

2026

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Chair's Column

HHJ Edward Hess

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



It is immensely comforting and reassuring to me in my role as Chair of the FRJ Editorial Board that, month after month, we receive significant numbers of offers of excellent articles to publish on a compelling range of topics relevant to financial remedies practitioners. In this issue we have a really good range of such articles. In commending this issue, I highlight just a few of them.

The problem of costs in the Financial Remedies Court

For as long as I can recall, everybody has objectively agreed that parties involved in cases in the Financial Remedies Court have spent far too much on legal costs. Many judges in very high places have called for something to be done to ameliorate this problem and some steps have been taken. In this issue, we publish some serious reflections on this by Philip Tait in 'Costs in Needs Cases: Persistent Reluctance', in which he comments that the actions taken (e.g. the revision to FPR PD 28A, para 4.4) and judicial pronouncements on what should happen (e.g. Mostyn J in *OG v AG* [2020] EWFC 52: 'The revised para 4.4 of FPR PD28A is extremely important. It requires the parties to negotiate openly in a reasonable way ... It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing') have not made much difference on the ground. He suggests that 'it continues to be relatively rare for costs orders to be made against the recipient of needs based awards in decisions below High Court Judge level'. If Philip Tait is correct about this, and I suspect he is, then plainly more thought will need to be given by decision-

makers as to what more can be done to improve the situation. It is important that the FRJ continues to contribute to this debate and to welcome and publish constructive suggestions as to what further steps might be taken.

Cohabitation law reform

I would guess that a majority of financial remedies lawyers agree that the non-availability of re-distributional financial remedies for separating cohabitants is an injustice which needs to be corrected. I recall becoming acutely aware of the potential injustice when the Court of Appeal decision of *Burns v Burns* [1984] 1 All ER 244 was published just before my university law final examinations and, after the Law Commission produced its persuasive report on the subject in 2007, I recall publishing a paper on this subject identifying the difference in available rights between separating cohabitants in England in contrast to those in Scotland. In the nearly 20 years since, whilst governments have come and gone, no progress has yet been made in England. The current government's public commitments on the subject are yet to be converted into legislative action. In this issue, we publish 'Cohabitation Law Reform – Perspectives North and South of the Anglo-Scottish Border' by Elizabeth Darlington, Graeme Fraser and Susannah Mountain, which both anticipates and encourages legislative reform on this subject in England in the near future and observes that Scotland may indeed now be ready to extend further the rights already available to separating cohabitants. If the authors' predictions about imminent legislative reform in England prove to be correct, this issue is likely to become a very lively topic in the months ahead, of course of great interest to FRJ readers.

Marinos v Munro revived

It perhaps should be regarded as an indicator of good health that different members of the FRJ Editorial Board have different views on topical legal issues relevant to financial remedies practitioners, such as the proper interpretation of Domicile and Matrimonial Proceedings Act 1973, s 5(2)(d). In this issue, we publish 'The Great *Marinos/Munro* Debate in Divorce – Beheaded or Survived?' by Michael Allum and Max Turnell which explains with impressive clarity how this debate, which might have disappeared with the arrival of legislative changes introduced as a consequence of Brexit, has resurfaced in recent case law. To all those interested in this area of the law, we still await a definitive answer from the highest courts to put this long-standing debate finally to bed!

Matthew Brunson-Tully

I finish with a commendation of Lily Mottehedan's 'In Memory of Matthew Brunson-Tully 3.6.1984 – 31.3.2026'. I imagine all of us who knew him (myself, from a good number of court hearings and even more legal events) will share the affectionate feeling for his intelligence and gregarious good humour captured in this memoir and the pain and sadness at his very premature passing.

Cross-examination in Financial Remedy Claims

Alexander Chandler KC

1KBW



There's a scene in the film *When Harry Met Sally* where the characters played by Carrie Fisher and Bruno Kirby argue about throwing out his wagon-wheel coffee table:

MARIE (Carrie Fisher) 'I'm on your side. I'm just trying to help you have good taste'

JESS (Bruno Kirby) 'I have good taste'

MARIE 'Everybody *thinks* they have good taste and a sense of humour, but they couldn't possibly all have good taste.'

As professional advocates, most of us *think* we're good at cross-examination. After all, we've been taught the rudiments at law school and attended advocacy training. To varying degrees, we've done the job in court. We might not see ourselves as Edward Marshall Hall KC or George Carman QC redux, but most of us are quietly confident we know what we're doing.

But there's a world of difference between the experience of a seasoned criminal advocate, who cross-examines almost on a daily basis, and those of us who specialise in areas of law, such as financial remedies, commercial or Chancery, where most disputes settle. Accordingly, the

opportunity to cross-examine arises only infrequently, whereby some practitioners can go years between trials,¹ not because they're unsuccessful, but precisely because they are so adept at negotiating agreements. This article is not a call for more cases to fight. There is no question that most matrimonial clients are well advised to stay away from court where reasonably possible and not incur the financial cost and emotional ordeal of going to trial. Nevertheless, for good reason or bad: a significant issue of law or fact; one party's unreasonable expectations; sometimes sheer bloody mindedness, some cases will go all the way. And to paraphrase Macbeth, if cross-examination has to take place, then it's better if it's done properly,² not in order to satisfy arcane professional rules, but in the interests of a fair hearing.

I don't profess to be a master of the craft. Over the years I've spent a lot of time thinking about and planning how to cross-examine. As an advocate and as a tribunal, I've listened to a lot of cross-examination in the Family Court, Crown Court and county court: some very good and persuasive; some ineffective; some so bad it was positively counter-productive. Cross-examination is unquestionably difficult. It takes a lifetime to learn how to ask a series of closed questions that probe relevant evidence while controlling the witness's responses and moving logically from one topic into another. It may no longer be the essential skill for a financial remedies specialist, but cross-examination can have a material impact on outcome, in terms of the court's findings of fact and determination of issues. This article is written for the occasional cross-examiner, as an *aide mémoire* of the rules, and as a guide for those who want to do the job properly, as opposed to metaphorically clubbing a witness into submission.

What is good cross-examination?

There's something about cross-examination that attracts sporting metaphors. I've heard it compared to cricket (fast bowling and spin bowling) martial arts (how many judgments complain that 'the witness fenced with counsel'), and fishing, as in the following, unimprovable epigram from American trial lawyer, Louis Nizer:

'In cross-examination, as in fishing, nothing is more ungainly than a fisherman pulled into the water by his catch.'

While not all good cross-examination is alike, it tends to involve a series of concise, focused questions, which box in a witness before the critical question is put. The process flows logically from one subject onto the next. When the advocate gets the answer he or she wants, they move on swiftly, without repetition or comment. The advocate remains in control throughout and does not need to raise his or her voice. As John Mortimer QC, the author of *Rumpole*, once famously put it:

'... "the art of cross-examination", my father³ told me, "Is not to examine crossly. It's the art of leading the witness through a line of propositions he agrees to until he's forced to agree to the one fatal question"' (*Clinging to the Wreckage*, (1982))

Good cross-examination is carefully planned and structured, but great cross-examination conceals the structure,

so that a witness answers each question on its merits, without anticipating the ultimate point, or foreseeing where is the forensic trap.

Bad cross-examination

Bad cross-examination involves what the Court of Appeal in *R v Farooqi* [2013] EWCA Crim 1649 described as a series of ‘... prolix, extensive, irrelevant, and, on occasions, offensive, [questions], the underlying purpose [of which] was not clear’ ([42]). The bad cross-examiner rapidly loses control of the witness, who can make hay with loosely phrased questions, talking around the subject and using up valuable court time. Where a witness says something significant, the bad advocate spoils its effect by resorting to amateur dramatics, slowly repeating the answer back for emphasis or larding on the commentary. This not only irritates the judge, but it also tips off the witness, who might seek to correct what he’s just said. The bad advocate commits a series of cardinal sins: asking open questions; questions to which he or she doesn’t know the answer; putting one question too many; asking questions that are inappropriate, badgering, irrelevant, or which in reality are statements or submissions; thereby losing all control of the length and nature of the witness’s answers.

The role of cross-examination in financial remedies

Cross-examination plays a more limited role in financial remedies than in other areas of law. Under s 25(1) Matrimonial Causes Act 1973, the court has a duty to consider the relevant circumstances of the case, whereby it exercises a ‘quasi-inquisitorial’ role (*Parra v Parra* [2002] EWCA Civ 1886 at [22]). By contrast, most civil and criminal trials are purely adversarial in nature, and the judge’s role during evidence is closer to that of an impartial umpire.

In financial remedies, cross-examination might help the court resolve factual issues relating to housing need, access to resources, liquidity, etc. but it will rarely, if ever, deliver a knock-out blow to the claim, which does on occasion happen in civil (e.g. a claim under the Trusts of Land and Appointment of Trustees Act 1996 based primarily on recollection evidence) and in crime, where the undermining of prosecution witnesses might lead a submission of no case to answer: *R v Galbraith* [1981] 1 WLR 1039).

The judge’s duty in financial remedies to ‘... investigate issues which he considers relevant to outcome even if not advanced by either party’ (*Parra* at [22]) provides a safety net for the badly prepared case and the party who ‘fails to come up to proof’ in the witness box. Where an advocate neglects to cross-examine on a relevant issue, or where yawning gaps have emerged during cross-examination, the judge may feel duty bound to ask the witness further questions (often to the intense frustration of the cross-examining advocate), which undoes some of the damage, or fills the evidential void, in the interests of fairly resolving the case. Or the court may conclude that only limited weight should be attached to what a witness has said, or the witness’s demeanour in the witness box (see Lord Leggatt’s keynote speech to the **At A Glance** conference, ‘Would you

believe it? The relevance of demeanour in assessing the truthfulness of witness testimony’, October 2022).

Rules of evidence do exist in financial remedies, but they are rarely enforced. The common law rule that an advocate should ‘put his case’⁴ applies in the Family Court as elsewhere, but with notable leniency. Otherwise, hours of court time would be taken up by hearing a line-by-line challenge of a party’s schedule of outgoings. The court may be able to resolve such factual disputes based upon a combination of written evidence, submissions and a generous dose of common sense or ‘judicial notice’,⁵ without hearing extensive, or indeed any, ‘banal cross-examination’ (e.g. ‘I suggest you don’t need £40 pm for hair products’, ‘You could live in that flat, couldn’t you?’, etc. In *Finch v Baker* [2021] EWCA Civ 72 Moylan LJ concluded that (at [42]):⁶

‘... A judge is well able to assess a party’s income needs without ... them being subject to detailed cross-examination. The wife’s needs had clearly been put in issue by the husband (as referred to during the hearing before the Judge) and a judge is well-placed to assess what is achievable and what is fair without any such, frankly often banal, cross-examination.’

The Family Court’s approach to the rules of evidence and cross-examination has always been somewhat *laissez faire*. Advocates are routinely allowed to get away with questions and commentary that would not be permitted in the county court or Crown Court. When objection is taken to a question because it is irrelevant, unfair, badgering, confusingly compounded, etc. a judge is as likely to waive away that objection (‘let’s just get on with it shall we’) as uphold it, even when the objection is entirely correct in law. If the standards of cross-examination are lower in financial remedies than say in crime, this is not simply down to the advocates’ lack of practice. Professional standards atrophy where they are not consistently upheld and enforced.

Professional rules and guidance

Across the mists of time, most practitioners may recall the rules and conventions of cross-examination: don’t ask a question to which you don’t know the answer, make sure put your case, ask closed and leading questions, etc. However, the source of these rules and conventions is surprisingly difficult to find. Given how minutely other aspects of legal practice have been codified over the years, in procedural directions and practice guidance, it is surprising that so little is said in relation to cross-examination.

Professional rules

Barristers might assume that cross-examination is extensively covered by the Bar Council Code of Conduct. In fact, this document (which seems to have been structured by an alien life form, with paragraph numbers like ‘CD3’, ‘gC2’ or ‘rC3.2’) says remarkably little about how to cross-examine. The Conduct Rules (‘C’) contain the following high-level principles:

- A barrister’s ‘core duties’ include the ‘... duty to act with honesty and integrity’ (CD3), that ‘... you must not abuse your role as an advocate’ (rC3.2).
- This includes not asking a witness questions ‘... merely to insult, humiliate or annoy a witness ...’ (rC7.1)

(which might seem somewhat self-evident), and, more pertinently, not making ‘... a serious allegation against a witness whom you have had an opportunity to cross-examine unless you have given that witness a chance to answer the allegation in cross-examination’ (rC7.2).

- A serious allegation must not be made against any person unless the advocate has ‘reasonable grounds for the allegation’ and that ‘the allegation is relevant to your client’s case or the credibility of a witness’ (rC7.3).

The Solicitors Regulation Authority website contains a more useful resource entitled ‘How to cross examine a witness’, which is a good starting point for any fledgling advocate. This identifies two key aims in cross-examination:

‘First, to advance your case by putting it to witnesses from the other side and getting them to say things which support your case. If you fail to put your case on a particular issue it may be assumed that you accept the other side’s account of that issue and you will not be able to put your account of it in your closing speech.

Second, to undermine the case of the other side by exposing weaknesses in the reliability and credibility of its evidence. This usually means attempting to show that a witness’ account is mistaken, inconsistent or deceitful.’

The SRA website also contains several other helpful pointers:

‘Your cross examination should remain fair, calm and composed so that the witness cooperates with you and to maintain your credibility as an advocate’

‘You should avoid commenting on the quality of a witness’s answer in cross examination or arguing with them about an answer you disagree with. This can undermine your credibility and make it harder to get the witness to cooperate.’

‘Carefully consider whether a leading or open question is more likely to generate valuable evidence on a particular factual matter.’

‘Keep questions short and clear by limiting them to one issue or query at a time.’

Practice area guidance

The compendious *2026 FRC Guide*⁷ does not cover cross-examination at all. This is curious since its predecessors, the *2016 HC Efficiency Statement*,⁸ and the *2002 FRC Efficiency Statement*⁹ contained the provision that ‘... when conducting cross-examination advocates must avoid assertion, comment and personal opinion’ (at paras 17 (HC) and 2 (below HC), respectively). While it can be difficult to draw a clear line between what amounts to impermissible comment or assertion, it might have been helpful to include some guidance as to standards of cross-examination.

In terms of the nuts and bolts of cross-examination, the most useful guide comes from an unexpected source: the Planning and Environmental Bar Association. The PEBA’s *Good Practice Memorandum (No 2)* concerns cross-examining experts in inquiries, but its checklist has general application (points 5 to 10 in particular) (my italics):

- (1) Cross-examination should be focussed on the matters in issue between the parties;
- (2) Providing the order of topics to be covered at the

outset of the cross-examination can assist with time and document management;

- (3) Where possible, questions should be kept short and directed to a single issue;
- (4) Questions may be “closed” rather than “open”;
- (5) *During cross-examination, barristers should not “comment” on the answers given;*
- (6) *Barristers should be courteous to the witness and avoid aggressive or bullying behaviour;*
- (7) *Avoid repetitious questioning. Effectively repeating the same question more than three times in total, when a clear answer has been given, should generally be avoided;*
- (8) *Barristers should not interrupt a witness answering the question put;*
- (9) *Barristers should not deliberately misinterpret the answer given by a witness;*
- (10) *Barristers should always be fair to the witness (e.g. avoid putting questions in a misleading context);*
- (11) Indicating to the witness when a document is no longer required can assist with document management;
- (12) The length of cross-examination should always be proportionate to the importance of the issue and have regard to any time estimate provided and making the best use of inquiry time.

[...] matters of law are not for cross-examination but are for submissions in closing.’

Vulnerable witnesses

There is also plenty of guidance available in terms of cross-examining a vulnerable witness with autism, a learning disability or hidden disabilities.

Practitioners will be aware of the contents of FPR PD 3A and PD 3AA, which relate to vulnerability, grounds rules hearings and the various ways a court can proceed to ensure a witness’s best evidence is given. There are also two helpful websites relating to cross-examination of vulnerable witnesses:

- (1) The Advocates Gateway contains a series of toolkits containing guidance on communicating with vulnerable witnesses, in order to promote high ethical and professional standards. There are 21 toolkits which are aimed mainly at criminal practice, although Toolkit 13 deals with vulnerable witnesses in the Family Court (also see Toolkit 13A which contains a crib sheet covering participation directions and intermediaries). Both are essential reading in any case involving vulnerability.
- (2) The Inns of Court College of Advocacy Twenty Principles. While this also is concerned primarily with criminal trials, it contains useful guidance such as (8) signposting a new topic, (10) thinking about how to take the evidence, chronologically or in a structured way, (12) avoid statements posed as questions, (18) avoid multi-part ‘tag’ questions.

Guidance from case law

Court judgments rarely deal with standards of cross-examination. When writing a judgment, the judge normally has enough on his or her plate in terms of setting out the factual background, summarising the parties' cases and, crucially, explaining findings of fact and decision. There is rarely the time or inclination to 'mark the work' of the advocates by surveying the conduct of cross-examination or providing more general guidance.

One leading exception is *R v Farooqi* [2013] EWFA Crim 1649, in which the Court of Appeal dismissed a criminal appeal in a terrorism case, but was extremely critical of the '... flagrant misconduct and alleged professional incompetence by one of the advocates at trial'. While this judgment primarily concerns criminal practice, the following observations of the Lord Chief Justice, Lord Judge are relevant more generally:

'107. The question was raised whether [counsel] discussed his proposed forensic strategy with his client. However, whether he did or not, and even assuming that his client agreed or encouraged it, the client's "instructions" were irrelevant. *The client does not conduct the case: that is the responsibility of the trial advocate. The client's instructions which bind the advocate and which form the basis for the defence case at trial, are his account of the relevant facts: in short, the instructions are what the client says happened and what he asserts the truth to be. These bind the advocate: he does not invent or suggest a different account of the facts which may provide the client with a better defence.*

108. Something of a myth about the meaning of the client's "instructions" has developed. As we have said, the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the solicitor "instructs" him. In short, the advocate is bound to advance the defendant's case on the basis that what his client tells him is the truth, but save for well-established principles, like the personal responsibility of the defendant to enter his own plea, and to make his own decision whether to give evidence, and perhaps whether a witness who appears to be able to give relevant admissible evidence favourable to the defendant should or should not be called, *the advocate, and the advocate alone remains responsible for the forensic decisions and strategy. That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates and as an advocate, burdened with twin responsibilities, both to the client and to the court.*

109. In the trial process the advocate is subject to some elementary rules. ...

111. The advocate cannot give evidence or, in the guise of a submission to the jury, make assertions about facts which had not been adduced in evidence. That is inconsistent with the proper function of an advocate ...

113. We do not suggest that the principle of fairness to the witness requires the somewhat dated formulaic use of the word "put" as integral to the process. Assuming that there is material to justify the allegation, "Were you driving at 120 mph?" is more effective than, "I put it you, that you were driving at 120 mph?" *What ought to be avoided is the increasing modern habit of asser-*

tion, (often in tendentious terms or incorporating comment), which is not true cross-examination. This is unfair to the witness and blurs the line from a jury's perspective between evidence from the witness and inadmissible comment from the advocate... we deprecate the increasing habit of comment or assertion whether in examination in chief, but more particularly in cross-examination. The place for comment or assertion, provided a proper foundation has been laid or fairly arises from the evidence, is during closing submissions to the jury.' (emphasis added)

Farooqi has been cited in several family and Court of Protection cases, such as *Re PB* [2014] EWCOP 14, in which Parker J, who insisted that cross-examination questions should always be short (no more than seven or eight words), underlined the importance of careful preparation, short questions and that it was the advocate's responsibility to control the length of the witness's answers:

'141. Effective steps must be taken to reduce evidence to the essential. In *Farooqi* Lord Judge emphasised the requirement that cross-examination should proceed by short, focussed question rather than by comment, opinion and assertion. *I also note that in The Law Commission lecture given last year Lord Judge stated (as I was taught) that in principle no question should be longer than one line of transcript.* In any event, the judge is interested in the answer, not the question.

142. Advocates need to be able to control the witness by the form and structure of their questions and not permit discursive replies or to allow the witness to ramble (particularly if the witness has the tendency to be prolix). There is no necessity for a long introduction: apart from anything else it may distract and confuse the witness and the judge.

143. Examination must not proceed by way of "exploration" of the evidence: i.e. a debate, or by putting theory or speculation, rather than by properly directed questions which require an answer.

144. This is all the advocates' responsibility'

Practitioners should also be aware of the following judicial observations about cross-examination:

'... mere comments by representatives under the guise of questioning of a party or witness are not appropriate. They are forbidden by the most elementary principles and rules of advocacy.': *Wagner v Secretary of State for the Home Department* [2015] UKUT 655 at [10] per McClosky J.

'... To be frank, cross-examination is often a largely pointless and futile exercise if it amounts to little more than counsel putting disputed facts to a witness. It is a dispiriting and largely useless experience for a judge to listen (often through translators) to lengthy cross-examination of a witness along those lines ... It is a very rare case where, without having been confronted by the documentary record or known or probable facts, a witness nonetheless collapses under cross-examination and admits that his witness statement is untrue.': *AO v LA* [2023] EWHC 83 (Fam) at [60]–[61] per Mostyn J.

Conclusion

Rather than layer my own commentary on the guidance summarised above, I would like to conclude by offering a

handful of practical suggestions which I've found useful in preparing cross-examination.

(1) Start with a pencil and paper

When it comes to thinking creatively, and planning cross-examination is a creative mental process, there's something freeing about starting with a blank sheet of paper and a pencil or several pens of different colours, and being able to create a mind map, as opposed to typing on a computer. Over the years I have wasted a lot of time typing out cross-examination notes only to find I get blocked or get too drawn into the minutiae. Start with a piece of paper, if only to work out the main topics, and how one will flow into another. When you have this in mind, by all means, type out the more detailed questions (especially if, like me, your handwriting is totally illegible).

(2) Preparation

This is both an obvious and somewhat tedious point to underline: with cross-examination, the devil is in the detail and careful preparation is essential. While some advocates seem to have been blessed with an innate ability to cross-examine, good preparation generally beats natural talent. This blessing often turns into a curse: those who can wing it are increasingly tempted to wing it.

The best points in cross-examination often derive not from the main witness statements and expert reports (which everyone will have read) but the exhibits and attachments (which the judge probably has not read, and which your opponent might have overlooked). The Pulitzer Prize winning biographer Robert Caro has a personal mantra: 'Turn Every Page'. This applies to cross-examination as much as it applies to research.

The extent to which you write out questions in long hand is a matter of personal preference. In interview,¹⁰ Sir Nicholas Mostyn gave the following guidance:

'Cross examination is the way, and the platform where, you can put your case again and again and drill it into the judge's head. If the witness gives an unsatisfactory answer for you, just ignore it and move on to the next question. Get the next question in. Get the questions, which is your case, into the judge's head. It's the questions that matter. The second thing: write out your cross-examination. My cross-examinations would always be: 'Question ... if he answers this, then ask this; if he answers that, then ask that question'. It would all be planned out in a flow chart, with every possible answer that the witness could give, because of course you happen to know all the answers, don't you? ... Third of all, never, ever, ever ask compound questions. The judge will not remember any part of them at all.'

For myself, I tend to allow for a bit more flexibility. Cross-examination is not a scientific process. Witnesses say unexpected things under pressure and sometimes there is good reason to pursue unexpected statements (albeit, within reason: see point (6), below). As to timing of when to prepare, I find it much easier to plan cross-examination in the early morning than in the evening. It is extraordinary how a good night's sleep can clear the mind in terms of structuring cross-examination notes.

(3) Work backwards

For those starting in practice, planning cross-examination can be overwhelming. There is so much material. Where to start? I would suggest that, as a first stage, you work out

what you want to say in closing submissions. Once you have established the dozen or so main submissions you want to make, and your overall 'theory of the case', use these to plan your cross-examination. What questions do you need to ask to support each submission (or to deal with the arguments your opponent is likely to make). If there is no connection between a question and either your submissions or the other party's case, cut the question – or put it on a separate page, so you have it in reserve if needed. It is particularly important at a hearing where court time is limited (and court time normally is limited at trial) to ensure you don't waste time in cross-examination pursuing lines of inquiry which might be interesting, but which lead nowhere in terms of closing submissions.

(4) Close your questions

Every advocate has had the frustrating experience of the rambling witness. Sometimes this is down to a witness's nerves, in other cases this might involve a defensive and canny witness who deliberately filibusters to blunt the point of your questions. It is the advocate's responsibility to control the evidence (see *Re PB* above), and the best way to do this with a difficult witness is to ask a series of tightly closed, leading questions: 'You're not saying this, are you?', 'And you're not saying that?', 'And you wouldn't be arguing for that?', 'So would you agree with me that ...?'. Done well, this takes the wind out of even the most difficult witness's sails (yet another sporting metaphor).

By contrast, it is dangerous to the point of professional incompetence to ask open questions such as 'What do you say about ...?' or 'Why didn't you do that?'. Some witnesses might respond by giving a lengthy, narrative answer which you might not be able to curtail, so long as the answer relates to the question put. Your opposing advocate may also be wily enough to make hay with such loosely phrased questions in re-examination ('You were asked what do you say about ... why don't you tell the court in your own words ...?').

(5) Persuasive as opposed to direct cross-examination

In Aesop's Fable, *The North Wind and the Sun*, the wind and the sun compete to remove a traveller's cloak. The wind used force but the harder it blew, the tighter the man clung to his coat, whereas the warmth of the sun caused the man to remove it. The point being that persuasion achieves a lot more than direct force.

It can be surprising how, even in the most contentious cases, witnesses are willing to make reasonable concessions provided the questions are reasonably put, and the witness is not taken as a fool or worse. Bear in mind that many witnesses genuinely find the experience of being cross-examined to be highly confusing, to the extent that they might attack innocuous questions raised by their own counsel in chief, as if the advocate had somehow changed sides.

Before you 'go direct' with a witness, consider whether it might first be worth gently exploring some of the less obviously contentious issues (e.g. 'You want to go back to work don't you?', 'Would it be reasonable to assume this will happen by x?', 'How much would you earn?', 'Would you be able to live outside Kensington and Chelsea?'). This is not an invariable rule: some witnesses enter the box with the battle-hardened determination to not concede an inch. But many witnesses want to appear reasonable in front of a

judge and may be more susceptible to respectful questions. This also raises a matter of structure: sometimes it's best to start where you think the witness might offer helpful answers, before you turn to more contentious items, where the witness might become more defensive and clam up.

