitation Contracts and Gender Equality', in R Probert and S Thompson (eds), *Research Handbook on Marriage, Cohabitation and the Law* (Elgar, 2024), p 352.

2 Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007); Women and Equalities Committee, *The Rights of Cohabiting Partners* (HC 92, 2022).

3 For an overview of criticism, see A Brown, 'The Legal Regulation of Cohabitation in Scotland: A Failed Attempt at Compromise' (2022) 44 *Houston Journal of International Law* 221; F Garland, 'Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006' (2015) 19 *Edinburgh Law Review* 311; F McCarthy, 'Cohabitation: Lessons from North of the Border' (2011) 23 *Child and Family Law Quarterly* 277; J Miles, F Wasoff and E Mordaunt, 'Reforming Family Law – The Case of Cohabitation: "Things May Not Work Out As You Expect"' (2012) 34 *Journal of Social Welfare and Family Law* 167.

4 J Miles, F Wasoff and E Mordaunt, 'Cohabitation: lessons from research north of the border' (2011) 23 *Child and Family Law Quarterly* 302.

5 At the end of 2022, the Scottish Law Commission recommended comprehensive reform broadening the remedies available to cover property transfer and occupation rights for cohabitants in an 'enduring relationship' – in other words, changing the definition of cohabitation by removing the comparison to spouses and civil partners: Scottish Law Commission, *Report on Cohabitation* (Scot Law Com No 261, 2022), para 3.30.

6 Scottish Law Commission, *Report on Cohabitation*.

7 Law Commission (n 2 above).

8 S Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart, 2015).

9 Y Khan-Gunns and G Fahy, 'One Size Does Not Fit All: Cohabitation Agreements' [2022] *Family Law* 513.

10 *Sutton v Mishcon de Reya* [2003] EWHC 3166 (Ch) decided *obiter* that cohabitation agreements could be enforced and were not contrary to public policy. For more on the current law of cohabitation agreements in England and Wales, see C Barton, 'Contract: A Justifiable Taboo?', in R Probert (ed), *Family Life and the Law Under One Roof* (Routledge, 2007), p 77.

11 *Radmacher v Granatino* [2010] UKSC 42.

12 Law Commission, *Financial Remedies on Divorce* (Law Com No 417, 2024).

13 S Thompson, 'Unreported Nuptial Agreements in England and Wales' (2025) *International Journal of Law, Policy and the Family* (forthcoming).

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15 *Radmacher* (n 11 above) [81].

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The Challenges of Dealing with Overseas Pensions on Divorce

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Pension rights that have been accrued in overseas territories by divorcing parties present a number of challenges for practitioners where proceedings take place within this jurisdiction. This article explores some of the pitfalls that might arise and the issues that practitioners need to consider.

In the first instance, our recommendation continues to be to consult PAG's *A Guide to the Treatment of Pensions on Divorce*. The wording on these matters was refreshed slightly for the 2nd edition, published in early 2024. The authors were members of the reconvened PAG and thus contributors to the 2nd edition.

We begin by considering what is meant by 'overseas' in the context of pensions. The 'England and Wales' jurisdiction is taken to include Northern Ireland, but with Scotland being subject to its own laws on this subject. Pensions law is a UK-wide jurisdiction and so while family law practitioners in England will seek to avoid matters pertaining to Scots law, there is rarely an issue with the serving of a pension sharing order (PSO) from an English court over a pension scheme that is based in Scotland. (In particular, it is noted that the Armed Forces Pension Scheme is administered by Veterans UK in Glasgow, but this has not prevented 'English' pensions being shared without issue over the years.)

Instead, what is meant here are jurisdictions outside the United Kingdom in which one or both parties to a divorce may have worked for some time, in turn accruing pension rights. This might take the form of defined benefit rights (a promise to pay a certain *per annum* pension in retirement), defined contribution rights (being a fund in the individual's name, but with no underlying pension promise) or overseas state pension provision (e.g. the so-called '1st Pillar' of old age provision that accrues in Switzerland and is mandatory for all residents).

In general, overseas pension rights are incapable of being shared pursuant to an order made under Matrimonial Causes Act 1973 (MCA 1973), s 24B. There may be some very limited exceptions to this, primarily in respect of pseudo-British jurisdictions such as the Channel Islands and Gibraltar, but beyond this it should not be accepted that any such order will be binding over a pension scheme that is based outside the United Kingdom.

In financial remedy proceedings, a wife applied for a PSO in respect of her husband's interest in an Indian pension fund which provided an annuity. A judge had ordered the husband to transfer his interest to the wife. The order was to no avail. In *Goyal v Goyal (No 2)* [2016] EWFC 50, the court set aside the whole order, including a declaration as to the husband's beneficial ownership of the pension fund. It was held as follows:

(1) It had long been accepted that property adjustment orders could be made in respect of a foreign property or nuptial settlement trust provided that there was clear evidence that such an order would be likely to be enforced by the foreign court. The question was whether a PSO fell into that category. A literal reading of Welfare Reform and Pensions Act 1999, s 46(1)(d) did not displace the presumption against the extra-territorial effect of the MCA 1973. The application of the presumption to the powers under s 24B seemed to be an inescapable reading of the legislation as a whole, and was reinforced by the procedural rules applicable to pension sharing. Those rules, devised in collaboration between government officials, family law professionals and the domestic pensions industry, could only work in the context of the sharing of domestic pensions.

(2) The procedure was set out with clarity in *Pensions on Divorce* (2nd edn, 2013, Sweet & Maxwell, with it being noted that the 4th edition of the handbook has now been published by Class Legal). In summary: (a) in every case involving pensions, regardless of whether pension sharing was specifically sought, the parties had to provide basic information about the pensions that the pension providers were obliged to supply; (b) if sharing was sought, the application had to be served on the providers; (c) at the first appointment, the court could direct the parties to file and serve a pension enquiry form, which the provider was obliged to complete; and (d) when making a PSO, the court had to append a pension sharing annex which gave detailed instructions to the provider as to how the sharing should be effected. The annex would specify the sharing percentage, as required by MCA 1973, s 21A(1)(b). The award could not specify a liquidated sum, only a percentage. Pension sharing pursuant to s 24B was not therefore available in relation to an overseas pension (*Goyal* at [17]–[29]).

It is noted also that in some jurisdictions, there is exclusivity. They will not entertain 'mirror orders' to replicate the intention of the English court in terms of sharing such pension provision. Again, Switzerland operates under an exclusive jurisdiction provision pursuant to the Swiss Federal Act on Private International Law. For example, if the English court were to determine that the English pensions are shared x and y between the parties and the Swiss pensions are shared a and b between the parties, the Swiss court will not recognise nor enforce the English decision.

Even if the limited exceptions set out above are overcome, it is noted that the implementation of any such overseas order is likely to be difficult. Pension sharing orders as applied to UK-based schemes permit the transfer of pension assets from one registered arrangement to another, but any attempt to repatriate a pension credit from an overseas pension to the United Kingdom is expected to give rise to this being treated as a fresh contribution, rather than a transfer. In turn, it is expected that such monies would be tested against the Annual Allowance, which is at present £60,000 per annum, with a punitive tax charge being applied on amounts contributed after this.

In general, defined contribution rights are likely to be the easiest to deal with, on the grounds that these will take the form of funds held in the name of one of the parties, albeit most likely expressed in a currency besides pounds sterling. Examples include 401(k) and IRA plans in the USA. It might then be reasonable to treat the sterling-equivalent amount as additional UK defined contribution monies, and thereby ascribe to such funds the characteristics of a UK-based plan, i.e. accessible from age 55 onwards, subject to income tax in payment but for a tax-free cash lump sum etc. The extent to which such a broad-brush approach may be deemed applicable is likely to depend on the relative magnitude of the overseas rights to the others in the case: an overseas fund equivalent to £50,000 is more easily glossed over where total pension rights exceed £500,000 than a case in which these instead comprise the majority of the pension assets.

Overseas defined benefit pensions are in general much harder to deal with, in keeping with the fact that the treatment of such UK-based arrangements is more complex than dealing solely in defined contribution funds. The existence of an explicit *per annum* pension promise at retirement whose value is not necessarily congruent with that of the disclosed cash equivalent means that detailed analysis is typically required, which is by definition much harder to perform in respect of overseas rights.

In particular, it is noted that while inflation-proofing of pension incomes is somewhat standard when it comes to defined benefit UK rights, this does not necessarily extend to all overseas arrangements. Likewise, UK pensions law requires that pensions 'vest' after no more than 2 years (the vesting period the minimum level of scheme service before a member is entitled to scheme benefits, rather than a mere refund or transfer of contributions on leaving service), but this again may well not apply to schemes in other jurisdictions. The authors are also aware of misleading statements being provided by such schemes, where what is described as the 'accrued pension' is, in fact, the projected figure that relies upon future service to retirement age: a quite different amount for an individual who might have a further 20 years of employment before retirement.

Overseas state pension arrangements are myriad in nature, with many features that may well differ from what exists in the United Kingdom, including the existence of variable pension ages with different levels of benefits then being available. The terms upon which citizens accrue such rights are likely to be highly varied, and again the practitioner is very much likely to be at the mercy of paperwork provided by the client and/or generic content found online. It is noted in passing that, despite the former Federal and Democratic Republics of Germany (being West and East, respectively) having been reunified as long ago as 1990, it was only in 2025 that state pensions for citizens of the former regimes were harmonised.

Other issues encountered in respect of state pensions payable overseas include the fact that in some countries – for example, the Netherlands – these may be subject to some form of formulaic or 'automatic' sharing on divorce, i.e. upon learning of the divorce, the state will then seek to deplete one party's entitlement to provide something to the ex-spouse. Practitioners should seek to investigate this as it may affect the extent to which such overseas rights need otherwise be considered in the settlement. It is noted that such considerations may well only apply to pension rights accrued within the marriage, rather than the entirety thereof. In some jurisdictions, this mandatory sharing on a formulaic basis can only be departed from in exceptional circumstances.

It should be noted also that the overall framework in which pensions are accrued may differ by country, i.e. provision may go beyond the state vs occupational/personal split that exists in the United Kingdom. Indeed, some countries have funded industry-specific pension arrangements into which contributions are compulsory, in addition to explicit state provision and voluntary arrangements. For example, in France, Agirc-Arrco provides supplementary pension benefits to employees in agriculture, commerce, industry and services.

There also exist a number of 'supranational' pension arrangements for employees of international bodies, including the UN, NATO, the European Commission, IMF, etc. These often provide benefits that are denominated in US dollars (or euros) and the arrangements tend to lie beyond the jurisdiction of national courts such that orders cannot be imposed upon them. All such arrangements need be considered on a case-by-case basis.

Practical considerations

It follows that where pensions or other assets are denominated in another currency, an additional element of risk is introduced into a settlement that involves netting off differences in assets. This is because any such calculations will be a function of the then prevailing exchange rate, and it follows then that any movement in the other currency against sterling will have the effect of changing the value of each party's settlement assets. This is especially true where the parties are 'young', with the settlement relying upon the offsetting with assets today of pension rights payable many years hence. It is noted that in the last 20 years, £1 has been able to secure as much as US$2.09 (in November 2007) to something slightly north of parity (US$1.08 in September 2022). Thus any settlement that was deemed 'fair' at the earlier date may not be deemed to hold some

15 years hence. This risk might be mitigated by the provision of offsetting monies in the currency in which the actual rights are held, but this may well be undesirable to an ex-spouse who intends to live only in the UK hereafter.

One further blocker that exists might be a practical one, being the provision of pensions documentation in languages other than English. Google Translate and similar may well assist for rudimentary attempts at the interpretation of statements with few words on them, but longer and more complex documents are likely to require the provision of a professional translation, which may in turn give rise to further costs for the parties. It stands to reason that one party to a divorce who is 'monoglot British' is unlikely to accept the other party's own translation of documents from his/her native language to English.

The analysis of complex pension provision almost always calls for the services of a pensions on divorce expert (PODE), but this may be harder to come by where overseas pensions rights exist. Most UK-based PODEs will regard themselves as experts only in the pension arrangements that exist within this jurisdiction, and will most likely profess to a more limited understanding of what might apply abroad, not least on account of the myriad of such arrangements and the infrequency in which any particular arrangement may arise.

It follows then that it may be necessary to engage the services of overseas-based experts, especially where matters pertaining to the tax treatment of such benefits applies, and this is likely to be an expensive endeavour. A UK-based PODE is more likely to accept an instruction with overseas pensions where they are: (1) relatively modest compared to the UK rights; (2) entirety defined contribution in nature; and (3) readily understood based on the information available. Where these criteria are not fulfilled, it may well be the case that the instruction will be declined or at least restricted solely to the UK pension provision.

Tips for consideration

Don't make assumptions as to what might otherwise happen to the overseas pension rights. Instead, use an expert in the jurisdiction in which the pension is held. Mrs X and Mr Y divorced and entered into a consent order in which X received a PSO over 65% of Y's English occupational pension on the understanding Y would retain his Swiss pensions, i.e. all 1st, 2nd and 3rd Pillar entitlements. Unbeknown to Y, after the conclusion of the English proceedings, X instigated proceedings in Switzerland to secure her mandatory entitlement to share in Y's Pillar entitlements accrued during the marriage to the point of divorce.

Don't determine the distribution of the assets until all expert evidence is obtained and understood. A piecemeal approach can lead to the difficulties encountered by Mr Y in the example above. He had to apply to set aside the order which proved difficult given, with sufficient investigation, it could have been foreseen that the Swiss court would share the accrued Pillar entitlements.

Don't assume the assets will remain *in situ* while a negotiated settlement (or court imposed one) is conducted. In some countries (e.g. the USA) pensions can be surrendered for cash. Often there is a financial penalty for doing so but if a party is set about the dissipation of wealth during the course of the proceedings, think about preservation of wealth orders or undertakings.

Don't assume other countries have 'mean' state pension provision. This can be a highly generous benefit: Austria, Spain, Switzerland and Germany all have high levels of state provision compared to what is offered in the United Kingdom. If you are looking to achieve equality of income in retirement, obtain the details.

Establish if you are dealing with a ROP (recognised overseas pension, pursuant to Finance Act 2004, s 150(8)) or a QNUP (qualifying non-UK pension scheme). Both are complicated but have some bearing on taxation considerations and reporting information. This can have a relevance in terms of seeking disclosure from a non-disclosing spouse. The ROP has a relevance in the potential for one to build up pension in the United Kingdom and retire abroad and take the pension asset with them. Specialist advice should definitely be sought.

Consider the instruction of an expert in the overseas territory alongside a UK-based expert. It may be that the English proceedings are conducted alongside supplemental proceedings in the jurisdiction in which the overseas pensions are held, with it being noted that this can be costly. Practitioners should obtain a report from an expert in the jurisdiction otherwise assumptions made in dividing assets in the English proceedings may prove to be erroneous. Between them, the two experts can consider the totality of the underlying benefits that might be lost or gained on divorce to achieve a fair outcome.

Offsetting is the most obvious solution but currency risk remains. The parties need to be comfortable with the assets that they hold post-divorce and accept that the relative values of these are subject to change where they are denominated in different currencies.

Unattractive as it often is and contrary to the court's duty to consider the clean break, the option exists for parties to adjourn pension claims until approaching retirement. Usually though this simply means deferring the problem to another day!

Justice that Heals: Lessons from Singapore's Family Justice System

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In the early 19th century, Britain was importing tea from China and financing the trade by illegally exporting opium (grown in British-controlled India) to China. The British East India Company required a port along the India–China maritime route to support this 'commerce' and to counter growing Dutch influence in Southeast Asia.[1]

Thomas Stamford Raffles[2] recognised Singapore's strategic geopolitical location as a potential British base. Singapore was useful due to its location on the Straits of Malacca, a vital maritime route between India and China. Its deep natural harbour provided a safe port for British ships to refuel and resupply.

On 30 January 1819, Raffles signed a treaty with the Johor Sultan's local representative, allowing the British to set up a trading post in Singapore. This initial foothold laid the groundwork for British influence, which expanded over the following years. By March 1824, the British and Dutch negotiated a deal: the Dutch conceded Singapore and Malacca, while the British relinquished Sumatra to the Dutch. Singapore's status as a British possession was confirmed by the Anglo-Dutch Treaty and the Treaty of Cession. A second treaty was entered into with the Johor Sultanate which ceded Singapore to the British in return for increased cash payments and pensions.[3]

Singapore was acquired by the British through diplomacy and tactical negotiation. Compare and contrast with the acquisition of Hong Kong by force following the First Opium War (1839–1842).

Singapore remained under British colonial rule for 144 years. Following Japanese occupation during the Second World War and a brief, ultimately unsuccessful union with Malaysia (1963–1965), Singapore became an independent sovereign state in 1965.

From its founding by Raffles to its independence, Singapore's legal development had been intricately linked with England. English legal traditions, practices, case-law and legislation were adopted without much consideration as to whether they suited the local circumstances.[4]

With independence, there has been a gradual movement towards developing an indigenous legal system. The guiding principle is that the adoption of any legal practice or norm must be compatible with Singapore's unique cultural, social and economic requirements.[5]

Singapore's family law draws from its Anglo-common law heritage, but it has evolved to reflect Asian values and communitarian principles, emphasising family harmony, duty and social cohesion.

In England too, our family law continues to evolve, shaped by changing societal values. The consistent direction of travel has been firmly away from a culture of litigation, towards a culture of efficient and constructive resolution of private family matters.

Private financial dispute resolution hearings (private FDRs) started gaining traction in England from 2018 and boomed during COVID-19 and beyond. In 2022, 'no-fault' divorce, the 'One lawyer, One Couple' model and the *Statement on the Efficient Conduct of Financial Remedy Proceedings* were introduced. The collective aims of these developments were to streamline cases, reduce unnecessary costs, and encourage early resolution.

The evolution of practice away from default litigation, towards constructive resolution, was noted in the introduction to *Chambers and Partners High Net Worth Guide 2022*, as follows:

> 'Gone are the days where a lawyer's success was measured by the amount of reported litigation. Instead, in a world where it is increasingly necessary and expected to offer a holistic approach which supports separating couples in making decisions that are right for their family, lawyers are selected on their ability to work with their counterparts to secure a family-centric settlement.'[6]

The April 2024 changes to the Family Procedure Rules are similarly designed to encourage couples (and their lawyers) to make meaningful attempts to resolve their disputes via non-court dispute resolution (NCDR) before entering the fray of family court litigation.

'Encouragement' arrived in the form of the FM5, the risk of proceedings being stayed, and costs orders for non-compliance with the revised pre-action protocol.

Looking ahead, the underlying context of the Law Commission's review of English financial remedy law is that the uncertainty in our discretionary system makes it hard to predict outcomes, which makes it difficult to negotiate, which leads to litigation that could otherwise have been avoided. Lord Bellamy KC suggests that the need to review financial remedy law is because it is 'in everyone's interest to remove acrimony from the process wherever possible … support separating couples and avoid unnecessary conflict.'[7]

However, as HHJ Hess highlights in the Spring 2025 issue of this journal, if from a pool of 45,000 financial remedies orders only 7% reach a final hearing each year, is it necessarily the case that those residual cases fight to the bitter end specifically because the law has some degree of uncertainty?

What percentage of the cases that reach a final hearing do so due to entrenched conflict between the parties, rather than a dispute about the law? Is it possible that the review of the law of financial provision on divorce is at least partially a red herring? Is there a more direct path that could achieve the stated aims of removing acrimony and reducing conflict?

The United Kingdom's withdrawal from the European Union freed us to continue to develop and shape our law as we see fit. We can seek inspiration from jurisdictions around the world and adopt the best ideas wherever we find them.

In October 2024, the Presidents of both the English and Singapore Law Societies signed a Memorandum of Understanding in which they renewed a mutual commitment to collaborate between legal communities and to share best practices between the professions.

Against that background, the intention of this article is to consider what England might learn from recent developments in how Singapore deals with financial remedies on divorce.

Re-casting the landscape?

Divorce is one of the most emotionally destabilising events a person can go through. Our clients' minds are often impaired by a debilitating mix of emotions: grief, fear, anger, confusion and a sense of overwhelm. The instructions that we receive from our clients in such circumstances are not always rational.

Simultaneously, the legal profession is riddled with bad incentives. If we make every effort to save our clients from the costs, risks and strain of litigation by calmly negotiating balanced and realistic settlements – we are financially penalised for doing so. Also, the opaque methodologies of the main directories and awards traditionally appeared to reward those who are regularly involved in reported cases, which ignores the fact that behind every reported case is a family that have been subject to the relentless misery of high conflict litigation.[8] Cases that are quietly and constructively resolved have less visibility.

Our family justice system should guard against bad actors who are determined to exacerbate conflict. We can and should continue to build on the objectives that lay behind the introduction of no-fault divorce, and the recent developments in favour of NCDR. Is it possible to go further? Can the philosophical landscape of our work be re-cast in a way which explicitly disincentivises acrimonious behaviour and which instead treats the Financial Remedies Court primarily as a problem-solving environment?

Singapore's Therapeutic Justice Model

High-conflict divorce has long-term psychological and emotional consequences for the parties, and for their children, and for subsequent generations, which in turn has implications for society as a whole.

As a response to this problem, the Singapore Family Justice Court (FJC) has, since 2020, increasingly incorporated ideas of Therapeutic Justice (TJ) into its structures, rules and procedures, and training.

In TJ, focus is placed on the law's impact on psychological and emotional well-being. The law is regarded as a social force capable of both influencing behaviours and producing outcomes.[9]

Adopting this philosophy, TJ at the FJC is designed to help families accept the past and move towards their best possible future. It involves a judge-led process where parties and their solicitors, along with other professionals, work together to find timely and enduring solutions to the family's disagreements, within the framework of the law.[10]

To meet the aims of TJ, the TJ Model sets out TJ Objectives,[11] which include the following:

(1) Parties are to resolve their family disputes amicably, as far as possible. Where feasible, parties are to resolve disputes out of court.
(2) If a case requires the court's intervention, everyone involved should endeavour to reduce acrimony and de-escalate conflict, wherever possible.
(3) Parties are to focus on resolving their underlying issues in the long-term interests of the family and children, and not just on short-term legal goals.
(4) Where children are involved, their welfare should be prioritised.
(5) Parties are to be accorded, and to accord others, respect, attention, empathy and support. Parties should feel that they have been given a voice and have been heard.
(6) For outcomes to be timely and enduring, so that parties may move forward; and are enabled and equipped (e.g. with enhanced co-parenting skills) to resolve any future disagreements and issues amicably by themselves, without having to resort to further litigation in court.

In her annual lecture for the 34th Singapore Law Review[12] on 24 March 2023 and in a speech delivered at Conversations with the Community[13] on 16 November 2023, the Honourable Justice Debbie Ong shared the thought process behind the design of the TJ Model:

> '• In the common law adversarial system of litigation, it is believed that justice is achieved when the truth emerges as parties single-mindedly pursue their own interests. The assumption is that the truth emerges when each litigant presents their best arguments to the court.
>
> • However, unrestrained litigation in the family arena shatters the relationship between the parties, and prolonged conflict results in negative long-term consequences for the parties and their children.
>
> • The adversarial system is not just unsuitable, it is harmful to continuing relationships. A system of litigation which incentivises or even allows the waging of war must be avoided.
>
> • Family proceedings are unique and therefore need an approach that is different from other types of court proceedings.
>
> • Therapeutic Justice is a lens of "care". Through

this lens, we examine the extent to which substantive rules, laws, legal procedures, practices, and the roles of the legal participants, produce helpful or harmful consequences.

- Therapeutic Justice obliges the legal participants to think about whether the system and processes and how they play their roles support the family in moving forward positively.
- In the family context, going to court should be reframed as a place to go for problem-solving and resolution. The court can and should be an active force to improve the parties' wellbeing. It is about putting an end to what has already broken, recasting plans, and moving on.
- The system itself should disincentivise parties from using the law in an adversarial manner.
- In family proceedings, the court looks ahead to support the family in recasting their future; it exhorts parties not to look back at the past to lay blame or re-live their hurt or pain, but to let go and focus on building a positive future despite the breakdown.
- In this system, the court is a place for problem-solving and resolution, rather than a battlefield.'

The TJ approach to family law is a way of transforming the court process by infusing it with a spirit of problem-solving, collaboration, and even healing. It encourages pro-active collaboration between lawyers, judges, counsellors and social workers to address the root causes of conflicts, such as emotional distress, miscommunication or trauma.

TJ provides a framework within which all family justice participants can work together to better support parties by equipping them with the necessary skills to be their own conflict managers and problem-solvers.[14]

Rather than displacing the court system, TJ keeps the court process intact but emphasises creative, less adversarial solutions to disputes.

Practical implementation of Therapeutic Justice

Under the TJ Model, each participant of the process thus has an important role to play.

TJ is a judge-led hybrid model which balances traditional adversarial processes with interventionist, inquisitorial practices to guide the proceedings and achieve solutions that are both equitable and healing.[15] In addition to performing an adjudicatory role, the family judge has a problem-solving role and functions as a conflict manager overseeing, coordinating and motivating the participants, to customise the most appropriate approach for each case.[16] The hybrid model focuses on *flexibility* and *context-specific problem-solving*, rather than adversarial litigation, reflecting the unique nature of family law.

The family lawyer, who comes into contact with parties well before the court does, plays an important part in advising the client on the right approach to adopt from the outset.[17] Family lawyers are mandated by the FJC's Practice Directions[18] to bring the TJ Model to the attention of, and to explain to, their clients, to encourage the client to focus on the long-term holistic interests of the family/children, facilitate problem-solving and collaborate with the court and the other party to generate options and solutions, as well as making reasonable proposals and adopting a cooperative and constructive approach in conducting court proceedings. Legal professionals are encouraged to adopt a collaborative mindset, focusing on the well-being of families and facilitating solutions that serve the best interests of all parties involved. To encourage conduct by solicitors that is aligned with the TJ Model, the judge (whether a mediation judge or a hearing judge) may commend solicitors who have displayed such conduct at the conclusion of the proceedings and/or in the court's written decision.[19]

The parties themselves are expected to conduct themselves to a certain standard. They are encouraged to prioritise the interests of children, focus on the future and parties' shared interests, adopt a cooperative and constructive approach, and make genuine attempts to resolve issues amicably, such as making reasonable proposals at mediation.[20]

Under the TJ Model, the cases filed under the 'Partial Simplified' or 'Non-Simplified Track' may be allocated to the 'Standard Track' or the 'Teams Track'. Under the Teams Track, high-conflict cases will be managed by a multi-disciplinary team comprising a mediation judge, a hearing judge and Court Family Specialists (CFS) (collectively, the 'Team'). Generally, the same members of the Team will manage the case, including linked cases (if any) involving the same family, from an early stage until the conclusion of the case. 'Linked cases' include guardianship applications, applications for personal protection orders against family violence and maintenance (child financial support) applications. The Team works collectively to address both legal and non-legal aspects of family disputes, ensuring comprehensive support for families.[21]

The FJC has also established a Panel of Financial Experts (POFE) comprising of public accountants or financial forensic professionals to provide financial valuation reports to assist the divorcing parties to better understand their financial situation. The professionals would, for instance, value company shares or real estate, thus facilitating fair and objective resolutions in contentious matters. [22]

To encourage adherence to TJ principles, the courts have incorporated cost considerations as a mechanism to influence parties' conduct during proceedings.[23] This framework allows the court to impose cost penalties on parties who do not adhere to TJ principles, such as:[24]

- failing to participate in mediation without good reasons;
- filing numerous applications and affidavits, and contesting application(s) 'aggressively';
- engaging in unnecessary and voluminous paperwork and extending the dispute into a 'protracted and bitter fight';
- using the court process as a platform to make personal attacks or insult the other party;
- alienating behaviour and excessive gatekeeping of children;
- insisting that the court addresses each and every point in the dispute, regardless of significance or merit;
- filing voluminous affidavits consisting of irrelevant information and/or unnecessary documents, photographs and video recordings of the children, which may also be detrimental to the parent–child relationship.

TJ integrates legal processes with psychological and

emotional support to achieve outcomes that prioritise the well-being of families and children. In the TJ Model, counselling and psychological services thus play an integral part:

- Prior to commencing divorce proceedings, the applicant (in contested proceedings) or both the applicant and the respondent (in uncontested proceedings) are required to complete a Mandatory Co-Parenting Programme (CPP). CPP involves an e-learning session, as well as a consultation session, which seek to help parents make informed decisions in relation to their marriage, encourage joint decisions on divorce in the interests of their children's well-being, address co-parenting concerns, develop a co-parenting plan, and support parents in coping with the divorce.[25]
- When undergoing a divorce, parties with at least one child below 21 years of age are required to attend mediation and counselling. The counselling sessions seek to resolve issues relating to the divorce and care arrangements for the children, and help parties gain insights and strategies to find better solutions to their disputes in the best interest of their children. The CFS may facilitate parties to identify significant issues that are important to the family and children; resolve underlying conflicts; develop skills to manage difficult and painful emotions; communicate effectively in relation to the needs of their children; and build a consensus on the interim and future care arrangements for their children.

The TJ Model relies heavily on the legal professionals who are not only equipped with the knowledge of the law, but various competencies and skillsets required to practice TJ. These include knowledge of the TJ Model; soft skills and techniques, such as interpersonal and communication skills; knowledge of basic social science concepts; familiarity with the different types of therapeutic or other related support services/programmes that are available; knowledge of wider multi-disciplinary topics that can help parties in practical ways; and family mediation skills. To equip family judges and lawyers with the necessary problem-solving, negotiation and communication skills, there are various training programmes which are made readily available:

- The Singapore Mediation Centre and the FJC jointly organise and run the Family Mediation Certification Programme for both judges and lawyers.[26]
- The Singapore Academy of Law and the Singapore University of Social Sciences jointly organise and run the Family Lawyers' TJ Certification Programme.[27]
- Each year, the FJC and the Family Law Practice Committee (FLPC) organise a 2-day long Family Conference, with the aim to trace the development of Singapore family law over the last decade while keeping an eye on how this shapes what lies ahead. The Conference also includes masterclasses where senior members of the Bar also share their insights and tips on the practical aspects of family law practice.[28]

Therapeutic Justice in other jurisdictions

Singapore is not the only country which is seeking to embed problem-solving, well-being and mental health awareness into family law practice.

Australia has Family Relationship Centres which provide pre-litigation counselling, mediation and parenting programs, which aim to resolve disputes before court proceedings. Also, except in cases of urgency, or where there has been violence, parties seeking financial relief in Australia are obliged to take genuine steps to try to resolve matters outside the court system before instituting proceedings for property settlement and/or spousal maintenance. This requires, in general terms, that parties to a marriage (or *de facto* relationships): exchange financial disclosure materials; make proposals for settlement; participate in ADR; and give prior notice of the intention to start a case, including identifying the matters in dispute and the orders that will be sought if proceedings need to be commenced under the Family Law Act.[29]

Several provinces in Canada have Unified Family Courts (UFCs) which offer a single access point to mediators, social workers, psychologists and parenting coordinators to provide a one-stop solution for family disputes. Families can receive parenting education, counselling or referrals to community-based therapy and support services. UFCs preserve the structure of the legal system while recognising the human side of family breakdown.[30]

Conclusion

As family law continues to evolve, both in England and internationally, there is growing recognition that traditional adversarial litigation is often ill-suited to resolving the deeply personal and complex disputes that arise on divorce.

The recent reforms in English family law, from no-fault divorce to the increased emphasis on NCDR, reflect a broader shift towards a less contentious, more solution-focused approach.

However, while English NCDR and Singapore's TJ have unarguable goals, in practice, it does remain necessary to retain access to a robust, properly timetabled court process, when required. Not all conflict can be softened. There are cases involving severe power imbalances, allegations of abuse and coercive behaviour, concealment of assets, and individuals who, for a variety of reasons, can be determined to be as obstructive as possible or to approach matters as aggressively as possible. Sometimes, resolution can only be achieved by challenging and containing difficult behaviour. The adversarial model provides equality of arms, due process and the testing of evidence. The process has teeth.

However, therapeutic principles can still be integrated into the system, by re-shaping the culture of practice and including mechanisms which seek to pre-emptively prevent conflict from arising in the first place or which steer parties away from unnecessary escalation, all the while protecting individual rights, testing truth, and keeping bad actors in check.

Singapore's TJ provides us with a set of ideas and practices which we might use as inspiration to continue to enhance our own culture and practice in a way that places the long term well-being of the parties and their children at its core.

Notes

1 Alvin Tan, *Singapore – A Very Short History, From Temasek to Tomorrow* (Talisman Publishing, 2020).
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3 Eugene KB Tan and Gary Kok Yew Chan, 'The Singapore Legal System' (2015), *Laws of Singapore*, Research Collection School of Law, https://ink.library.smu.edu.sg/sol_research/466
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6 Russell Cooke's family team, in 'Family/Matrimonial: High Net Worth: Introduction to London (Firms), available at https://chambers.com/content/item/4834.
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8 The Inaugural Class Legal Awards 2025 are the first to explicitly include settlement rate and proportionality of costs, and the Legal 500 rankings now include the Client Satisfaction ranking which emphasises client feedback and the quality of the client experience, providing a more holistic view of a firm's performance.
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Flo, *FI v DO* and the Future: Dogs on Divorce

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Flo

Meet Flo. She is my Cavalier King Charles Spaniel. I know I am biased, but she is beautiful and is a key member of my family. I bought her with my very first pay cheque from my work as a barrister and she has been with me ever since. She is my trusty companion.

In the days of twitter, Flo would regularly feature alongside short summaries of recent family law cases. She would always attract more 'likes' and 'retweets' compared to the reported cases on which I would comment! Flo has appeared in the Law Paw Charity Calendar for Billable Hour, complete with my wig and gown. She is a regular member of Sunday Homework club, although her contribution is often of the snoring kind. And who can forget remote hearings through COVID-19 lockdowns, as despite a long morning walk and a tonne of treats before the hearing started, there was often a distant bark or whimper mid-hearing coming from downstairs. She is sitting at my feet as I pen this piece. I know I am not alone in sharing how special Flo is to me. Friends, colleagues and contacts in the legal world often talk to me about their pets, whether that be a pooch, a pet of the feline variety or another beloved animal.

So, why bleat on about Flo? Well, at present, the financial remedies world is talking a lot about pets on divorce. One only need consider the recently reported case of *FI v DO* [2024] EWFC 384 (B), peruse LinkedIn to see articles about so-called 'pet nups', or consider the material generated by the Pets on Divorce Working Group to appreciate the point. Pets are often regarded as treasured members of the family and are sentient beings, and what happens to our beloved pets on divorce is a hot topic.

Current law

So, what's the current state of the law?

The law is trite. Pursuant to s 24 Matrimonial Causes Act 1973 the court is able to make property adjustment orders, which includes orders against not only bricks and mortar, but also chattels and personal property.

Put simply, Flo is a chattel.

If I was to divorce, the Financial Remedies Court (FRC), or an Arbitrator, could make an order in relation to Flo. Of course the tribunal's job would be to achieve an outcome which is 'as fair as possible in all the circumstances', per Lord Nicholls at 983H in *White v White* [2000] UKHL 54, [2000] 2 FLR 981, but I am almost certain that if the order provided for me to retain Flo, her co-owner would regard that as totally unfair, as I certainly would if the order was the other way around.