(6) Resist temptation

In cross-examination, temptation is everywhere. The temptation to gild the lily, by asking one question too many; the temptation to play to the gallery, to be your client's white knight; the temptation to stray from your carefully prepared notes and chase metaphorical rabbits down the rabbit hole.

To say that advocates must resist all the above temptations would be a counsel of perfection. Everyone does this in practice. It is extremely difficult to plan for every eventuality in cross-examination, when in truth no one really knows precisely what a witness is going to say to any given question. But cross-examination will generally go better if you can control your impulses and resist the temptation to stray into commentary or submissions. This is particularly so where the advocate can remain physically still, without fidgeting, while maintaining a courteous and steady tone, without raising one's voice or adopting a hectoring tone.

In real life there are very few 'gotcha' moments in court, in terms of a witness giving a truly damaging answer. When it does happen, it's far more impressive to take a careful note and move on, rather than pantomiming your response, or asking one question too many, which lets the witness off the hook. Pick up the point in closing. Allow for the evidence to have a delayed effect; acting like a depth charge.

(7) Silence

Finally, a semi-serious point.

It is a slightly depressing aspect of an advocate's job to find that the most helpful answer in cross-examination came, not in response to one of your carefully crafted questions, but when you'd lost your place, paused, and the witness has felt the need to keep talking to fill the silence. It is remarkable how often this happens in court, not because the advocate is doing this deliberately, but because he or she can't find a page reference. The serious point is to listen carefully to what has been said, and on occasion to allow a pregnant pause to develop if you think the witness might keep talking.

Further reading

Richard du Cann QC, *The Art of the Advocate* (Penguin 1993).

Dominic Carman, *No Ordinary Man* (Hodder & Stoughton Ltd, 2002).

Thomas Grant KC, *Court Number One* (John Murray, 2019)

Thomas Grant KC, *Jeremy Hutchinson's Case Histories* (John Murray, 2015).

Thomas Grant KC, *The Mandela Brief* (John Murray, 2022).

Iain Morley, *The Devil's Advocate* (Sweet & Maxwell, 2015).

John Mortimer QC, *Rumpole, Clinging to the Wreckage* (Penguin, 1986).

David Pannick QC, *Advocates* (Oxford University Press, 1992).

Keble Advanced Advocacy Course, Inner Temple, <https://www.innertemple.org.uk/membership-services-support/financial-support-members/keble-advanced-advocacy-course/>.

Notes

- 1 Technically speaking, financial remedy claims are set down for 'final hearing' not 'trial'. However, I use the generic term 'trial' in this article.
- 2 'If it were done when 'tis done, then 'twere well/It were done quickly' (*Macbeth*, Act I, Scene 7).
- 3 Clifford Mortimer, formerly of this parish, in terms of Mr Mortimer senior having practiced in matrimonial cases and published the very long *Clifford on Probate*, before going blind. Played memorably by Laurence Olivier in the TV adaptation of 'A Voyage Round My Father'.
- 4 *Browne v Dunn* (1863) R 69, *Griffiths v TUI (UK) Ltd* [2023] UKSC 48.
- 5 I.e. the rule of evidence that the court may take into account something that is generally well-known and established, without needing to hear evidence on the point. 'Judges are entitled and bound to take judicial notice of that which is the common knowledge of the great majority of mankind and of the greater majority of men of business': *R v Aspinall* (1876) 3 QBD 48 at 61–62 per Brett JA.
- 6 With thanks to Rhys Taylor for drawing my attention to this decision.
- 7 *The Financial Remedies Court of England & Wales: Financial Remedies Guide* (March 2026), www.judiciary.uk/guidance-and-resources/financial-remedies-guide-2026/
- 8 *Statement on the efficient conduct of financial remedy hearings allocated to a High Court Judge whether sitting at the Royal Courts of Justice or elsewhere* (revised 1 February 2016), <https://financialremediesjournal.com/content/images/2025/07/2016-hc-efficiency-statement.pdf>
- 9 *Statement on the Efficient Conduct of Financial Remedy Hearings proceeding in the Financial Remedies Court below High Court Judge level* (issued 11 January 2022), www.29br.co.uk/images/uploads/documents/FRC_Efficiency_Statement_11.01.22.pdf
- 10 'Interview with Mr Justice Mostyn – rules and woolly discretion', [2023] 2 FRJ 89.

50 Years on from *Martin v Martin* 1976 – Are Add-backs Fit for Purpose?

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Fifty years ago, on 14 June 1976, the concept of add-backs in financial remedy cases was first articulated. In the ground-breaking case of *Martin v Martin* [1976] Fam 335, the Court of Appeal upheld the decision of Purchas J notionally to add back the monies spent by the husband, following separation, on his unsuccessful business ventures, in its determination of a fair division of assets. In what subsequently has become a well-known passage, Cairns LJ stated, that ‘a spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what is left as he would have been entitled to if he had behaved reasonably’.

Add-backs, of course, do not create more money. But they are a mechanism that can mean that the over-spender reaps what they sow. The husband’s conduct in *Martin* was such that it made it ‘just for the court to be more concerned to mitigate the reduction in the wife’s standard of living than the husband’s’. The focus was on minimising the impact on the party who had not wasted money, rather than punishing the party who had. Importantly, the Court of Appeal clearly distinguished between personal misconduct and overspending of assets. Cairns LJ noted that ‘In my opinion, nothing that was said in *Wachtel v Wachtel* [1973] Fam 72 was intended to apply to any conduct either during or after cohabitation which has the effect of reducing the funds available to provide for the needs of both after divorce’. It was in *Wachtel* at first instance that Ormrod J (as

endorsed by the Court of Appeal) stated that conduct would only affect outcome if it was ‘obvious and gross’. So, in *Martin*, there appeared to have been a clear distinction between ‘gross and obvious’ conduct, for which we say read personal misconduct, and overspending: the former was considered an assessment of personal behaviour, the latter a question of fair allocation of assets.¹

Martin predated the introduction of s 25(2)(g) Matrimonial Causes Act 1973,² which specifically provides that the court shall have regard to the conduct of each of the parties if that conduct is such that it would be inequitable to disregard it. But, over time, the ‘*Martin* distinction’ between add-backs and personal conduct has been eroded and ultimately lost completely. It was more than 30 years after *Martin* that add-backs specifically started to be identified as species of conduct, see Moylan J in *Evans v Evans* [2013] EWHC 506 (Fam) and Moor J in *MAP v MFP* [2015] EWHC 627 (Fam) where he said ‘It does seem to me that arguments in this area essentially come down to an issue of conduct as defined in section 25(2)(g) namely “conduct that it would in the opinion of the court be inequitable to disregard”’.

This categorisation has since been applied by other High Court Judges, leading ultimately to Mostyn J in *OG v AG* [2020] EWFC 52 categorising conduct into four different species: personal misconduct, add-backs, litigation misconduct and drawing inferences about undisclosed assets. These four are very different scenarios but, it appears, are considered together for litigation purposes. In *Tsvetkov v Khayrova* [2023] EWFC 130, Peel J set out the procedure for pleading conduct generally and stated, without differentiating between the species, that pleaded conduct must, per [43(ii)], ‘meet the conduct threshold, which has consistently been set at a high or exceptional level’ although the test for each species of conduct differs.

The elision of add-backs with conduct has, we say, made the test for the former formidably, and unduly, high. The result is that add-backs have lost their flexibility and simple logic and have become disproportionately expensive and difficult to litigate.

Family law was very different in 1976. It would be nearly 25 years until *White v White* [2000] UKHL 54 revolutionised the approach of the courts to financial cases, removing gender bias, and introducing for the first time the yardstick of equality in dividing matrimonial assets. It took a further 6 years for the principles of needs, sharing and compensation to be developed in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

But despite the clear benefit and fairness of these developments, the authors contend that the rationale behind the decision in *Martin* produced fairer outcomes than the current approach to add-backs. Add-backs were a useful mechanism to prevent one party’s unilateral dissipation of assets which unfairly prejudiced the non-dissipating spouse’s share. They were borne of pragmatism, easy to calculate and, we believe, consistent with concepts of fairness in the general population. We suggest something has gone wrong when the outcomes that the litigation generate deviate too far from what the average person considers fair.

What is the legal test?

What is the legal test to add back a sum? The jurisprudence

uses words such as ‘reckless’, ‘wanton’ and ‘wilful’, without any clear explanation of what they are intended to mean. Are they the same test expressed differently, or different tests?

The law has evolved. In *Norris v Norris* [2002] EWHC 2996 (Fam), the husband had financed *over-spending*, i.e. expenditure over income, of £350,000 in 2 years, including spending on items like jewellery for his new partner, from the parties’ capital. Bennett J found his overspend was ‘reckless’ and as a consequence added £250,000 back. Given that the parties had more than enough to meet their needs – £4m each – he could have chosen to add back the entirety but ‘did not think it appropriate’. He posed the unanswerable question: ‘Why should the wife be disadvantaged in the split of assets by the husband’s reckless expenditure?’ and held that an overspend that ‘recklessly depleted’ assets and thus ‘potentially’ disadvantaged the other should be added back.

Five years later, in *Vaughan v Vaughan* [2007] EWCA Civ 1085, the Court of the Appeal per Wilson LJ (as he then was) reformulated the test from *Martin v Martin*, from ‘reckless’ to ‘clear evidence of dissipation (in which there is a wanton element)’. The Court of Appeal warned that a notional re-attribution has to be conducted ‘very cautiously’ and ‘that the fiction does not extend to treatment of the sums reattributed to a spouse as cash which he can deploy in meeting his needs, for example in the purchase of accommodation’.

‘Wanton’ has a multiplicity of meanings from licentious to extravagant, but all import an unjustifiable and deliberate action, deserving of criticism.

In *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), Bennett J found that £500,000 of the wife’s expenditure was ‘unreasonable’: he was critical of the wife’s unreasonable belief that she was entitled to the marital standard of living indefinitely. He referred to his own test in *Norris* of ‘reckless’, and to *Vaughan*, but did not actually categorise the spend as any more than ‘unreasonable’. Moreover, he did not specifically include the overspend as a head of conduct, and, indeed, went on to consider conduct – personal conduct – explicitly later in the judgment. We comment that the wife’s spending could not properly be classified as *reckless*, given it was found to be a deliberate attempt to preserve a level of marital expenditure with the aim of increasing the claim.

Thereafter, add-backs started to be classified as a species of conduct by the High Court, for example by Moylan J (as he then was) in *Evans v Evans* [2013] EWHC 506 (Fam) and, as noted above, by Moor J in *MAP v MPF* [2015] EWHC 627 (Fam). Moor J went on to limit the scope of add-backs through several methods. First, he noted that there had to be ‘wanton dissipation of assets’ a rather higher test than that in *Vaughan* of ‘dissipation in which there is a wanton element’. Though he quoted *Vaughan* later in the judgment, it is ‘wanton dissipation’ which has become the key definition in this area. Second, Moor J emphasised the importance of motivation: he highlighted that deliberate spending to deprive the other party could not be allowed. And lastly, and now infamously, he found that a spend of £250,000 on drugs and cocaine would not be added back as the husband’s personality flaws meant he could not help himself. The husband’s personality had helped to generate capital and then waste it. There was no add-back, however,

as the judge held, essentially, that you have to take your spouse as you find them.

In *BD v FD (No 2) (Application of the Principle of Need)* [2016] EWHC 594 (Fam), Moylan J (as he then was) reiterated the high tests for add-back, holding that it was a species of conduct. But he found the wife’s spending sufficiently ‘exorbitant’ to justify an add-back. An overspending husband escaped add-back again in *AP v ALP v Krechet Holdings Ltd v Ardea Ltd* [2018] EWHC 2758 (Fam), where Moor J, arguably eliding deliberate and wanton, used the phrase ‘wilful dissipation’ as the test. He doubled down on holding that overspend – here of ‘mouth-watering’ sums – should be subject to the *Miller; McFarlane* restriction (derived from *Wachtel*) that the spend therefore had to be ‘gross and obvious’. Effectively, a *volte-face* on the *dicta* in *Martin*, the genesis of this area of jurisprudence.

Recent authorities have led to a lack of clarity. In *OG v AG*, Mostyn J cites the jurisprudence as ‘where one party has wantonly *and* recklessly dissipated assets’ which implies both elements are required. That analysis is quoted and impliedly endorsed by Peel J in *Tsvetkov*. In *BS v HC* [2026] EWFC 20 (B),³ HHJ Hess considered the spending must be wanton *or* reckless for an add-back. The judge went on to accept Moor J’s focus on the spender’s intention. He held that the test for add-backs was a high one ‘only dissipations which are wanton *or* reckless and where the spending was deliberately targeted towards diminishing the share of the party will justify such an add-back’. He went on to state ‘It is right for the court to state clearly that any financial remedies litigant who does engage in manipulative spending between separation and a financial remedies hearing with a view to diminishing the sharing claim of the other does run the risk that the court will add back that the amounts spent to restore mathematical fairness’.

That view was arguably in contrast to the view of Nicholas Allen KC (sitting as a deputy High Court Judge), in the previous year, in *BY v GC (No 2)* [2025] EWFC 397, who did not consider the spender’s motivation to be a necessary element of the add-back. He derived four propositions from *Evans v Evans*:

- (1) an ‘add-back’ argument requires an analysis of what *both* parties have been spending. It is not sufficient to simply point out certain aspects of one party’s expenditure; the overall picture needs to be analysed. Context is important;
- (2) *Vaughan* was cited with approval – ‘a notional reattribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) ...’;
- (3) reattribution must be justified in the context of the case. It is a form of conduct and, as such, it must be ‘inequitable to disregard’; and
- (4) there are therefore two elements: (a) a factual/evidential element – Is there clear evidence of wanton dissipation?; and (b) a legal/discretionary element – Would it be inequitable to disregard it or is notional reattribution required in order to achieve an outcome which is fair?

What is clear on any analysis, however, is that the test to add back is higher now than originally intended. Since the case of *MAP v MPF* [2015] EWHC 627 (Fam), the overarching theme has become one of a focus on the *intention*

behind the overspend and the culpability of the spender, rather than to focus on the erosion of the marital acquest and the impact on the financial outcome for the other spouse.

Doing the best we can, we suggest the test (in respect of spending other than on legal costs) appears to be the following: the dissipation must be wanton or reckless, with the effect of diminishing the other party's award, so as to cross the threshold of inequitable to disregard, with some but not all of the judiciary considering a deliberate intention to deprive the other to be a necessary element. This high test means that the over-spender, rather the non-culpable party, has the advantage in litigation. Keen readers may also note that overspending wives seem to have done rather worse than high-flying or drug-addicted husbands.

Adding back legal costs

In contrast, when it comes to legal costs, the jurisprudence has largely developed in the opposite direction with the legal test lowered rather than elevated.

A brief traverse of the case law illustrates the increasing willingness of the courts to add back sums spent on legal fees from a restrictive start. In *MacGreagh v MacGreagh* [1995] 2 FCR 321, Thorpe J (as he then was) acknowledged that misconduct in proceedings is usually reflected in costs, but the 'husband's strategy had been so gross and so extreme that it would be inequitable to disregard it' so it had sounded in the award by quantifying the wife's share as if the waste and destruction had not happened. The husband's behaviour in that case had crossed the conduct threshold, which was not a necessary element of add-backs at the time as set out above.

However, that case was something of an exception: judges were generally cautious about adding back sums that had been spent on costs. Coleridge J in *R v R* [2011] EWHC 3093 (Fam) insightfully noted at the time that 'a wife often has higher costs because she has to make the running, and particularly where, as here, there was deep, and to some extent justified, suspicion'.⁴ He went on to discourage the use of add-backs when it came to costs. King J (as she then was) went on to quote *R v R* in *GS v L (Financial Remedies: Pre-acquired Assets: Needs)* [2011] EWHC 1759 (Fam).

Since then the direction of travel has seen judges being more critical of overspending on costs, especially since the change to FPR PD 28A in 2019.⁵ In *TT v CDS (Rev 1)* [2020] EWCA Civ 1215, Moylan LJ confirmed in the Court of Appeal, 'The general approach is that litigation conduct within the financial remedy proceedings will be reflected, if appropriate, in a costs order. However, there are cases in which the court has determined that one party's litigation conduct has been such that it should be taken into account when the court is determining its award'.⁶ The judge clarified that the caution about notional reattribution in *Vaughan* does not mean 'that the financial effect of litigation conduct cannot impact on a needs-based award'. Indeed, his *obiter* view was that the 'financial consequences of the litigation misconduct, perhaps combined with other factors, might be such that it is fair that the innocent party is awarded all the matrimonial assets'.

Add-backs for legal costs are now routinely pursued when there is a difference in the parties' expenditure. HHJ

Hess analysed the authorities on adding back legal costs in *YC v ZC* [2022] EWFC 137 (B).⁷ The judge concluded where one party has spent 'at a sensible and moderate level and the other has incurred legal costs at a grossly disproportionate level':

'absent any proper explanation for the differential in spending, the court can deal with any unfairness arising from the differential in legal costs spending by making an adjustment in the court's asset schedule before distribution, for example by excluding a portion of the over-spender's unpaid costs and/or adding back a portion of the over-spender's costs already paid, thus appropriately penalising the over-spender without actually making an inter partes order for costs.'

At that point, add-backs for legal costs appeared not to be subject to a test of exceptionality, nor the requirement that the expenditure has to have been *wanton* or *reckless*. However, Peel J may have been requiring a higher test in *HO v TL* [2023] EWFC 215 when he said, 'Although I accept that this add-back technique is available, in my judgment it is best deployed where it leaps from the page'. That, at least, sounds like the hurdle that must be crossed for establishing excessive legal expenditure is closer to that of add-backs generally.

As with other forms of conduct, the jurisprudence is driven by policy. The test for add-backs of other forms of expenditure is high so as to discourage 'disproportionate forensic accounting disputes',⁸ whereas it is low in respect of legal costs to ensure that the 'grossly disproportionate spender (and the solicitors representing such a person)' feel there is a check on legal costs spending.⁹ The difficulty, however, with a seemingly different test for add-backs of general spending, and add-backs for legal costs, is that it implies that it is worse to over-spend on legal fees (often, this is the financially weaker party seeking disclosure) than to spend monies on rather more insalubrious activities.

Are add-backs fit for purpose?

We suggest the problems with the current law on add-backs can be distilled as follows:

- (1) an excessively high, and inconsistent threshold, in part, to the elision of add-backs with conduct;
- (2) a focus on the motivations, and culpability, of the over-spender (save in respect of spending on legal costs) rather than the impact on the other party;
- (3) the limited attention that is paid to the fact that over-spending ultimately erodes the marital acquest; creating a tension between the care placed on quantification of the marital acquest, and an indifferent approach to its erosion; and most importantly
- (4) a difference between the approach of the courts and the view of the ordinary person's sense of standards of fairness.

We deal briefly with each in turn without wishing to repeat comments raised earlier.

The elision of add-backs with conduct means that the test for add-backs is high, usually prohibitively high, and the procedural obligations are burdensome. The argument must be pleaded with full particularity and evidenced in the Form E – at a time when it is difficult to do so as no financial disclosure has been provided. In our experience, some,

although not all, judges now require that the non-miscreant set out how the overspend affects their claim and possible award. That all takes time and money in circumstances where it may, frankly, be self-evident from the bank statements. Courts require arguments to be proportionate, for which we understand that the overspend must be substantial, potentially ignoring the fact that relatively small amounts can have a far bigger impact on the long-term outcome of lower asset cases. The legal and evidential hurdles make running the argument successfully extremely difficult, the financially weaker party having to take all the risk, or bear the cost of the expenditure. The other party – the possible over-spender – will provide another disincentive when they almost inevitably threaten that they will seek an issue-based costs order if the argument does not succeed.

The court will consider that it is obliged to consider the motivations of the spender. It may also feel obligated to discern whether or not there is anything inherent in that party that somehow excuses their behaviour or justifies forgiving their overspending on the basis that they have some other balancing good quality – most likely significant entrepreneurial flair that has generated (most of) the matrimonial assets. This investigation into these issues takes the court into an unwelcome, and unnecessary, analysis of personality.

We say the focus should, instead, remain on impact and outcome. The original purpose of add-backs was to limit or alleviate the disadvantage suffered by the non-spender. The impact of overspending is the same, irrespective of whether or not the spender was manipulative and reckless, or indifferent and selfish.

Financial remedy litigation focuses on two elements: computation and distribution. The concept of the marital acquest establishes that the court considers matrimonial assets belong to both parties, not just the party in control of the assets. Overspending by one party of the marital acquest is not just spending their money, it is also the involuntary expenditure of the other party's money too; an invasion of their resources. The unknowing, and non-consenting, party is therefore paying 50% of the costs of their estranged spouse's holiday with their new partner, or new Porsche, or drug habit. The jurisprudence gives the impression the court will probably, save in the most extreme circumstances, be indifferent to that spend. A lot of court time is spent on quantifying the marital acquest with precision for equal division, with significant attention now being paid to excluding post-separation accrual – a notoriously difficult area. This is in contrast to the relative lack of attention given to arguments about what the pot fairly should have been, were it not for expenditure during the decline of the marriage and post-separation. It is a cruel irony for the non-miscreant to have a judge determine that their add-back claim does not cross the conduct threshold and shall not be heard, but then hear the judge analyse post-separation accrual in detail.

Add-backs are routinely refused because of the need to prove the spender's deliberate manipulation or because of 'proportionality'. That approach, we say, is inconsistent with how the general public would perceive that a fair outcome should be achieved. In non-court dispute resolution (NCDR) and negotiation, we have all seen parties agree to add back

some, or all, of the overspending, which must be a recognition by both parties of the fairness of doing so.

It does not have to be this way. There is currently heated debate as to whether or not financial remedies courts should reflect personal misconduct and, in particular, findings (or admissions) of coercive control or other instances of domestic abuse, in the outcome of cases. The principled reason against making an award that reflects personal misconduct is that it is difficult to identify the financial consequences, or that those consequences are not quantifiable (or at least not in the foreseeable future). Wherever one falls in that debate, add-backs do not have those problems. They have financial consequences and *are* financially quantifiable, so they should fit easily in the current framework.

What can practitioners do in the current framework?

We do not have a silver bullet for the advantage given to the spender by the current case law. Until there is a brave litigant willing to take this issue to the Court of Appeal, practitioners may consider the following:

- (1) if the spending is ongoing:
 - (a) regrettably, spending too much time in mediation/pre-proceedings NCDR will only benefit the spender. If the court is not going to add back the expenditure, getting to the end of the litigation is the only way to stop the spending; and
 - (b) try to negotiate each party being allocated the same amount of funds in the interim on the basis that the sums are distributed on account of final awards.
- (2) plead the add-back on the Form E, in the ES1 and reflect it on the ES2. Consider whether it should be raised in *4.1.2 Significant changes in assets or income likely to occur during the NEXT 12 months*, as well as the conduct box;
- (3) make clear in recitals (if permitted by the judge) and/or correspondence what spending is not accepted to lay the groundwork for the add-back claim; and
- (4) it is impossible to plead and prove an add-back argument without disclosure to evidence it. That means persuading the judge at the first hearing to go back further than the most recent 12 months of bank statements. In our experience, it is rare to find a client who says that the prospect of separating has only occurred in the last 12 months; marriages (and civil partnerships) usually break down over a longer period. The argument that greater disclosure should not be allowed because it will increase costs no longer holds true in the digital age as solicitors turn to AI tools which can analyse large data sets swiftly. If a party is moving and spending money, directions may need to be sought for direct credit card statements, business bank/credit accounts, directors loan accounts and management accounts where appropriate.

What is the solution?

At the time of writing, the government has said it is about to undertake a consultation on making outcomes in finan-

cial remedy cases fairer. When you respond to that, we invite you to consider this issue because, at its worst, what is referred to as ‘overspending’ in the jurisprudence, crosses the test of, and should be seen as, economic abuse.¹⁰ We suggest that resolving how to deal with unilateral overspending of the parties’ resources would give litigants greater confidence that the court is engaged in stopping or rectifying abuse.

There are a few options you may consider raising in the consultation. Prevention is always better than cure and, like many areas (legal services payment orders, rehousing), the ability of the court to make interim orders, particularly interim lump sum orders, would be enormously beneficial. There seem to be few if any arguments against the court being given the powers to make an interim lump sum order (and an interim order for sale). Sharing assets that are agreed to be part of the marital acquest at the first appointment on the basis of overall claims would give the parties transparency on spending, freedom to spend on legal fees and some protection from the profligacy of the other. A reformed scheme could also permit the court to make targeted interim orders, to transfer property, shares or funds into joint names, trust or escrow, or the applicant’s sole name (subject to safeguards (if considered appropriate) and later adjustment). Crucially, these powers would be protective rather than distributive, to protect against historical misappropriations and prevent future dissipations.

Alternatively, consideration could be given to some form of *saisie conservatoire*, as in other jurisdictions. In *ND v KP* [2011] EWHC 457 (Fam) and *UL v BK* [2013] EWHC 1735 (Fam), Mostyn J was at pains to emphasise we do not have a system where assets are automatically frozen pending the disposal of a divorce or any other kind of claim. That approach is not universal. In New York, for example, from the date of proceedings assets are no longer shared and statutory preservation orders automatically come into force on the filing of divorce proceedings and service of the relevant order (s 236 Domestic Relations Law). Absent agreement by the parties, these orders restrain both parties from disposing of, encumbering or transferring assets, other than in the ordinary course of practice in line with how the family had otherwise been conducting their finances and to pay legal and professional fees. A breach of the provisions may be enforced by contempt. The court must also consider whether overspend amounts to ‘the wasteful dissipation of assets by each party’. Therefore, expenditure on affairs, addictions, gambling or similar unilateral purposes that do not create or bring value to the marital estate (but have instead denuded the marital estate of value) can be rectified by being added back, supported by disclosure obligations to require the delivery of necessary evidence.