So, *how* does the court exercise its discretion when dealing with chattels and personal property? This question has already been tackled by Nicholas Allen KC (who beat me to it) in his erudite blog post 'Chattels: What If They Are *Not* to Be Divided by Agreement?'[1] published on 28 April 2025 on the FRJ Blog. Although I could never do justice to Nick's piece, which I urge readers to consider in full, the main points can be distilled as follows:

(1) There exists *some* guidance as to the appropriate mechanism when dealing with division of chattels.
(2) One such case is *K v K (Ancillary Relief: Property Division)* [2005] EWHC 1070 (Fam), [2005] 2 FLR 1137, a decision of Baron J, in which Her Ladyship said, 'in my experience, the division of chattels can often be problematic, particularly where items of sentimental value are concerned'. The parties in *K v K* owned £330,000 of

valuable antiques in relation to which no steps had been taken to resolve, or even narrow, who was going to keep what prior to the commencement of the trial. After observing the costs of the litigation thus far, Her Ladyship did not relish the prospect that there might have to be another round of litigation dealing with chattels, saying such would be 'unacceptable'. The caution:

> 'Solicitors must not forget chattels. As a matter of practice, the division of chattels must be accomplished prior to trial (with a clear schedule denoting the destination of items). If the parties cannot agree, then a Scott schedule must be completed with the items marked as agreed or remaining in dispute. The schedule should set out, in very short form, the reasons why any particular item is sought.'

At the court's direction, the parties drew up a schedule and agreed a mechanism to resolve the issue.

(3) *Rayden & Jackson on Relationship Breakdown, Finances and Children* refers only to *K v K* as giving guidance on dealing with valuable chattels. This is not perhaps surprising given the paucity of authority on the point.

(4) There is even less authority on *how* the jurisdiction should be exercised.

(5) Proportionality must not be forgotten. In *B v B* [2013] EWHC 1232 (Fam), by all accounts a big money case, Coleridge J said:

> '[54] Although the parties are to be applauded for achieving agreement on many of the major issues and certainly cannot be criticised for the disagreement over the apportionment of the [MB] funds, a mild rebuke is justified over their approach to the lesser assets. The small differences (as a proportion of the pot) in the value of the yacht, the approach to cars, the credit cards etc, etc does not merit the time (and costs) spent on them. As the rules now make clear, proportionality is the name of the game when costs are so high and court time is more and more at a premium. A much more rigorous approach to case management (especially in the field of the employment of experts) is being introduced in other areas of the family justice system to save precious time and money. This type of high value litigation cannot expect to be immune and parties to it can expect to be confronted more and more by a refusal by the court to participate in these disputes over the lesser assets and where in each case the difference is around 1% of the net value of the pot or less. Assets falling in this category should be bundled up together and an overall value for them all agreed. If not the court is itself likely to apply that system in a broad, even rough and ready, way. As Mr Marks QC observes the pursuit of precise accuracy is a spurious and vain endeavour where the figures are in most cases derived from professional valuations and opinion and assets are not being sold anyway.
>
> [55] Paragraph 54 above has been seen and approved by the President.'

(6) Whilst a 'chattels' claim is not brought under s 188 Law of Property Act 1925, the breadth of the discretion therein is wide:

> 'Where any chattels belong to persons in undivided shares, the persons interested in a moiety (i.e. one of two parts) or upwards may apply to the court for an order for the division of the chattels or any of them, according to a valuation or otherwise and the court may make such order and give any consequential directions as it thinks fit.'

(7) Moylan J (as he then was) in *RK v RK (Financial Resources: Trust Assets)* [2011] EWHC 3910 (Fam), [2013] 1 FLR 329, said:

> '[89] It is not unusual for chattels which have been purchased during the course of a marriage with funds provided by a relative or by way of inheritance to be divided between the parties as part of a fair division of the former matrimonial home's chattels …'

The main chattels dispute concerned a painting purchased using part of an inheritance from the husband's family. However, I will drop a marker here and return to it below, as *RK v RK* also concerned a dispute about the family dogs.

(8) Other authorities touching on the topic, but at the same time not really providing any general guidance, include:

(a) *Re C (Divorce: Financial Relief)* [2007] EWHC 1911 (Fam), [2008] 1 FLR 625, another Baron J decision this time concerning an aeroplane valued at £120,000;

(b) *Joy v Joy* [2015] EWHC 455 (Fam), a decision of Singer J, pertaining to an application to secure a Bentley motor vehicle so as to satisfy other orders;

(c) *G v T* [2020] EWHC 1613 (Fam) in which Nicholas Cusworth QC (sitting as a deputy High Court Judge) excluded from the asset schedule contents and artwork finding that an *in specie* division could be discussed and arranged, including as their value was *de minimis* in the context of the case and the issues in dispute; and

(d) *KFK v DQD* [2024] EWFC 78 (B) in which Recorder Rhys Taylor, in the context of both parties seeking to retain the contents of Flatacre, said:

> '260. … the overriding objective includes the requirement to allot an appropriate share of the court's resources to the dispute, whilst taking into account the need to allot resources to other cases. This case has now had its fair share of judicial time.'

Recorder Rhys Taylor gave the parties 28 days to resolve the issue of division with liberty to restore within 35 days before him, at the same time expressly reserving the option of the items being sold on eBay or the like, with the parties each being free to bid for items or to enjoy a 50/50 division of whatever net sum is produced from the sale.

Nick drew the threads together as follows:

'What may perhaps be taken from foregoing (in no particular order) is:

1. As the court is making a property adjustment order under MCA 1973, s 24(1)(a), it must apply s 25. It is therefore the court's duty to have regard to all the circumstances of the case giving first consideration to the welfare of any child or children of the family who is under 18. The court must have particular regard to the matters set out in s 25(2).
2. The court's objective is to achieve fairness (*White v White* [2000] 2 FLR 981 per Lord Nicholls of Birkenhead). It goes without saying that this involves fairness to both parties. There is no place for discrimination between husband and wife.
3. The authorities (such as they are) mainly focus on the mechanics of division rather than the principles of division.
4. Parties may agree that chattels are to be divided by value and/or number (but may also not so agree).
5. Parties may base their claim on little more than "I want that chattel because …" – i.e. no legal/beneficial entitlement needs to be evidenced.
6. It is not unusual for chattels purchased during a marriage with non-marital monies to be divided between the parties as part of a fair division.
7. From a court's perspective – where it is required to give effect to the overriding objective (and which includes at r 1.2(b) "dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues"; (d) "saving expense"; and (e) "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases") – proportionality is key and the court's approach to division may be a broad and potentially robust/simplistic one.
8. The overriding objective does not apply to arbitration proceedings in the same way particularly as parties may choose to arbitrate what they wish at their joint cost (subject to any order for costs that may be made) and r 1.2(e) does not apply in the same way. However, this does not mean that an arbitrator ought not take a proportionate approach to issues such as these not least because Coleridge J's observation in *B v B* at [54] that "the pursuit of precise accuracy is a spurious and vain endeavour where the figures are in most cases derived from professional valuations and opinion and assets are not being sold anyway" is of general application.'

But what about Flo? Flo isn't an antique, although she is now more mature. She isn't a Bentley. She isn't the photograph which hangs above the hearth purchased with inherited funds. Flo is a dog, and part of my family. Should she be treated by the court in the same way as other chattels on divorce?

Pet nups

One option for parties to deal with the potential fall out as to the fate of a family pet on divorce is to make an agreement ahead of time. As we know from *Radmacher v Granatino* [2010] UKSC 42 'the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement'. Absent successful challenge to a nuptial agreement, the terms, in most cases, prevail. With sufficient foresight, a nuptial agreement could cover what is to happen to a pet on separation, after all, a pet is a chattel.

A simple perusal of the web throws up ample articles on so-called 'pet nups', with considerations including ownership and 'custody', financial responsibilities, contact with the non-resident party, and what happens to the dog if the owner dies or moves. In my own practice at least two nuptial agreements have included clauses about pets.

But what about those cases where there is no 'pet-nup'? What does the court do? There is a scarcity of authority expressly dealing with family pets.

FI v DO [2024] EWFC 384 (B)

The decision with which most readers will be familiar is *FI v DO* [2024] EWFC 384 (B).

FI v DO is the first instance decision of District Judge Crisp, who was dealing with a financial remedies claim following a 12-year marriage. The parties had two children, who at the time of the hearing lived with their mother, having no contact with their father. Then there was, N, the family dog, in relation to whom the husband had issued an application seeking a declaration of ownership and a shared care arrangement. Initially the wife sought to keep N in her care but with periods of contact between N and the husband, however following an incident in December 2022 (referred to in the judgment as an alleged abduction) her position changed such that she no longer supported any contact. District Judge Crisp, who described the dispute concerning N as the 'thorny issue' between the parties, had the task of determining N's fate.

On the one hand the husband argued that he purchased N, with the wife making no financial contribution thereto. He claimed N was trained by him and that she was registered as his disability support dog, in support of which he produced a letter from his medical practitioner. N was required, on the husband's case, to assist him with his anxiety and depression. The wife had not looked after N post-separation, including a failure to feed and walk her, so said the husband, who, overall, asserted that he had become N's sole carer.

On the other hand, the wife claimed the parties jointly purchased N, following the loss of their former dog which caused much upset for the children, with their daughter using £320 of her birthday money, the wife contributing £280, and the husband paying the balance of £600. The wife pointed out that she was N's registered keeper, had registered N at the Kennel Club and paid for all N's upkeep. The wife also disputed that N was ever registered as a disability support dog in the currency of the parties' relationship.

As to the alleged abduction, the wife accused the husband of taking N, with force, from her own mother whilst she was walking N. The police were called, and the husband was reported to the RSPCA. N returned with damaged paws from being dragged. The husband's account differed. He claimed N was running freely, that he took her

and she was happy to go with him. When cross-examined, the husband explained he had been exercising his legal rights and compared his superior rights over the rights of the wife's mother. The husband however accepted N had run back to the family home, where the wife was living, and that he had followed. He denied dragging N.

Having read and heard the evidence, in relation to N, District Judge Crisp found:

(1) N's registration as a support dog first occurred in February 2024. If N had been registered as a support dog before this point, it would have been easy to go onto the internet to obtain a copy of previous registrations. Fortified in this conclusion, District Judge Crisp noted that the husband's earlier civil claim and letter before action, written in January 2024, did not ask for return of N because she is a support dog but rather that the husband wished N to be delivered up, or a shared care arrangement implemented, together with a money claim of £39,600 for the loss of litters during N's lifetime. The husband registered N as a disability support animal to support his claim in the financial remedy proceedings that she should be returned to him.
(2) Although irrelevant to the issues in the case, the parties jointly purchased N.
(3) The wife's evidence was compelling when she said 'I would not force a dog to come away when he didn't know me' when talking about the alleged abduction. The wife has lived with dogs all her life and they are an integral part of her and the children's lives.
(4) The husband has no inclination as to the upset that will have been caused to the wife's mother, the wife and the children when he forcibly removed N from the grandmother outside the family home.
(5) The children see N as their dog.
(6) The husband fails to see the implications of his action on the family and on N.
(7) As to the allegation the wife did not care for N post-separation, the wife's evidence was far more in tune with someone who has the welfare of N at heart.

District Judge Crisp was referred to the decision of *RK v RK* in which Moylan J (as he then was) said this concerning the dog:

> '85. There are a few subsidiary issues I must determine, including the wife's claim to a painting and to one of the family dogs. On the latter issue, I do not consider it appropriate to make any order in respect of one of the dogs because, on the evidence I have heard, they would seem to have been looked after principally by the husband.'

So, how did District Judge Crisp approach the dispute concerning N?

She observed:

> 'The legal authority to which I have referred provides assistance as to who has principally looked after the dog. Not who has purchased the dog, that fact in my view is not as important as who the dog sees as her carer. This is not who had previously looked after the dog, but who does now. It is an agreed fact that the parties separated and the dog has been cared for solely by the wife since that separation some 18 months previously. I accept what the wife says 18 months is a long time in a dog's life. It was clear when the dog ran back to the family home after he had been taken by the husband that the dog considered that to be a safe place and where he belonged. The wife's evidence as I have set out was compelling but more importantly in my view showed someone who understood about dogs, was compassionate and would always put the dog's interests first. The dog's home is with the wife, and she should stay there. It would be upsetting for both the dog and the children were those arrangements to alter. The husband has managed without a dog for 18 months and it does not therefore seem necessary for his support, even if that were the case which I do not accept was the position at the time the parties separated.'

As you may have guessed, District Judge Crisp ordered that the wife retain ownership of N.

The excerpt above succinctly summarises why, for District Judge Crisp, N was to remain with the wife. The care of N post-separation was relevant, as was the wife's demonstrable understanding about and compassion towards dogs, coupled with the importance of N to the children of the marriage who lived with their mother. These considerations simply do not crop up if the issue is, for example: Who gets the living room coffee table?

FI v DO generated a lot of attention. Readers of the FRJ Blog will perhaps recall the blog post 'On Dogs and Divorce'[2] by District Judge Hatvany published on 21 January 2025. Readers of the Blog met District Judge Hatvany's treasured companion, Ernest, the English bull terrier, and were treated to a photo of him reclining on a chaise longue doing his best Kate Winslet impression *à la Titanic*. District Judge Hatvany postulated: How can Ernest have the same legal status as a settee? He went on:

> 'Our legal system has a reputation for being the finest on the planet. Yet in court, the legal test for who gets to keep the family dog is the same as that for any other inanimate content of the family home.'

The post ends with a plea (and a poem):

> 'In a legal system that prides itself on fairness and humanity, treating pets as chattels is both a relic and a betrayal. Has the time not come for the law to recognise the reality that animals are neither property nor mere ornaments in our lives? They are, like Ernest, our companions, confidants, and occasionally our greatest source of chaos and amusement.
>
> "So here's my plea for a legal shakeup
> treat pets like family, not just a breakup
> for Ernest's no chair no trinket no tat
> he's priceless, and frankly he'd agree with that!"'

Following the President of the Family Division's recent guidance on 'Citation of Authorities: Judgments of Circuit Judges and District Judges',[3] published on 24 February 2025, read alongside the approved list of judgments in cases below High Court level[4] which have been retrospectively certified as suitable for citation pursuant to the said Guidance, *FI v DO* is not a citable authority. It nevertheless gives us an insight into how District Judge Crisp dealt with the issue in the case before her. *RK v RK*, to which District Judge Crisp refers in *FI v DO*, is of course a citable case, being a High Court decision, and whilst the dog in that case is dealt with in one line, that one line does refer to the husband having cared for the dogs after separation.

What if Flo was a snow dog or a beach dog?

If Flo lived with me in a beautiful chalet in Whistler, British Columbia (albeit she doesn't like the snow), and I were to divorce, how would the court deal with Flo? Is the law as it is here? In short, no.

Whilst I am not a Canadian family lawyer, I understand[5] that following changes to British Columbia's Family Law Act, which came into force in January 2024, a 'companion animal', defined by s 1 as 'an animal that is kept primarily for companionship',[6] is treated differently to other property when it comes to decisions about possession and ownership. Pursuant to s 92[7] separating or divorcing spouses can make their own agreement about the possession and ownership of a companion animal, which may include jointly owning a companion animal, sharing possession of a companion animal, or giving exclusive ownership or possession of a companion animal to one of the spouses. If, however, agreement is not possible, s 97[8] permits a spouse to ask the court to decide who will have possession and ownership of a companion animal. The factors for consideration include: (1) the circumstances in which the companion animal was acquired; (2) the extent to which each spouse cared for the companion animal; (3) any history of family violence; (4) the risk of family violence; (5) any cruelty or threat of cruelty toward the animal by either spouse; (6) the relationship between a child and the companion animal; (7) the willingness and ability of each spouse to meet the basic needs of the companion animal; and (8) any other circumstances the court deems relevant. There are some limitations, in that the court can only make an order for ownership and possession of a companion animal by one spouse. The court cannot declare that spouses jointly own the companion animal or require spouses to share possession of the companion animal. The criteria are however clear, and they provide a guide for the judiciary where the fate of a companion animal requires adjudication.

As of April 2025, is has been reported in the Canadian press[9] that, for the first time since the recent changes to the Family Law Act, a judge has awarded custody of a family pet in a divorce. Justice Maegen M Giltrow made an order that Toba, a beloved pet dog, should remain in the care of the wife following the divorce proceedings. The judge emphasised that whilst pets are still regarded as personal property, under the new laws the court has discretion to consider who is most equipped and best suited to care for the pet, and on the facts that was the wife. It is clearly recognition of the importance of pets as sentient beings.

Let's hop on a plane. What if I decided to relocate to the Gold Coast in Brisbane and bring Flo with me (she does love the beach). If I were to divorce, what would happen to Flo?

Well, very shortly, hot on the heels of British Columbia, Flo might well be treated by the court in the same way as she would in Whistler. By the time of publication of this piece, legislative amendments[10] very similar to those in British Columbia will have come into effect (as of June 2025). The criteria for consideration are as follows: (1) the circumstances in which the companion animal was acquired; (2) who has ownership or possession of the companion animal; (3) the extent to which each party cared for, and paid for the maintenance of, the companion animal; (4) any family violence to which one party has subjected or exposed the other party; (5) any history of actual or threatened cruelty or abuse by a party towards the companion animal; (6) any attachment by a party, or a child of the marriage, to the companion animal; (7) the demonstrated ability of each party to care for and maintain the companion animal in the future, without support or involvement from the other party; (8) any other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

I could continue to globe trot (Flo is always up for an adventure) as there are other examples from other jurisdictions as to the different treatment of pets on divorce as compared to the jurisdiction of England and Wales. However, not being greedy and being satisfied with a snow and a beach break, looking at the framework in two commonwealth countries, Canada and Australia, demonstrates how differently pets are treated when their owners divorce. Specific legislation requires the court to consider a list of careful criteria to ensure that the best decision is made for the animal concerned.