A final option would be for policymakers to step in to ensure add-backs are a realistic remedy, by changing the presumption in favour of adding back and ensuring the financially vulnerable party does not have to face contested disclosure applications to evaluate and run their case. The writers contend that there is an inconsistency between the test in s 37(5) MCA 1973, where there is a rebuttable presumption that any disposition in the 3 years before the application was done to defeat the other person’s claim, and the difficulty in persuading judges to order more than 12 months of personal statements. That is not to say every case should be weighed down with 3 years’ disclosure, but

where there is a concern about dissipation, having a judge on a busy list summarily decide 2 years of disclosure is ‘proportionate’ can advantage the spender. One way for the court to better case manage additional disclosure requirements would be for section 4.1.1 of Form E to be expanded to require each party to provide a schedule of assets which have been transferred to third parties, or which created a significant change in assets covering a minimum of a 3-year period prior to Form E. The fact that such a requirement is required would support the principle that overspending will be assessed and could alleviate all the expensive disputes about disclosure.

Conclusion

We want to make clear that we do not underestimate the difficulty of managing these issues during litigation. Nor are we arguing that spouses should have the same level of spending; there may be good reasons why one party has to spend more than the other, on legal fees or in other aspects of their life. However, if the law is there to encourage ‘good behaviour’ and stop abuse then it currently fails. The party who overspends, other than on legal costs, is unlikely to face any penalty.

We say bring back the ‘*Martin* distinction’ between add-back and conduct, reformulating add-backs to be merely part of the computation exercise. Cairns LJ identified them as a means to ensure a ‘just’ outcome. We agree and say the current approach is not fit for purpose.

Notes

- 1 See also *Scallon v Scallon* [1990] 1 FLR 194 where the Court of Appeal (including by then Purchas LJ) drew a distinction between spending, albeit after breakdown of the marriage, and conduct.
- 2 Through the Matrimonial and Family Proceedings Act 1984.
- 3 Not citable
- 4 Note, the point that the party who has to make the running is likely to have to spend greater sums to achieve a fair outcome is still valid. Moylan J made a similar point in *MF v SF* [2015] EWHC 1273 (Fam): ‘it is not unusual for the effective applicant, in this case the Wife, to incur costs which are greater than those of the respondent’.
- 5 FPR PD 28A, para 4.4: ‘The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a “needs” case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets’.
- 6 *TT v CDS (Rev 1)* [2020] EWCA Civ 1215.
- 7 *RH v RH* [2007] EWHC 396 (Fam), *LS v JS* [2012] EWHC 2960 (Fam), *A v M* [2021] EWFC 89 and *Azarmi-Movafagh v Bassiri-Dezfouli* [2021] EWCA Civ 1184.
- 8 *BD v FD (No 2) (Application of the Principle of Need)* [2016] EWHC 594 (Fam).
- 9 *YC v ZC* [2022] EWFC 137 (B).
- 10 ‘any behaviour that has a substantial adverse effect on B’s ability to— (a) acquire, use or maintain money or other property, or (b) obtain goods or services’: Domestic Abuse Act 2021, s 1(4).

Thwaite – The Jury Remains Out

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In ‘The *Thwaite* jurisdiction – a stay of execution?’ published on the *Financial Remedies Journal* Blog on 21 November 2023, <https://financialremediesjournal.com/the-thwaite-jurisdiction-a-stay-of-execution>, Philip Tait and I traced the *Thwaite* jurisdiction from its origins through several cases including *Benson v Benson (Deceased)* [1996] 1 FLR 692 (per Bracewell J), *L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26 (per Munby J as he then was), *Bezeliansky v Bezelianskaya* [2016] EWCA Civ 76 (per McFarlane LJ as he then was) concluding with *H v W* [2023] EWFC 120 (per HHJ Reardon) and *AFW v RFH* [2023] EWFC 119 (per Recorder Moys).

We concluded our article as follows:

‘So the jury is still out. Is *Thwaite* solely an equitable jurisdiction to refuse to enforce an executory order if in the circumstances prevailing it would be inequitable to do so or a power that extends to making a different order albeit (perhaps) one restricted to cases where there has been an element of deliberate frustration of the implementation of an unexecuted order by the actions of a party or third parties and where the case might fail the first limb of *Barder* on the basis that the events in question were foreseeable.

It is almost inevitable that this will be a question for the Court of Appeal to determine in due course. In the meantime it remains a problematic jurisdiction. As Michael Horton noted in “Setting aside executory orders: a terrible fate for *Thwaite*?”, [2018] Fam Law 884: “rely on *Thwaite* with care – at some point, an

appellate court may well be asked to consign *Thwaite* to the history books”.

In *Collardeau v Fuchs* [2025] EWFC 307, [2026] 1 FLR 461 from [40] onwards Poole J cited from (or referred to) *Thwaite v Thwaite* [1981] 2 FLR 280, *L v L* (which in turn cited from *Benson v Benson (Deceased)*), *Bezeliansky v Bezelianskaya*, *Kicinski v Pardi* [2021] EWHC 499 (Fam), [2022] 1 FLR 474 and *BT v CU* [2021] EWFC 87, [2022] 2 FLR 26 before stating as follows:

‘44 I proceed on the basis that it is now established that where an order is executory, meaning that it has not been implemented, and there has been a significant change in circumstances since the order was made, the Court has the power to vary the order if it would be inequitable not to do so.’

But *has* it been so established?

Origins of the jurisdiction

The *Thwaite* jurisdiction (unsurprisingly) has its origins in *Thwaite v Thwaite*. The parties negotiated a consent order on the basis that the wife agreed to return from Australia with the children and to live with them in England. The husband agreed to transfer a home for them to live in. The wife did return, but only for 3 months, and the husband refused to complete the property transfer. Ormrod LJ stated at p 284:

‘Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so: *Mullins v Howell* (1879) 11 Ch D 763 and *Purcell v F C Trigell Ltd* [1970] 3 All ER 671 at 676–677, [1971] 1 QB 358 at 367–368. Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders: per Jessell MR in *Mullins v Howell* (1879) 11 Ch D 763 at 766.’

In *Thwaite*, the Court of Appeal in fact went further than this and upheld the decision of the lower court not only to decline to enforce the unexecuted transfer of property order, but also to exercise its discretion to make a fresh order providing for sale of the property and division of the proceeds.

Ormrod LJ explained the rationale for this as follows at p 285:

‘The learned judge was entitled, in his discretion, to make a new order for ancillary relief in favour of the wife, notwithstanding the refusal of the wife to consent to his doing so. His jurisdiction arose, not from the liberty to apply as he held, but from the fact that the wife’s original application for ancillary relief was still before the court and awaiting adjudication. It had not been dismissed since the conveyance had never been executed, so that that part of the order ... by which her application was dismissed, had never come into effect. We think that the judge correctly exercised his discretion in this respect.’

It is this second part of the decision that continues to cause controversy.

Consideration of the jurisdiction by the Court of Appeal

Bezeliansky, as with *Thwaite*, concerned an order made by consent that contained provision for property transfer; likewise it was a term of the order that upon transfer of the properties and division of other capital matters provided for in the order, there was to be a clean break between the parties; and likewise those transfers had not taken place.

At first instance Moor J was clearly aware of the conditional nature of the clean break arrangement that would only dismiss the parties' claims for financial provision upon implementation of the property transfers. He said (as quoted at [22] of the appeal judgment):

'... I am quite satisfied that I have that jurisdiction. It is right, in fact, to note that the clean break only takes place once there has been compliance with all of the orders that were made by Holman J, so in one sense there is still jurisdiction in any event to make an order under s 24(a) for a sale of the French property. But, I am equally satisfied that pursuant to *Thwaite v Thwaite* [1982] Fam 1, a decision of the Court of Appeal, an executory order can be varied in the way that Mr Chamberlayne invites me to do.'

Moor J therefore set aside certain capital elements of the parties' consent order and made a new property adjustment order (and an order for sale) in favour of the wife.

The appellant did not attend the appeal. His McKenzie Friend attended but was refused permission to address the court. Leading counsel appeared for the respondent. The appellant had, however, prepared a skeleton argument for the appeal, with the assistance of his McKenzie Friend, in which several submissions were made.

McFarlane LJ (as he then was) stated as follows:

'31 ... the husband submits that Moor J was wrong in his interpretation of the case of *Thwaite v Thwaite* (1981) 2 FLR 280. It is submitted that that authority dealt solely with the court's jurisdiction to opt to refuse to enforce a consent order and that it is not authority in relation to there being any jurisdiction to set the original order aside.'

Thereafter he stated that:

'37 It is plain to me that Moor J was entirely correct in holding that the authority of *Thwaite v Thwaite* to the effect that "an executory order can be varied in the way that Mr Chamberlayne invites me to do" was entirely sound and the appellant's submission that the judge was wrong in his interpretation of this authority is completely unsustainable.'

Bezeliansky confirmed that *Thwaite* not only provides authority for a court to opt to refuse to enforce an executory order, i.e. that it acts as a 'shield', but also extended to being able to set aside or vary the order and hence permits the substantive amendment of an executory order, i.e. it acts as a 'sword'. As Poole J observed in *Collardeau v Fuchs*:

'42 In *Bezelianski v Bezelianskaya* [2016] EWCA Civ 76, a refusal of permission to appeal and thus not strictly binding on this Court,¹ the Court of Appeal made it very clear that the *Thwaite* jurisdiction as it is sometimes called, exists.'

Bezeliansky was therefore the first time this power was confirmed after argument on the point (albeit where only

one party was represented by counsel). However, as noted above, the case shared with *Thwaite* the three similarities as set out above. This is of importance given that when the Court of Appeal approved Moor J's decision to vary the order (rather than simply to refuse to enforce it) it did so having emphasised at [36] the point in *Thwaite* as set out above that the court's jurisdiction arose 'from the fact that the wife's original application for ancillary relief was still before the court and awaiting adjudication. It had not been dismissed ... that part of the order ... by which her application was dismissed, had never come into effect'.

Bezeliansky does not therefore seek to suggest that the court has any jurisdiction to vary an order where the parties' claims for financial provision have been dismissed and there is no live application before the court.

The editors of *Rayden* state at [28.364] that it 'may be relevant to note' that in both *Thwaite* and *Bezeliansky* the court found that there were other grounds to vary the order. In *Thwaite*, the judge could have allowed an appeal on the basis of fresh evidence, and in *Bezeliansky*, a clean break only took place on compliance with other orders.

The views of Mostyn J

Mostyn J first considered the *Thwaite* jurisdiction in *SR v HR (Property Adjustment Orders)* [2018] EWHC 606 (Fam), [2018] 2 FLR 843. He stated:

'9 ... it is an iron rule that, aside from a lump sum payable by instalments and aside from a set aside on traditional grounds as discussed below, a capital award cannot be varied, or, a fortiori, discharged, by a court of first instance. That an order has, in the usual way, a "liberty to apply" clause certainly does not entitle a court to rewrite non-variable capital awards and to make different ones. Equally, the fact that a dismissal clause does not take effect until there has been full compliance with certain transfers and payments plainly does not entitle a court to replace an executory order with a new one.'

At [11] and [12] Mostyn J considered the facts of *Mullins v Howell* (1879) 11 Ch D 763 and *Purcell v FC Trigell Ltd* [1971] 1 QB 358 and thereafter stated they give 'no support to the notion that if the court, exercising its equitable jurisdiction, refuses to enforce an order it gains the power to make a completely new one'. He continued:

'13 I have to say that *Mullins v Howell* and *Purcell v FC Trigell Ltd* provide scant support for a loophole to the prohibition of the discharge of a non-variable final capital order. Both cases concerned the court's power to "control" interlocutory orders. The first case involved an undertaking where there was full power to discharge it anyway. In the second case the court refused to discharge the earlier interlocutory order requiring answers to interrogatories. Therefore, I think that any application under the principle in *Thwaite* should be approached extremely cautiously and conservatively.'

The editors of *Rayden* note that it appears that *Bezeliansky* was not cited to Mostyn J in *SR v HR* and it is not referred to in his judgment.

Mostyn J returned to the issue in *BT v CU* [2021] EWFC 87, [2022] 2 FLR 26 from [47]. At [49] and [50] he again considered the facts of *Mullins v Howell* and *Purcell v FC*

Trigell Ltd and stated both say ‘nothing about the existence of a power to vary a substantive final order which happens to be executory’. Both cases ‘merely say that the court has power to control its interlocutory orders inter alia by not enforcing them’. He continued:

‘51 Thus, *Thwaite* goes no further than to confirm the existence of an equitable jurisdiction to refuse to enforce an executory order if, in the circumstances prevailing at the time of the application, it would be inequitable to do so. Although the cases relied on by Ormrod LJ relate only to interlocutory orders, he pushed back the boundary of that power so as to cover final orders. But the reasoning in *Thwaite* does not, on any view, support the idea that there exists some kind of equitable power, not merely to refuse to enforce an executory order, but to make in its stead a completely different one. For this reason, I stated in *SR v HR (Property Adjustment Orders)* [2018] 2 FLR 843 that any application under the principle in *Thwaite* should be approached “extremely cautiously and conservatively”, which, of course, was coded language expressing my doubt that the jurisdiction to rewrite (as opposed to mere refusal to enforce) existed at all.’

Thereafter, Mostyn J referred to four authorities which had rejected his doubts as expressed in *SR v HR (Property Adjustment Orders)* and had held that the court has the power not merely to stay enforcement of an executory order but to rewrite an executory final order to provide for something different to that which it originally stated, namely:

- (1) *US v SR (No 4) (Executory Mainframe Distribution Order: Change in Circumstances: Extent of the Court’s Ability to Revisit Terms)* [2018] EWHC 3207 (Fam) (in which Roberts J pointed out that *Thwaite* had been followed in *L v L* – a decision which in turn had referenced *Benson v Benson (Deceased)* – and *Bezeliansky*);
- (2) *Akhmedova v Akhmedov & Ors* [2020] EWHC 2235 (Fam), [2021] 1 FLR 667 per Gwynneth Knowles J;
- (3) my own decision sitting as a Recorder in *G v C* [2020] EWFC B35 (OJ); and
- (4) *Kicinski v Pardi* per Lieven J when she allowed the appeal from *G v C*. In relation to my observation that *Bezeliansky* was not citable (as it was a decision refusing permission to appeal that had not been certified), Lieven J noted at [29] that the case ‘was a permission to appeal decision and no permission has been given to rely upon it, so far as I am aware’, but stated that ‘it was a fully reasoned decision of three members of the Court of Appeal, including McFarlane LJ (now President of the Family Division). Therefore, although not technically binding on me, it carries the very greatest weight’.

At [63] of *BT v CU* Mostyn J stated that he did not agree with these four decisions as they appeared to be in conflict with the binding precedent of *Barder* (and he noted at [46] that in *Barder* itself the order under appeal was executory yet, fully aware of *Thwaite*, the House of Lords did not decide the case by reference to that doctrine and therefore ‘must be taken as having impliedly rejected this route as a legitimate source of relief’).

When considering Matrimonial Causes Act 1973, s 31, Mostyn J stated as follows:

‘64 There is nothing within the terms of s31 of the Matrimonial Causes Act 1973 to suggest that its strict curtailment of the power of variation and discharge is confined only to orders which have been performed. An application to set aside an executory order under the *Barder* doctrine is explicable as an exercise of appellate powers, now replaced by a specific rule permitting the power to be exercised at first instance. An application to set aside an executory order based on fraud, or mistake, can be explained as a separate cause of action. These are surely the only legitimate exceptions to the statutory prohibition on variation of the amount of capital settlements.

65 In the nature of things the variation powers in s31 will apply predominantly to unexecuted orders. Some are variable; most are not. It is a carefully devised scheme which was proposed by the Law Commission (see below) and democratically enacted by Parliament. The *Thwaite* exception, as developed in *L v L* and the later cases, in my opinion drives a coach and horses through the statutory scheme.

66 If this route were available, then it means that many *Barder* cases, including *Barder* itself, will have been tried, and in most cases dismissed, applying a set of principles far more rigorous than those required under the executory order doctrine. This is because most *Barder* cases, including *Barder* itself, concern orders which are executory. It would therefore seem, if the proponents of the executory order doctrine are correct, that the entire litigation in *Barder* itself, all the way to the House of Lords, was conducted on a completely wrong footing.’

Sir Nicholas Mostyn’s views have not altered since his retirement from the Bench. When posting on LinkedIn in relation to the recent Court of Appeal decision in *De La Sala & Anor v De La Sala & Ors* [2026] EWCA Civ 282 (17 March 2026), Sir Nicholas Mostyn stated that ‘Pedantic lawyers can be grateful that the completely spurious *Thwaite* jurisdiction was not invoked to seek to set aside the order’.

Dealing with the differing judicial approaches

It is of note that in *Collardeau v Fuchs* Poole J stated at [43]:

‘43 Mr. Chamberlayne did not seek to rely on Mostyn J’s judgment in *BT v CU* [2022] 2 FLR 26 in which he asserted that *Thwaite* did not support the idea that there was an equitable power to vary an executory order by making “a completely different one.”’

In *H v W* [2023] EWFC 120 (B) (a decision which is not formally citable and so not capable of being referred to as primary authority but which has been referred to on many occasions since its publication), HHJ Reardon observed:

‘52 Mostyn J’s conclusion, in essence, was that where the court is dealing with an unexpected change in circumstances since the order was made, the stringent test in *Barder* should not be replaced by a different, potentially less stringent test, simply because the order is still executory.’

HHJ Reardon noted, however, that one significant difference between *BT v CU* and the cases in which the *Thwaite* jurisdiction has been exercised was that for the most part the latter cases involve circumstances where there has been an element of deliberate frustration of the implementation of an unexecuted order. Therefore she stated at [53] that

‘one answer to Mostyn J’s argument in *BT* is that many “deliberate frustration” cases might well fail the first limb of *Barder* on the basis that the events in question were foreseeable, especially if the responsible party has a history of obstructive behaviour’ and at [54] that ‘[i]t would be strange if the Family Court offered no remedy for the disadvantaged spouse in cases in that category’. She continued:

‘During the course of submissions I asked Mr Tait, for W, what other remedy would be available where, prior to implementation, one spouse has culpably and foreseeably reduced the value of an asset that is within their control but is due to pass to the other spouse on implementation. Mr Tait suggested that if an undertaking has been given, the other spouse could apply for committal for breach; or that, if the asset in question is real property, there might be a remedy in a different court under TLATA 1996. But those remedies are cumbersome and uncertain (committal does not of course provide a financial remedy at all), and their availability is contingent on the nature of the asset and the terms of the order.’

This led HHJ Reardon to conclude as follows:

‘56 ... in the *Thwaite* cases (particularly *Bezeliasky*, the facts of which are similar to the facts of the present case, albeit played out on a bigger stage) there is usually a close link between the executory nature of the order and the disaffected spouse’s ability to frustrate it. This is particularly obvious in property sale or transfer cases, where, however tightly-drafted the order, the owner of the property is likely to have a number of opportunities to obstruct and delay the sale or transfer, or otherwise to diminish the value of the asset, in the pre-implementation period. The *Thwaite* jurisdiction would appear to be the only remedy available in such cases, where the change in circumstance has brought about a foreseeably disaffected spouse, rather than an unforeseeable event.

57 For these reasons it is my view that the *Thwaite* jurisdiction does exist as a separate remedy to *Barder*. I would suggest that its use may be particularly apt where:

- a. The respondent has culpably acted in such a way as to diminish the value of an asset, or otherwise to frustrate the intention behind the order;
- b. There is a link between the executory nature of the order and the change in circumstances: ie, it is the fact that the order remains executory that has provided the respondent with the opportunity to frustrate it; and
- c. The applicant might well fail the first limb of the *Barder* test because the respondent’s conduct was foreseeable.’

In *L v O (Stay of Order; Hadkinson Order; Security for Costs)* [2024] EWFC 6, [2024] 2 FLR 343 Cobb J (as he then was), having referred at [2] to *BT v CU* noted that ‘[t]he *Thwaite* jurisdiction (which is less stringent than *Barder*) is not uncontroversial’.

The existence (or otherwise) of the *Thwaite* jurisdiction was next considered in *WZ v HZ* [2024] EWFC 407 (B) per District Judge Doman. Although this decision is also not formally citeable it is another useful example of the exercise of the discretion. At [55] he cited from *Bezeliasky* and stated ‘[c]learly, ratio from the Court of Appeal is binding

authority on me’. In this particular context this appears not to have been correct given that *Bezeliasky* is not formally citeable. Thereafter at [143] the judge stated ‘[t]he Wife in her submissions seeks to persuade me that the *Thwaite* jurisdiction is highly controversial. It is only really Mostyn J that has expressed such a view. In *H v W* HHJ Reardon deals with the suggestion that this is a “rare jurisdiction”, note, not controversial at [56] and [57] of her judgment’ before citing further from *H v W* and also *AFW v RFH*.

District Judge Doman therefore varied the terms of an order for sale where the wife refused to cooperate with the sale of the former matrimonial home (of which she was to receive the entirety of the proceeds and where an offer had been made far in excess of the value used at final hearing). He concluded at [149] that ‘[a]s £675,000 would meet the Wife’s need and she has been the one to frustrate the order it seems fair to me that the *Thwaite* jurisdiction should be invoked to ensure that any monies over £675,000 be paid to the Husband’.

In *Hersman v De Verchere* [2024] EWHC 905 (Fam), [2024] 2 FLR 1011 Moor J at [28] stated he had ‘no doubt whatsoever’ that the court had jurisdiction to make orders ‘working out and enforcing’ earlier financial remedy orders as ‘[i]t would be a very surprising and unjust omission if such a power did not exist. It would be a cheats charter and encourage non-compliance or obstruction with legitimate court orders’. He cited *Bezeliasky* per McFarlane LJ (as he then was) at [37] as confirming that that the jurisdiction exists to enable a judge to make such orders where the order remains ‘executory’.

It is important to consider whether *Hersman v De Verchere* was in fact an exercise of the *Thwaite* jurisdiction. It was an enforcement application after the wife had failed to transfer a ski chalet to the husband pursuant to a final order and the husband sought substantial sums by way of compensation (primarily in the form of lost rental income and mortgage interest/penalties). Further, query whether *Thwaite* is as Moor J stated in fact synonymous with the court’s jurisdiction ‘working out and enforcing’ earlier orders and whether this is more properly the realm of the liberty to apply and the enforcement jurisdiction.

The views of Peel J

In *Rotenberg v Rotenberg & Ors* [2024] EWFC 185, [2025] 1 FLR 351 Peel J stated:

‘55 ... I do not propose to traverse the *Thwaite* jurisdiction which has been set out comprehensively by leading counsel for H. Although doubt has been expressed by Mostyn J as to the existence of the *Thwaite* jurisdiction in *SR v HR* [2018] EWHC 606 (Fam), I have not heard argument on the point and am inclined to accept, for the purposes of this case, that the jurisdiction does indeed exist, although it should be used sparingly. The essence of the jurisdiction is that the court may adjust an executory order (i.e. before it has been complied with) if it would be inequitable not to do so, most commonly where there has been a significant and necessarily relevant change of circumstances since the order was made.’

In *Rotenberg*, within Matrimonial and Family Proceedings Act 1984, Part III proceedings, Moor J had ordered that a company, Ravendark Holdings Limited, was to transfer a

property to the wife to provide a home for her and the children in England. However, the wife left for Russia 2 years later and did not return. The husband applied (at [29]) ‘purportedly under the *Thwaite* jurisdiction for “a stay preventing the execution of, and permanently suspending the implementation of the order of Mr Justice Moor dated 20 July 2016” on grounds that there had been a significant change of circumstances since the order was made (i.e. the wife had, contrary to her evidence, left the jurisdiction with the parties’ two children to live overseas).

Peel J exercised the *Thwaite* jurisdiction although he did so by discharging the applicable paragraphs of the Part III order in their entirety. He noted at [57 (v)] that ‘in my judgment, the landscape on the ground was very different from that which was envisaged at the time of the order made on 20 July 2016. The facts of this case are exceptional, and justify the order being reframed’.

It has been said that: (1) *Rotenberg* is further authority for the proposition that the *Thwaite* jurisdiction can be used proactively as the basis for an application (a sword) rather than merely in response to an application to enforce (a shield); and (2) Peel J discharged provisions of the 2016 and 2019 orders and did so regardless of (and in full knowledge of) Mostyn J’s two judgments in *SR v HR* and *BT v CU*.

However, there may be some reason to be cautious that *Rotenberg* is further authority for such a proposition. The successful application was narrow – H sought an indefinite stay of certain provisions of Moor J’s order and ultimately achieved their discharge. It is therefore arguable that this is in keeping with the original ambit of *Thwaite* – namely prevention of enforcement/implementation rather than a wholesale rewrite/variation – and is therefore an example of the jurisdiction being exercised in its uncontroversial ‘shield’ sense.

Rotenberg may also be said to be important given that Peel J’s decision to exercise the *Thwaite* jurisdiction did not depend on a finding that there had been a deliberate frustration of the implementation of an executory order, which was the theory contemplated by HHJ Reardon in *H v W*. It may be of note in this context, however, that: (1) although Peel J stated (at [57 (iii)]) that the court was *prima facie* misled in 2019 when the husband had made his original application (Moor J accepted that the wife had intended to return to England when instead she and the children had moved abroad and had not been back since 2018); (2) he also said that even if Moor J was not misled ‘there has been a material change in circumstances since the 2016 and 2019 orders ... That undermines the essential basis upon which the order was made ...’. In other words, it may be said that Peel J’s order did not depend on a finding that the court was misled and he was able to revisit the order simply because it remained executory.

Further, there are additional reasons to be cautious in how far forward *Rotenberg* takes the debate in relation to the existence and scope of this jurisdiction given: (1) Peel J was clear he had not heard argument in respect of the *Thwaite* jurisdiction (and in particular on *BT v CU* and – in Mostyn J’s view – the irreconcilable tensions between *Thwaite* and *Barder*); and (2) he was also merely ‘inclined to accept for the purposes of this case’ that the jurisdiction existed.

Further differing judicial approaches

In *AP v TP (Pension Enforcement)* [2025] EWFC 190 (B) (again not formally citable but another interesting exercise of the jurisdiction), HHJ Farquhar from [24] onwards referred to and/or cited from *Thwaite*, *WZ v HZ* and *Bezeliansky* before stating at [27] ‘there has been considerable debate as to the extent and indeed the availability of the *Thwaite* jurisdiction’ and citing from *BT v CU* per Mostyn J. At [28] he then stated that Mostyn J’s view was ‘in stark contrast’ to the position in *Hersman v De Verchere* per Moor J and at [29] that in *Rotenberg v Rotenberg* Peel J ‘was satisfied that the *Thwaite* jurisdiction was still good law’. Thereafter, he stated as follows:

‘30 I have been referred to the analysis of the *Thwaite* Jurisdiction of HHJ Reardon in *H v W* [2023] EWFC 120 at paragraphs 46 to 59 in which she refers to a number of the authorities that I have set out above. I find myself in full agreement with the decision of HHJ Reardon which I do not set out in full but summarise as follows:

- a. It would be strange if the Family Court offered no remedy for the disadvantaged spouse in cases in which the other spouse had deliberately frustrated the order.
- b. The essence of *Thwaite* is fairness.
- c. However, in exercising the jurisdiction the court is not approaching the situation with fresh eyes. *Thwaite* itself, *Bezeliansky* and *L v L* [2008] 1 FLR 13 all refer to making an adjustment from the terms of the final order not because it is fair to do so, but because in the light of events since the order it would be inequitable not to do so.’

HHJ Farquhar therefore exercised the jurisdiction so as to set aside a pension sharing order that had been made in the wife’s favour after she refused to cooperate with its implementation and the husband could not retire without access to the pension funds.

In *M v B* [2025] EWFC 182, [2026] 1 FLR 194, Sir Jonathan Cohen considered a strike out of a *Thwaite* application. The case considered the jurisdiction to strike out an application on a summary basis (a question considered in *Roocroft v Ball* [2016] EWCA Civ 1009, [2017] 2 FLR 810 (which in turn considered *Vince v Wyatt* [2015] UKSC 14, [2015] 1 FLR 972), *AB v CD* [2022] EWFC 116 and *Ma v Roux* [2024] EWHC 1917 (Fam)). As a result, the correctness (or otherwise) of the *Thwaite* jurisdiction was expressly not in issue:

‘13 W expressly parked her argument over the continued controversy in family law circles as to whether *Thwaite* does in fact present a freestanding jurisdiction to set aside and vary an executory order. Mr Dance on her behalf accepted that a strike out application was not the time to seek a judgment determining that controversy. ...

16 It is not necessary in this judgment to enter into the debate over the existence of a *Thwaite* jurisdiction and whether it establishes that a lower threshold than a *Barder* event suffices to give the court jurisdiction to vary an order which is executory. Neither is it necessary at this stage for the court to determine whether or not an absence of fault on the part of the party seeking to enforce is fatal to an application to vary made by the party in default.’

In *X v Y* [2025] EWFC 144 (B) (again not formally citable but a very detailed analysis of the jurisdiction), District Judge Stone stated:

'28 It is the existence (or otherwise) and the extent of the *Thwaite* jurisdiction that requires exploration. Specifically there are 3 questions I must answer to establish a legal framework to which I can then apply the facts of this particular case:

- a. What are the conditions that must be fulfilled to rely upon the *Thwaite* jurisdiction?
- b. What does it enable the court to do?
- c. Does the jurisdiction even exist – ie has it survived *Barder*?'

The District Judge continued:

'30 This judgment is not intended to be a treatise on the *Thwaite* jurisdiction – I leave that to many more qualified than I am. However, the authorities and commentaries are inconsistent and it is difficult to pin down the existence and extent of the *Thwaite* jurisdiction without methodically reviewing the authorities, so needs must.'

X v Y concerned a party's application to vary an order which set out how the proceeds of sale of a property should be divided. An order for sale was made at the final hearing and by the date of the application to set aside and/or vary the order the property had not sold and the estate agents were recommending a further reduction in the marketing price.

From [31]–[69] there followed a detailed analysis of *Thwaite*, *Bezeliansky*, *L v L*, *US v SR*, *BT v CU* and *Kicinski v Pardi* that justifies careful reading. Thereafter, the District Judge answered the three questions he posed at [28] of his judgment in the following way:

'70 The resulting position appears not to have moved on greatly from *Thwaite* itself.

- a. What are the conditions that must be fulfilled to rely upon the *Thwaite* jurisdiction?

There must have been a change of circumstances that would render it inequitable to hold one party to the financial provision order that has not yet been implemented (ie is executory). By definition a minor change in circumstances would not be sufficient to render it inequitable to hold a party to it, so it is inherent that the change of circumstances must be significant. Where the change of circumstances has been brought about by the other party's inappropriate conduct, that also may point towards inequity.

It is not necessary for the change to be unforeseeable. Indeed, in some cases where a party has conducted themselves badly throughout the process, an attempt to frustrate the implementation of an order may be as foreseeable as it is inequitable.

- b. What does it enable the court to do?'

It enables a court to refuse to enforce the relevant provision of the order if to do so would be inequitable.

Whilst some of the High Court decisions appear to conflate the issues of refusal to enforce with an ability to alter the order, the basis for asserting that the court has a general jurisdiction to alter the order is unclear. It appears to arise from the fact that in *Thwaite* the court did vary the order, but it did so only because the

parties' claims remained live before the court and had not been dismissed.

- c. Does the jurisdiction exist – ie has it survived *Barder*?

Despite the best efforts of Mostyn J to interpret the House of Lords' silence regarding *Thwaite* in the subsequent *Barder* judgment, there is no doubt that the jurisdiction continues to exist. If it had not survived the Court of Appeal would not have referred to it in the *Bezeliansky* permission to appeal decision.'

This therefore led the judge to the following conclusion:

'71 If my analysis above is correct, then were I to conclude that a reduction in the value of the family home was a sufficiently significant change to render it inequitable to hold Mr X to the current order, I could refuse to enforce that part of the order. I would nevertheless have no jurisdiction then to vary the order.

72 The reason is straightforward: Mrs Y's capital claims and Mr X's capital and periodical payments claims have been dismissed. The dismissal of those claims was not conditional upon the implementation of the property transfer: it was immediate. Accordingly the conditions in *Thwaite* that enabled the court to vary the order (from the fact that the wife's original application for ancillary relief was still before the court and awaiting adjudication – it had not been dismissed since the conveyance had never been executed) do not exist here. The parties' claims have been dismissed and are not live before the court, such that there is no ongoing jurisdiction to determine them.'

The husband's application to vary the capital provision contained in the order (how the net proceeds of sale of a property were to be divided) was therefore dismissed. The judge stated, however, at [73] that in the event that he was wrong and that he did have the jurisdiction to make the order sought, he did not consider that the reduction in value of the property was a sufficiently significant change to render it unfair to hold the husband to it.

The District Judge therefore concluded that the *Thwaite* jurisdiction survives as a 'shield' to enforcement of the relevant provision of the order if there has been a change of circumstances that would render it inequitable to do otherwise. However, the basis for asserting that the court has a general jurisdiction to alter the order remained unclear and appeared to arise from the fact that in *Thwaite* the court varied the order only because the parties' claims remained live before the court and had not been dismissed. The position was the same in *Bezeliansky* as there was still a live application before the court to be determined because, as in *Thwaite*, the conditions that would dismiss the parties' claims for financial provision had not been fulfilled. *Bezeliansky* it was said does not therefore seek to suggest that the court has any jurisdiction to vary an order where the parties' claims for financial provision have been dismissed and there is no live application before the court.

In *Collardeau v Fuchs*, Poole J observed:

'45 Here, the Final Order is executory and there have been a number of changes in circumstances since the order was made, most importantly the failure of H to abide by his undertakings and the impending loss of the family home.'

Poole J then went on to make a number of orders that varied the terms of the original final order.

So where are we now?

Does the above mean that Mostyn J and District Judge Stone are lone voices or dissenters and that as a remedy *Thwaite* remains viable and available to the extent that an order remains executory and there has been a material change in circumstances since the order was made such that it would be inequitable not to vary the same? Can it therefore properly be used as a ‘sword’ rather than simply a ‘shield’? If so, does that require a party’s (or the parties’) claims to remain live and before the court? Is there good reason to conclude that the new circumstances (or event) that justify a variation do not need to be unforeseen in circumstances where there has been non-compliance by a respondent and/or they have culpably acted to frustrate the intention behind the order?

It may be difficult (if not impossible) to answer these questions given the – arguably – contradictory authorities.

However, notwithstanding this there may be one way to reconcile the same – or at least largely seek to do so.

It may be argued that Mostyn J’s analysis of the proper scope of the *Thwaite* jurisdiction is correct (i.e. that it exists solely as a ‘shield’ to enforcement) *but* that notwithstanding the restrictions imposed by MCA 1973, s 31 there is also the need for a remedy for the reasons advanced by Moor J, HHJ Reardon, District Judge Doman and HHJ Farquhar.

If so, the correct position in law would be as follows:

- (1) *Barder* confirms the availability of a set-aside jurisdiction if the requisite criteria are satisfied (which include unforseeability);
- (2) *Thwaite* confirms the availability of an equitable jurisdiction to refuse to enforce an executory order if, in the circumstances prevailing at the time of the application, it would be inequitable to do so;
- (3) save for (4) below the court may only vary what would otherwise be a non-variable order that remains executory if one party’s (or both parties’) application(s) for financial orders has (or have) not yet been dismissed (although Mostyn J is clear in his view that the fact that a dismissal clause does not take effect until there has been full compliance with certain transfers and payments does not entitle a court to replace an executory order with a new one); and
- (4) there is (or at least there should also be) an equitable jurisdiction to vary an executory order in circumstances where there has been non-compliance by a respondent and/or they have culpably acted to frustrate the intention behind the order. These circumstances do not need to have been unforeseen.

The argument would be that this latter equitable jurisdiction is required as, otherwise (as Moor J observed in *Hersman v De Verchere*), it would be a cheat’s charter and encourage non-compliance or obstruction with legitimate court orders where claims had otherwise been dismissed. It would be said that this is the power exercised in *H v W* by HHJ Reardon, in *WZ v HZ* by District Judge Doman, and in *AP v TP* by HHJ Farquhar.

It may be argued that this was the jurisdiction exercised by Poole J in *Collardeau v Fuchs* – as the husband was the non-compliant party and had failed to abide by his undertakings – when at [52] the judge stated he had jurisdiction

to discharge an undertaking to pay the future monthly mortgage on a property and to order that the husband pay the wife a lump sum award which was the capital equivalent of the periodical payments that the husband had undertaken to pay – although Poole J considered this to be a power he had under the *Thwaite* jurisdiction but also (as he said at [45]) under MCA 1973, s 31.

The contrary argument would be that such a capitalisation order could *only* be made pursuant to the *Thwaite* jurisdiction being used as a ‘sword’ given that it related to an undertaking. In *L v L*, Munby J (as he then was) expressed the view at [100] that ‘the court can perfectly properly accept undertakings which impose obligations that the court could not itself impose, and such undertakings are nonetheless just as enforceable as an order of the court’ and at [113] that:

‘[s]ection 31 of the 1973 Act entitles the husband to apply for an order varying, discharging or suspending that part of the consent order which constitutes an order for periodical payments. That entitlement is not in any way affected either by the fact that the order was a consent order or by the fact that the relevant provisions are contained in undertakings rather than in the curial part of the order.’

However, in *Birch v Birch* [2017] UKSC 53, [2017] 2 FLR 1031, Lord Wilson took a more restrictive view of the court’s powers to ‘vary’ an undertaking (whether under s 31 or otherwise) in the following terms:

‘5 All three lower courts adopted without demur the wife’s description of her application as being to “vary” her undertaking. But her description betrays a conceptual confusion which it is as well to dispel as this early stage. An undertaking is a solemn promise which a litigant volunteers to the court. A court has no power to impose any variation of the terms of a voluntary promise. A litigant who wishes to cease to be bound by her (or his) undertaking should apply for “release” from it (or “discharge” of it); and often she will accompany her application for release with an offer of a further undertaking in different terms. The court may decide to accept the further undertaking and, in the light of it, to grant the application for release. Equally, the court may indicate that it will grant the application for release only on condition that she is willing to give a further undertaking or one in terms different from those of a further undertaking currently on offer. In either event the court’s power is only to grant or refuse the application for release; and, although exercise of its power may result in something which looks like a variation of an undertaking, it is the product of a different process of reasoning.’

Acknowledging the existence of a freestanding equitable jurisdiction would also be consistent with the observation in *Bezeliensky* per McFarlane LJ (as he then was) at [39] that ‘the circumstances justifying intervention are likely to be met where an order remains executory *as a result of one party frustrating its implementation*’ (emphasis added). Such an analysis would therefore reflect the only Court of Appeal decision on this issue.

However, it would arguably be inaccurate to call this an exercise of the *Thwaite* jurisdiction as it is not, for the reasons espoused in *BT v CU* including that *Thwaite* is simply a ‘shield’ jurisdiction – and which is why the House of Lords in *Barder* did not decide the case by reference to it.

The contrary argument would be that although it may be said there *should* be such a jurisdiction, there is not one and one cannot be created by common law in the face of MCA 1973, s 31 and hence offends against the boundaries of statutory construction and that this lacuna can only be resolved by statutory reform. This is why, in Mostyn J's opinion, as stated in *BT v CU* at [65], the *Thwaite* jurisdiction 'drives a coach and horses through the statutory scheme'.

It is likely that only consideration of the above issues by the Court of Appeal – after hearing full argument – will (finally) determine the question of the ongoing existence of

the *Thwaite* jurisdiction and, if it does still exist, its appropriate scope.

So the jury is still out. Whether the Court of Appeal will deliver a unanimous or majority verdict in due course remains to be seen.

Notes

- 1 A decision refusing permission to appeal that had not been certified cannot be relied upon as authority (*Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 at para 6.2 and FPR PD 27A, para 4.3A.2).

Costs and *Calderbank* Offers: The Current Landscape

Victoria Flowers

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What can be done to protect one's client against escalating costs arising from uncooperative behaviour and inflexible positions within matrimonial finance disputes?

There appears to be an emerging (if still sporadic) willingness to make costs orders not only for starkly obstructive conduct such as deception, as demonstrated by the recent case of *RKV v JWC (No 2)* [2025] EWFC 429 (B),¹ but also for a basic failure to negotiate proactively, per FPR PD 28A. Peel J's message in *HO v TL (Costs)* [2023] EWFC 216 at [8] that 'unreasonable failure' to make 'sensible attempts to settle' exemplifies the purchase of this broader definition of 'litigation misconduct'. We examine which way the wind is blowing in the Family Court in terms of costs orders, the extent to which *Calderbank* offers still serve a purpose, and we highlight practical considerations for practitioners.

The law: basic principles

FPR 28.3(5) articulates the 'general rule in financial remedy proceedings' that 'the court will not make an order requiring one party to pay the costs of another party'. However, this 'no order' principle is qualified by FPR 28.1, which allows that 'the court may at any time make such an order as it thinks just'. Per FPR 28.3(6), costs orders can be made 'at any stage' where a party's related conduct occurring 'before or during' proceedings renders an order 'appropriate'. When making an order under FPR 28.3(6), the court must have regard to the factors set out at FPR 28.3(7), which include (but are not limited to) failure to attend non-court dispute resolution (NCDR) without good reason, the reasonableness of pursuing and the manner of pursuing particular allegations or issues, open offers made and the

financial effect upon each party. Per FPR PD 28A, 'the court will take a broad view of conduct for the purposes of this rule' and 'will generally conclude that to refuse to negotiate reasonably and responsibly will amount to conduct', warranting consideration of a costs order.

The exceptions to the 'no order' principle are detailed at FPR 28.3(4)(b)(i) and, per FPR 28.3(9), include applications under FPR 9.9A. These include (but are not limited to) orders for maintenance pending suit, orders for maintenance pending outcome of application, interim periodical payments orders, orders for payment in respect of legal services, applications under Sch 1 Children Act 1989 and appeals. In such instances, the 'clean sheet' rule applies (*Baker v Rowe* [2009] EWCA Civ 1162, *Gojkovic v Gojkovic (No 2)* [1991] 2 FLR 233), essentially constituting a 'soft costs follow the event' approach. These cases open the door to the strategic use of *Calderbank* offers, which we consider further below.

The courts' current attitude

The courts have proved willing, where appropriate, to make costs orders in proceedings in which the 'clean sheet' principle applies. In *BY v GC (No 3: Costs)* [2026] EWFC 50, at the end of the final hearing, Nicholas Allen KC (sitting as a deputy High Court Judge) awarded W the costs, *inter alia*, of litigating H's failed *Daniel v Walker* application (the judgment in relation to the *Daniel v Walker* application is *BY v GC* [2025] EWFC 226), with the fact that H was unsuccessful constituting a decisive factor. The disbursements related to the application were considered 'necessary', and therefore (irrespective of which costs regime applied) no corresponding costs award was made.

In *SM v BA (No 2: Maintenance Pending Suit)* [2025] EWFC 28, Nicholas Allen KC (sitting as a deputy High Court Judge) ordered H to pay 85% of 80% of W's costs for her legal services payment order (LSPO) application (the substantive application having been determined at an earlier hearing and the costs issue being reserved to this hearing). Perhaps notably, no *Calderbank* offer was made in that case, as H's only offer was made the day before the hearing, and was materially less than the sum ordered. Taking into account the degree to which W succeeded in her LSPO application, the court determined that an order should be made in her favour for 80% of her costs, assessed on the standard basis. On summary assessment, those costs were reduced by 15%.

In *C v S* [2024] EWFC 109, concerning a D11 liberty to apply application which fell into the 'clean sheet' category, Peel J awarded H two-thirds of his costs due to W's obstructive behaviour, which had included her delay in instructing solicitors which rendered the first hearing abortive, and her disregard of an open proposal by H.

Such readiness is not confined to 'clean sheet' proceedings. Following the introduction of no-fault divorce in April 2022, awareness of the principle, articulated by the then-President Andrew McFarlane in his *President's Guidance. Divorce, Dissolution and Separation Act 2020: Costs in Proceedings for Matrimonial and Civil Partnership Orders*, that 'the concept of success' should 'be of limited application' had bolstered the 'no order' standard. However, three outstanding factors potentially indicate a developing appetite to deem parties' behaviours sufficiently unreason-

able as to meet the FPR 28.3(6) bar for ‘appropriate’ costs orders on the basis of litigation conduct.

The first is the courts’ sensitivity to being perceived as environments that facilitate (or, at least, fail to discourage) disproportionate expenses. Recent alertness to the pyrrhic nature of such expenditure is illustrated by Cobb J’s condemnation of the ‘dispiriting’ £5.5m costs in *PN v SA* [2025] EWFC 141 at [7], by Trowell J’s emphasis upon the ‘staggering’ and ‘horrifying’ costs of over £5m in *IN v CH* [2025] EWFC 265 at [17]–[19], and by District Judge Hatvany’s criticism of the ‘irreparable damage’ caused by the disproportionate costs of over £300k in *EC v JC* [2024] EWFC 175 (B) at [39]–[40]. In *DSD v MJW (Costs of MPS)* [2025] EWFC 119 (B) at [29], Deputy District Judge Hodson dismissed an inordinate maintenance pending suit application with the warning that ‘this family court will not entertain such cost disproportionate applications’ for ‘it has only done ill for the reputation of the family courts and family lawyers’. This admonition illustrates an acute consciousness of the detrimental effect that unfettered costs can have upon perceptions of the profession’s integrity.

The second factor indicating developing inclinations towards costs orders is the continuous encouragement of low-temperature, NCDR-oriented proceedings. Such impetus is demonstrated most obviously by the Family Procedure (Amendment No 2) Rules 2023 (SI 2023/1324), which came into force in April 2024. More recently, it has been indicated by the explicit emphasis placed upon FPR 28.3(7)(aa) (‘the court must have regard to any failure by a party without good reason to attend a MIAM or attend NCDR’) in *The Financial Remedies Court of England & Wales: Guide* (March 2026), www.judiciary.uk/guidance-and-resources/financial-remedies-guide-2026/ (2026 *FRC Guide*) at paragraph 24. Given the substantial pressure upon the Family Court, highlighted by the recent reduction of Financial Remedies Court sitting days from September 2025 to March 2026, the courts may become increasingly disposed towards identifying unreasonable negotiation behaviour as grounds for costs orders.

Lastly, the prominence of the ‘conduct’ debate potentially forecasts an increase in costs orders against its sub-species of litigation misconduct. An increasingly robust stance has recently been exemplified in the highly fact-specific case of *LP v MP* [2026] EWFC 36, in which W was ordered to pay H £275,000 (85% of H’s costs) in light of her egregious behaviour throughout the proceedings. This attitude is further illustrated by *WX v HX* [2023] EWFC 279 (B), in which H had to pay £40,000 towards W’s costs due to his failure to provide full and frank disclosure and the impediment to settlement that it provoked. More recently, in *D Culligan v A Culligan (No 2) (Costs and Anonymity)* [2025] EWFC 26, H recovered 20% of his costs after W had run a meritless Matrimonial Causes Act 1973, s 25(1)(g) ‘conduct’ case, despite both parties’ open offers having fallen outside what the court determined as the fair outcome, and despite criticisms of both parties regarding their approach to litigation and the manner in which they gave their evidence.

An incipient readiness to make stricter and more consistent costs orders for the broad offence of ‘unreasonableness’ has recently been indicated by the 2026 *FRC Guide* at paragraph 30. Echoing Mostyn J in *OG v AG (Financial Remedies: Conduct)* [2020] EWFC 52 at [31], it emphasises how:

‘parties will be warned that, whatever the size of the case and whether it is being decided by reference to needs or sharing, a failure to make reasonable attempts to compromise cases in open negotiation once the financial landscape is clear may be met by an order for costs.’

As such, courts increasingly appear poised to identify intransigent or fundamentally uncooperative behaviour as suitable for costs orders, within both ‘clean sheet’ and ‘no order’ proceedings.

‘Clean sheet’ cases and *Calderbanks*: When can without prejudice offers be considered for costs orders?

In cases which constitute ‘financial remedy proceedings’ (for these purposes), *Calderbank* offers are inadmissible. Although they can still be useful in terms of litigation strategy in running side cases which may have greater chances of resolution, such offers serve no purpose in substantive proceedings because the court will never see them.

However, it is important to remember they are not confined to the history books in all cases. As noted above, the definition of ‘financial remedy proceedings’ for these purposes does not extend to various common applications including maintenance pending suit orders, interim periodical payment orders, orders for payment in respect of legal services, and liberty to apply as to implementation applications.

In those ‘clean sheet’ cases, *Calderbank* offers marked clearly as ‘without prejudice save to costs’ may be admissible in determining any costs application. It can be a strategic avenue to seek some costs protection for one’s client whilst preserving their open position during any trial of the merits. It may be wise to accompany *Calderbank* offers with open offers, to demonstrate a consistent willingness to negotiate.

Whilst there is no automatic rule that a costs order will be made if a party has ‘beaten’ their *Calderbank* offer, and *Calderbanks* are not akin to Part 36 offers in civil proceedings, they can be an influential factor in a court’s analysis.

There are forceful debates concerning the use of *Calderbank* offers, particularly given their potential to upset outcomes in needs cases. In *J v J* [2014] EWHC 3654 (Fam), Mostyn J gave his views about *Calderbank* offers in financial remedy proceedings in emphatic terms: ‘For my part I will fight its reintroduction to the last ditch. In my opinion it would be retrograde and unconscionable to allow a carefully crafted disposition to be turned upside down by virtue of a without prejudice letter produced after judgment has been given’.

Whatever one’s views of those policy arguments, the reality is that *Calderbanks* can be used within common applications to great effect. A practitioner who omits to use this separate negotiation method may leave a client open to adverse outcomes in terms of achieving settlement.

Approaching costs and costs applications: practical points to bear in mind

Given the courts’ emergent preparedness to make costs

orders in both ‘clean sheet’ and ‘no order’ cases, some general practical points are worth acknowledging.

Warning clients

Peel J in *HO v TL (Costs)* [2023] EWFC 216 at [12] emphasised that ‘the message must get across that although the starting point is no order as to costs, the courts are increasingly willing to depart from that’. Such readiness to depart is apparent in *BM v MB & Ors* [2025] EWFC 129, in which Fiona Hay (sitting as a deputy High Court Judge) ordered W to pay 25% of H’s costs to reflect her lack of open negotiation in a case where she made a singular, ‘completely unrealistic’ open offer. This willingness is not confined to cases governed by the ‘no order’ principle: in *LM v DM* [2021] EWFC 28 at [1], Mostyn J stated that the obligation to negotiate openly and reasonably ‘clearly applies’ to, and is ‘especially important’ in, interim proceedings, which should be settled pragmatically. It is therefore essential to alert clients of the risk of adverse costs orders if they fail to reasonably engage in negotiation. Similarly, clients must be cautious of making overstated proposals or singular offers.

Open proposals

Where *Calderbank* principles do not apply, it is worth considering making more open offers with reasonable proposals. Time-limited open offers at an early stage of proceedings can provide costs protection to a client, demonstrating a continuing commitment to settlement whilst recognising the inherent uncertainties of litigation. FPR 9.27A requires parties to send open proposals within 21 days of an FDR if settlement is not reached following the FDR, or 42 days before a final hearing if the parties had no FDR (the court can arrange a different timeline where suitable). However, making moderate proposals through open offers, which are updated and reflect developments in the disclosure, demonstrates continued willingness to negotiate. Moreover, it makes a client’s position available for the court’s consideration if a costs application needs to be brought at final hearing.

Calderbank offers

Remember their potential in common applications. At the outset, identify the costs regime and whether *Calderbank* offers may be admissible. It is entirely acceptable to run a sideline ‘without prejudice save as to costs’ case of what your client would accept alongside open offers. Although it may seem something of a foreign concept to family practitioners, it potentially enables persuasive costs arguments at the conclusion. Similarly, take received offers seriously and undertake a careful costs/risks analysis when giving advice regarding response. Consider timing when making a *Calderbank* offer – one made days before trial may carry less weight in the court’s analysis, particularly if brief fees have been incurred. Lastly, make it realistic. One purpose of a *Calderbank* is to try to show that you have beaten it at trial, and setting the offer too high undermines its very purpose.