The future?

Alongside the international financial remedy practitioners who might be thinking about a *forum conveniens* argument (which is outwith this piece), if I were to move to Canada or Australia, the devil's advocates amongst you may pose the question: 'Is there any reason why some, or all, of the above factors couldn't be considered by the FRC absent specific legislation on the point?' District Judge Crisp certainly considered several of the factors in *FI v DO*. But does the hope of litigating this very issue before a judge who is prepared to engage with some, or all, of the above factors offer sufficient protection for beloved pets on divorce? Some, and probably many, would say 'no'.

Many readers (especially the animal lovers amongst you) will likely be familiar with the 'Pets on Divorce Working Group' (the Working Group). Spearheaded by Estella Newbold-Brown, Head of Family Law at Amphlett Lissimore, and Sarah Lucy Cooper of Thomas More Chambers, the Working Group comprises a set of professionals spanning the legal profession (and beyond) who are dedicated to bring about legislative change to ensure pets are treated differently to other chattels on divorce. The Working Group has a LinkedIn page which contains a raft of information about its aims and progress. I can vouch for the cute photos of the members' pets.

Sarah Lucy Cooper, one of the co-founders, recently noted that:

> 'the whole of the UK is sadly becoming an outlier as the examples [the Working Group] have collated from many other jurisdictions clearly show. Australia, Argentina, Colombia, Spain, Portugal, France, Italy, New Zealand, many states of the USA, and many states of Canada are just some of the jurisdictions where domesticated animals have a different status to other chattels on divorce.'[11]

Moving forward, I understand that there is a forthcoming short survey to be circulated by Resolution, the Family Law Bar Association and the Scottish Family Law Association on behalf of the Working Group designed to understand how common pet disputes are. The issue is also drawing traction

in the wider media with members of the Working Group appearing on local and national radio shows.

Supporters of the Working Group have also been encouraged to contact their MPs, and the issue has already reached the House of Lords. In February 2025, Baroness Berridge, during the debate on Prenuptial Agreements,[12] highlighted the issue. The Baroness began by noting that:

> 'there are currently about 13 million dogs and about 10 million cats as pets, so it is actually not a minority issue. The United Kingdom is becoming something of an outlier legally in relation to this. I am sure the noble Lord, Lord Meston, from his role at the International Academy of Family Lawyers, will be aware of this as well. The recent decision of District Judge Crisp in *FI v DO* on 20 December last year in the Manchester family court outlined what might become a test for other cases to decide, as in that case, who gets custody of the dog.'

The speech continued by acknowledging that a change in the law could avoid some litigation, or at least that is what she hoped.

Baroness Berridge then referred to District Judge Hatvany's blog post, and in so doing noted that the 'niche professional journal got a large response to this blog piece on pets'. As Blog Editor, I can confirm it did indeed. Noting that change has happened, or is happening, in other jurisdictions, the following examples were referenced: (1) Colombia amended its law in 2016 and its case-law recognises that emotional bonds to animals within families do not equate to making animals equivalent to humans; (2) proposals are apparently afoot to amend the Italian legal code to 'regulate the custody of family pets upon separation or divorce'; and (3) New York has a best interests test on deciding the custody of a companion animal.

Towards the conclusion of her speech, the Baroness posed the following questions: 'Do His Majesty's Government have a view on pets in prenuptial agreements and on whether they should continue to be considered chattels? Is the committee that your Lordships established under the Animal Welfare (Sentience) Act 2022 looking at this matter?'

Sir Nicholas Mostyn, former High Court Judge (and a fellow Swiftie), has shared his wisdom on the topic too:[13]

> 'As a retired High Court Family Division judge and the co-owner of a beloved miniature dachshund, I am well able to understand the additional stresses that disputes about pets can cause on divorce. Pets should not be treated by the Courts merely as another chattel, equivalent to the family car or a grandfather clock, as Baroness Berridge rightly argued in the House of Lords on 27 February 2025. Pet owners know that pet welfare demands a different approach. I commend this project to bring about a much needed change. This is a huge step forward for the Pets on Divorce working group.'

Who could disagree with Sir Nicholas?

Flo is my sidekick. If ever I found myself in dispute over Flo, the lawyer in me would say, let's sit around a table and be sensible about this, failing which let's arbitrate the issue, having FPR Part 3 in mind. But if agreement was not possible, as things stand, if there had to be a determination of Flo's fate, the outcome would be uncertain and there is no guarantee that factors relevant to her welfare would be considered by the court. Would the court even engage with the issue? Would my and her co-owner's skills at caring for Flo be poured over by the court? Would the fact I bought her carry any weight, even if not decisive? Would she be treated as just any other chattel?

For now, we await what may come, especially with the determination and enthusiasm of the Working Group at the fore. Watch this space.

Postscript: Having shared a draft of this piece with Flo's co-owner, he suggested the answer is simple: put Flo in the centre of the room with one of us to her left, and the other to her right, and allow her to pick. As much as she is my little shadow, I hate to admit it, but his confidence that she would choose him is probably not misplaced!

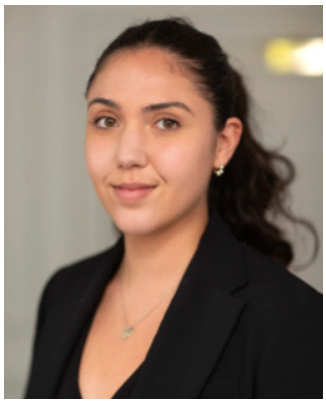
Notes

1 https://financialremediesjournal.com/content/chattels-what-if-they-are-em-not-em-to-be-divided-by-agreement.ee16258caaca43e5b9d8b6d0d3d778e6.htm
2 https://financialremediesjournal.com/content/of-dogs-and-divorce.5bb3762c535d48538ac01a9717890f6c.htm
3 www.judiciary.uk/wp-content/uploads/2025/02/PFD-Guidance-citation-of-authorities-2025.pdf
4 https://financialremediesjournal.com/download/496c5d290baa414cb628ccf25aa4e1d1
5 www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/divorce/family/property-and-debt/companion-animals-info-guide.pdf
6 www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/11025_01
7 www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/11025_05
8 www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/11025_05
9 https://globalnews.ca/news/11149900/bc-judge-awards-custody-family-pet-divorce/#:~:text=Canada-,For%20the%201st%20time%2C%20B.C.%20judge%20awards%20custody,family%20pet%20in%20divorce%20case&text=In%20what%27s%20believed%20to%20be,to%20B.C.%27s%20family%20law
10 www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_act/flaa2024194/sch1.html
11 https://allaw.co.uk/news/pets-on-divorce/
12 https://hansard.parliament.uk/Lords/2025-02-27/debates/9CF77A50-10D3-4F2B-9F0D-83B32286D4C6/details
13 https://allaw.co.uk/news/pets-on-divorce/

Second Six at the Financial Remedies Bar – A Survival Guide

Sophia Paraskeva
1 Hare Court

Fatima Ismail
1 King's Bench Walk



There is no perfect way to approach being 'on your feet' and completing your second six. Your first day in court will inevitably be one of the most exciting but equally terrifying moments of your career. However, through this article, we hope to share our ten top tips: those things we have learned during our (very) short time 'on our feet' over the past year that helped us survive and enjoy our second sixes at the financial remedies Bar.

Tip 1 – Make sure you have the skills to approach cases with limited assets

The reality of the vast majority of financial remedies cases that are heard in courts up and down the country is that there are relatively limited assets, so 'needs' will largely govern the outcome of cases. This does not always align with the work that one sees shadowing supervisors in the first six, as supervisors will often be very experienced practitioners dealing with more complex matters and a far greater matrimonial pot. Therefore, to get to grips with the creative problem-solving skills required in cases of limited assets, it is useful to ask your pupil supervisor in the early months of your second six if you may attend court with more junior members of chambers to see examples of the types of cases on which you're likely to be instructed.

Tip 2 – Explain legal concepts simply to your client

Developing the ability to explain legal concepts simply to lay clients is an important skill, and your second six is a good time to practise and get to grips with this. Some clients may be unfamiliar with the legal system or how the divorce and financial remedy process works. Setting this out is helpful, so they are prepared for what is to come. It is particularly useful to able to explain what factors the court considers when dividing assets, the concept of 'needs', and the use of *Mesher* orders and how they work in reality (including which triggers the court will consider are appropriate).

Sometimes, clients may assume that they are entitled to a larger share of the matrimonial assets, due to specific contributions they have made during the marriage. Alternatively, they may want to seek compensation from their spouse or run a conduct argument. It is important to be able to explain in a succinct and clear manner what the prospects are of succeeding with these arguments.

It is also important to remember that some of the clients you represent may have modest assets and are of limited means. It means your cases may be tricky – they will require creativity, and legal fees need to be managed carefully. This is why it is helpful to consider cost-effective ways for them to manage the proceedings. There are some useful pointers in Amy Beddis' blog post 'Limited Assets in Difficult Times' on the FRJ website,[1] such as advising your client to consider making an offer early on in the proceedings, or in Schedule 1 cases using *Calderbank* offers and the additional protection that this may offer. Another example is advising your client to draft the first version of their own Forms E/statements, if they are able, to save on legal fees.

Tip 3 – Be polite and do what you can to assist the court staff

Where the financial remedies courts around the country are under such pressure and strain, it goes a long way to be polite and as helpful as possible to court staff when you arrive for your hearings. Particularly for hearings such as FDRs, where you are likely to be in court for a significant portion of the day, it assists to introduce yourself, sign in promptly with court staff, and provide timely updates on any progress that has been made. It is often also useful to bring multiple paper copies of any documents you would like the judge to see and provide these to court staff on arrival. Unfortunately, electronic copies of documents do not always make it to their desired destination and litigants in person on the other side may prefer paper copies of documents.

Tip 4 – Brush up on your Excel skills

If Excel is not something that comes naturally to you or you have had relatively limited experience using it prior to beginning your pupillage, it is useful to commit some extra time to improving your skills throughout your second six. Being able to use Excel effectively and efficiently is essential in financial remedies work and will speed up prep time significantly. In addition to getting to grips with using the ES2 template, it is helpful to begin to build a portfolio of templates on Excel for 'net effect' schedules and other analyses of cases. This will not only assist you in prepping cases

more efficiently but also allow you to advise on proposals at court where you may be under more time pressure.

Tip 5 – Draft orders at court (if possible)

A helpful tip we picked up during pupillage was to try to agree the terms of orders while at court. A huge amount of time and money can be expended after the hearing debating the terms of relatively straightforward draft orders over email. This can impede on your prep time for future hearings and cause unnecessary delay and expense to be incurred by your client. Often, it is far simpler to iron out a disagreement in relation to the phrasing of an order, or a judge's intended order, while in person at court.

Tip 6 – Be organised

During your time as a second six pupil, it is helpful to be organised and efficient from the start. Getting a system in place will help ensure that your position statements and Forms ES1 and ES2 are completed on time. This will also allow more time to prepare your submissions or notes for the hearing and perhaps a draft order. This could all result in a smoother day at court. Get into the habit of taking an accurate attendance note of the hearing that you can later provide to your instructing solicitor. This will also help with drafting orders, in the event that you need to remind yourself of the court's decision or any important recitals to include.

It may also be helpful to speak to your clerks about when you expect papers to arrive, so that you can organise your time accordingly. Not only will this help build a rapport with your clerks but building in prep days also ensures that you have enough time to properly consider your brief and to draft your documents. It also ensures you have time to contact your instructing solicitor if there are documents missing, or things that need to be actioned or discussed with the client before the hearing.

When you finish in court, you should inform your clerks of the outcome as soon as possible. The more they know, the better they can manage your workload for other hearings or prospective matters in your diary.

Tip 7 – The FR Portal

It is important to register and make use of the HMCTS Portal. Signing up takes a few minutes and it is a relatively easy website to navigate. It is good practice to get into the habit of asking your instructing solicitor to assign you to the case when you receive your brief, if the matter is on the portal. You can then view the documents which have been previously uploaded and upload your own documents when they are ready. There is a quick guide on how to use the FR portal on the FRJ website – you can find it in the 'FRC Corner'[2] – and this is particularly helpful on the issue of whether to select 'Confidential Documents' – a mistake that can easily be made!

Many judges and courts are now checking the portal first for ES1s, ES2s and position statements. There is new guidance dated 11 January 2025 on how to upload a draft order that is either agreed between the parties or suggested by one party before a hearing. Also, note the importance of naming your documents appropriately.

Some judges are now only approving draft orders that are uploaded onto the portal. Make sure you check with the judge on their preference in respect of draft orders after the hearing, as some prefer them to be uploaded onto the portal after they are approved by email.

Tip 8 – Plan your trip to court

Do not underestimate the importance of planning your trip to court. Ensure you calculate how long it will take you to get to court and give yourself enough time so that you are not rushing. It is helpful to get the train before the one you need to take, to account for any possible delays or cancellations. Also, make sure you are going to the correct court – for example, Reading County Court and Reading Magistrates' Court are in different locations and Uxbridge County Court is not in Uxbridge itself. Some courts are tricky to get to – for example, West London Family Court or Harrogate County Court – and require a bit more planning!

If you are running late due to public transport delays, do not panic. Inform your clerks as soon as possible. They may be able to contact your instructing solicitors and/or the court.

Obtaining a Bar Pass through the Bar Council is also helpful for your arrival at court. The scheme is intended to reduce the time barristers and other professional court users spend passing through security at courts. It is easy to sign up and is free.

Tip 9 – Keep up to date

It is important to stay up to date with the latest cases, trends, and guidance in your second six. The Class Legal *Dictionary of Financial Remedies*[3] is a helpful reference guide and compact resource which you can take to court with you.

There are also regular updates about the latest cases on the FRJ website,[4] which are helpfully filtered out into categories by keyword. Judgments published in the High Court are uploaded onto the National Archives in chronological order and are easily accessible as PDFs.

The Family Law Bar Association (FLBA) is helpful when it comes to keeping up to date, and its website contains resources and links to guidance. The FLBA sends regular emails to its members containing helpful updates on guidance, advocacy and training sessions, and pro bono opportunities.

Tip 10 – Ask questions and ask for help if you need it

Being 'on your feet' does not mean that you can no longer ask questions or be unsure how to approach a case. A career at the Bar is one of lifelong learning and it is always important to ask for help or ask questions if you need to. Your supervisors will continue to be a source of support that you should utilise during your second six and it is important to keep in mind that everyone in chambers will have been in your shoes at some point and will be unlikely to consider any question you have too silly or simple!

Notes

1 Available at https://financialremediesjournal.com/content/limited-assets-in-difficult-times.6dbb69d4a6e24832ad391aafb5627792.htm
2 Available at https://financialremediesjournal.com/vertix/the-portal-information-guidance.htm
3 Available at https://classlegal.com/collections/all/products/dictionary-of-financial-remedies-2025?_pos=7&_fid=690835c47&_ss=c
4 Available at https://financialremediesjournal.com/bykeyword/cases.htm

Money Corner: All A Bit Unnecessary

Simon Denton

Partner, Milsted Langdon

'Tax doesn't have to be taxing' was the slogan that HMRC used 20 years ago to raise awareness about the system of Self-Assessment, but some of the recent developments around tax and divorce have me scratching my head about this maxim.

No gain no loss transfers and the former matrimonial home

As most family practitioners are no doubt aware, since 6 April 2023, no gain, no loss (NGNL) transfers apply to a much longer period than was previously the case.

Ironically, where the former matrimonial home (FHM) is concerned, this extension appears to have made the position worse than it was before where one spouse is transferring a share of the property to the other. This is because the NGNL treatment takes precedence and there is no way to opt out of it.

Capital gains tax (CGT) principal private residence (PPR) relief interacts with NGNL transfers in such a way that the recipient of an NGNL transfer inherits the transferor spouse's ownership period and occupation history. In other words, if an absent spouse transfers their share of the FMH to the recipient spouse, the latter picks up the absent spouse's period of non-occupation and will not receive full PPR relief on an eventual disposal even if they have lived in the property throughout their period of ownership.

By way of an example, Figure 1 illustrates a timeline for a property owned 50:50 between husband (H) and wife (W). In the Figure 1 example, H has not been resident in the property for 5 years. His share of the property is transferred on divorce to W under an NGNL transfer.

When W sells the property 3 years later, her PPR relief claim is based on the occupation periods in Figure 2. Working this out on a proportional basis, W only receives PPR relief on 21/26th of the gain and the remaining 5/26th of the gain will be taxable (as a result of her inheriting the H's period of non-occupation).

The situation was different prior to 6 April 2023. Before the NGNL period was extended, a transfer between spouses on divorce and outside the tax year of separation fell within s 225B Taxation and Capital Gains Act 1992 (TCGA 1992), which extended the period of deemed occupation if certain conditions were met. The recipient spouse would receive the transferred share of the property at its market value at the date of transfer and without inheriting any period of non-occupation.

I suspect that this is an unintended consequence of the extension of NGNL. It is important that family practitioners are alive to this issue so that they can make clients aware of the risk of potential CGT liabilities. Indemnities from the transferring spouse may well be appropriate and I am starting to receive instructions to provide tax advice on how to structure indemnities to cover potential future CGT liabilities.