Litigation misconduct

Emphasise to clients that obstructive behaviour particularly encourages penalties. A recent example of the courts’ attitude is found in *LP v MP* [2026] EWFC 36, in which W’s non-attendance at the first appointment and the pre-trial review, her failure to serve her Form E before the first

appointment, her delayed section 25 statement and her failure to provide documentation to support her replies to questionnaire led Cusworth J to make a costs order. Furthermore, in *BY v GC (No 3: Costs)* [2026] EWFC 50, W, *inter alia*, was awarded costs to reflect that H’s Form E valuation of a company was knowingly inaccurate.

Timing

Costs orders can be made ‘at any time’ within proceedings, per FPR 28.1. As such, if the opposing party is acting intransigently, it is worth considering an application at an interim hearing as a deterrent against further misconduct. Per FPR PD 28A 4.4, ‘[w]here an order for costs is made at an interim stage’ the court will ‘not usually allow any resulting liability to be reckoned as a debt’ in computation.

Needs

Orders can be made against parties to needs cases. Per FPR PD 28A 4.4, the court’s ‘broad view of conduct’ applies ‘in a “needs” case, where the applicant litigates unreasonably’. In *Rothschild v De Souza* [2020] EWCA Civ 1215 at [98], the Court of Appeal held that conduct can, where justified by the s 25 factors, lead to a party receiving less than their needs. In *OG v AG (Financial Remedies: Conduct)* [2020] EWFC 52, Mostyn J emphasised that the likelihood of penalties for failure to ‘openly negotiate reasonably’ applies ‘whether it is being decided by reference to needs or sharing’. This has been reiterated in the *2026 FRC Guide* at paragraph 30. In *WC v HC* [2022] EWFC 40 at [13], Peel J stressed that ‘even in needs-based claims no litigant is automatically insulated from costs penalties’, even ‘notwithstanding the possible impact on the intended needs award’. This might apply even if the payor does not immediately possess the requisite funds: in *JN v GN* [2023] EWFC 244, District Judge Hatvany made a structured costs order to provide for payment in monthly instalments. The treatment of costs in these instances is particularly case-specific, and impacts on a child’s welfare can prompt hesitation to make an order: in *BC v SC* [2023] EWFC 307 (B), no costs were deducted because Deputy District Judge Holmes-Milner considered that doing so would impair W’s ability to rehouse herself and her child. Nevertheless, in principle, applications for costs against parties to a needs case are viable.

Outstanding legal fees

Equally, the prospect exists in appropriate needs cases of an award being made to include a lump sum for outstanding legal fees. This approach was upheld on appeal in *Azarmi-Movafagh v Bassiri-Dezfouli* [2021] EWCA Civ 1184 despite the argument that such an approach puts the other side in a worse position than if the court had simply made a costs order. If, in order to provide for outstanding costs, practitioners intend to seek an award which substantially exceeds the sum required for needs, they should remember that the court will consider whether the case is suitable for a costs order. A cross-check of fairness should be undertaken to consider what the additional lump sum would represent if expressed as an order for costs. The outcome of that cross-check may either support or detract from one’s arguments.

Litigants in person

Limited case law exists concerning the application of costs principles where a party is self-representing. However, it is

important to bear in mind Lord Sumption JSC's statement in *Barton v Wright Hassall LLP* [2018] UKSC 12 at [18] that whilst their lack of representation will 'often justify making allowances in making case management decisions and in conducting hearings', it will (albeit in the context of the CPR 1998):

'not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules.'

There may be leniency if 'the rules and practice directions are particularly inaccessible' ([18]), although it is unclear which parts of the FPR might qualify as such. In principle, however, the courts are not barred from making costs orders against litigants in person, and where appropriate may treat them in the same way as represented parties.

Standard and indemnity bases

The difference between them is set out in CPR 44.3(2) and (3). The test for whether the indemnity basis is to be used is whether the conduct of the parties or other particular circumstances of the litigation (or both) are 'out of the norm', as detailed by Joanna Smith J in *Cabo Concepts Ltd v MGA Entertainment (UK) Ltd & Anor* [2022] EWHC 2024 (Pat) and recently applied in a financial remedies context by Cusworth J in *LP v MP* [2026] EWFC 36. The courts are not reluctant to make indemnity costs orders where appropriate: in *Norman v Norman* [2025] EWFC 107 (B), District Judge Veal made an order for indemnity costs because W knowingly pursued a 'speculative' ([183]) application. In *VTY v GDB* [2025] EWFC 110 (B), Recorder Rhys Taylor considered H's litigation conduct to have been so reprehensible as to justify an order for indemnity costs.

Fault of both parties

In *Grace v Grace* [2025] EWFC 37 (B), whilst there was 'fault on both sides', HHJ Farquhar determined at [5] that H had been 'responsible for the major escalation of the costs', thereby warranting a costs order of £20,000. An order is

unlikely if the fault is equal: in *EC v JC* [2024] EWFC 175 (B) at [47], District Judge Hatvany did not expect a costs application because 'the finger of blame can be pointed to both parties'.

NCDR

Per FPR 28.3(7)(aa), the court, when making decisions about costs orders, must consider 'any failure by a party, without good reason to – (i) attend a MIAM (as defined in rule 3.1); or (ii) attend non-court dispute resolution'. However, it is important to note that the confidentiality of NCDR has recently been emphatically upheld in *BC v BC* [2025] EWFC 236 (concerning pFDRs) and *Spencer v Spencer* [2025] EWFC 431 (concerning arbitration). Regarding pFDRs, per Peel J in *BC v BC* [2025] EWFC 236 at [27], reference to whether offers were made or indications given, or whether parties left early is prohibited. However, per [22], reference can be made to whether or not a pFDR took place, how long it was and whether both parties attended.

Conclusion

The courts have been prepared to make costs orders in 'clean sheet' cases, and it is therefore crucial to remember the strategic merits of *Calderbank* offers in these instances. Moreover, we have identified the courts' sensitivity to its reputation, its emphasis on NCDR and reasonable negotiation, and its developing robustness towards litigation misconduct as three factors that may anticipate an increase of the existing readiness to award costs in 'no order' cases. Practitioners must be alert to these risks and opportunities.

Notes

- 1 A number of the authorities cited in this article are from the lower courts. They are not citeable if the reference ends with '(B)', if they were only attended by one party, or if they are permissions for appeal, unless the judgment explicitly says that it has been approved as citeable. We use them to elucidate the matrimonial finance landscape and to summarise the courts' current position.

Costs in Needs Cases: Persistent Reluctance

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Introduction

Costs in needs cases comprise two main scenarios: (1) when a party has unpaid costs (or debts referable to costs) and seeks an additional lump sum to cover these on a needs basis; and (2) when, as a result of litigation misconduct, a costs order is sought against the recipient of a needs-based award. In both scenarios, courts should apply the legal framework contained within FPR 28.3 and the revised PD 28A, para 4.4.¹ Significant reform has taken place in this area in recent years; however, notwithstanding this reform, and notwithstanding strong rhetoric at High Court Judge level, judges in the Financial Remedies Court seem to remain reluctant to penalise litigation misconduct in needs cases. This article argues that this gap – between the revised costs framework and reality – can and should be closed, even in cases where resources are more limited.

The current legal framework

The general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party (FPR 28.3(5)). This general rule is subject to an important conduct exception, namely that the court ‘may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them)’ (FPR 28.3(6)). The factors the court must have regard to when considering whether to make a costs order because of a party’s conduct are set out in FPR 28.3(7):

(aa) any failure by a party, without good reason, to –

- (i) attend a MIAM (as defined in rule 3.1); or
- (ii) attend non-court dispute resolution;
- (a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
- (b) any open offer to settle made by a party;
- (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
- (e) any other aspect of a party’s conduct in relation to proceedings which the court considers relevant; and
- (f) the financial effect on the parties of any costs order.’

This list provides both a sword (subparagraphs (aa)–(e)) and a shield (subparagraph (f)). It also highlights a tension, analysed below, between appropriately penalising litigation misconduct and ensuring parties can meet their needs at the level assessed by the court.

PD 28A deals specifically with costs and was revised in April 2019 following a consultation by the Family Procedure Rule Committee’s (FPRC’s) Costs Working Group. As revised, PD 28A, para 4.4 provides:

‘In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a “needs” case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.’²

Subsequently, rule changes were made (in July 2020) to require the provision of costs estimates before hearings in Form H or Form H1 (FPR 9.27) and for open offers to be made 21 days after an FDR (FPR 9.27A). Furthermore, the above-mentioned FPR 27.3(7)(aa) was introduced (in April 2024), the Pre-Application Protocol annexed to PD 9A was amended (in May 2024) to emphasise the importance of open negotiation and engagement with non-court dispute resolution and the new *2026 FRC Guide* (published in March 2026)³ confirmed open offers must also be made 21 days after a private FDR.

The reasons for reform

The general rule in financial remedy proceedings (that there

will be no order as to costs) was introduced in 2006 at the same time that *Calderbank* offers became inadmissible in financial remedy proceedings.⁴ In advance of this reform, it was considered that *Calderbank* offers – and the costs orders that followed – were having a destabilising effect on financial settlements that had been carefully constructed by the court, and it was hoped that the introduction of the general rule would ‘stress to the parties, and to their legal advisers, that running up costs in litigation will serve only to reduce the resources that the parties will have left to support them in their new lives apart’.⁵

In the years that followed, disproportionate costs continued to be an issue. Famously, in *KSO v MJO & Ors* [2008] EWHC 3031 (Fam), the parties spent £553,000 out of a marital pot of £771,000. That prompted Munby J, as he then was, to append an extract of Dickens’ *Bleak House* to his judgment and to state ‘Something must be done ... We simply cannot go on as we are’. Similar sentiments were expressed in *J v J* [2014] EWHC 3654 (Fam) by Mostyn J, who urged the FPRC to consider reform.⁶

The issue, in the context of needs cases, is illustrated by *HG v WG* [2018] EWFC 84. The wife (having belatedly abandoned her sharing claim) sought c. £7.715m out of total net assets of c. £12.258m to meet her needs. She was awarded a *Duxbury* fund of £2m and £1.65m for housing. Francis J, in a judgment that presaged the subsequent reforms to PD 28A, then had to consider what to do with the wife’s outstanding costs (and debts referable to costs), which totalled c. £900,000 including interest. The wife’s counsel argued she was entitled to a full indemnity in respect of all of her costs because costs are a debt that needs to be paid and, in a needs case, needs must be met. Francis J rejected this submission:

‘91 ... Doing the best that I can to recognise that her costs are excessive, to recognise that she has presented an unreasonable case in financial remedy proceedings but to recognise that her *Duxbury* fund cannot be completely undermined and that the husband’s offer was too low, I am going to add to the lump sum, already referred to above, an additional £400,000 which is a little bit less than half of the total sum due.

93 The wife will, therefore, have to find some £500,000 in order to fund that part of the costs which I am not ordering the husband to pay. I recognise that this will deplete her *Duxbury* fund. I have very carefully considered whether this is fair. It might be said that I have assessed her needs at a given figure. If I have done that, then how can I leave her with a lower sum which, by definition, does not meet her needs? This conundrum happens in so many cases. People who engage in litigation need to know that it has a cost. The wife may choose to sell the property at some point in the future converting part of the value of it into a *Duxbury* fund. She may decide to use the property to generate some income rather than simply installing her own staff into it. She will have to make the sort of decisions about budget managing that other people have to make day in day out, but I am satisfied that people who adopt unreasonable positions in litigation cannot simply do so confident that there will be an indemnity for the costs of the litigation behaviour, however unreasonable it may have been.’

Consideration of the revised legal framework at High Court Judge level

Since the revision to PD 28A, para 4.4, there have been a significant number of reported decisions at High Court Judge level both: (1) emphasising the importance of the revised para 4.4 and the change in culture it seeks to effect; and (2) demonstrating increased willingness, at High Court Judge level, to make costs orders even if doing so prevents a party from meeting their needs, as assessed by the court.⁷

The starkest warnings have been provided by Mostyn J and Peel J.

In *OG v AG* [2020] EWFC 52, Mostyn J said:

‘30 The revised para 4.4 of FPR PD28A is extremely important. It requires the parties to negotiate openly in a reasonable way. ...

31 It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing.’⁸

In *HO v TL (Costs)* [2023] EWFC 216, Peel J said:

‘10 Parties must understand that to run an untenable case risks adverse costs orders being made.

11 Perhaps more importantly, lawyers must advise their clients accordingly. Of course, they act on instructions, but it is, in my view, incumbent on the legal team to explain clearly that a failure to negotiate reasonably on an open basis carries costs risks. If the party persists in an unreasonable stance, they can have no complaints if they are on the receiving end of a costs order.

12 Litigation is expensive and personally demanding for lay clients. I see no reason why the court should not visit a costs order if one party makes unreasonable open offers. The authorities make plain that a costs order may be made even if it reduces the needs as found by the court. These comments apply particularly to big money cases, although I take the view that in smaller value cases the court should also be willing, in the right case, to make an award for costs, even if only in a modest amount, to register condemnation of the party whose open proposals are far removed from the eventual outcome. The message must get across that although the starting point is no order as to costs, the courts are increasingly willing to depart from that so as to do justice to the party who has been put to unnecessary costs by the other party’s overstated proposals.’

Reality on the ground and the way forward

Notwithstanding the changes made to PD 28A, para 4.4 and the warnings offered at High Court Judge level, it continues to be relatively rare – both anecdotally and by reference to reported decisions⁹ – for costs orders to be made against the recipient of needs-based awards in decisions below High Court Judge level. In other words, a gap persists between the rhetoric at High Court Judge level and the reality of most cases in the Financial Remedies Court.

In part, this may be explained by the fact that there are normally significant differences between the resources available to parties in cases at High Court Judge level than those below – and there are undoubtedly cases where

making a costs order would prevent a party from acquiring a property suitable for themselves and any children. However, that explanation only goes so far. It is difficult to see why a party who has been found, for instance, to need to purchase a property costing £400,000 could not in fact make do with £375,000, if their litigation conduct justifies it. Fundamentally, needs are elastic.¹⁰ As Cusworth J observed in *TY v XA (No 3)* [2025] EWFC 350:

‘32 Where King LJ speaks of the housing needs of the recipient party, at [59] of her judgment in *Azarmi-Movafagh v Bassiri-Dezfooli* (above), I am therefore clear that she is not suggesting that a party can never be left with a hard choice as to how to meet their outstanding debt, which may include housing at a lesser level than that assessed by the court, as an alternative to a reduced available income ... Leaving a party needing to relocate to a less exclusive neighbourhood is not in my judgment necessarily leaving them “unable to meet their housing need” ... In any case where their needs assessed are on the basis of lifestyle, as opposed to “bare” needs, a party would be unwise to assume that their unreasonably incurred costs are bound to be laid at the door of the other party in any circumstances.’

A better explanation may therefore be a lag in culture. Prior to the revision of para 4.4, the tension between: (1) conduct-based reasons for making a costs order; and (2) the need to consider the financial effect of making a costs order tended to be resolved in favour of protecting needs.¹¹ However, the revised para 4.4 changes this balance: if considering the financial effect of making a costs order meant not making a costs order because it undermines a needs-based award, para 4.4 would be meaningless. Even in smaller money cases, assuming litigation conduct justifies it, practitioners should not shy away from emphasising the sea change augured by cases such as *OG v AG* and *HO v TL (Costs)* to seek a costs order, even if it is modest.¹²

Further support, in the right case, can be found in *TT v CDS* [2020] EWCA Civ 1215, where the Court of Appeal considered litigation conduct under s 25(2)(g) Matrimonial Causes Act 1973.

At [80], Moylan LJ said:

‘I agree with Moor J in *R v B* when he said that, if required to achieve a fair outcome, the court “must be entitled to prioritise the [needs of the] party who has not been guilty of such conduct”. It is clear ... that the financial consequences of the litigation misconduct, perhaps combined with other factors, might be such that it is fair that the innocent party is awarded all the matrimonial assets. In this respect, I also agree with Moor J’s observation that an order can be made which does not meet needs because to exclude that option “would be to give a licence ... to litigate entirely unreasonably”.¹³

Conclusion

Judicial reluctance to make costs orders that interfere with

needs-based awards, even if the recipient’s conduct justifies doing so, is likely to perpetuate a culture in which parties fail to openly negotiate reasonably and costs are disproportionate. The revised legal framework is designed to enable courts to penalise litigation conduct appropriately, even in needs cases with limited assets, and courts should not shy away from doing so.

Notes

- 1 See *Azarmi-Movafagh v Bassiri-Dezfooli* [2021] EWCA Civ 1184 at [63].
- 2 Note that in advance of the introduction of the revised para 4.4, Moor J repeatedly emphasised the importance of open offers and stressed that he would not hold a party to an early open offer designed to facilitate settlement: *SR v RS* [2014] EWHC 4305 (Fam), *MAP v MFP* [2015] EWHC 627 (Fam) and *FB v PS* [2015] EWHC 2797 (Fam). However, the revision of PD 28A, para 4.4 provided, for the first time, a clear statement of intent from the FPRC that a failure to negotiate openly reasonably and responsibly could (and should) see costs orders made, even in needs cases.
- 3 *The Financial Remedies Court of England & Wales: Financial Remedies Guide* (March 2026), www.judiciary.uk/guidance-and-resources/financial-remedies-guide-2026/
- 4 They remain admissible in clean sheet cases.
- 5 See the consultation paper issued in October 2004 by the Department for Constitutional Affairs, ‘Costs in Ancillary Relief Proceedings and Appeals in Family Proceedings’, at paragraphs 22 and 27.
- 6 The parties spent £920,000 in costs (nearly a third of what they had built up during their 18-year marriage), prompting Mostyn J to bring his judgment to the attention of the President with the aim of raising disproportionate costs as an urgent issue with the FPRC.
- 7 For cases where costs orders were made notwithstanding the fact this would cause the paying party to have to dip into their needs-based award, see *MB v EB* [2019] EWHC 3676 (Fam), *Taharne v Limb* [2022] EWFC 27, *VV v VV (No 2)* [2022] EWFC 46, *WC v HC* [2022] EWFC 40 and *HD v WB* [2023] EWFC 2.
- 8 See also, for example, the decision of Mostyn J in *E v L (No 2: Costs)* [2021] EWFC 63 at [7].
- 9 For examples of (modest) costs order being made in needs cases with limited assets, see *AA v AB (Costs)* [2021] EWFC B16 and *A v R (Financial Remedy: Costs)* [2021] EWFC B35.
- 10 See, on the discretion afforded to judges, Mostyn J in *Cummings v Fawn* [2023] EWHC 830 (Fam) at [14]. See also *TY v XA (No 3)* [2025] EWFC 350 at [31].
- 11 See, for instance, *J v J* [2014] EWHC 3654 (Fam).
- 12 Modest costs orders were made in the cases referred to in n 9 (above): in *AA v AB (Costs)*, an order of £10,000 was made by way of a deduction of £1,000 from the series of lump sums payable to the wife from 1 September 2021 to 1 September 2030 inclusive; and in *A v R (Financial Remedy: Costs)*, an order of £9,000 was made. A further creative solution was alighted on by Charles J in *V v V* [2011] EWHC 3230 (Fam), where a charge against the wife’s property was increased to include the costs of the appeal.
- 13 Moylan LJ is referring to *R v B & Ors* [2017] EWFC 33, particularly at [85].

Keep Calm and Carry on: *A v M* in a Wells World

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Introduction

The quantification and valuation of carried interest (or Carry) is often a contentious issue in financial remedy proceedings. This is because Carry is illiquid, uncertain in value and only realisable at some future (and often unknown) point in time. These factors make it difficult to know the value that should be attributed to it. To complicate matters further, Carry can also be highly valuable if certain criteria are met (or entirely valueless, if those criteria are not met), and, as a result, can often be a key asset in the case.

The Family Court has adopted different approaches to deal with Carry, as illustrated by *A v M* [2021] EWFC 89 (Mostyn J) and, more recently, *ED v AP* [2025] EWFC 399 (HHJ Hess, sitting as a deputy High Court Judge) and *B v B* [2013] EWHC 1232 (Fam) (Coleridge J), before that.

In this article, we take a closer look at how Carry was shared in the cases of *A v M* and *ED v AP*, and the different approaches adopted for its assessment. We conclude by proposing an alternative method by which Carry can be shared when the timing of future receipts is unknown. This method maintains the simplicity of Mostyn J's 'formulaic' approach, but also accommodates the passing of time (and the work undertaken in that period) as reflected in HHJ Hess' 'tapered' approach.

We also provide a Microsoft Excel tool to enable practi-

tioners to calculate the marital sharing percentage under this approach, as well as vary the assumptions contained in the *A v M* Formula, where appropriate.¹

Carry and the case for Wells sharing

Carry is a form of compensation that is sometimes earned by individuals working in finance and investment businesses.² In simple terms, an entitlement to Carry represents the allocation to an employee (who, for ease, we will refer to as the 'Carry Owner') of a share of the investment returns earned by the investment firm. Those investment returns are, most typically, generated from amounts invested via a 'Fund' structure. The receipt of Carry is often predicated on the returns (i.e. profit) of the Fund surpassing a given rate of return (sometimes referred to as a 'Hurdle Rate'). These Funds can span many years, with Carry typically only being paid out once the investments made are disposed of, often many years into the future.

As a result, and in the context financial remedy proceedings, the consideration of Carry can raise two distinct computation problems. These are:

- (1) **How to quantify the value of Carry**, where its value may be uncertain and unknowable during the proceedings, as it is dependent on the future performance of the underlying investments held by the Fund; and
- (2) **How to determine the marital proportion of Carry**, given that the timing of Carry payments to the Carry Owner are similarly uncertain and unknowable, as they depend on either the timing of the disposal of the Fund's underlying investments or the end of the life of the Fund.

Problem (1) – how to deal with an uncertain and unknowable future receipt – already appears to have been answered by the court, namely by way of so-called *Wells* sharing. For example, in *ED v AP* (at [57]), HHJ Hess explained that, whilst *Wells* sharing arrangements are typically undesirable in family proceedings, he nonetheless agreed with Lewison LJ in *Versteegh v Versteegh* [2018] EWCA Civ 1050 (at [135]) that in cases involving large amounts of contingent assets, such as Carry, *Wells* sharing can be necessary to avoid 'considerable unfairness'. He therefore proceeded to adopt this approach when considering how Carry should be quantified in that instance.

But what about Problem (2)? If Carry is to be *Wells* shared, is there a method that allows the appropriate marital percentage to be assessed given that the issue of the timing of receipt is equally uncertain and unknowable? The cases of *A v M* and *ED v AP* are instructive in terms of the different way the courts can approach this issue.

The *A v M* Formula

In *A v M*, Mostyn J assessed the marital (and thus shareable) proportion of the husband's Carry using the following formula (the '*A v M* Formula'):

$$A/B = C$$

Where:

A is the period between the establishment of the Fund and the date of the trial;

- B** is the expected life of the Fund; and
- C** is the resulting marital proportion to be shared by the parties.

In adopting the *A v M* Formula, Mostyn J sought to determine the marital share of the value of the husband’s Carry in two funds. In that case, he reallocated the wife’s share of the husband’s Carry in a latter, second fund to an earlier fund, after adjusting for the relative projected future values of Carry for each. That is, Mostyn J concluded that the wife should receive an enhanced share of the husband’s Carry in the earlier fund when realised (and no share of the latter fund).

In the recent judgment of *ED v AP* (at [58(v)]), HHJ Hess outlined what he considered to be two primary concerns with the *A v M* Formula, namely that:

- (1) it relies upon an unreliable estimate of the end date of the Fund to determine the end date of ‘B’; and
- (2) it assumes that work on the Fund occurs linearly across its lifetime, which is not always the case (and which HHJ Hess considered to be an unreasonable assumption in *ED v AP*).

As a consequence of these issues, HHJ Hess moved away from the strict mathematical and formulaic approach of the *A v M* Formula. Instead, he adopted alternative sharing percentages for the Carry arising from the different Funds in the case, each of which were established at different times and therefore spanned different periods of the marriage.

In doing so, HHJ Hess concluded, in a holistic manner, that the Funds which spanned the longest periods of the marriage should be shared to a greater extent, as compared to the Funds which straddled smaller portions of the marriage, which should be shared to a lesser percentage.

In our view, however, in both of *A v M* and *ED v AP*, one drawback arises. By fixing the sharing percentage at a given point in time (i.e. at final hearing), the marital element is effectively ‘locked in’, even though the precise timing of the Carry payout is unknown and unknowable. What this means is that if investments held by the Fund are realised earlier than was anticipated at the time of the final hearing, the post-marital endeavour can be overestimated, and therefore the marital proportion underestimated. Conversely, if investments are realised later than anticipated, the post-marital endeavour can be underestimated, and therefore the marital proportion overestimated.

To put it another way, in order to determine the precise marital proportion to be shared at the date of trial, even where the ultimate proceeds are to be *Wells* shared, the court has, up till now, relied on an uncertain estimate of when the Carry might be received.

In the authors’ eyes, this has the appearance of being somewhat inconsistent; why (rightly, we suggest) make provision for the uncertainty of the quantum of the Carry (by way of *Wells* sharing) but not the uncertainty of the marital element? Both quantum and marital element are unknowable, why not apply the same *Wells* sharing logic to both?

In the following section, we propose an extension of the time apportionment principles developed by Mostyn J and the *A v M* Formula to accommodate variable future dates of Carry receipt. Whilst, for ease, we refer to this proposed, new approach as *A v M* (Extended), we should emphasise it

is really just a broader application of the *A v M* Formula itself.

A v M in a Wells world

In summary, the authors propose extending the *A v M* Formula to enable the marital proportion of a Carry receipt to be dependent on the date that it is actually received, rather than an estimate at trial of when it might be received. Explicitly, we propose adopting a flexible, formulaic approach that tweaks the *A v M* Formula so that the end date of ‘B’ is determined at a later date, once it is known with certainty, i.e. once Carry has been received (or is receivable).

The result is that both computational problems, i.e. Problems (1) and (2) above (the quantum of Carry and its marital proportion) are variable, but assessed accurately, only once the relevant parameters are known. In effect, this adopts *Wells* sharing for the quantum and the analytical equivalent for assessing the marital proportion (i.e. *A v M* (Extended)).

By way of illustration, in Figure 1 we show how, using the *A v M* (Extended) approach, the marital proportion of Carry would change over time based on adopting alternative end dates of ‘B’ for when the Carry is actually received. For example:

- (1) If the Carry was received on the date of final hearing, then the *A v M* (Extended) methodology would treat all work to get to that point as marital, and thus the proceeds would be shared equally.
- (2) Conversely, as the date of receipt of Carry extends further into the future and beyond the end of the marriage, a greater proportion of work would be treated as non-marital and thus the sharing percentage would be reduced.

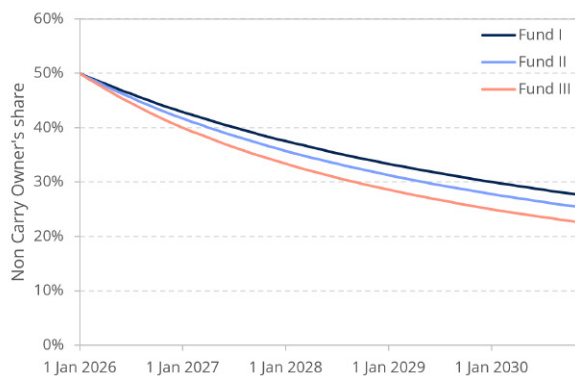


Figure 1: Illustrative example of the Non Carry Owner’s share of Carry through time

It is our hope that the flexible, yet formulaic, approach offered by the *A v M* (Extended) method can reduce the scope for dispute, by allowing parties to rely on known and factual information at the point in time at which that information is available (rather than relying on uncertain estimates) and, at the same time, increase the scope for fairer outcomes.

The A v M Formula’s assumptions

Of course, the *A v M* Formula also requires certain other

assumptions to be made. However, with the *A v M* (Extended) method, it is possible that these assumptions (or the approach to determining the assumptions) can either be agreed by the parties or, if agreement cannot be reached, determined by a judge prior to the receipt of the Carry distributions in the future. We discuss the required assumptions below:

- (1) **Start date of 'B':** in *A v M* (at [15]), Mostyn J adopts a start date for both 'A' and 'B' equal to the establishment date of each Fund. In effect, this assumes that work on the Fund begins on the date the Fund is established. However, whilst the start date of the Fund may be a straightforward assumption, there may be instances where (and we have advised on cases where there are arguments that) it could be appropriate to adopt:
 - (a) an earlier date, if the Carry Owner was significantly involved in fundraising efforts prior to the establishment of the Fund; or
 - (b) a later date, if the Carry Owner did not undertake significant work on the Fund until later in the Fund's life.
- (2) **Start date of 'A':** in the majority of cases, the start date of the marital period, i.e. 'A', will be the same as the start date of 'B'. However, where the Fund predates the marriage, it may be possible to argue that a proportion of Carry is pre-marital (see, for example, Figure 2). In those cases, it will be necessary to decide at what point the marital period, 'A', should start. This could be, say, the date of cohabitation.

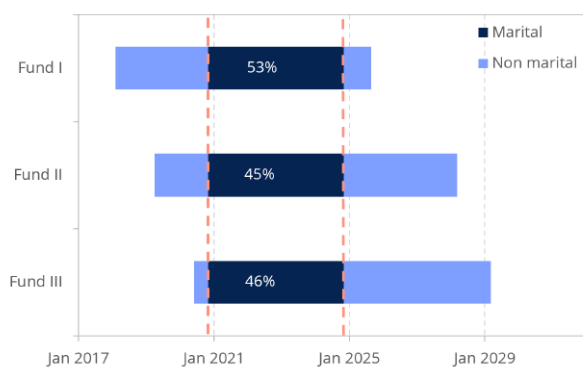


Figure 2: Illustrative example of the marital portion of Carry for funds which start before and end after the marriage. Dashed orange lines indicate the start and end of 'A' (the marital period)

- (3) **End date of 'A':** in *A v M* (at [15]), Mostyn J considers that the marital period, 'A', should end on the date of the final hearing. Whilst not unreasonable, as with many other cases, we appreciate that there may be arguments for why date of separation is more appropriate. One for the lawyers, we are afraid!
- (4) **End date of 'B':** in *A v M* (at [15]), Mostyn J considers that 'B' should represent the full lifetime of the Fund. However, as we explain above, under the *A v M* (Extended) approach, we consider it more consistent to adopt an end date of 'B' equal to the day that Carry is received (or receivable) by the relevant individual (which is of course unknown as at the date of final hearing). This is because once an investment is sold by

the Fund and Carry is paid to the Carry Owner, it may be that little to no further work is required by the Carry Owner in respect of this investment even though the Fund itself may still continue its 'lifetime' for some (potentially considerable) period of time.

- (5) **Linear apportionment of work:** as we discuss above, in *ED v AP* (at [58(v)]), HHJ Hess explains that it is not always appropriate to assume that work occurs linearly across the lifetime of the Fund. In our experience, significant work can be required throughout the lifetime of a Fund in respect of: (a) fundraising; (b) identifying investments; (c) completing acquisitions and performing the associated due diligence; (d) managing the acquired companies; and (e) completing sales and performing the associated due diligence. This may support adopting a 'broad brush' approach that Carry should be apportioned linearly. Equally, however, there will be specific cases where a linear approach may be inappropriate, depending on the facts of the case. In these instances, it may be that the *A v M* Formula can be suitably adjusted to apply additional weighting during the periods in which the Carry Owner undertakes significant work, with comparatively less weight applied during periods of less work. In practice, such an approach will be more mechanically complex and specialist advice may be required, for example, if a non-linear or weighted average approach is to be adopted when adjusting the *A v M* Formula to reflect alternative apportionments of work.

To assist, we have prepared a simplified Microsoft Excel spreadsheet, the '*Illustrative A v M Calculator (RDA)*', alongside this article.³ This allows the user to input various assumptions, as discussed above, including, importantly: (1) the date of actual Carry receipt in order to allow the sharing percentage under the *A v M* (Extended) method to be calculated, as based on the *A v M* Formula; and (2) the amount of actual Carry receipt so the shares in absolute terms can be ascertained.

Of course, both the inputs into the calculator (either as agreed by the parties or as determined by the court) and how the later receipt, when crystallised, is to be paid by the Carry Owner will need careful drafting. As accountants, it is not for us to comment on how an order should be drafted, but it will need to record in an appropriate way how the amount due to the Non Carry Owner should be calculated in the future (when all information is known). For example, it may include something along the lines of 'the Non Carry Owner is to receive by way of deferred payment half of X% of the Carry Owner's receipt due to their carry entitlement in fund Y, where $X = A/B'$ (with A and B then subject to bespoke definitions that can incorporate the actual date(s) of receipt).

Likewise, the amount of the receipt (including how any tax payable is to be accounted for) will need to be carefully drafted and consideration will also need to be given as to whether (and to what extent) there is a requirement for ongoing financial disclosure and/or security pending payment. However, we understand that these drafting and other considerations often (if not always) arise in *Wells* sharing cases, but we will (again) leave that to the lawyers!

Conclusion

In cases where Carry is to be *Wells* shared, we consider that a flexible, yet formulaic, approach, that builds on the strength of analysis put forward by both Mostyn J and HHJ Hess in *A v M* and *ED v AP*, respectively, to assess the marital proportion of Carry as at the date of its receipt, when all information is known, is both more consistent and reliable, as compared to fixing the sharing percentage in advance at a given point in time, based on uncertain and unknowable assumptions at the point of final hearing.

In our view, the *A v M* (Extended) method, as outlined in this article, provides a greater deal of flexibility and increases the scope for fairer outcomes, especially in circumstances where all assumptions can be agreed between the parties. It allows for a simple calculation to determine the marital proportion once Carry is received

and hopefully reduces the scope for further dispute when issues of Carry arise in a case.

Notes

- 1 The Microsoft Excel tool (*Illustrative A v M Calculator (RDA).xlsx*) can be found in the online version of this article on the FRJ website.
- 2 For a more detailed overview and introduction to Carry, see Joe Rainer and Thomas Rodwell, 'A Beginner's Guide to Deferred Compensation (and Other Forms of Remuneration)', [2022] 1 FRJ 11: <https://financialremediesjournal.com/a-beginners-guide-to-deferred-compensation-and-other-forms-of-remuneration/>
- 3 The Microsoft Excel tool (*Illustrative A v M Calculator (RDA).xlsx*) can be found in the online version of this article on the FRJ website.

Maybe Compensation Isn't What You Think

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It is obvious that compensation is all about loss caused by career sacrifice. It is a rare claim because it is seldom worth pursuing: the loss must be sufficiently large for the claim to be proportionate, and there must be a sufficient career track record to minimise the 'What if?' speculation inherent in proving and valuing the loss. Overall, it's a poor fit with the usual financial remedies discretion.

Right ... ?

What if the problem isn't the concept itself but the way it has been interpreted by the lower courts? What if our loss-based understanding of compensation is a category error that doesn't actually have *any basis at all* in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 itself? What if the axiom that a career sacrifice is a prerequisite for compensation is not supported by the speeches?

In this article, I argue that the compensation principle set out in the *Miller; McFarlane* speeches is simply the logical next step in ending the discrimination between different but equal contributions. Compensation is a vehicle to alleviate post-divorce disparity in order to 'give both spouses an equal start on the road to independent living'.¹ As sharing alleviates capital disparity, compensation should alleviate income disparity.

This article² provides an overview of my argument and analysis, which is fully explored in an article in *Child and Family Law Quarterly*.³

What compensation is actually for

Miller; McFarlane builds on White

Compensation should be viewed in the context of the overall development of financial remedies law. Briefly: before *White v White* [2000] UKHL 54, we had the discriminatory reasonable requirements approach. *White* introduced the non-discrimination principle, proscribing discrimination between caring and money-making contributions. The new yardstick of equality effectively introduced formally equal division of capital as the starting point.

Miller; McFarlane sought both to consolidate and to build on *White*. The needs principle recognises that needs is the dominant factor in the majority of cases. The sharing principle consolidates the yardstick of equality, conceptualising marriage as an interdependent partnership of equals.⁴ The compensation principle should have tackled the remaining discrimination: on income.

While the marriage subsists, the spouses' interdependent contributions secure the family's welfare. When it ends, equal division of capital frequently does not suffice to achieve a fair outcome because '50% plus substantial earning power is self-evidently better than 50% and no earning power'.⁵ Without further adjustment, the spouse who made more of the caring contributions may be left to bear the brunt of the economic consequences of interdependence.

Miller; McFarlane therefore sought to build on the *formally* equal division of capital under the yardstick with *substantive* equality of post-divorce outcomes, by alleviating post-divorce disparity in earning capacity through the vehicle of compensation. The goal of substantive equality is apparent in Lady Hale's 'ultimate objective' of giving 'each party an equal start on the road to independent living'.⁶

This is an issue of gender discrimination because the stark fact is that the wife is still more likely to provide more of the caring contributions in the marriage and to suffer worse post-divorce outcomes. This is the pattern in every reported case in which compensation is argued. To reflect this, I use 'wife' to describe the lesser-moneyed spouse and 'husband' to describe the moneyed spouse.

What Miller; McFarlane actually said

Compensation should alleviate disparity in the parties' post-divorce positions, not recompense for loss caused by career sacrifice. Lord Nicholls is very clear: compensation is 'aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage'.⁷ He repeatedly says that compensation redresses post-divorce disparity in outcomes, and that this disparity arises from the division of the spouses' roles,⁸ but this message has been completely lost.

Lady Hale uses different language to express the same essence: compensation is for 'relationship-generated disadvantage'.⁹ Taking the word 'disadvantage' in isolation, one might think it offers support for the loss-based understanding of compensation for which it has become the shorthand. The wife's disadvantage is taken to be compared to her own position if she had not made a career sacrifice. But there are indications throughout Lady Hale's speech that, like Lord Nicholls, she is highlighting the disparity revealed by comparing the wife's outcomes with *the husband's*.

Lady Hale is explicit that ‘an equal partnership does not necessarily dictate an equal sharing of the assets’.¹⁰ Needs is the most common reason to depart from equality, but not the only reason. She points out that an equal share with a clean break can cause rapid divergence in the parties’ post-divorce standard of living if there is an earning capacity disparity, and the importance of the husband’s ability in such cases to recover his capital position after an unequal division.¹¹

She points explicitly to earning capacity disparity when she says:

‘... except in those cases where the present assets can be divided and each can live independently at roughly the same standard of living, *equality of outcome* is difficult both to define and to achieve. Giving half the present assets to the breadwinner achieves a very different outcome from giving half the assets to the homemaker with children.’¹²

The idea that the reason for Mrs McFarlane’s enhanced award was her career sacrifice has been super-imposed after the fact. The career sacrifice was just one part of her full – and ongoing – caring contribution that supported the husband’s career. As District Judge Redgrave explained at first instance, the ‘spadework’ put in over the course of a long marriage with interdependent contributions meant that the ‘greatest fruits’ of the husband’s career became available later in the marriage and after separation.¹³ It would be unfair to deprive the wife of her fair share of those fruits just as they ripened.

It is a common scenario that the wife compromises her earning capacity for the benefit of the family. The House of Lords created the label ‘compensation’ simply to make the District Judge’s reasoning easy to replicate¹⁴ so that alleviating the ensuing income disparity could routinely weigh in the discretionary balance.

Both Lord Nicholls and Lady Hale are clear that compensation and needs overlap,¹⁵ and that compensation forms part of a flexible balance with needs and sharing.¹⁶

The clean break

Compensation is often taken to undermine the clean break because Mrs McFarlane was compensated via periodical payments. However, this was simply because there was insufficient capital for a clean break, combined with a large surplus of income.

Both Lord Nicholls and Lady Hale are clear that needs and compensation should take place via capital if possible, but that the clean break should not be at the expense of a fair outcome.¹⁷ Therefore, if there is insufficient capital, needs and compensation – that is alleviating the earning capacity disparity – should take place via income. Matrimonial Causes Act 1973, s 25A encourages the capital option rather than discourages the income option. However, the lower courts continue to take s 25A as discouraging the income option, with the clean break taken to be an objective in its own right, even at the expense of giving the parties an equal start on the road to independent living.

Two versions of compensation

The version of compensation that exists in practice shares only its name with the principle actually found in the *Miller*;

McFarlane speeches, to the extent that it is misleading to call them both ‘compensation’. The House of Lords designed what I call ‘holistic compensation’ as part of a flexible balance with needs, sharing and the section 25 factors.

The version in practice bears no resemblance to holistic compensation. Instead, compensation has been siloed as a discrete loss to be assessed separately and added on, a version I call ‘discrete compensation’.

How it went wrong

The loss assumption

Discrete compensation is based on the foundational misunderstanding that compensation is for the specific loss caused by career sacrifice. This misunderstanding is so ubiquitous that it does not require any justification. It underpins the entire compensation case law without ever even being stated clearly, let alone demonstrated through citation. Ultimately, the loss-based understanding is an assumption about what *Miller*; *McFarlane* says, not an interpretation, so we can call it the ‘loss assumption’.

One might think the loss assumption has some basis in the speech of Lord Nicholls because he uses the word ‘loss’ several times. However, in context, he is clearly not using the word in its tortious sense:

- (1) He refers to the wife’s potential ‘double loss’¹⁸ in leaving the marriage with both a diminished earning capacity and no right to share in the husband’s income. In context, he is giving an example where the disparity in earning capacity that compensation seeks to address will be starkest.
- (2) In the same paragraph, he mentions the ‘disproportionate financial loss’ that women may still suffer because of their ‘traditional’ caring role in marriage.¹⁹ Here, he draws attention to the gendered nature of the issue rather than suggesting that the courts should seek to compensate that loss in a tortious sense. In any event, the loss he mentions is caused by the caring role, not career sacrifice.
- (3) He distinguishes a compensation claim from a needs claim as being ‘loss-related’ rather than ‘needs-related’. This is in the specific context of a future variation of Mrs McFarlane’s periodical payments, making it clear that, unlike her needs claim, the claim for compensation ‘is not directly affected by the use she makes of her resources’.²⁰

That is 100% of the uses of the word ‘loss’ in *Miller*; *McFarlane* relating to compensation. There is simply no doctrinal basis for the loss assumption.

In financial remedies cases, the broad-brush discretion is usually exercised by weighing competing considerations in an overall balance. The loss assumption sets compensation at odds with the usual approach by treating it as a separate damages claim being made within the broader claim for financial provision.²¹ This inevitably gives rise to serious case-management issues around proving and quantifying the claim, inflating both costs and complexity. But these concerns are misconceived because they arise from the misunderstanding that compensation is discrete.

RP v RP sets the tone

The die was cast in the first reported compensation case, which focused not on understanding and operationalising the principle, but on the perceived case-management issues. *RP v RP* [2006] EWHC 3409 (Fam) was a perfect test case for holistic compensation. The wife had given up a ‘serious career’²² to have children and support the husband’s career. Coleridge J assessed the husband’s earning capacity to be ten times the wife’s. The parties had approximately £3m total capital and both wanted a clean break. Pre-*Miller; McFarlane*, a departure from equality would have obviously been necessary to meet the wife’s needs. It should have been straightforward to weigh holistic compensation in the balance to push that division further in the wife’s favour.

Instead, the whole case is framed by the loss assumption. It is so obvious that compensation is for loss that this does not even need to be stated. It is shocking how little analysis there is of compensation. Coleridge J provides a cursory examination before concluding that compensation is ‘not new’, but just ‘highlighting ... an underlying principle’ that obligations arise from the parties’ equal but different contributions.²³ Remarkably, this first interpretation of the new principle contains *zero* citations of *Miller; McFarlane* (or indeed any other case).

Rather than the compensation principle itself, Coleridge J focuses on the case-management consequences of the quasi-tortious discrete version that both he and the advocates assume it to be. He is rightly concerned that there is ‘creeping in from some quarters a new methodology or approach akin to a damages claim’, including the prospect of expert evidence being called to establish the extent a wife’s loss.²⁴ He notes that ‘it is simply not possible (and highly undesirable and costly) to conduct, additionally, a speculative “what if ..?” exercise to reconstruct the parties marriage on a different basis’.²⁵ Famously, he declares that such an approach is ‘a blind alley at the mouth of which a “no entry” sign should now be firmly planted’.²⁶

There is obviously no place for a tortious methodology in financial remedies. What is missing is redirection from the discrete tortious approach back to the holistic compensation found in the words of *Miller; McFarlane*. The no entry sign has been taken to relate to the compensation principle itself, save in highly exceptional circumstances.

The valuation trap

The biggest practical issue with discrete compensation is quantifying the loss. Valuation is a trap that judges fall into because the loss assumption sets up compensation as something to be separately valued and added on to the wife’s needs or sharing award.

This quantification is assumed to require comparing the wife’s actual earning capacity with her potential earning capacity if different career decisions had been made – an ‘alternate universe’ approach. Of course, this requires exactly the sort of speculative exercise that Coleridge J warned against. It is an impossible task that has no place in the statutory discretion, where independent valuation is usually confined to ascertaining the resources available for distribution.²⁷ Notably, this task was not attempted in *McFarlane* itself. The wife’s career sacrifice was simply treated as part of her overall contribution, with no attempt

to assess how her career might have progressed in an alternate universe, or to value any loss.

The lower courts resolved this illusory problem by treating compensation as inherently flawed, and restricting it to exceptional circumstances.

The McFarlane baseline

As already explained, the central feature of *McFarlane* was the interdependence of the wife’s caring contribution and the husband’s financial contribution in the spadework for the husband’s career, which created the earning capacity disparity. Nevertheless, the wife’s enhanced level of periodical payments is ubiquitously taken to be because she sacrificed a high-level career, and had the track record to prove it. The most exceptional feature of *McFarlane* is the baseline against which all wives are measured and found wanting.

A substantial track record makes discrete compensation more palatable because it helps to mitigate the speculative nature of the alternative universe valuation. Being on track for a large salary helps to make it proportionate to go to the expense of proving and quantifying the loss. Making Mrs *McFarlane* the baseline alleviates these case-management concerns by confining claims to exceptional circumstances.

Early cases effectively barred wives with ‘ordinary career prospects’²⁸ from claiming compensation by suggesting that they were adequately compensated by an equal division of capital or a generous assessment of needs.²⁹ This merely pays lip service to the wife’s disadvantage, making no attempt to share the consequences of interdependence more fairly. Even paying lip service did not last long, with compensation quickly relegated to exceptional circumstances.

The facts of *McFarlane* were a double-edged sword for the House of Lords. The wife’s exceptional career sacrifice left no doubt that it would be unfair to confine her to her needs, making it a perfect vehicle to introduce compensation. However, that exceptional career sacrifice obscured the broad applicability of the compensation principle as part of the overall balance, facilitating its relegation to a niche concept for wives who can prove they would have made it rich on their own.

The false equivalence with a damages claim

Issues caused by the false equivalence between compensation and a damages claim pervade the compensation case law. Several points arise in addition to the central concerns around valuation and proof:

- ***Heads of claim:*** discrete compensation creates a separate head of claim, attempting to build up an award by aggregation.
- ***Looking backwards:*** discrete compensation inevitably drags the focus backwards to the choices made during the marriage and the wife’s professional track record, and away from the parties’ post-divorce future.
- ***Ignoring the husband’s ability to pay:*** the defendant in a damages claim must pay what it awarded, in contrast to the financial remedies approach of balancing competing claims to a finite pot.

These are all legitimate objections to *discrete* compensation, and they are all irrelevant to the holistic version. Holistic compensation does not require counterfactual alternate universe valuation, just the routine establishment

of the parties' contributions and earning capacities. It does not require proof of track record. It is not a separate head of claim. It looks forwards to a post-divorce future, not backwards to the wife's career sacrifice. It does not ignore the husband's ability to pay.

Holistic compensation draws attention to the economic consequences of unpaid caring contributions within an interdependent partnership of equals, so that they weigh in the overall balance as a matter of course. Lady Hale provided the objective in balancing the parties' competing interests: the equal start on the road to independent living.

Rather than redirecting practice to holistic compensation, the lower courts shut down the whole idea of compensation because of its perceived failure to fit with the discretion.

Waggott v Waggott

The Court of Appeal did not engage with arguments relating to compensation until *Waggott v Waggott* [2018] EWCA Civ 727, by which time the misunderstandings were completely embedded. There was no question of the wife making a discrete compensation claim, so she tried to reframe the concept by arguing that compensation applies to an advantage to the husband separately to any disadvantage to the wife.³⁰ This argument was rejected, with the court confirming that compensation applies only to disadvantage.

Not only did *Waggott* complete the embedding of the loss assumption, it took compensation even further away from *Miller; McFarlane*. Moylan LJ held that the wife can only claim compensation if she can prove that her earning capacity in the alternate universe would have generated greater resources than she would receive under either a needs or a sharing award.³¹ This guidance completely precludes an equal start on the road to independent living by making the wife bear the economic consequences of her caring contributions from her own resources in all but the most exceptional cases, in order to protect the husband's earning capacity and the clean break.

Where does this leave us?

Judges routinely cite the central principles of 'needs, sharing and compensation', but the mention of compensation is mere habit because it has been almost completely subsumed into the other two principles, explicitly applied only in truly exceptional cases. Something has obviously gone wrong when a flagship principle is never applied.

Wives are told that they were right not to raise compensation in exactly the sort of cases where it should have been used to alleviate the earning capacity disparity.³² Some of the wife's worse post-divorce outcomes may be dealt with via a generous assessment of needs, but using the language of needs greatly limits the adjustment, and makes it more susceptible to variation. Even this use of needs is being curtailed.³³ A sharing award likely means an equal share with a clean break, unless there is a reason to depart from equality, with such reasons – needs apart – always favouring the moneyed spouse.

Gender discrimination is thriving in financial remedies law.

Conclusion

How plausible is it that the House of Lords either forgot how the discretion works, or intended to reconfigure it for the sake of a few exceptional wives in well-off families? And that they used one of their rare opportunities to develop the law for that purpose?

Maybe it is more plausible to interpret *Miller; McFarlane* as I have set out, with a holistic compensation that fits within the usual flexible approach, completing the work of eradicating gender discrimination started in *White*.

The dissonance between the holistic and discrete versions of compensation is so jarring that it seems scarcely credible that judges could have got it so wrong. How could this have happened? I suggest that the case law reflects what Sharon Thompson has called 'the intransigent, near-instinctive notion that the property always belongs to the person who directly earned it'.³⁴ From this perspective, a formally equal division of capital requires the husband to give up some of what he earned in pursuit of fairness, an approach that 'resonates with moral and philosophical values' and 'banishes discrimination'.³⁵ On this view, the husband's income is solely the result of his efforts, so a clean break is the obvious corollary to equal sharing. A further change to address income disparity resulting from interdependence to provide substantive equality of outcome is literally unthinkable, especially given the lack of diversity in those providing the interpretations.

Against that intransigent background notion, judges may have instinctively adopted the most familiar definition of the word 'compensation': recovery for loss, as in tort law. The loss assumption arose from the word, leading judges to see only what they expected to see in *Miller; McFarlane*, the words 'loss' and 'disadvantage', and Mrs McFarlane's undeniable loss.

But to compensate can also mean to counterbalance an undesirable state of affairs, which requires no departure from the usual broad-brush discretion. In appropriate cases, the earning capacity disparity can be counterbalanced by giving the wife a larger share of capital and/or periodical payments, to give the parties an equal start on the road to independent living.

The Law Commission's recent Scoping Report³⁶ has renewed focus on reform of financial remedies. If one of the codification options is pursued, the distorted interpretation of compensation may well become enshrined in statute. *Miller; McFarlane* remains the authority on compensation and it is time to get back to what it actually said.