Importantly, recipient spouses who have not been properly advised of their potential CGT liabilities could well assume (wrongly) that the sale of their home was tax-free. If they were then to fail to make the appropriate disclosures to HMRC and to fail to file correct tax returns, they would be liable to interest and penalties.

In addition, all this means that the cost of divorces is rising, which was the opposite of HMRC's stated intention. For that reason, steps are being taken to lobby for a change in the rules, but while they remain as they are, it is vital that clients are given appropriate warnings.

Court orders for future capital sums

Such lobbying can be successful, as was demonstrated when the cat was set amongst the proverbial pigeons at the end of last year, when a change to an entry in HMRC's manuals was spotted.

On 8 October 2024, HMRC updated its CGT manual para-

Figure 1

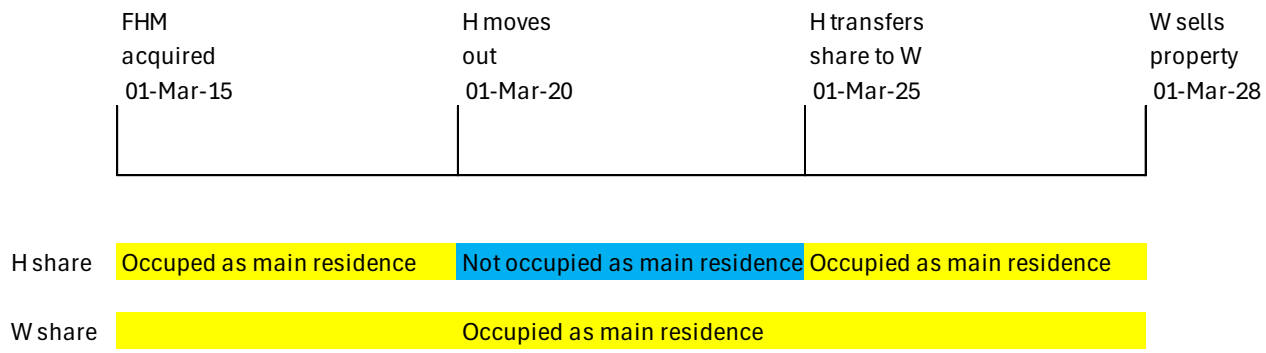


Figure 2

graph CG65334. This paragraph sets out HMRC's opinion in relation to PPR relief and the effect of court action. The old version of the paragraph included an example where the court had ordered that the wife be given one-third of the sales proceeds from the disposal of the FMH which was owned solely by the husband. In the numeric example, one-third equated to £53,000. In the old version of the paragraph, this was HMRC's position:

> 'Mrs D is not chargeable to Capital Gains Tax on the £53,000 she has received. It represents financial provision for her ordered by the Court and is not a sum received in consideration for the disposal of an asset.'[1]

The amended paragraph now reads as follows:

> 'Mrs D is chargeable to Capital Gains Tax on the £53,000 she has received. Although it represents financial provision for her ordered by the Court it is also a capital sum derived from an asset (which in this case is the right to 1/3 of the proceeds of sale), see CG12940.'[2]

Once our heartrates had settled and returned to only double digits, we started to consider the potential ramifications of this change, including its implications on settlements currently being negotiated and on existing court orders. Needless to say, we were concerned about the unreasonableness of, in this example, taxing over 100% of the sale proceeds.

If you take this manual as it stands, if you have a situation where a court order provides for the wife to receive 50% of the sale proceeds of a property owned solely by the husband, he would pay CGT on any gain made on the disposal of his 100% share of the property, without a deduction for the payment made to the wife. In addition, the wife would be subject to CGT on the 50% share of the sale proceeds she receives, with no deduction.

Putting some numbers to this, if the property was originally acquired for £600,000 and is sold for £1m, ignoring incidental costs of sale and purchase, the husband would pay CGT on a gain of £400,000 (being £1m less the purchase cost of £600,000) and the wife would pay CGT on £500,000 (being 50% of the sale proceeds). Consequently, a sum of £1.5m would be subject to CGT as proceeds, or 150% of the sum actually received for the sale of the property.

There is, however, good news to report. Resolution has raised this issue with HMRC, which has confirmed that this amendment was incorrect and does not accord with HMRC's view. This amendment was made on 7 May 2025. The example has been changed to confirm that Mrs D is not subject to CGT on the £53,000.

Notes

1 Old version of HMRC manual (archived content): https://webarchive.nationalarchives.gov.uk/ukgwa/20240906130537/https:/www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg65334

2 New version of HMRC manual: www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg65334

DR Corner: Thinking Outside the Box – Two Different Forms of NCDR

Stephen Wildblood KC
Partner in GardnerWildblood LLP and Associate member of 3 PB Chambers

Dr Freda V Gardner
Partner in GardnerWildblood LLP and Consultant Clinical Psychologist

On a number of occasions when sitting, Stephen heard Dr Freda Gardner, Consultant Clinical Psychologist, say in evidence as an expert witness: 'the issues in this family should never have developed to a point where this litigation became necessary'. Then, one day, they met outside the court environment, and he asked her how she thought that issues in complex family cases might be resolved better. That led to a number of further conversations and, ultimately, to them both changing their working arrangements and working together in an LLP. Having both trained as mediators, they now work together, as consultant clinical psychologist and lawyer with mediation training, to offer separating couples a different form of non-court dispute resolution (NCDR) in cases concerning children and finances.

We, Stephen and Freda, therefore, write this article to describe that work and its benefits. It then goes on to consider another form of developing NCDR which we prefer to call a settlement meeting. A settlement meeting involves a lawyer with expertise in a relevant area of law meeting (alone or with a psychologist) with the couple and their legal teams to thrash out a settlement. Rather than try to shoe-horn that type of meeting, awkwardly, into one of the existing categories of NCDR (lawyer assisted mediation, early neutral evaluation (ENE) or private FDR – none of which hit the nail on the head), we will write about them as settlement meetings.

Work that integrates the expertise of a lawyer and a clinical psychologist represents an approach that harmonises informed conflict resolution, legal experience and psychological insights. We apply it across the full spectrum of family issues; it is not limited to cases concerning children. It is a collaborative model which is particularly effective in circumstances where, as in many cases, emotional and psychological factors have a significant impact upon the issues that need to be resolved.

As a clinical psychologist, Dr Gardner plays a pivotal role in assisting parties to explore the underlying emotional and behavioural issues that may be intensifying the conflict and complicating the process of resolution. She works to facilitate the development of mutual understanding, so that complex emotional issues within the relationship can be explored safely, with appropriate support and containment. She is skilled and experienced in ensuring that issues of that nature can be expressed and understood. In this way, the complex issues that frequently prevent resolution, such as emotional inequality, control, vulnerability and conflict-driven exhaustion can be addressed in the context of our work.

Concurrently, the lawyer-mediator (as we are calling the role) is able to focus on understanding the underlying legal issues and guiding the process in a manner that is fully and legally informed. For instance, in a meeting about finances, the parties may well need help ensuring that disclosure is completed, understanding the finances, understanding reports (e.g. pension reports) or company accounts and then understanding and maintaining the legal context in which discussion can take place, for example – can there be a clean break, what is a pension sharing order and how does it operate, what is a *Duxbury* payment, what tax advice do they need, what other information is needed for a fair resolution, are arguments that one party is advancing realistic? Although the parties may each have separate legal advice, the lawyer-mediator can ensure that the legal context of the discussion is maintained in the immediacy of the work that we are doing with the couple.

We believe that by working together we can ensure a fair resolution process, and develop a more comprehensive approach to mediation by addressing the emotional, legal and practical dimensions of disputes. This model of co-working allows for different perspectives, avoidance of any appearance of gender bias, improved communication management, and increased support for the parties involved.

We aim to provide a balanced and supportive process where emotional and legal needs are addressed to create amicable resolutions and enduring outcomes. We believe this can be achieved because the parties manage the process of separation and resolution within a revised relational dynamic focused on emotional preservation and development.

We find this style of working of particular value when working on complex cases, be they financial or child-related. Whatever may be his own skills, Stephen recog-

nises that he does not possess anything like the skills of Dr Gardner when working with people and understanding the emotions that contribute to the complex dynamics that prevent resolution. He also recognises that, when discussing issues, in finances or children, it is very easy for someone without psychological training and experience to unintentionally 'trigger' one of the parties in a way that could jeopardise the whole process. Further, some family issues are so complex and ingrained that they need two professionals, working together with the couple, to make effective progress. By contrast the lawyer involved can bring years of experience in the specific area of law involved and in the settlement of cases.

It is also a style of work that lends itself well to greater involvement, where appropriate, of children. Dr Gardner has spent years working with children and writing expert reports for the court on complex child-related issues. Therefore, if an issue arises where children need to have a direct voice within the process, she has exceptional skills in engaging with the children concerned. She also supports parents to understand the perspectives of children when considering arrangements for co-parenting.

Working with a clinical psychologist also allows for proper, trauma-informed practice. The phrase 'trauma-informed practice' tends to get used with liberality, but it is an extremely complex form of working. Most professionals will assert that they work in a trauma-informed way; we wish that were so. If the balance of the resolution process is going to be maintained in a collaborative environment, a proper understanding of the impact that trauma may have had on the functioning of the couple as parties to a relationship and as parents may be essential if their divisions and relationship issues are to be addressed collaboratively. That applies whether the issue be money or children. As a clinical psychologist with considerable court experience as an expert witness, Dr Gardner can ensure that discussions occur in a safe and constructive manner, minimising emotional distress for all parties. As a lawyer-mediator, Stephen recognises that he does not have anything like Dr Gardner's skills as a trauma-informed clinical psychologist who has worked in her professional domain for the same amount of time that he has been a lawyer (i.e. a very long time).

Neither of us is prepared to say that this is just mediation by another name or description. We have worked as mediators, and Stephen qualified and practised as one before being appointed to the bench and after departing from full-time sitting. This work *feels* very different to the type of mediation that is generally practised in this country. We have always been concerned about mediators who think that a mediation qualification gives them an ability to mediate in areas of practice in which they do not have very specific training and experience. A general mediation qualification may extend to an outline understanding of the law relating to financial remedies, for instance, but any financial remedy practitioner will know that it takes years and a particular aptitude to deal with complex financial issues. The same applies to complex issues relating to children.

Stephen gives this example of a case that spilled over into court litigation, after a financial mediation was completed. The husband was a one-third shareholder and a company director in a family company. The company accountant valued the company. The fixed assets involved business units. The business units were entered into the accounts on the basis of their purchase cost, increased by the money that had been spent on them before they were leased out. The units were worth very considerably more than the figure in the accounts. The value of the husband's shares was discounted by a third, due to being a minority interest, even though the company was a quasi-partnership on any reckoning. The wife accepted what the husband said. The mediator, who did not have sufficient experience in interpreting accounts, did not identify the issue and nor did the wife's solicitor. The wife got a very bad deal and it all had to be unpicked in court.

Given the experience that we have, we think that we are able, where necessary, to be more directive with the couple if one of them is obviously barking up the wrong tree (e.g. when and if we hear 'it's my pension and I am keeping it'). We also think that the type of work that we do is better able to get to the core of the issues that lie between the couple because we have dealt with the underlying issues in our professional work.

There are two areas of NCDR that are especially problematic – consent and domestic abuse. As to the first, NCDR is based on consent – the parties must agree to mediation, ENE and private FDRs. Mediation involves the continued and agreed involvement of the parties leading to an agreed 'understanding'. Even though arbitration involves a decision being imposed on parties, the parties enter into the process of arbitration by agreement; the choice of arbitrator and the issues that the arbitrator is to decide must all be the subject of agreement, also (or they must appoint IFLA to select the arbitrator). The work that we do involves the continued consent of the parties, in the same way as mediation, and that means that the parties must have confidence in us and the process that we are following. The model that we are using, we believe, encourages that confidence because of the combined involvement of psychologist and lawyer-mediator. A single mediator is involved in a triangular relationship with the couple when they work together, and it only takes one point of the triangle to break for the system to fail.

Domestic abuse and the effect of it on NCDR is controversial. As NCDR develops, there is an increasing examination of how it can take place *in some cases*, even where there has been some aspect of domestic abuse. Surely, in a case where there are allegations of domestic abuse, it is a question of degree and the effect that the abuse would have on the NCDR process that is suggested. The dividing line between cases that are suitable for NCDR, despite allegations of abuse, and those that are not, is complex. If there are significant allegations of abuse then mediation, for instance, it may be said to be unsuitable. That being so, the early identification of abuse (which includes, for instance, coercive control) is essential. Not only do we think that two heads are better than one in identifying whether a particular case crosses the dividing line, but also that if NCDR does continue (in money or children cases) where there have been allegations of abuse, the involvement of a psychologist can be of particular importance.

We think that this model is an effective way of working. It produces good outcomes. Further, it feels positive and leads to an effective relationship developing between the four people involved. It also means that, when difficulties emerge, the lawyer and the psychologist are able to discuss

the issues together, rather than the single mediator having to deal with matters in supervision (which cannot be as informed as co-working) or alone. As to expense, it is as expensive as the people involved want to make it. Because we believe in what we are doing, we charge, for the two of us, less than most financial remedy solicitors do.

This style of working is not unique. It is well recognised in other countries. We were influenced, in particular, by the work that is done in Denmark where mediation is an integral part of the court process. For instance, in a child-related case, the judge will work with an expert on children in an investigative court process. They do not allow any of the hugely damaging adversarial hearings that so dominate our practices and wreak such havoc with our listing arrangements. If that form of co-working can be so civilised and successful within the court process in Denmark, why, we asked, should it not be transported into the NCDR arena? So, we took the plunge. We have absolutely no regrets for having done so. We think that it is a style of working that would also improve issue resolution in the workplace, the community and within other organisations.

Of course, this article cannot trawl the world to state what happens in every country. However, in the United States, many states encourage interdisciplinary mediation, especially in family law cases, where psychologists or mental health professionals work alongside mediators to address emotional and relational aspects. In Australia, mediation is integrated into the legal system, and psychologists often participate in family dispute resolution processes, particularly in cases involving children. In provinces like Ontario, in Canada, mediation is a mandatory step in family disputes, and psychologists may be involved to provide emotional support and insights. In Germany, judicial mediation often includes psychologists or counsellors to address emotional dynamics alongside legal issues.

Now settlement meetings. We can hear the voices of mediators saying that what we are describing is 'hybrid mediation' or 'lawyer-assisted mediation'. We can also hear financial practitioners saying: 'that's private FDR/ENE'. However, having done settlement meetings and those other forms of work, we do not agree. They are different from mediation (which, we accept, can involve lawyers being present) because they are much more directive than mediation. They involve the person holding the meeting engaging actively with the lawyers and their clients, giving indications on issues that present themselves, giving clear views on legal issues and actively involving him/herself in the process of resolution. It is not a matter of facilitating discussions leading to a without prejudice 'memorandum of understanding'. At the end of the meeting, if matters are agreed, there will be a formal heads of agreement document. Further, by having the lawyers present, the pausing of the process for the parties to get legal advice (which causes delay and people's eyes to drift from the ball) is avoided. They *feel* very different to mediations.

As to the comparison with ENE and early (private) FDRs, settlement meetings do not just extend to money cases. Stephen has done two where money and children were considered, sequentially, in the same 2-day meetings and it was possible to resolve both issues in both cases before proceedings were issued. They are different to ENEs in that they do not simply amount to the evaluator expressing an opinion on a 'Menu choices: One: Take it. Two: Leave it' basis. The person holding the meeting engages actively in resolving the issues and securing an outcome. The nearest analogy is the private FDR but they only relate to money and often take place later in the procedure. Settlement meetings take place outside the scope of legal proceedings and can cover much broader issues, including children. They are a sort of one-stop shop.

Do settlement meetings work? We believe that they do. So far, so good on the ones that we have held.

Tech Corner: Miris Reporting – Innovative Technology to Help Solicitors Prepare, Verify and Negotiate Client Housing Needs

Jason Reeve

CEO, Miris

Introduction

This article reviews how solicitors currently fulfil the filing requirements of the 2022 *Statement on the Efficient Conduct of Financial Remedy Hearings in the Financial Remedies Court below High Court Judge Level* (the Efficiency Statement). It documents the specific challenges of producing indicative borrowing capacity material, going on to describe how new technological innovation from Miris Reporting will improve this through transparency and standardisation. Lastly, the article considers how technology can bring mortgage capacity, mortgage sourcing and property finding together, to improve the efficiency and effectiveness of negotiating housing needs for both non-court dispute resolution (NCDR) and in court.

Overview

The idea for Miris started with a long overdue catch-up with six family lawyer friends and red wine (well, let's be honest, many new business ideas start this way). It had been 6 years since I had sold my family law service business, Novitas Loans, and I wanted to learn how the family law world had evolved and changed in that time. The conversation ultimately focussed on two things: the drive to improve the efficiency of financial remedy court hearing proceedings and the growth in use of NCDR.

It was explained that in January 2022, Mr Justice Mostyn and HHJ Hess introduced their Efficiency Statement.

Contained within that statement was the requirement that each party, 14 days before the First Appointment, use their best endeavours to 'file with the court jointly obtained brief *indicative* material as to their respective borrowing capacities' (emphasis added).

It further states that 'if obtaining such material has proved impossible, the parties should individually use their best endeavours to obtain and file such material (this material will not preclude the parties from later seeking to adduce formal evidence of this nature)'.

The drive for efficiency at the First Appointment stage and the increased use of NCDR were clearly both exciting initiatives and a positive step forward. Listening to the solicitors talk, however, it became apparent that the requirement to file further additional material before the First Appointment can result in increased legal fees for clients.