Notes

- 1 At [144].
- 2 This work was supported by the Economic and Social Research Council (grant numbers 2271988, UKRI2523).
- 3 Lucy Crompton, 'We need to talk about *Miller; McFarlane*: why we've got compensation all wrong', (2026) 38 CFLQ 101. In my forthcoming book, I analyse all citations of *Miller; McFarlane* in the compensation case law, demonstrating that the current understanding of compensation cannot be traced back to *Miller; McFarlane*. See Lucy Crompton, *Gender, Care and Financial Remedies on Divorce: An Untold Story of Invisible Work* (Hart Publishing, forthcoming 2027).
- 4 At [16] and [141].
- 5 Joanna Miles, '*Charman v Charman* (No 4) – making sense of

- need, compensation and equal sharing after *Miller/McFarlane*, (2008) 20 CFLQ 378 and 391.
- 6 At [144].
- 7 At [13].
- 8 See also [39] and [93] and Lord Hope at [114], [116] and [117].
- 9 At [140].
- 10 At [142].
- 11 At [142].
- 12 At [136] (emphasis added).
- 13 At [85].
- 14 At [94].
- 15 At [15] and [138]–[140].
- 16 At [28]–[29] and [144].
- 17 At [38] and [134].
- 18 At [13].
- 19 At [13].
- 20 At [99].
- 21 Very occasionally, compensation may influence the outcome indirectly, but it always requires the wife to prove that she sacrificed an established high-level career. See *AT v BT* [2023] EWHC 3531 (Fam).
- 22 At [56].
- 23 At [59].
- 24 At [61].
- 25 At [64].
- 26 At [62].
- 27 I note the concerning parallels with the current approach to treating domestic abuse as conduct that it would be inequitable to disregard, which is, of course, a similarly gendered issue. See <https://financialremediesjournal.com/the-problem-with-conduct/> and <https://financialremediesjournal.com/principles-vs-resources-conduct-and-the-law-commission-scoping-report/>
- 28 *CR v CR* [2007] EWHC 3334 (Fam) at [92].
- 29 *VB v JP* [2008] EWHC 112 (Fam).
- 30 The wife made other unsuccessful arguments that I do not have space to discuss here.
- 31 At [139].
- 32 See, for example, *W v H (Divorce: Financial Remedies)* [2020] EWFC B10 (a judgment of HHJ Hess sitting in the Family Court).
- 33 See *Augousti v Matharu* [2023] EWHC 1900 (Fam) and Sharon Thompson’s analysis: ‘Is there a need to limit needs in financial remedy cases?’, (2024) 36 CFLQ 111.
- 34 Sharon Thompson, ‘Is there a need to limit needs in financial remedy cases?’, (2024) 36 CFLQ 111 at 114.
- 35 *JL v SL* [2015] EWHC 360 (Fam) at [18] per Mostyn J.
- 36 <https://lawcom.gov.uk/publication/financial-remedies-scoping-report-and-summary>

‘Fair to Us’: Legal Myths and Privately Negotiated Financial Settlements

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Introduction

Since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) dramatically curtailed publicly funded legal aid in private family law matters, the expectation that separating couples will resolve complex financial arrangements without legal help has become the norm.

In 2025, 105,704 final orders were issued in England and Wales, with 49,067 financial remedy applications made.¹ Research confirms that many divorcing couples reach financial arrangements informally, without ever applying for a financial remedy order.² Policy makers have framed this shift as promoting autonomy, reducing conflict and empowering couples to take control of their own futures.³ But what happens when couples negotiate in the absence of legal advice? What principles guide them? And what does ‘fair’ mean to people who have never seen the inside of a courtroom?

This article draws on qualitative research with divorced women to examine how cultural narratives about fairness,

ownership and entitlement, described here as legal myths, replace legal principles in privately negotiated settlements. Three myths are particularly influential: ‘50:50 is fair’, ‘his money, he decides’ and ‘what’s mine is mine’. Each is familiar territory for practitioners; less familiar, perhaps, is the structural role these myths play when no lawyer is present to challenge them.

The implications are practical and pressing. Private ordering now dominates the landscape of financial remedy work. Practitioners and judges encounter its results daily: in consent orders that arrive without legal representation; or in cases where needs have gone unmet because one party simply did not know that they could ask for more. Understanding how legal myths operate, and what they displace, matters for how we approach those cases.

The research

The findings are drawn from semi-structured interviews with 32 civilian women, all of whom had previously been married to serving members of the British Army, all divorced in England and Wales. Interviews were conducted between 2018 and 2019 and analysed using thematic analysis.⁴ Participants had obtained their decree absolute at least 12 months prior to interview, allowing reflection on both process and outcome.

Military families provide a particularly illuminating context for examining private ordering. Military service is associated with long deployments, unpredictable working hours and frequent relocation, producing gendered divisions of labour.⁵ Non-serving spouses absorb responsibility for childcare and domestic work, while the serving spouse’s career is institutionally prioritised.⁶ As a result, military wives frequently exit marriage with constrained earning capacity, limited pension accrual and significant economic dependency.⁷

The headline findings are stark. None of the 32 participants instructed a solicitor in relation to finances and none applied for a financial remedy order. Only two received any legal advice at any stage of the divorce process and mediation was rarely used. Settlements were negotiated informally, without full disclosure or asset valuation and almost entirely without reference to legal principles.

While the context of military families is specific, the dynamics at work are not. Informal settlement is widespread across divorcing couples more generally,⁸ and the patterns identified here are recognisable across everyday financial remedy practice.

Private ordering: the gap between policy and reality

The shift towards private ordering has been driven by a consistent policy narrative: that couples are best placed to resolve their own financial arrangements; that legal intervention is a last resort rather than a safeguard; and that self-resolution promotes autonomy and reduces conflict.⁹ The removal of legal aid in private family matters under LASPO was framed within this logic.¹⁰

There is something intuitively appealing about this account. Parties who are separating amiably, who know their circumstances better than any judge might, and who

want to move on with their lives should, in principle, be capable of reaching fair agreements. The problem is that this model assumes broadly equal bargaining power, financial knowledge and, critically, knowledge of what the law would otherwise provide.

Family law practitioners recognise, however, that intimate relationships are characterised by interdependence and inequality: in earnings, information, confidence and post-separation resources. Decisions made during the marriage, particularly about caregiving and employment, carry long-term financial consequences that are rarely visible to those who made them.¹¹

Financial remedies law acknowledges this reality. Section 25 Matrimonial Causes Act 1973 requires the court to have regard to all circumstances of the case, with the first consideration being the welfare of any minor child of the family. In *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, the House of Lords articulated the principles of needs, sharing and compensation as guiding principles. Those principles reflect an acknowledgement of the value of non-financial contributions. Crucially, however, this recognition operates primarily within the formal legal system. In private negotiations conducted without legal advice, they are replaced by something else entirely.

Legal myths in privately negotiated settlements

Without legal advice to guide them, the participants in this study drew widely on shared cultural narratives about what a fair settlement looks like; narratives that often bore little resemblance to what a court would order. Three myths in particular shaped how negotiations were conducted and how outcomes were understood: (1) that the primary earner is entitled to determine the division of assets; (2) that fairness demands a 50:50 split; and (3) that assets perceived as belonging to one party are beyond the scope of negotiations.

'His money, he decides'

The most pervasive myth identified was the belief that the spouse who had earned the income was entitled to determine how assets should be divided upon separation. Primary earner status was treated not simply as a financial fact, but as a source of moral authority over the negotiation itself.¹²

Gemma's account is representative:

'I'd say he was the one who ultimately decided how we were going to split things. I suppose it was no different to when we were married. There was no animosity, and I wasn't going to argue with him. What was the point? It was his money and he could decide what to do with it. He's always been fair, and I thought it was fair, so I wasn't going to argue.'

What is striking about this and similar accounts is the continuity between the financial dynamics of the marriage and those of its dissolution. Deference to the primary earner, established and normalised during the marriage, simply carried over into the negotiations. Trust in the primary earner's inherent fairness did the work that legal advice would otherwise have done, and because there was 'no animosity', there was no perceived reason to challenge arrangements that might, on examination, have fallen well short of what needs-based reasoning would require.

The desire to preserve cooperative parenting relationships was also significant. As Kathryn explained: 'Why would we involve a solicitor? ... I have to still deal with him afterwards, what with Fin [their son] and that, so I don't want to do anything that would rile him up'. Instructing a solicitor was perceived not as a legitimate step in securing a fair outcome, but as an act of aggression likely to damage an ongoing relationship. The cost of asserting legal entitlement, in relational terms, was too high.

Practitioners will recognise the practical implications. In everyday cases, the issue of needs (particularly the housing and income needs of the primary carer, and above all the welfare of the children) is the dominant consideration, frequently resulting in an unequal distribution of the assets.¹³ The conflation of economic authority with legal entitlement is not merely a conceptual error on the part of the parties; it is a structural failure with real financial consequences for those who do not know what the law would have given them.

'50:50 is fair'

A second dominant myth was the belief that fairness means an equal division of assets, irrespective of differing needs, responsibilities or future financial prospects. Many participants understood equal division as both legally required and morally correct. Its appeal is obvious: it promises balance and closure without requiring difficult conversations about individual circumstances.

Many participants, including Amy, were unequivocal:

'Well, I told him that I should get 50:50 of everything, and I did. That's the fairest way, just split it down the middle: I get half; he gets half. Why would we need to go to a solicitor when it's as easy as that? Half and half. Easy.'

The problem – which many practitioners will immediately identify – is that substantive equality frequently requires unequal outcomes. Where one party retains primary caring responsibilities and reduced earning capacity, an arithmetically equal division may leave needs unmet and provide inadequate long-term security. Among participants, the 50:50 heuristic often functioned not as a floor but as a ceiling on claims. Kerry's account illustrates this clearly: 'I said to him that I wasn't going to take anything less than half. I was always the one who was going to have the kids, so that's the least he could do'. Framed as a maximum entitlement, the 50:50 norm here sets a limit on what Kerry was prepared to negotiate for. The fact that she would be the primary carer of the children (and suffer the long-term financial consequences that follow from primary caregiving) did not translate into a claim for more than equal division. The principle of needs, which might have justified a higher award, was simply absent from her reasoning.

Some participants expressed the 50:50 norm in explicit terms. Rachael believed: 'It's supposed to be half each ... That's what the law says is fair'. This conflation of formal and substantive equality matters for practice. When parties arrive at an agreement founded on the premise that half is what the law requires, and when that agreement may in fact fail to meet the needs of the primary carer and dependent children, the question of what scrutiny ought to apply to a resulting consent order becomes pressing.

Jennifer's account adds a further dimension: 'If I'm really honest, I didn't really think about the future, it was more

about what we needed straight away ... I suppose I accepted less than I wanted'. The absence of legal advice meant there was no framework within which to weigh immediate needs against long-term financial security. Short-term pressures, such as the urgency to resolve things, financial exhaustion and emotional depletion, drove outcomes. Future pension entitlement, earning capacity and retirement security were not considerations.

'What's mine is mine': ownership and pensions

The third myth concerned ownership assets acquired before marriage, held in one name or associated with one party's employment, which were treated as belonging to that party alone and placed beyond the scope of negotiations. This bears little relationship to how financial remedies law actually operates, where the concept of needs permits a holistic assessment of all resources without treating individually held assets as automatically ring-fenced.

Pensions were the most striking example. Despite frequently representing the most valuable asset in everyday cases – particularly where the family home may not be owned¹⁴ – pensions were consistently treated as personal property belonging to the earner and excluded from negotiations as a matter of course. The accounts across interviews were remarkably consistent:

'He kept his pension – it was his. I didn't earn it.' (Kate)

'His pension never came up to be honest. I just didn't think about it.' (Amy)

'It was his pension, not mine.' (Beth)

'His pension didn't come into it ... it was a given that it was his.' (Tara)

The logic underlying these accounts reflects breadwinner ideology in which financial contributions are valued whereas non-financial contributions are not.¹⁵ The military pension, which is a form of deferred pay accrued through service, was understood as exclusively attributable to the serving spouse. The significant contribution made by the non-serving spouse, in enabling that career through the absorption of domestic and childcare responsibilities, was invisible in this framework and not reflected in the outcome.

The consequences are serious and well-documented. The gender pension gap is substantial and is directly connected to women's interrupted labour market participation and lower lifetime earnings.¹⁶ Pension sharing orders are one of the most powerful tools available in financial remedy cases for achieving long-term fairness, yet they remain chronically under-utilised even in proceedings conducted with legal representation.¹⁷ In settlements reached without any legal advice, this omission appears to be near-universal; many participants effectively traded financial security for immediate stability, without any informed assessment of what that trade was worth.

The cost of 'keeping the peace'

Across the study, participants expressed strong resistance to instructing solicitors. Legal professionals were characterised as expensive, adversarial and likely to inflame what might otherwise be an amiable process. Avoiding lawyers was framed not as a constraint, but as a positive choice: positive, practical and in the best interests of the children.

Stephanie's account captures this framing: 'We both agreed not to involve solicitors. We had enough to deal with without them making it worse. We got on, so why make it worse?' The solicitor appears here as an agent of conflict, rather than as a source of information or protection.

For many participants, however, the decision was less a free choice than a reflection of constrained choices. Kerry identified the financial logic with clarity: 'I just didn't have any money for any lawyers ... Any money that goes to them, doesn't go to me, right? Like, it's all got to come out of the same pot, and the pot wasn't that big'. The perceived cost of legal advice was itself a product of the economic dependency that legal advice might have helped to address.

Tara was candid about the emotional calculus: 'I just didn't have the fight in me ... I wanted to get out, and move on, and this was the easiest way'. Emotional exhaustion, the desire for closure and the prioritisation of relationship harmony over financial entitlement were consistent themes. Even where participants acknowledged that legal advice might have produced a more generous outcome, expediency prevailed.

The result is a situation in which 'autonomy' – the founding premise of the policy case for private ordering – functions in practice as something closer to its opposite. Where one party lacks financial resources, legal knowledge and the confidence to assert claims against a former partner, the decision not to seek advice may reflect structural constraint rather than free choice. Private ordering under such conditions does not express autonomy, it substitutes for it, and risks legitimising substantive inequality under the guise of consensual agreement.

Implications for financial remedies practice

The findings set out in this article have a number of direct implications for practitioners and judges working in financial remedies.

Consensual does not mean fair

The most fundamental lesson from this research is that an agreement reached without acrimony may nonetheless rest on fundamental legal misunderstandings, significant power imbalances and incomplete financial disclosure. Practitioners advising a client who has already reached an informal agreement should probe, as a matter of course, the basis on which that agreement was reached: Was there pension disclosure?; Was the division of assets driven by a 50:50 norm?; Did the primary earner take the lead in structuring the settlement? The presence of these features does not invalidate an agreement, but it should prompt careful scrutiny.

Pensions must be a baseline, not an afterthought.

The persistent exclusion of pensions from informal negotiations is perhaps the most consequential finding of this research. For practitioners engaged in even limited advisory roles, raising pension entitlement and the availability of pension sharing orders should be treated as a non-negotiable first step. The long-term consequences of pension omission are irreversible in a way that may other settlement 'errors' are not.

Scrutiny of consent orders

This research also raises questions about the level of

scrutiny applied to consent orders produced without legal representation. The current approach, characterised by minimal judicial intervention in circumstances where the parties have reached an agreement, may inadvertently legitimise outcomes founded on myth rather than principle. As Eekelaar has observed, ‘law is the only safeguard individuals have against the exercise of power’ within intimate relationships.¹⁸ The judicial function in approving consent orders is not merely administrative, it is a substantive protection for those whose negotiating position has been shaped by structural inequality rather than informed choice. Greater proactive engagement with the adequacy of consent orders, particularly in cases involving children, pensions assets or an obvious power imbalance, may be warranted.

The Law Commission’s scoping project

The Law Commission’s scoping project identified the need for clearer statutory principles and improved guidance for those reaching settlements without legal advice.¹⁹ The findings reported here provide empirical support for that concern. The myths described – ‘50:50 is fair’, ‘his money, he decides’ and ‘what’s mine is mine’ – are not fringe misunderstandings held by a small minority. They are culturally embedded, widely shared narratives that systematically disadvantage the financially weaker party. Any reform agenda that does not address the operation of private ordering in practice risks leaving its most significant problem unresolved.

Conclusion

Private ordering now dominates the resolution of financial arrangements following divorce in England and Wales. What this research demonstrates is that, in the absence of legal advice, the legal framework governing financial remedies is routinely displaced by cultural myths that tell a different, and less protective, story about fairness, ownership and entitlement.

The myths of ‘50:50 is fair’, ‘his money, he decides’ and ‘what’s mine is mine’ are familiar enough; practitioners hear versions of these regularly from clients who have already tried to sort things out themselves. What is less familiar is the recognition that these myths function not merely as misunderstandings to be corrected, but as decision-making frameworks that structure negotiations from the outset, in the absence of the legal guidance that might have displaced them.

The consequences fall disproportionately on those who are already economically vulnerable: the primary carer who accepts 50:50 without understanding that her needs might justify more; the woman who does not know that she can claim a share of her ex-husband’s pension; the woman who defers to her former husband’s financial authority because that is how it worked during the marriage and because she does not want to make things difficult.

These are not edge cases. They are the everyday reality in the gap between the number of divorces and the number of financial remedy applications. If financial remedies law is to fulfil its redistributive and protective purpose, greater attention must be paid to how legal principles are understood (and misunderstood) beyond the courtroom. Early access to independent legal advice, renewed judicial

scrutiny of consent orders reached without representation and continued engagement with the Law Commission’s reform agenda are each part of that picture. Fairness in financial remedies cannot remain a concept that operates only for those who know to ask for it.

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Notes

- 1 Family Court Statistics Quarterly: October to December 2025 (26 March 2026), www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2025/family-court-statistics-quarterly-october-to-december-2025#financial-remedy, accessed 22 April 2026.
- 2 E Hitchings and others, ‘Fair Shares? Sorting out money and property on divorce’ (Nuffield Foundation 2023).
- 3 A Barlow and others, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave 2017).
- 4 V Braun and V Clarke, ‘Using thematic analysis in psychology’, (2006) 3 *Qualitative Research in Psychology* 77.
- 5 H Gray, ‘The power of love: how love obscures domestic labour and shuts down space for critique of militarism in the autobiographical accounts of British military wives’, (2022) *Critical Military Studies* 1.
- 6 D Harrison and L Laliberte, ‘How combat ideology structures military wives’ domestic labour’, (1993) 42 *Studies in Political Economy* 45.
- 7 J J Hisnanick and R D Little, ‘Honey I love you, but ... investigating the causes of the earnings penalty of being a tied-migrant military spouse’, (2014) 41 *Armed Forces & Society* 413.
- 8 Hitchings and others (n 2).
- 9 S Cretney, ‘Private ordering and divorce – How far can we go?’, (2003) 33 *Family Law* 399.
- 10 J Wallbank, ‘Universal norms, individualisation and the need for recognition’, in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2014); E Hitchings, J Miles and H Woodward, *Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce* (University of Bristol, 2013).
- 11 J Ginn and L Foster, ‘The gender gap in pensions: how policies continue to fail women’, (2023) 11 *Journal of the British Academy* 223; A Barlow and S Duncan, ‘New Labour’s communitarianism, supporting families and the “rationality mistake”: Part II’, (2010) 22 *Journal of Social Welfare and Family Law* 129.
- 12 T Wilkinson-Ryan and D Small, ‘Negotiating divorce: gender and the behavioural economics of divorce bargaining’, (2008) 26 *Law and Inequality: A Journal of Theory and Practice* 109.
- 13 E Hitchings, ‘The impact of recent ancillary relief: jurisprudence in the “everyday” ancillary relief case’, (2010) 22 *Child and Family Law Quarterly* 93; G Douglas, ‘Sharing financial loss as well as gains on divorce’, (2018) 32 *Australian Journal of Family Law* 108.
- 14 E Hitchings, C Bryson and G Douglas, ‘The financial realities of getting divorced in England and Wales’, in RC Akhtar (ed), *Divorce Voices in Family Law* (Bristol University Press, 2026).
- 15 L Coelho, ‘My money, your money, our money: contributions to the study of couples’ financial management in Portugal’, (2014) 6 *RCCS Annual Review* 83; E Gordon-Bouvier, ‘Crossing

- the boundaries of the home: a chronotopical analysis of the legal status of women's domestic work', (2019) 15 *International Journal of Law in Context* 479.
- 16 A Vlachantoni, 'Older women and comparative pension inequalities in the UK and US', in S Westwood and N J Knauer (eds), *Research Handbook on Law, Society and Ageing* (Edward Elgar, 2024).
- 17 Hitchings and others (n 2).
- 18 J Eekelaar, 'Self-restraint: social norms, individualism and the family', (2012) 13 *Theoretical Inquiries in Law* 75 at 83.
- 19 <https://lawcom.gov.uk/publication/financial-remedies-scoping-report-and-summary>

What is a Pension and Why Does it Matter?

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Ask any individual who sat on the Pension Advisory Group (PAG) to define a pension, and you are likely to be met with a different answer from each.

PAG Report	Does not explicitly define a pension.
Cambridge Dictionary	'An amount of money paid regularly by the government or a private company to a person who does not work anymore because they are too old or have become ill.'
Oxford Dictionary	'An amount of money paid regularly by a government or company to somebody who has retired from work.'
<i>Martin Dye v Martin Dye</i> [2006] EWCA Civ 681, [2006] 2 FLR 901	Thorpe LJ: '[Pensions] are to be characterised as "other financial resources" within the section 25(2) (a) classification. For they do not sit comfortably in the category of "property", since they are unrealisable and non-transferable. Nor do they sit comfortably in the category of "income" because, although purely an income stream, the income does not derive from future endeavour but from past employment or contribution which will generally have been effected during the years of marriage'.
<i>SJ v RA</i> [2014] EWHC 4054 (Fam)	Nicholas Francis QC (then, and sitting as a deputy High Court Judge) said: 'the recent well published changes to pension regulations will mean that pension investments are virtually to be treated as bank accounts to people over 55'.

<i>W v H</i> [2020] EWFC 810	HHJ Hess recognised the different nuances arising: 'There is no one size fits all' with this being in recognition of the differences that arise depending upon DB and DC schemes and ages of parties/proximity to retirement age.
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Perhaps though it is more useful to define a pension as a form of deferred pay, such that a pension scheme is a mechanism by which one can defer gratification from earnings today in favour of enjoying these in some form when one is unable to work. This point was recognised in the European Court of Justice ruling of Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* (1990). This definition is most explicitly true with the security that comes from having a salary-related defined benefit (DB) pension but is also true with a defined contribution (DC) pension where no formal benefit promise exists.

Our proposition is that a pension is a unique asset (as we seek to demonstrate below) that cannot and should not be ascribed the categorisation of 'capital' or 'income' because that is an oversimplification. There must be a recognition that it is erroneous to ascribe an oversimplified approach or categorisation with to an asset that takes so many different forms – even DC and DB arrangements (being the two main types of pensions recognised by PAG) can mask the complexities surrounding this asset. There are, to name but a few, DB schemes based on career average revalued earnings (CARE), public sector DB schemes (not funded), schemes from an employer paying a proportion of the final pensionable salary, small self-administered pension schemes (SSAS), unapproved retirement benefit schemes (FURBS and UURBS), retirement annuity contracts (RAC), etc. This asset class is heavily regulated and subject to change depending upon legislation; one only has to consider the impact of the lifetime allowance, introduced and abolished all within 20 years. From April 2027, the government plans to bring pension funds into a person's estate for inheritance tax purposes. This is a complex asset.

To support our proposition, we highlight the unique qualities of such an asset category, including the difficulties associated with providing accurate valuations. However, we propose to return to valuation issues in article three in this series, to highlight the complexities in the valuation process). We do, however, touch on valuation terminology below to highlight the uniqueness of the pension asset category.

The valuation exercise and terminology used for the exercise

When we consider offsetting alone, a considerable number of terms are used by pension providers, pension on divorce experts (PODEs) and others to describe the value of the pension. This vast array of terminology includes:

- best estimate market consistent capital value;
- DC fund equivalent;
- fair actuarial value;
- full value;
- money purchase equivalent value;
- open market value;
- pension share declined;
- pension share denied; and

- cash equivalent transfer value (CETV) (and variations on a theme on this).

The terminology and the description used and the analysis of the CETV is alone a confusing and complex issue. There is more widespread knowledge that the CETVs of DB pension schemes will not necessarily reflect the fair value of the underlying pension rights.

Offsetting has its own complexities and is fraught with problems from a professional negligence risk point of view. The accumulation rates pre-retirement are hard to predict. What allowance is made for inflationary pension increases in the future? What are you predicting will be the position at retirement? Do you use annuity rates, or do you assume some form of drawdown? Do you allow for a contingent spouse pension? Significant help has been given by the Galbraith Tables, which were revised in early 2024 to reflect changes in market conditions.

The oversimplification aspect of categorisation of pensions might be illustrated from the worked example below.

- The parties had a 30-year marriage.
- All pensions were accrued during the marriage.
- H 64 and W 55 (no underlying health issues).
- Total pensions were valued at £3.6m, of which:
 - H CETV of £1m in DB scheme with very favourable underlying benefits/annual inflationary increases /dependants' benefits of substance/normal retirement date 65/no funding issues.
 - H and W hold £2.6m of value in their company's SSAS.
 - SSAS holds commercial properties – property X and property Y.
 - Property X subject to a long rent paying £120k per annum (above market rate and no break clauses/further 15 years to run).
 - Property Y has been empty for several years/so no rental income derived but has the potential for both development opportunity but also an enhanced value given recent interest showed by an adjoining landowner who would be a special purchaser.

The above example highlights:

- (1) H will not want to sacrifice his DB scheme entitlement – no investment risk/no investment cost/guaranteed income for life/inflation proofed income stream.
- (2) The SSAS presents risk to both H and W.
- (3) Liquidity issues with property X if there is no break clause/impact selling with existing tenant might have on value/extraction of funds would be limited to rental income net of expenditure, etc.
- (4) Uncertainty over value of property Y/sale delayed/sale not achieved/no rental income received.
- (5) Property Y has maintenance costs with no rental income from which to meet the costs creating possible liquidity issues over maintaining the asset until sold/rented.
- (6) If the parties remain in the SSAS together, potential for disagreement as to decisions to sell.
- (7) Lack of sale creates problems with accessing tax-free cash lump sums.