For example, they described the challenges from non-standardisation of mortgage capacity reports, or the regular back-and-forth with experts on even basic mortgage-related questions; all this contributed to delays and additional cost for the client.

It was apparent that the industry had simply not kept pace with the evolving needs of the solicitors and judiciary; the situation needed a technological solution. If a solution could be found to provide solicitors with an interactive mortgage capacity tool and access to information such as live mortgage data, it could step change the effectiveness and operational efficiency of how a law firm delivered these requirements.

The judiciary had set a clear direction – industry now needed to step in and provide the platform. This led to the creation of Miris Reporting.

NB: Since the initial solicitor meeting, Miris has met with a further 50 solicitors and barristers, the information from these meetings informing the development of the MIRIS platform.

Current approaches to indicative mortgage capacity reports

If we start with a review of indicative mortgage capacity reports, we could surmise two main approaches used in their creation:

- *Client-produced evidential material*: these are varied but can take the form of a short email from a 'friend who is a broker', to a print-out from a bank's website where some very basic information had been provided. These tend to be limited in nature and often incomplete, for example not including monthly mortgage costs.
- *Regulated mortgage broker reports*: the client visits a mortgage broker who typically produces a standard letter with perhaps a paragraph or two dedicated to the client specific circumstances.

Solicitors are unsure what information the client has shared with the broker, is it complete and accurate, in line with the Form E? Solicitors may write a directions letter to the broker and regularly require one or multiple follow-ups with the broker, to get to the right answer, i.e. the one they finally wish to present as best meeting the needs of their client. All these steps take billable time (from both solicitor and broker), meaning the actual cost to the client of the report is well above the headline report price of £200–£500.

There is clearly a time and cost balance to be struck in producing a borrowing capacity that is indicative, but one which is also reflective of the client's actual capacity, and therefore useful. But does either approach achieve this balance? It is time to introduce the concepts of *transparency* and *standardisation*.

We need more transparency

At this point some mortgage-specific context is required. Broadly, a mortgage company calculates borrowing capacity by looking at key client facts (age, employment status, credit history, etc) and applying a percentage to their surplus income (difference between income and expenditure).

If the borrowing capacity report is not transparent, i.e. does not contain the detailed breakdown of key client information and what income and expenditure has been applied, there is going to be uncertainty as to the reliability of the borrowing capacity. This is unfortunately quite usual, especially when solicitors take a strategic approach to sharing what actual underlying information was used to create the borrowing capacity. Without transparency it is very hard to attribute an associated level of confidence with the numbers being put forward.

We need standardisation

Currently, there is no standardisation in how borrowing capacities are presented. Every client and broker utilise their own format, with varying levels of information and completeness. This means solicitors, barristers and judges are always having to interpret different documents, making assumptions as to the accuracy of the numbers presented, thus making their jobs harder.

The logical outcome is a lack of trust by the solicitor of client-produced evidence, or more commonly between parties. Solicitors told us they would get an indicative report and regularly say 'how on earth did they get to that number?' or 'that's a nonsense, I bet they haven't included retained profits'. Consequently, further time and expense are incurred challenging the report and/or in the commission of a shadow report. These shadow reports are increasingly common and are in effect doubling the cost across the proceedings.

Proposed new indicative borrowing capacity report

It must surely be beneficial therefore for all parties to use the same style report, delivering standardisation, and to achieve transparency by each report containing key information such as:

- Client details (type and length of employment, planned retirement age, credit situation such as any active CCJs, dependants, etc).
- A detailed list of income and expenditures, showing how the surplus income used in the mortgage capacity calculation has been accomplished.
- Their actual borrowing capacity and associated deposit level to achieve the maximum level of affordable property.
- Mortgage product examples, with fees and monthly costs both during and after any offer period.

Inclusion of property particulars

There is also much sense in extending the borrowing capacity report to further include property particulars. When negotiating housing needs, the mortgage capacity, mortgage product details and suitable housing all flow together, one leading the next.

Currently, solicitors are searching on Zoopla or Rightmove looking for properties or chasing clients, then using Google to try to calculate travel distances and times.

For ease and efficiency, it seems logical to include property within the same mortgage capacity report as each component is intrinsically linked. This would also allow solicitors to meet a further requirement of the Efficiency Statement, namely 'to file with the court and serve on the other party no more than 3 sets of property particulars showing what their case is likely to be on housing need for themselves and the other party'.

The technology opportunity

We need to recognise that the current approach to indicative borrowing capacity (and, by extension, to NCDR proceedings involving property needs) operates in this form due to the unavailability of suitable technology.

Solicitors simply don't have access to tools to calculate mortgage capacity or see available mortgage products to know if and what their client can qualify for. They don't have any way of preparing their own client scenarios, for example change an expenditure, such as paying off a car loan, and see in real time the impact on mortgage capacity, availability and price of an available mortgage product, and the impact on examples of suitable housing. They also have no way of producing their own indicative borrowing capacity reports.

Solicitors have been forced to rely on third parties with their inherent costs and delays.

If technology, for the first time, could put the tools into the hands of the solicitor, the advantages are compelling:

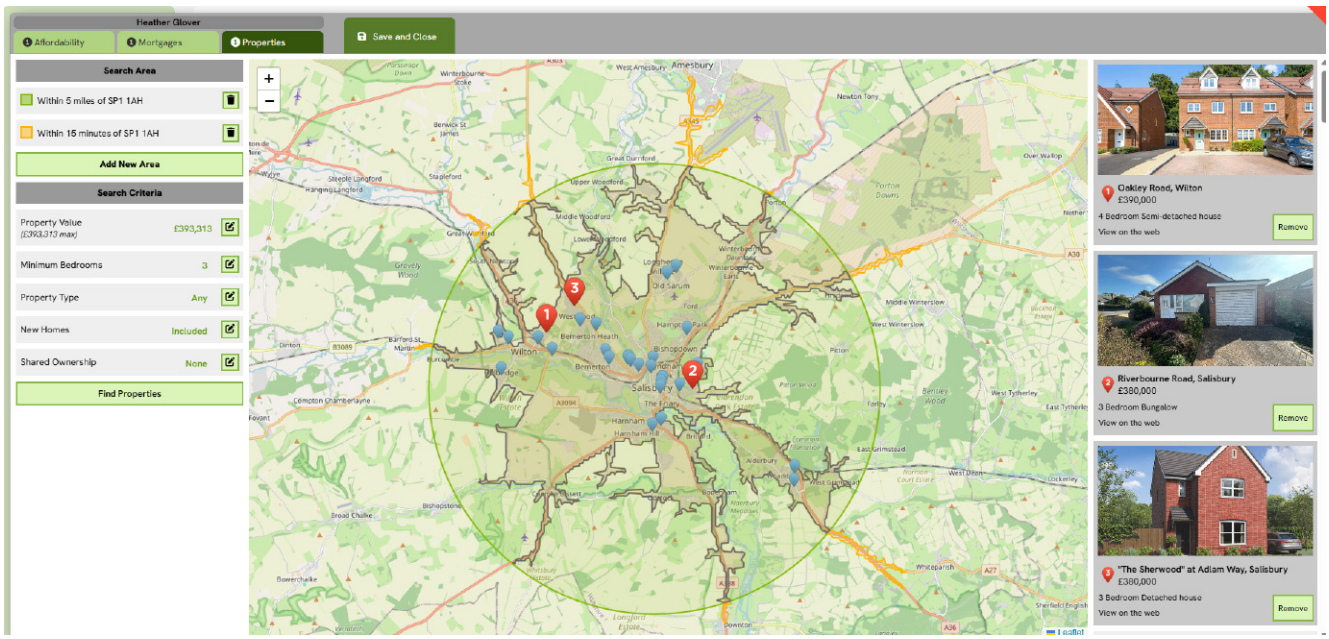


Figure 1: Property search function on Miris platform

- *Greatly improve efficiency*: solicitors, barristers and judges can review the same style of report for all clients. It would remove the need for clients to visit a broker, or for solicitors to have multi-interactions with third parties, on basic mortgage related matters.
- *Increase trust*: having all key data, including detailed income and expenditure, clearly laid out, showing how the borrowing capacity has been arrived at, would give confidence in the numbers or allow for informed challenge, limiting the need for shadow reports.
- *Remove constraints*: it would allow the solicitor to investigate numerous different scenarios before settling on the best one to move forward with, with no constraints as to the number they can prepare.

Combined, this will meet the goals of increasing the operational efficiency of both the law firm and financial remedy proceedings, ultimately driving down the cost to the client.

The Miris technology solution

The goal of Miris is to bridge this technology gap. Miris has designed and built a unique online platform for solicitors, using a combination for proprietary and proven technology. It provides a live interoperability between mortgage capacity, mortgage sourcing and property selection. Solicitors now have a tool that allows them to prepare client scenarios, verify the other party's mortgage claims and use in live negotiations.

The Miris platform has three main functions, allowing a solicitor to:

(1) Calculate a client's mortgage capacity

Build up a client's list of income and expenditures, include a second party or a cohabitee/partner. Add key information such as retirement age, credit history and available deposit.

The platform then automatically calculates the client's mortgage raising capacity and associated deposit requirement.

Changing any factor, e.g. repayment of a loan, will automatically update mortgage affordability and associated fields such as deposit requirement; immediately see the impact of decisions/offers.

(2) Run live mortgage searches

Normally only available to mortgage brokers, Miris has created a unique partnership with twenty7tech, the United Kingdom's leading whole of market mortgage search engine (used by over 18,000 brokers in the United Kingdom). As a result, the Miris platform:

- instantly searches 'whole of market' mortgage providers to return details of available mortgages with their monthly costs, fees and any charges;
- displays mortgages with 2-, 3- and 5-year offer periods with monthly cost both during and after any offer period;
- carries over any changes in affordability calculations so you immediately see updated mortgage availability and pricing.

As a consequence, the mortgage product data is always current, solicitors are not referencing products in an historical report that may no longer be available.

(3) Search for suitable property

Miris has partnered with Zoopla and other specialist technology companies so solicitors can set the area for a property search using multiple factors:

- distance from a postcode;
- travel times to a postcode using transport methods at different times of days.

These can be overlaid to narrow down the target area for the property search. Lastly, it also allows the user to add property characteristics such as number of bedrooms to then show all available properties, shortlisting the most suitable.

Seamless integration with the Miris mortgage capacity and deposit calculation means the data pre-populates the property search. Suitable properties can be shortlisted at the push of a button and added automatically into the report.

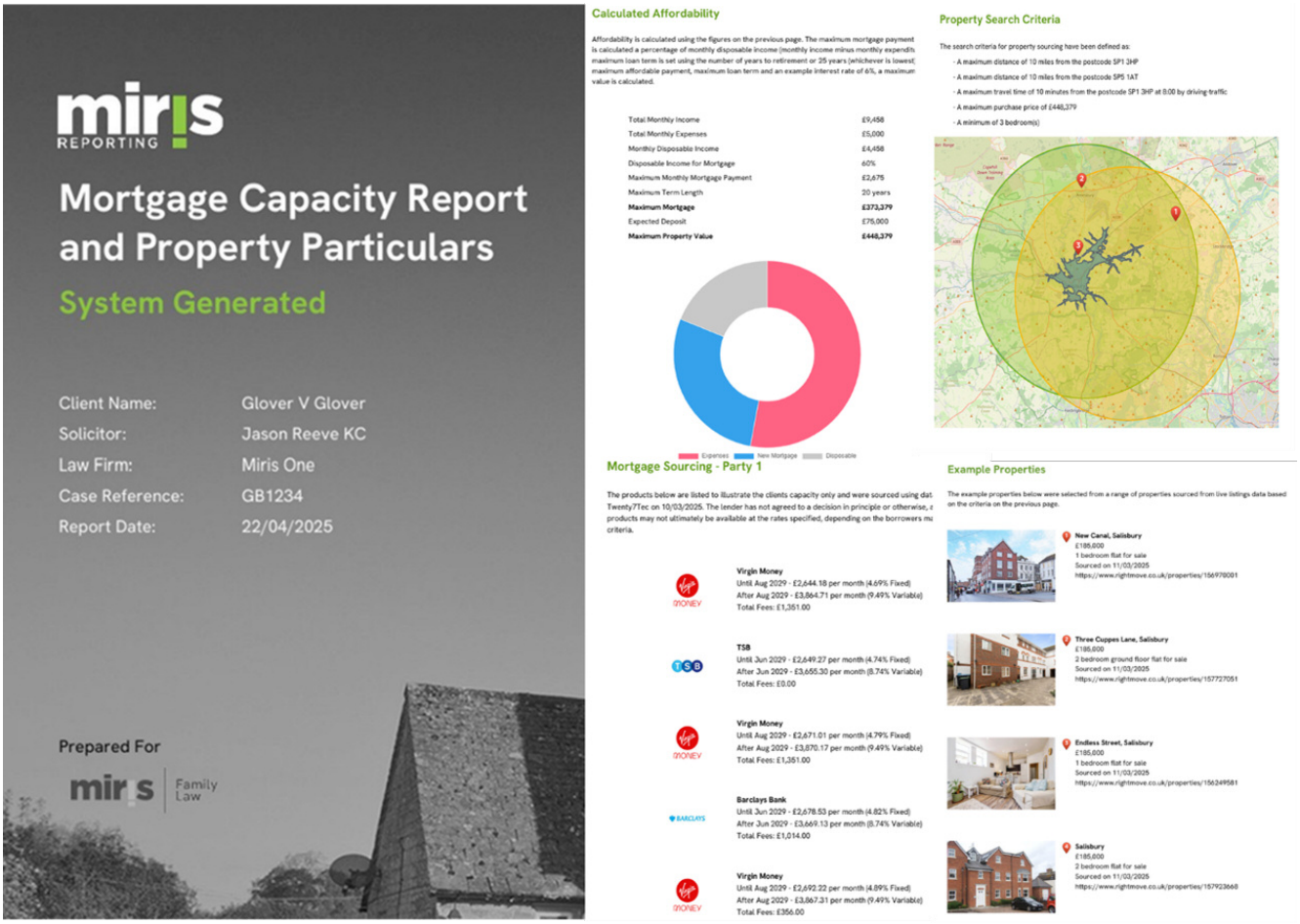


Figure 2: Extracts from Miris mortgage capacity and property report

The Miris mortgage capacity report

Once a scenario is complete (mortgage capacity, product examples and property particulars), the system will generate a mortgage capacity report at the push of button, one that is clear, concise and complete, perfect for use with clients, the other party or filing with the court. All the key information previously outlined is included.

This report can be for one or both parties, meeting the preferred position of the Efficiency Statement that respective borrowing capacities should be jointly obtained.

Further, there is an option to produce a report just showing property particulars for the other party, everything can be done from the one platform.

By adopting the Miris platform, the solicitors and courts will have a standardised report format, one that provides transparency, and which allows solicitors to meet the requirements of the Efficiency Statement in the most operationally efficient and cost-effective way possible.

NCDR and court proceedings

In designing the Miris platform to improve mortgage capacity reporting, we believe the platform can also dramatically improve how NCDR providers and the courts consider and determine housing needs.

Currently, a mortgage report cannot be queried. In practice, solicitors want to be able to ask many 'what if?' questions before settling on their preferred scenario to take forward on behalf of their client.

That is why, on the Miris platform, solicitors can run as many scenarios as they like; for example, input different retirement ages, deposit amounts and maintenance levels, the mortgage capacity and available products will change in real time in response.

A goal of Miris is to put the tools in the hands of the mediator, arbitrator, PFDR judge; allow them to see in real-time the impact of proposals, or suggested changes, and whether a mortgage would be available and its cost. Imagine how much time would be saved and how much more effective meetings would be if those tools were always to hand.

The role of the broker

In this article we have explained why we believe that brokers are over-used at the First Appointment stage, incurring delays and cost. However, we recognise that the system-generated report meets a specific need. When cases have a certain level of complexity, such as offshore assets or multiple company ownerships, it is advisable to go straight to a broker. Furthermore, there will be times, for example, where directions are made by the court, or prior to a settlement being agreed, when the services of a regulated mortgage broker will be required or desirable.

To cater for this, the Miris platform directly links with leading mortgage brokers to provide ease of data transfer and communication, improving the efficiency of their involvement.

Current status

At the time of writing, the Miris platform is currently being

beta tested by a number of major regional firms for both report production and as a tool for NCDR. It will be live and available when this issue goes to press. In parallel, we are working on further enhancements around collaboration. For example, to allow solicitors to share their client scenarios with third parties such as barristers and judges, and for those parties to be able to rehearse amendments prior to a meeting.

To make it accessible for all clients, Miris will be priced at only £50, a one-off charge when a client is added to the platform. Run as many scenarios as you like and produce as many reports as you like for that single fee.

Summary

The judiciary has set a clear direction for the efficient conduct of financial remedy proceedings. The associated requirement to provide property particulars and indicative borrowing capacity could be improved through greater transparency combined with report standardisation. Through combining proven and proprietary technology, Miris has looked to provide a solution to this issue and, in so doing, allow solicitors and the courts to maximise the effectiveness of the time they spend with the clients.

Book Review: *International Family Law Handbook*

(Resolution, 2025)

Michael Allum

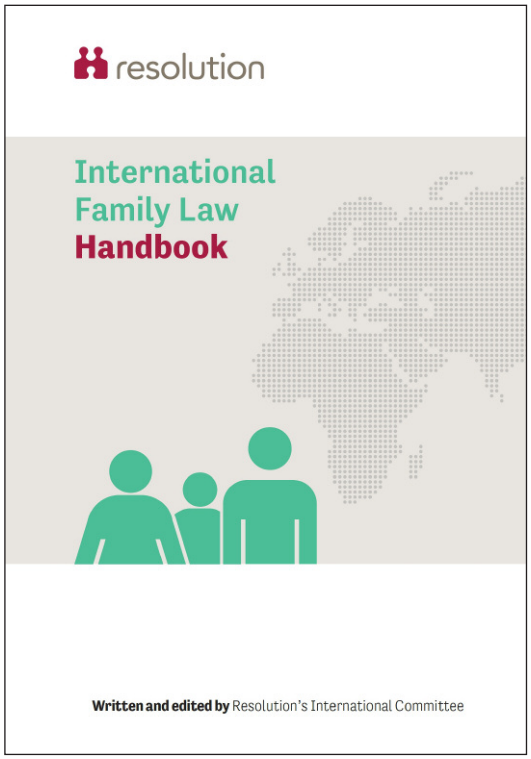
The International Family Law Group LLP

The *International Family Law Handbook* is an indispensable resource for all family practitioners. Written and edited by Resolution's International Committee, it draws on the experience and expertise of an impressive list of authors including solicitors, barristers, judges and academics, many of whom also either practice or are qualified in other jurisdictions including Scotland, Northern Ireland, the Republic of Ireland, Australia, Switzerland and the UAE.

The breadth and depth in both experience and expertise of the authors enables the Handbook to cover an impressive range of topics. Available in both print and PDF, some of the areas most relevant to financial remedy practitioners include chapters on jurisdiction and forum in divorce and financial remedy cases, the recognition of foreign marriages and divorces, international marital agreements, financial provision after foreign divorces and much more.

Equally impressive as the breadth of topics covered is the quality of the content. The Handbook manages to distil complex areas of law into short passages which can be easily understood by busy practitioners. Notable examples include the coverage of divorce jurisdiction under s 5(2)(d) and (e) Domicile and Matrimonial Proceedings Act 1973 (the so-called *Marinos/Munro* debate) and the EU Regulations that will continue to have an impact on the drafting of international marital agreements.

The Handbook is not only high quality but also exceptionally timely. Being written approximately 4 years after the United Kingdom's departure from the European Union has enabled the Handbook to cover trends in case-law (both domestic and overseas) that have developed in the aftermath of Brexit. This includes developments regarding divorce jurisdiction (e.g. *BM v LO* (Case C-462/22) and *TI v LI* [2024] EWFC 163) and the treatment of foreign marital agreements (e.g. *BI v EN* [2024] EWFC 200).



One area which may perhaps have benefited from further analysis is enforcement. Practitioners may have found it helpful to have further guidance on enforcement under the EU Maintenance Regulation (which still applies to the enforcement of maintenance orders arising from proceedings instituted before 11 pm on 31 December 2020) and the enforcement of non-maintenance orders, although the Handbook contains a very helpful summary of enforcement under the 2007 Hague Convention which will be increasingly used post-Brexit.

What is perhaps most impressive is the almost unique balance the authors have struck in appealing to all practitioners regardless of their experience and expertise in international family law issues. Junior lawyers with limited experience of international family law cases all the way through to experienced practitioners who have specialised in the area for many years will find the Handbook to be an invaluable resource.

There may perhaps have once been a time when not all practitioners needed to be aware of international family law issues. If that were once true it is certainly no longer the case. As the Introduction to the Handbook records, in 2023 a third of all births in England and Wales were to mothers born outside the United Kingdom (up from a quarter of all births in 2013). As time goes on I have no doubt the number of cases involving international family law issues will only increase.

The authors are to be applauded on an exceptional piece of work which I have no doubt will become an increasingly invaluable resource for the family law profession.

Important Recent Case Developments

Mid-January 2025 to mid-May 2025

Professor Polly Morgan

Case Editor, Professor of Family Law, and Director of UEA Law Clinic, University of East Anglia

These are the noteworthy case-law developments since the last issue went to press in January 2025.

Civil restraint orders

Civil restraint orders are addressed in FPR 4.8 and PD 4B. They can be limited, extended or general. A limited order may be made where a party has made at least two applications which are totally without merit. An extended civil restraint order (ECRO) may be made where a party 'has persistently made applications which are totally without merit'. A general restraint order is for situations in which the party against whom the order is made 'persists in making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate'.

The effect of each kind of order is to impose a requirement that the party against whom the order is made obtain leave to proceed with any future applications within the ambit of the order.

The difference between each relates to the ambit, with a limited order relating only to further applications in the current proceedings, an ECRO relating to 'any matter involving or relating to or touching upon or leading to the proceedings in which the order is made' and a general order applying to any application in any court.

The parties in *Galbraith-Marten v De Renée (Extension of Extended Civil Restraint Order)* [2025] EWFC 96 have been litigating since 2009, a record surely second only to that of *Jarndyce v Jarndyce*. The wife's enthusiasm for the legal process has made her the subject of an ECRO, and this particular judgment extended that for a further 2 years in light of her most recent attempts to revisit the financial remedy order.

Under FPR PD 4B, para 3.10, the court may extend an ECRO for a further 2 years on each occasion 'if it considers it appropriate to do so'. The judgment of Cobb J explains the 'rationale for a different test for an extension of an ECRO (as opposed to a first grant) is that the person who has already been subject of an ECRO will (theoretically at least) have had limited if any opportunity to issue any application or claim ruled to be totally without merit'.

The order requires the wife to notify the husband of any intention to make an application. He would respond to that, and this response would be included in the wife's application for leave. In this way, it is different to an order under s 91(14) Children Act 1989 which does not include notification of the potential respondent prior to leave being given so as to protect them from the emotional impact of vexatious applications.

Needham v Ellis [2024] EWCC 29 involved a limited civil restraint order made in TOLATA proceedings and accordingly falling within CPR PD 3C rather than FPR PD 4B. *Needham* required HHJ Tindal, in a first instance county court decision, to consider the applicable test to grant permission to apply where a civil restraint order was in place. He held that the test was as one of a 'real rather than a fanciful prospect of success' in the proposed application.

This makes the test lower than that for civil proceedings orders in relation to vexatious litigants under s 42 Senior Courts Act 1982. The latter are made where the Attorney General has satisfied the High Court that a person has 'habitually and persistently and without any reasonable ground' instituted civil proceedings. The test for those is whether or not the proposed application is an abuse of process whether there are reasonable grounds for the proceedings or application.

The *Barrell* jurisdiction

This refers to a judge's ability to change their mind before their order has been perfected by sealing. This is a rare situation. In *X v Y* [2025] EWHC 727 (Fam) the wife unsuccessfully invoked the jurisdiction when she learned that the husband may inherit from his father, who had recently died. On the facts, the husband inherited under a trust with his siblings and subject to his stepmother's life interest, rather than outright, and against a background of strained family relationships. Trowell J cites with approval the summary of the law given by HHJ Spinks at first instance, namely that exceptional circumstances are not required for the court to alter its decision, that if the application is made on the basis of new evidence there needs to be good reason to depart from the finality principle, that the finality principle is of considerable importance, and the issue should be approached through the prism of the overriding objective.

Per *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16, the 'question is whether the factors favouring re-opening of the order are, in combination, sufficient to overcome the deadweight of the finality principle … together with any other factors pointing towards leaving the original order in place'. That is not a neutral starting point but leans towards a refusal to reopen the issue.

Wells sharing

D Culligan v A Culligan (Wells Sharing) [2025] EWFC 1 is a straightforward equal sharing case complicated by issues over valuations of business interests and a number of irrelevant ancillary issues. A significant proportion of the matrimonial assets were illiquid, being the husband's shares in a company called Colendi, and as such also somewhat risky compared to the other assets which were predominately real estate. As MacDonald J notes, '*Wells* sharing allows for the possibility that the only way to achieve fairness in a given case might be to share, to whatever degree appropriate, an illiquid and risk laden asset, notwithstanding the disadvantages that may cause for the receiving party'.

MacDonald draws a distinction between those cases in which the shares cannot be valued and cases such as *Culligan* where a value can be placed on them. The issue here was not valuation, but 'the size of the illiquid or risk laden asset relative to the "copper bottomed" matrimonial assets in the case'. Despite the cautious treatment of *Wells* sharing in *Versteegh v Versteegh* [2018] EWCA Civ 1050, it was the only way to achieve fairness in the present case.

DF v YB [2025] EWFC 46 (B) was another case of *Wells* sharing, and also a case in which sharing rather than needs dictated the outcome. The husband had made a sizeable loan to a third party, and his proposal was that the wife receive a contingent lump sum: if he was repaid, he would pay a lump sum to the wife, so the risk and benefits were borne by them both. While acknowledging that such an arrangement precludes a clean break, Recorder Nicholas Allen KC thought that Mostyn J had gone too far in *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2017] EWFC 25 when he said *Wells* sharing should be a last resort. It was about fairness, and it would be unfair to give the wife a lump sum in respect of an asset the husband may never recover.

Solomonic judgments and furry chattels

There have been two interesting chattels decisions in the last few months, *FI v DO* [2024] EWFC 384 (B) and *RI v NG* [2025] EWFC 9 (B) about (you've guessed it) a dog and a ring, respectively.

The ring in question was an engagement ring, and its status when the engagement had been called off. Section 17 Married Women's Property Act 1882 – the law that gave married women the right to separate property on marriage – gives the court jurisdiction to determine ownership or possession as between those who were engaged. In English law, an engagement ring is presumed to be an absolute gift, but this presumption can be rebutted by evidence that it was conditional on the marriage taking place. District Judge Ashworth treated the presumption as being rebutted for two reasons, first that the respondent had broken off the engagement, and second that on the respondent's case she had in fact returned it – an acceptance, therefore, that the ring should be returned when the engagement ended. The judge held that she had not in fact returned the ring and could either do so, or under s 7 Matrimonial Causes (Property and Maintenance) Act 1958, pay the value.

The dog in *FI v DO* was a golden retriever puppy, and the relevant law the Matrimonial Causes Act 1973. The fact that the law sees pets as chattels is contentious, and as District Judge Hatvany points out in a blog for the FRJ website, there are cases from other jurisdictions in which dogs have been treated as more akin to children. Following Moylan J's approach in *K v RK* [2011] EWHC 3901 (Fam), Deputy District Judge Crisp looked not at who had paid for the dog, but who had principally cared for the dog and who the dog saw as his carer.

In each issue of FRJ, we nominate a judgment for the Mostyn Award – the must-read case of the last few months decided below High Court level. There are very few reported cases involving chattels on relationship breakdown, which meant a distinct lack of useful precedent; and while not precedent-setting, these judgments are useful to the 'everyday' practitioner. (The author of this column once achieved a clean break 'save as for the dog'; it was holding up the resolution of everything else.) Dividing up the money, even millions, is much easier than deciding who gets the family dog. Accordingly, District Judge Ashworth and Deputy District Judge Crisp are our Mostyn Award winners of this issue.

This article draws on the case summaries prepared by the FRJ summariser team.

The Summary of the Summaries

Liam Kelly

Deans Court Chambers

FI v DO [2024] EWFC 384 (B) (District Judge Crisp)

Final hearing in financial remedy case involving which party should keep the family dog, a golden retriever puppy, 'N'. *Keywords: chattels*

XY v XX [2024] EWFC 387 (B) (HHJ Hess)

Application brought by H to set aside on the basis of a 'mutual mistake' of the parties which presented the court with inaccurate computational figures. *Keywords: setting aside orders (including Barder applications)*

Vince v Vince [2024] EWFC 389 (Cusworth J)

A long marriage with substantial wealth, held mostly in H's green energy business. Questions of how to treat political donations; attributing value to pre- and post-marital business efforts; and discounting the value of a business already sold. *Keywords: companies; valuations; add-backs*

RI v NG [2025] EWFC 9 (B) (District Judge Ashworth)

The parties agreed to marry in February 2024 and the wedding was scheduled to take place on 15 May 2024, but was later called off on 30 April 2024. It was the applicant's case that the respondent had been removing various items of jewellery not yet gifted to her from his property without his knowledge or consent. *Keywords: chattels; engagement; Married Women's Property Act 1982; return of items; separation*

SM v BA (Legal Services Payment Order) [2025] EWFC 7 (Nicholas Allen KC sitting as a deputy High Court Judge)

Application for a legal services payment order within high net worth financial remedy proceedings. H ordered to pay significant sums for both historic and future litigation costs. *Keywords: financial remedies court (FRC); maintenance pending suit; legal services payment orders*

TO v GA (Financial Remedies: Deferred Sale) [2024] EWFC 405 (B) (Deputy District Judge Harrop)

Deputy District Judge Harrop publishes a judgment as a good example of the decisions district judges have to make in 'everyday' financial remedy cases.

T v T & Ors (Disregard for Procedural Rules, Adjournment) [2025] EWFC 14 (B) (Recorder Chandler KC)

Recorder Chandler KC was forced to adjourn a 3-day hearing in the face of W's legal aid solicitors failing to comply with the Family Court's procedures. The judge made it clear that where a legally represented applicant failed to comply with the Family Procedure Rules, practice directions and the *Statement of Efficient Conduct* relevant to preparing a case for a hearing, it was likely there would be costs consequences. *Keywords: costs; bundles; efficient conduct*

PM v RM [2025] EWFC 11 (Justin Warshaw KC sitting as a deputy High Court Judge)

Application for maintenance pending suit, a legal services payment order and an injunction in a high value financial remedy case. *Keywords: disclosure; maintenance pending suit; legal services payment orders*

AF v GF [2024] EWHC 3478 (Fam) (Geoffrey Kingscote KC sitting as a deputy High Court Judge)

Useful analysis of business matrimonialisation and quantification of assets, including the valuation of pre-marital business interests. The judgment clearly covers the two-stage exercise in *Charman v Charman* [2007] EWCA Civ 503 to add-back jurisprudence, the fragility of company valuations, matrimonialisation of pre-marital assets, and share trans-

fers. *Keywords: matrimonial and non-matrimonial property; company valuations; add-backs*

Walton v Walton [2025] EWFC 16 (B) (HHJ Moreton)

Committal proceedings following non-compliance with court orders. The offending party was sentenced to a period of imprisonment of 28 days, suspended until the conclusion of the financial remedy proceedings. *Keywords: committal applications and judgment summonses*

QW v GH [2025] EWFC 19 (B) (District Judge Worthley)

Final hearing in a financial relief claim brought by W 8 years after the parties separated, and in circumstances where W had remarried. *Keywords: post-separation accrual; jurisdiction; delay*

GO v YA [2024] EWFC 411 (HHJ Hess sitting as deputy High Court Judge)

Discussion of valuing art and H's art business, the difficulties of valuing large collections of art, and problems that can arise when experts are not cross-examined at final hearing. *Keywords: experts; valuations*

Mary-Jane Grace and Ian Douglas Grace [2025] EWFC 37 (B) (HHJ Farquhar)

Straightforward financial remedy proceedings continued an additional 2½ years after the agreement at the FDR. Significant litigation misconduct, far beyond acceptable standards, resulting in striking delay and wasted costs orders; criticism also of conduct of W's solicitor. The judgment provides useful guidance on anonymisation in financial remedy judgments where there is litigation misconduct. *Keywords: anonymity and transparency; conduct; delay; costs; litigation misconduct*

Re CB (Financial Remedies: Antisuit Injunction) [2025] EWHC 427 (Fam) (HHJ Moradifar)

Application by the husband for an anti-suit injunction to prevent the wife from pursuing, participating or otherwise continuing any applications for periodical payments for the children of the family or any other applications relating to their marriage in the courts of India.

Keywords: injunctions; habitual residence; forum conveniens; jurisdiction; child maintenance; periodical payments; anti-suit injunctions

Collardeau v Fuchs & Anor [2025] EWFC 36 (Poole J)

Finding of a sham lease within enforcement proceedings of a final financial remedy order. *Keywords: setting aside transactions; enforcement*

Sandeep Kumar Chugh v Latika Chugh [2025] EWFC 42 (Nicholas Allen KC sitting as a deputy High Court judge)

Final hearing concerning H's application for recognition of divorce proceedings brought by H in India, and H's challenge to the jurisdictional basis of divorce proceedings brought in the United Kingdom by W. *Keywords: Family Law Act 1986; jurisdiction; stay pending resolution of overseas proceedings; stay of proceedings; non-recognition of overseas divorce; international enforcement; recognition of Indian divorce; setting aside orders (including Barder applications)*

Culligan v Culligan [2025] EWFC 1 (MacDonald J)

An equal division of the matrimonial assets following a 40-year marriage, including a *Wells* share in favour of W. *Keywords: Wells sharing; conduct; companies; crypto; valuations*

DF v YB [2025] EWFC 46 (B) (Recorder Nicholas Allen KC)

Judgment following 4-day final hearing, in which the parties agreed that it was a sharing case and that the net capital assets should be divided equally. The dispute centred around issues of computation, including tax issues and add-back vs *Wells* sharing. *Keywords: loans; tax; debts; add-backs*

D Culligan v A Culligan (No 2) (Costs and Anonymity) [2025] EWFC 26 (MacDonald J)

Judgment dealing solely with the issues of costs and whether the substantive judgment in the financial remedy proceedings handed down on 14 January 2025 should be anonymised. *Keywords: anonymity and transparency; costs*

Monisha Mahtani v Vivek Hariram Mahtani [2025] EWFC 35 (James Ewins KC sitting as a deputy High Court Judge)

A difficult case where the respondent husband failed to attend any hearing or make any disclosure. All the court could do was draw inferences to prevent a 'cheat's charter' in the face of W's quasi-sharing claim. W asserted H had significant assets but had no fixed or agreed values. The final hearing proceeded in H's absence, with no evidence from H. The court awarded W £13.9m in H's absence. *Keywords: conduct*

TA v SB [2025] EWFC 61 (B) (HHJ Muzaffer)

The only question the court was concerned with was what should happen to the jointly-owned FMH. However, this case illustrates the difficulties arising when one party lacks capacity to litigate and is dependent on the Official Solicitor, but where security for that party's costs may not be readily available. *Keywords: sale of property; housing need; legal aid; Official Solicitor; capacity; litigation friend*

P v B (Permission to Appeal an Arbitral Award: Children) [2025] EWFC 69 (B) (HHJ Robertson)

Permission to appeal heard by HHJ Robertson involving a challenge to an arbitral determination in a children matter. Held that the powers of an arbitrator to re-open issues in a case are different to those of a judge, as they operate in different spheres, under different rules and to achieve different outcomes. *Keywords: arbitration, appeals*

DF v YB (No 2: Costs) [2025] EWFC 76 (B) (Recorder Nicholas Allen KC)

Application for costs following a final hearing. *Keywords: NCDR; costs*

Duncan Needham v Susan Rosemary Ellis [2024] EWCC 29 (HHJ Tindal)

An unusual case, involving two appeals arising from long-standing TOLATA claims involving the former family home. Mr Needham's application to vary the consent order which was made in 2017 was refused. He sought 'permission to apply' to set aside that refusal, permission being required because of an LCRO. Permission to apply was refused; Mr Needham appealed. This judgment deals with his application to set aside that refusal. *Keywords: TOLATA claims; appeals; civil restraint orders*

BR v BR [2025] EWFC 88 (Peel J)

Final hearing in ultra high net worth financial remedy case involving valuations of complex business structures. *Keywords: sharing principle; company valuations; wells sharing; experts; companies, costs, valuations*

Simon v Simon [2025] EWFC 89 (Peel J)

Cost judgment from Peel J in 'highly unusual' financial remedy proceedings, in which a litigation loan provider successfully applied to be joined and to set aside a consent order which prevented them recovering a loan to W. *Keywords: conduct; costs; joinder of third parties; efficient conduct; consent orders; setting aside orders (including Barder applications)*

GH v IH [2025] EWFC 120 (B) (District Judge Hatvany)

Final hearing on enforcement and variation of 2012 financial remedy order. The primary issue to be determined was the enforcement and variation of a joint lives periodical payments order made in 2012. *Keywords: periodical payments; variation; Duxbury capitalisation; needs; enforcement*

X v Y [2025] EWHC 727 (Fam) (Trowell J)

Wife's unsuccessful appeal against the rejection of her *Barrell* application to reopen a final order in a needs case following the husband's father's death. Trowell J agreed with the trial judge that the husband's inheritance prospects were uncertain, and the principle of finality ought to be favoured over re-opening the case. *Keywords: Barrell applications; appeals out of time; appeals; setting aside orders (including Barder applications)*

Kathryn Elizabeth Norman v Michael Ian Norman [2025] EWFC 107 (B) (District Judge Veal)

Alleged material non-disclosure, W's totally without merit application issued in October 2024 after seven rounds of litigation including W's D50K application, settled by agreement, made when she knew about H's alleged non-disclosure. W ordered to pay costs on indemnity basis. Warning given regarding the use of websites leading to jigsaw identification and thereby breaching FPR 9.46(3). *Keywords: disclosure; costs; consent orders; setting aside orders (including Barder applications)*

Galbraith-Marten v De Renée (Extension of Extended Civil Restraint Order) [2025] EWFC 96 (Cobb J)

Application granted for an extension of an extended civil restraint order and an application for further financial orders within long-running financial remedy proceedings. *Keywords: civil restraint orders*

VTY v GDB [2025] EWFC 110 (B) (Recorder Rhys Taylor)

Final hearing in a financial remedy application which concerned issues of non-disclosure and allegations of asset concealment in different countries. The matter also involved foreign litigation which appeared to undermine the existing proceedings in this jurisdiction. The parties married in 1999 and have two adult children and one aged 16. The family structure was a traditional one with H being the breadwinner and W the homemaker. *Keyword: foreign assets; non-disclosure; chattels; adverse inferences; school fees; fraud; costs; Duxbury capitalisation; debts; foreign judgments*

DSD v MJW (Costs of MPS) [2025] EWFC 119 (B) (Deputy District Judge David Hodson)

Proportionality and maintenance pending suit, a cautionary tale. In this case the DDJ concluded that the game was very much not worth the candle, and the application turned out to be very costly for the applicant wife. *Keywords: interim relief; maintenance pending suit*

Interview with Steve McCrone, the Senior Clerk at 1 Hare Court

Rhys Taylor

Vice Chair of the FRJ Editorial Board, The 36 Group

The Editorial Board of FRJ wanted to hear from a family law clerk. By universal acclaim, Steve McCrone was agreed as 'the senior man' having been clerking for nearly 35 years and so the invitation fell to him (other senior clerks are available).

Steve, can I ask you how old were you when you started clerking?

I actually came into clerking slightly later – my first job was in the Civil Service and I worked as a Family Division associate in the High Court. I then was on a temporary promotion; I then did get promoted, but one of the conditions of the promotion was transferring me to the Criminal Appeal Office, which, to be honest Rhys, I absolutely hated! I still kept in touch with some of the clerks that I knew and, to cut a long story short, I applied for a position in chambers as a fixing clerk. I let my Civil Service employers know that I was going to leave, and their best attempt to persuade me to stay was 'Steve, think about your Civil Service pension'. And I said, 'Well, if that is the best reason at 20 you've got to keep me, then I'm definitely going'. I left and went to 5 King's Bench Walk as a listing clerk in the Family Division, so certainly for the first 3 or 4 years I had a charmed life because I was fixing cases with all the people who, until very recently, I'd been working with and primarily got every date I wanted (some things never change!).

So that's how I got into it – a slightly different route than the traditional start as a junior clerk. I suppose you could say, technically, I've never, ever been a junior, junior clerk, but that's how I started.

Can you describe the clerks' room and the typical duties you had when you started out?

Definitely. I was in a clerks' room where there was just me and two other clerks. It was a common law set, so I very quickly got used to dealing with family, criminal, civil, all types of work, so it was just a brilliant introduction. Nigel Dyer, who you know, was a member of those chambers, and for example I remember him being regularly sent across the Western Circuit to prosecute football hooligans – it was certainly a different clerks' room. There were, as I say, the three of us there. Fee note runs were photocopying fee notes that were kept in a big filing cabinet, and I had to cut them down to size and put them into envelopes. But, you know, they were great times, and it was just a brilliant introduction to the job, because I really got to learn, at a very early age, about so many different areas of clerking. It really put me in great stead for the future.

How have things changed in the clerks' room down the years? Do you think it's for the better or the worse? And in what way?

The major difference for me was definitely the computerisation. I'm not saying I had literal fights (came close to it once or twice though), but when I first started off, we had a paper diary, and obviously every enquiry was coming in by phone and the clerks would argue over the diary because it was the only way of seeing if people were available.

I'll never forget the introduction of when emails first came in, our senior clerk was so distrusting of them! He used to ask us to make notes of the emails and keep them in a book, it was sort of almost Dickensian! Now, with its computerisation – with the diary, with the fee procedures – it's the difference between light and shade, it's transformational, really.

The actual day-to-day job is pretty much the same, to be honest – that hasn't changed much. I think for me, it's more to do with the computerisation of the fee system as well as obviously emails, which now all of us are beholden to.

And outside the clerks' room – do you have any observations as to how the Temple has changed during your career?

It's always been a brilliant place to work, full of character, the facade of the buildings and the regular requests we get for filming just show how old the Temple is. But inside those buildings, most of the chambers, certainly in the Temple, are just modern offices with all the up-to-date equipment. Funnily enough, today I was talking to a mini-pupil in chambers and she was saying to me that she hadn't really been in this area, and she couldn't believe that between one of the busiest streets in London – Fleet Street – and Embankment was the Temple. She said she actually wandered around a bit here before just to get a feel for it. It is like an oasis of calm, so I don't think the chambers itself has changed so much, even now I just love coming into the Temple every morning – it's just a great place to work.

And how has the family law profession changed in your time?

Again, talking about the technology side, all the work we do has just been subject to continual modernisation. I remember I never used to see my junior clerks when I was in chambers, not that long ago to be honest. But now, seeing members go over to court with iPads when you know they're doing a 5-day really complicated financial remedies trial is just amazing. Very recently, when I told the junior clerk there was a court run because one of the barristers had had to print out a lot of papers, they looked at me as if I had three heads! I suppose that's a big change. I think as well, more sets have specialised, more boutique firms of solicitors have set up just to deal with the family law aspects of what we do as well.

One very recent change is the non-court dispute resolution. Sadly, it's because of the legal system creaking at the edges and private FDRs, arbitrations and mediations are now a massive growth area, which I suppose, sadly, is reflective of how the law is, or that the courts are, at the moment. That's been a real change, especially for instructions to chambers.

And do you have any observations about increased specialism in family law over your career?

When I first started off, because I was in a common law set, I really did see lots of different areas of law. Now, more sets specialise in the Family Division. My chambers specialise in money; there are sets that specialise in children cases and others that still do both. I suppose one of the biggest challenges for me was when the opportunity, if that's the right word, of being given the option not to undertake legal aid work was introduced, it made a big difference, because most of our solicitors went down that route which definitely led to a reduction in children's work, although that has definitely increased more recently. But that's probably the most relevant area, I think.

So you've seen a lot of marital disharmony come through your clerks' room with your cases. Do you have any observations about the institution of matrimony?

I think in some ways you could say it's a sad sort of observation on life that sets like ours and other sets that specialise in matrimonial cases are busy. However, with such a strong Family Law Bar I genuinely feel that clients really do receive the best advice around.

Do you have any observations about the changing face of the judiciary, other than that they appear to be getting younger?

I've been lucky, as you know, to witness some of the great practitioners in law. Stephen Trowell, who's recently been made a High Court judge, was a pupil when I first started in chambers – that, in some ways, makes me feel older, but also makes me feel that it's great that I'm seeing those people become High Court judges, in my mind, relatively quickly. It's Silk's Day today, and I've noticed that a lot of the silks who are being appointed are younger. I personally think it's a good thing, they're more attuned to what's really going on in the world at the moment, so I'd like to think that's reflected in the decisions they make.

You've been involved in clerking some of the biggest cases which have changed family law. Do you have any comments about that experience from the clerks' room perspective?

I feel very lucky that I've managed to be in chambers whilst those cases are taking place, they're seminal cases. Various members who were involved in them are now High Court judges and some have become Court of Appeal judges. I'm just very lucky if I'm really honest, Rhys. It's also nice to get the inside track on some of these big decisions that are made. Of course, they all remain completely confidential, but it's just incredibly interesting to be involved in them and know that in a small way I've been actively involved, definitely.

One of the hardest relationships to pin down in the law is the relationship between the senior clerk and a barrister. Can you give us your take on that relationship? Who really is the boss?

Very good question! I suppose the relationship is built up over time and you get to know members extremely well. I have been lucky to work with lots of brilliant personalities and my relationship with them all is slightly different but equally important – they think they are the boss and of course they are...! I cited Stephen as an example – when I started in chambers both Stephen and Justin Warshaw were pupils; one is now a High Court Judge, one is now one of my senior silks.

I've also been lucky to have Mike and Dan working with me for over 20 years and their assistance to both me personally and chambers has been invaluable. They have both become more senior and experienced, have got to know all of the barristers individually and separately as well, and between us I like to think we make it work. On a personal level I'd like to think all members know that I would do anything I can to enhance their practice (within reason), the work that they get, their career progression and the remuneration they receive. Clearly, at times, you have to give some constructive criticism, and I'd like to think that the experience I've gained over the years, people appreciate it, that's why they take it from me in the spirit that it's meant. I'd like to think I play quite an integral part in how they develop at all seniorities but it works both ways, they certainly help me a lot and I've learnt so much every day in different ways to deal with things, so hopefully that answers the question.

Any advice to a young barrister starting out in family law?

I try to encourage any junior member of chambers to ideally spend as much time in chambers. Just being in chambers – talking to members of chambers or seeing them in action – is just invaluable. We also try to make sure that we bring them to the attention of as many clients, i.e. solicitors, as possible, just to, even at an early age from their second six, build up a rounded practice as well as looking to spend short secondments at firms. I'm sure they know that my or the clerks' doors are open at any time, and if they've got any queries, or they need help or assistance just to come and see us. We really try to nurture, especially our junior members, because they are the future of chambers and pupils can end up being High Court judges as I referenced earlier!

What about advice to an older barrister?

Well again, you should be having regular discussions generally about practice, whether, for example, applications should be made to silk, or whether or not a really strong junior practice will translate into a really strong silk's practice. Going back to the earlier answer, sometimes you have to have conversations that are not very easy, but as long as you're being realistic and as open and honest as possible that's my mantra. Sometimes I think with older barristers, I don't really like that term, it's also difficult because sometimes they don't feel they have achieved what they deserve, whether that's appointments, applying for silk or doing a particular case, it just hasn't happened. I don't think that's necessarily a reflection on them, their personality or perhaps attitude to work – it's just how our business works at times.

And what about advice to a young clerk?

Well, I think similar to a young barrister – just take in as much information as possible; don't try and run before you can walk; just learn as much and listen to those all around you and don't try to be something you're not! Most junior clerks get frustrated with the more mundane junior clerk duties, they really want to get onto the more responsible areas of the clerking, but it really is a question of learning your trade, work as hard as you can, keep your head down and just become somebody that the barristers can feel completely reliant on – that works very well and the responsibility will come. We do get opportunities for business development and marketing, which often take the guise of receptions or solicitors' parties. One thing I was told by my old senior clerk, which I still say to my junior clerks, is never be the person that everybody's talking about tomorrow – that's put me certainly in good stead.

Are there any memorable stories you're allowed to tell?

There are literally loads of stories – as to how many I can tell, probably not many, Rhys, to be really honest! One that I will tell you which was great was on one of those said solicitors' receptions – this was not recently, it was when I was at Mitre Court, actually before we came to Hare Court – I'd come into work the morning after the long night before. I sat down in the clerks' room, my phone rang and Nicholas Wall, the President and ex-member of chambers, called me in and said to me, 'Oh, Steve, what time does so and so start?'. I thought it was a bit of a strange question, but I said, 'Well, he starts at 9 o'clock, but he's not in yet' and he just put the phone down, I didn't think anything more of it. Then just before 9 o'clock, the phone rang again, and it was Nicholas Wall again. He said, 'Steve, is it possible for you to pop over?' and I said, 'of course'. I had no idea why he wanted to see me, but anyway, I walked in. He had one of those great big rooms, and he was sitting behind a great big desk, and so I walked up and stood in front of his desk. He looked at me, but I noticed he was sort of looking past me rather than at me, and as I swivelled round, my junior clerk was fast asleep on the floor, and Wall said to me, 'Steve, you'd better wake him because I don't want him to be late for work'. It was one of my most embarrassing moments. As I'm talking to you now about it, I just thought it just illustrated the character of Wall and how much he felt for us as clerks. That was one of my funniest ones!

So what about clerks staying in one place, or moving about to different chambers? What do you see as the advantages and disadvantages?

The advantages are the more different areas of law that you learn about and become familiar with it gives you a better selling point for any opportunities that come up in other sets of chambers. I certainly know lots of clerks who have worked in different chambers and progressed to a very high level. I've been in chambers 35 years this May and I've stayed in these chambers for all of that time and I suppose you could say I haven't done too bad! I would say that there's benefits of both and I don't think there's any downside to either as long as you feel that you are progressing both personally and professionally. I suppose if you work in one chambers for a long while, then perhaps there's an argument to say it makes it difficult for you to move. But again, I think all of us just have to take opportunities as and when they come and so I think there are pretty much pros and cons for both.

Would you do it all over again?

I think I definitely would. I think most people, to be honest, don't even realise what a barrister's clerk's job is, you never see it advertised and still most clerks start off as a result of a friend of a friend introductions. I suppose, with more TV programmes, documentaries about the law, newspaper articles, etc, the role of a clerk has become more widely known and recognised. For the career I've had so far, for the most part I've loved it, it's a brilliant job and I'm not really sure what else I would do, I really have loved working in chambers and definitely don't regret leaving the Civil Service all those years ago. The short answer is yes, I probably would do it all again.

Could I ask you for your desert island book, your record and your luxury?

Well, I've always loved John Grisham books, so perhaps every one of his books, so I can read them over and over again! Funnily enough, probably the first one was *The Firm* which resonated a bit with me with because of the job that we're doing, because that was all about a law firm and everything that goes with that.

A record – well, ever since I was a junior clerk, The Jam and Paul Weller were probably my go to, so I would say any record by The Jam or Paul Weller.

A luxury – probably something like a TV. You probably know I'm an absolute avid Spurs supporter and I'm putting my two sons through the same nightmare of supporting them in and out. Perhaps on my desert island I might see them win a trophy, that's certainly something that I haven't seen for a very, very long while!

And when you eventually get there, Steve, where will we find you in retirement?

Well, I'd definitely like to travel more. I'm lucky, work has taken me to lots of great places. I've been to Hong Kong and seen Nicholas Mostyn, Martin Pointer and Richard Todd there and certainly would like to re-visit. I really would like to travel more with my wife and there are loads of places we would like to go to (ideally fitting a bit of golf in as well). That's probably a bit of a twee and predictable answer, but travel and just spending more time with my wife as obviously the job is the job and it takes up a lot of your time, and

it'd be fantastic for us to spend more time together and finally stop looking at emails!

Steve McCrone. Thank you very much for your time this afternoon.

Not at all, I've absolutely loved it. It's been a real privilege to be asked. Hopefully you've seen perhaps a little bit of a different side to me. I've been thrilled to do the interview, and thanks ever so much for asking me, Rhys.

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