- (8) If the parties remain in the SSAS, potential for disagreement about accessing income from it.

The straitjacket of capital versus income, in the categorisation of a pension, can lead to unfair results.

Returning to HHJ Hess, *W v H (Divorce Financial Remedies)* [2020] EWFC B10:

'60. (i) There is no "one size fits all" answer to this question. [Q: Is it right for the court, in dividing pensions with a view to promoting equality, to target capital equality or to target the promotion of equal incomes?] There are undoubted scenarios where the fair solution is probably to divide pensions by CE value. For example, where the CEs are relatively small in themselves or as a portion of the assets overall. For example, where the parties are relatively young and any projections about the future income producing qualities of the pensions are likely to be speculative or unreliable. For example, where all the pensions are simply defined contribution funds so that the CE values can be regarded as reasonably reliable and simple predictor of future income streams. For example, where the sole pension is involved is a non-uniformed public sector defined benefits scheme offering internal transfers only. There are, however, scenarios where a simple division of CEs may well not represent a fair solution. For example, where the pensions are medium or large, both in themselves and as a portion of the assets overall, but needs issues still arise. This is particularly the case where one or more of the pensions involved is a defined benefit scheme (an income from within the scheme per £1 of CE is likely to be higher than an annuity income outside the scheme per £1 of CE on an external transfer). This is particularly the case where the parties are no longer young and retirement issues are on the horizon.'

Fast forward to 2024, when the same judge, in *SP v AL* [2024] EWFC 72 (B), addressed the issue of income versus capital and said:

'I have noticed that it is not uncommon for PODEs to be asked to provide an answer not only based on equal incomes but alternatively based on an equal capital approach.'

He concluded that it was an issue to be raised and determined at the first appointment because in most cases the only question which needs to be asked is what level of pension sharing order will produce an equal level of income on retirement, and asking more questions than are necessary will add to the costs of the case and cause confusion. Too often the first appointment does not resolve this issue and the parties exit the process with an order which sanctions the instruction of a PODE but which *does not* address in sufficient detail the remit of such instruction.

In a much-overlooked case called *Burrow v Burrow* [1999] 1 FLR 508, Cazalet J considered, with care, the different features which presented themselves in respect of the annuity that the husband had the benefit of and held:

- There were difficulties in treating an annuity provided under a pension scheme in the same way as a capital sum available under that scheme might be treated.
- As regards the capital element of a pension, different considerations applied; 'I start by considering separately the two different elements which constitute the pension fund, namely the annuity or income fund and the capital fund'.

Other key features of pensions as an asset class

Pensions require (almost) mandatory participation

The 2012 auto-enrolment reforms require that employees earning all but the lowest of wages are admitted to a pension scheme by default, with minimum pension contribution levels being specified. A target of getting some 10.6m people into a workplace pension with such mandatory contribution requirements was set as part of these reforms. Opting out is permitted but barriers to this exist, the effect being to encourage all workers to make provision for their retirement beyond the State Pension entitlement.

Employers must contribute too

Another feature of the auto-enrolment rules is that employers must contribute at least 3% of employee salaries to their pension arrangements (alongside 5% of salaries from employees). However, it is noted that this only applies to 'qualifying earnings' and those on higher salaries may receive less than 3% of the total.

The taxation treatment is unique

Pension benefits in general follow the 'EET' rule when it comes to tax: contributions are exempt from income tax, the returns on the monies are likewise exempt from taxation and only the benefits are taxed when they are taken (with this being something of a simplification here). This is in contrast, say, to a stocks and shares ISA, where only post-tax income can be deposited but the proceeds are then untaxed.

The limits to the tax reliefs are also unique to pensions

Tax-free contributions are subject to the 'Annual Allowance' of £40,000, with this being reduced for very high earners albeit with there being scope to carry forward some prior years' allowances. The former 'Lifetime Allowance', which placed a cap on the level of tax-advantaged pension benefits an individual could have, was abolished in April 2024.

Tax-free benefits exist at retirement

HMRC rules allow a tax-free cash lump sum of 25% of the value of a pension to be taken at retirement, with this being capped at c. £268k. Some DB pensions – especially those in the public sector – come with an automatic lump sum alongside the lifetime pension that is payable.

Tax benefits extend on unto death

In general, DC pension funds that remain upon an individual's death are not counted for inheritance tax purposes, in contrast to other assets that form an individual's estate. However, this position is to change in April 2027, when pension rights are to be counted for inheritance tax purposes.

There are age restrictions on when pension benefits can be accessed

Absent the pension schemes of the uniformed services (police, Armed Forces, firefighters) and some unfortunate circumstances around serious ill-health, the minimum age at which one can access pension benefits is 55. Moreover, anyone born after 5 April 1973 will have to wait a further 2 years as the 'minimum pension age' increases to 57, again with a few limited exceptions existing.

There are fewer restrictions on how benefits may be taken than before

The 2015 pension freedoms removed the requirement for DC funds to be used to purchase an annuity after the tax-free cash lump sum was taken. Individuals may continue to do so, but can also pursue various drawdown options instead where no explicit product is purchased. The Financial Conduct Authority suggests that since the advent of the 2015 changes, most people have cashed in smaller pension pots while larger pensions have been put into drawdown (wherein funds remain invested, but with amounts being accessed at regular intervals). Former pensions minister Sir Steve Webb also notes that the number of annuities purchased fell by 80% from 2013 to 2015.¹

Some pensions come with explicit guarantees ...

DB pensions (including the very large public sector schemes that exist) provide an explicit benefit promise at retirement and inflation-proofing of pension entitlements. Moreover, the State Pension enjoys the benefit of the 'triple lock guarantee' (such that each year it increases with the better of prices or wages, subject to a 2.5% minimum increase). It is estimated that there are 6.8m public sector workers (including MPs) who have DB pensions that pay a guaranteed inflation-proofed income for life.² This comes at enormous expense to the taxpayer, not least as these schemes are in general unfunded, i.e. assets have not been set aside to cover the benefits as these fall due.

... but some other pensions do not

Some older personal pensions might provide guaranteed annuity rates or minimum fund amounts, but these are increasingly rare. By comparison, most DC schemes do not offer any kind of benefit promise and contributions are invested in unit-linked holdings whose value is subject to move in either direction over time.

Rights to a take a transfer of benefits exist

Barring the unfunded public sector DB pension schemes, pension arrangements must in general give their members the right to transfer-out to another arrangement. This is usually a straight transfer of funds in DC schemes, but can also take the form of effecting a 'DB to DC transfer' with private sector DB schemes. Extreme caution must be exercised here though, and the law requires that such a transfer may only proceed where advice has been taken.

Various protections for pension rights exist if things go wrong

Public sector DB schemes enjoy the protection of HM Treasury – although there are no explicit funds set aside to cover the liabilities – and private sector DB schemes are covered at least in part by the Pension Protection Fund, which is a 'lifeboat' arrangement for schemes whose employers have failed. DC pension funds typically enjoy the £85k protection of the Financial Services Compensation Scheme, but this varies.

Pension rights can be shared by court order

With a view to bringing this back to family law, we note that pension rights can be made the subject of a sharing order or attachment order. The pension sharing order regime was introduced in 1999 and is a unique remedy, insofar as it allows pension benefits to be shared between parties

today, even where they cannot be accessed until much later.

Further thoughts

For those still unconvinced, it is far too simplistic an approach that is adopted, sometimes, by the courts in considering what a pension is. We know of no other ‘asset category’ in financial remedy proceedings in which there is a guide – the authors both sat on the Pension Advisory Group 2023, and its report *A Guide to the Treatment of Pensions on Divorce* (2nd edn, 2024) is recommended reading!

Financial remedy reported decisions are dominated by asset computation running in the millions. The vast majority of court users have insufficient wealth to meet need, let alone consider the principles of sharing and/or compensation. The features of a pension require detailed consideration when assessing the needs of the parties’ post separation and the transition to retirement where every pound of pension needs to be shared to make inroads into the provision of post-retirement income to meet need. Valuable and often overlooked underlying benefits – death

in service/dependents’ pensions – can usefully provide security whether or not periodical payments orders are being made.

The analysis of wealth in investigating the construct of matrimonialisation of assets is unlikely to change. The Court of Appeal in *Standish v Standish* [2024] EWCA Civ 567 considered carefully this construct and the ongoing acknowledgment that ‘the underlying principle is that fairness may require or justify treating property, which was not purely the product of the parties’ joint endeavours, as matrimonial property, and, therefore, within the scope of the sharing principle’. The Court of Appeal answered in the affirmative that the concept of matrimonialisation should continue to be applied.

Nothing in this article should be construed as the authors giving financial advice.

Notes

- 1 ‘The pension freedoms worked wonders – but not everyone was a winner’, *Daily Telegraph*, 11 May 2024.
- 2 www.thetimes.com/money/pensions/article/public-and-private-sector-pensions-the-great-divide-2r38gscmp

Uncertain Futures in Pensions Enforcement – What happened to *Blight v Brewster*?

Adrian Barnett-Thoung-Holland

Coram Chambers



The remedy in *Blight v Brewster* [2012] EWHC 165 (Ch) finds itself often mentioned but never particularised in the context of enforcement in financial remedies. A civil remedy in origin, it has had the Law Commission's endorsement, wide judicial support and potentially one instance in a financial remedies matter where it was (apparently) successfully employed.

That remedy has now been partially overridden by the Court of Appeal decision in *Manolete Partners Plc v White* [2024] EWCA Civ 1418. So while the original remedy appears to remain in existence (its scope now drastically reduced), it would seem that it is no longer an attractive method of enforcement.

Blight v Brewster

In *Blight v Brewster* [2012] EWHC 165 (Ch), the claimant and others had been defrauded by the defendant. Summary judgment was obtained. The defendant was over 55 and thus eligible to draw down 25% of the value of his pension as a tax free lump sum. Since the claimant creditors were

not able to enforce directly against the pension, they sought an order requiring the defendant to make an election on the draw down. When he had done that, he would then have a capital sum which the claimants could obtain a third party debt order against.

It was held that the court had the jurisdiction in aid of enforcement of a claimant's judgment debt, to grant an injunction compelling the defendant to draw down his pension, to appoint the claimant's solicitor to make the necessary election on the defendant's behalf then to enable a third party debt order to take effect, and that receivership by way of equitable execution is also available as a means of enforcement as the right to elect to take a pension payment is tantamount to ownership:

'58 The Defendant has a right to elect to drawdown 25% of his pension as a tax free sum. The question is whether that right and the 25% can be reached by execution in order to recover the balance or part of the balance of the judgment debt.

59 The Claimants applied for a third party debt order. This was clearly unviable taken by itself, because the right to elect the drawdown was not a debt. A debt could only arise if the election were made. The District Judge below so held, in my view correctly. The Claimants also argued that the court could compel the Defendant to elect to take his lump sum now. However, the District Judge held:

"The court cannot force the Defendant to make an election that is not in his financial interest and there is no jurisdiction to make any form of mandatory order against the Defendant in these circumstances."

...

75 In my judgment, it is not necessary to go to the disproportionate trouble and expense in a case of this kind to appoint a receiver by way of equitable execution and then force the Defendant to delegate his power of withdrawal to the Receiver, as was done in the Privy Council case. The Defendant in this case can simply be ordered to delegate the power of election to the Claimants' solicitor and for the court to authorise the solicitor to make the election in his name. Upon the election being made, the sum payable by Canada Life will then become due to the Defendant and can be made the subject of the third party debt order.

76 I propose therefore to order that the Defendant sign such letter as may be presented to him by the Claimants' solicitors to delegate to the Claimant's solicitor the power to make in the Defendant's name the election to receive his tax free 25% payment, up to the amount needed to repay the balance of the judgment debt. I also propose to order that if the Defendant does not comply with this order, the Claimants be authorised by the court to write in the Defendant's name to Canada Life making the election on his behalf and in his name. There is no question here of assigning the right to make the election; there is simply a question of authorising another party to act on the Defendant's behalf. A copy of the order of the court together with the Claimant's solicitor's letter should be sufficient authority for Canada Life to act on the election.'

This approach is a collection of distinct orders that produce the overall effect of an enforcement:

- (1) The decision itself assumes that the debtor can draw a

tax-free lump sum – it has no consideration of an early draw down with tax implications, for example. The draw down is expected to take place imminently.

- (2) Without relying on either the power of equitable execution or the Family Court's power to appoint receivers, a mandatory injunction (per s 37 Senior Courts Act 1981) is implemented to appoint the creditor's solicitor as a type of receiver. This is achieved by way of delegated election in the event that the debtor fails to make the draw down with the solicitor authorised to make the election direct to the pension provider.
- (3) A third party debt order is then implemented to make the sum due, once received, to the creditor. It is the debt from the election itself to which the third party debt order attaches itself to, as opposed to the right to make the election in the first place (see [59], quoted above). This is explored in further detail later.

At the time of the decision, there was significant commentary around its importance. In 2016, the Law Commission published *Enforcement of Family Financial Orders* (Law Com No 370), which suggested significant reform to enforcement powers. Its recommendations were surprisingly definite at the time:

'9.7 ... However, despite the potential for creative use of existing methods of enforcement, we think there are advantages in giving the court the power to make pension orders, which can be made directly against a debtor's pension fund for the purposes of enforcement. First, a pension sharing order enables the creditor to enforce against pension assets before the debtor reaches retirement age. This means creditors can secure the funds they are owed at an earlier stage. Further, where the creditor is older than the debtor, the creditor will be able to draw a lump sum or receive an income from his or her share of the pension at an earlier time than the debtor would have been able to access those funds. Secondly, a pension attachment order for the purposes of enforcement will avoid the artificial two-step approach employed in *Blight v Brewster*, and should be more efficient.'

The Law Commission did recognise that there had to be limitations on any power over both pension sharing and pension attachment orders – it posited four distinct scenarios (at 9.25) where there could be restrictions on pension orders as enforcement, reflecting existing restrictions under the Matrimonial Causes Act 1973 redistributive powers, and gave its views on each of those:

- (1) Where pension sharing orders have been previously made between the same parties – the Law Commission accepted the view of consultees that preventing further pension sharing orders from being made would limit the available enforcement methods.
- (2) Where pension sharing orders have been previously made but for the benefit of someone who is not a party to the enforcement – under the pre-existing MCA 1973 regime, there is no bar from a second spouse obtaining a pension sharing order against a party where a previous spouse has already obtained their own pension sharing order. So the issue shouldn't really matter in the context of enforcement.
- (3) Where a pension attachment order has been previ-

ously made between the same parties. The Law Commission distinguished that a pension sharing order should still be available between the same parties *even if* a pension attachment order had already been implemented. That said, the Law Commission recognised that if a pension sharing order was made, it might not be of any benefit to the creditor. A pension sharing order would naturally reduce the available capital in the pension, which in turn would reduce any pension attachment order. Instead of making a second pensions attachment order, for example, the Law Commission was of the view that it could be more efficient to simply vary the existing pension attachment order (see 9.32 and 9.33).

- (4) Where a pension attachment order has been previously made but for the benefit of someone who is not a party to the enforcement. The Law Commission agreed that this circumstance needed to be barred from enforcement when it came to pension sharing orders only. Such orders ought not to be made where it would prejudice a third party. It could see no reason why a second pension attachment order couldn't be implemented in this situation by the subsequent spouse. There was no reason in financial remedy proceedings why a further pension attachment order couldn't be made against a pension which already had a pension attachment order applied to it for the benefit of another party.

All these recommendations were taken up in July 2018 when the government agreed to explore the Law Commission's recommendations for non-legislative amendments.

Case law

The Court of Appeal accepted the existence of the remedy in *Horton v Henry* [2016] EWCA Civ 989. The decision related to pensions and bankruptcy. The court held any pension entitlement in which the bankrupt has the existing right to draw an income but has elected not to exercise such a right cannot be regarded as part of the bankrupt's income. In such circumstances, the trustee in bankruptcy has no power to exercise that same right and draw income on the bankrupt's behalf. It was accepted that the remedy available under *Blight v Brewster* existed, though was not applicable here.

The first mention of the remedy in a family law context comes from Mostyn J in *Goyal v Goyal (No 2)* [2016] EWFC 50 and *Goyal v Goyal (No 3)* [2017] EWFC 1. In that case, the court implemented an injunction for the husband to procure payments to go to the wife. The injunction mandated the husband to make an election to the annuity provider for two-thirds of the income to be paid directly to the wife. Mostyn J did confirm that a foreign pension can't be subject to a s 24B MCA 1973 pension sharing order, but made an injunction 'pursuant to the principle expounded in *Blight v Brewster*' at [14].

The family courts went on for some time accepting the remedy existed but, to date, no single reported incidence of the remedy being deployed actually exists. The closest thing we have is an article from 2017 referring to an unreported judgment obtained by Philip Cayford KC and Beverley

Morris – ‘An effective method of enforcement? *Blight v Brewster*, [2017] Fam Law 219.

The authors reported they successfully obtained a *Blight v Brewster* order to enforce an order for costs from the Court of Appeal. What makes this even more interesting is that the remedy was obtained against an occupational pension scheme in respect of which the respondent had not sought to commute the lump sum. Indeed, it was an NHS scheme, so not just an occupational scheme but also a public sector scheme. No mention is made of s 91(2) Pensions Act 1995.

Following the appropriate components of *Blight v Brewster*, the applicant’s solicitor was authorised to make the election to draw the pension and the lump sum early, with an attached freezing order and provision to vary it to facilitate the payment. The issue arose because the trustees of the fund made a complaint that no order assigning or charging a debt owed by the Crown can be made in favour of any third party and that the NHS pension, owned by the Crown, would fall within such prohibition.

The court appeared unconcerned whether the remedy applied to a money purchase scheme or a defined benefit scheme. The High Court went on to say that the election by the respondent to take a lump sum from his NHS pension fund via the applicant’s solicitors would *not* constitute an assignment in breach of National Health Service Pension Scheme Regulations 1995 (SI 1995/300), reg T3. Further judgments referred to the remedy:

- (1) *Amin v Amin* [2017] EWCA Civ 1114: the Court of Appeal approved Moylan J’s decision to leave open a pension sharing order claim pending the payment of a lump sum if it were to be later utilised for enforcement. The husband was also prohibited from dealing with his pension in anticipation of using a pension sharing order to enforce the debt. The remedy was mentioned.
- (2) *Brake & Anor v Guy & Ors* [2022] EWHC 1746 (Ch): here, the High Court used a third party debt order enforcing a cost against a pension provider and granted an injunction, requiring the pension to be drawn down on a specific date. This is best described as a ‘species’ of *Blight v Brewster* order.
- (3) *AW v AH* [2022] EWFC 195: refers to *Blight v Brewster* but in relation to requirements about non-compliance before the implementation of orders under s 39 SCA 1981.
- (4) *Lindsay v O’Loughnane* [2022] EWHC 1829 (QB) is not a family case, but saw the High Court positively endorsing and implementing the remedy. What stands out here is that questions were raised about the suitability of a third party debt order under the *Blight v Brewster* remedy when no debt had yet been accrued. The order in that case thus eschewed the need for a third party debt order and an order was only made for a mandatory injunction under s 37 SCA 1981 instead.
- (5) *Cohen v O’Leary* [2023] EWHC 1939 (Ch) also saw positive implementation of the remedy in a bankruptcy setting. Here, the High Court followed the approach in *Bacci v Green* [2022] EWCA Civ 1393 (see below) where a draw down on the pension was permitted to satisfy a breach of trust.
- (6) *AXA v BYB (QLR: Financial Remedies)* [2023] EWFC 251

(B) makes a nod towards *Blight v Brewster* and considered that making a pension sharing order in lieu of a costs order ‘goes with the grain of what the Law Commission commends’.

Those authorities all confirm that the remedy exists but generally make no comments on the procedure for the same.

Manolete Partners Plc v White

In *Manolete Partners Plc v White* [2024] EWCA Civ 1418, the appellant was successful in arguing that under s 91(1) and (2) Pensions Act 1995, the High Court was *not* permitted to make an order which required the respondent to exercise his pension rights, receive his pension and then use it to discharge a judgment debt. The High Court had made an order requiring the appellant to exercise his rights to draw down his pension, to receive that pension into a bank account in his own name and to keep the respondents informed so that they could apply to discharge the judgment by way of enforcement at later date.

The Court of Appeal disagreed and held that the injunction and notification provisions could not be looked at separately from the enforcement proceedings which they were intended to facilitate. They regarded this as a breach of s 91(2) Pensions Act 1995 which prohibits the court from making an order ‘the effect of which would be that [a person] would be restrained from receiving their occupational pension’.

So, the court held that the injunction and notification provisions could not be distinguished from the enforcement proceedings as a whole. The *de facto* outcome could only be that the appellant would be denied his pension, which breached s 91(2) Pensions Act 1995.

As for *Blight v Brewster*, the Court of Appeal had this to say:

‘For the present purposes, it is sufficient to note that in *Blight v Brewster*, claimants who have been the victims of fraud, and who had a judgment against the defendant fraudster, obtained an order that the defendant should give notice to the trustees of his personal pension scheme to draw down a tax-free lump sum of 25% of the fund, so that the resultant debt due to the defendant from the trustees could be made the subject of a third party debt order in favour of the claimants. The case did not concern an occupational pension scheme, so the issue of s.91 did not arise.’

In one fell swoop, despite everything said by the Law Commission in its previous report and the unreported judgment referred to by Philip Cayford KC and Beverley Morris (neither of which were referred to the Court of Appeal), the entire remedy of *Blight v Brewster* was changed. It still exists, but now the issue of s 91(2) Pensions Act 1995 prevents *Blight v Brewster* relief being available against any occupational pension. The High Court’s guidance specifically on the NHS pension appears to have fallen entirely by the wayside. It would still be possible for a court to conclude that a *Blight v Brewster* assignment would not be in breach of National Health Service Pension Scheme Regulations 1995 (SI 1995/300), reg T3 as the remedy is not an ‘assignment’ within the meaning of the Regulations. However, it would still collide with s 91(2) Pensions Act

1995 as ‘restraining’ a party from accessing their occupational pension so the decision would certainly not be the same as before.

The impact that *Manolete* had on *Blight v Brewster* is significant. But the methodology between the two cases is distinct. *Manolete* was pursued with no suggested receiver to be appointed, simply a mandatory injunction with an order under s 39 SCA 1981 to allow the notice to be given by the creditor’s solicitor if the debtor did not give the written notice to draw down. The respondent’s intent was that since the appellant’s pension was not yet in payment, they had asked for an order where their solicitors were authorised to exercise his pension rights, receive his pension and pay it to *Manolete* in order to discharge the judgment debt.

After *Manolete*

Century Property (Leeds) Ltd v Aldiss [2025] EWHC 1348 (KB) saw an application for injunctions under s 37 SCA 1981 (the mandatory injunction and receiver components of the *Blight v Brewster* remedy). Like *Lindsay v O’Loughnane*, the court only addressed the issue of the injunction and did not consider a third party debt order. The court was satisfied on the evidence that the defendant was fully entitled to entirety of his pension fund as well as his 25% tax free draw down.

Meanwhile, in *Zubarev & Anor v Singh & Ors* [2025] EWHC 2242 (Ch), three specific issues were considered:

- (1) whether each of the pensions held by the defendants with the third party were occupational pensions schemes (per s 1 Pensions Act 1995)
- (2) whether the court needed to consider the protections under s 91(1) and (2) Pensions Act 1995 for occupational schemes if it was exercising its discretion to make a final interim third party debt order in respect of a personal pension scheme; and
- (3) whether the court should exercise that discretion to grant third party debt orders.

The pensions in question were accepted as personal schemes, so the actual jurisdiction of *Blight v Brewster* post-*Manolete* was not specifically engaged. The decision was more focussed on the third party debt order component of the *Blight v Brewster* remedy and whether it could be implemented in advance of the draw down to settle the judgment debt. Criticism was made in the extant case as to how a third party debt order for the payment of the lump sum could be made before a debt had even come into existence, following what had been previously said in *Lindsay v O’Loughnane*. The trail of authorities shows changes to *Blight v Brewster*’s individual components. Authorities like *Lindsay v O’Loughnane*, *Century Property (Leeds)* and *Zubarev v Singh* have all brought into question the implementation of a third party debt order to support a *Blight v Brewster* enforcement. Those decisions simply did away with the requirement and elected to use only the s 37 SCA 1981 powers of injunction and appointment of receiver. Similarly, *Manolete* has restated protections to occupational pension schemes. None of these changes suggest the remedy no longer exists, but it has certainly changed in personality.

The road goes ever on

The Law Commission’s Scoping Report on *Financial Remedies on Divorce and Dissolution* was published in December 2024 and made no mention of *Blight v Brewster*, albeit it did confirm the Law Commission’s prior recommendations from the 2016 report. There are still few reported examples of *Blight v Brewster* applications for enforcement taking place with the remedy becoming even more restricted in light of *Manolete*.

The Law Commission’s recommendations back in 2016 are still relevant. Pension sharing orders as enforcement, for example, have never been fully explored. The most creative implementation we have seen took place in *AXA v BYB (QLR: Financial Remedies)* [2023] EWFC 251 (B) where Recorder Taylor used a pension sharing order to implement a costs order in much the same spirit as a *Blight v Brewster* remedy might have looked. It is still not an example of the remedy being implemented, but it does show how pension sharing orders can be used to find an equitable and creative solution. Indeed, in that case, there were notable problems with disclosure, limited assets in the jurisdiction and a central dispute about the ownership of a foreign property.

Some exceptions to the protections of s 91(2) Pensions Act 1995 might exist though. The decision of Newey LJ in the Court of Appeal in *Bacci v Green* [2022] EWCA Civ 1393 was referred to in the *Manolete* decision. An order under s 37 SCA 1981 was made in relation to an occupational scheme and it was concluded that the s 91 Pensions Act 1995 did *not* restrict the court’s jurisdiction (though a third party debt order was *not* made in that case, in line with other authorities):

‘33 In my view, the public policy which led Parliament to protect pension rights in bankruptcy will, at most, normally be a factor of very limited significance when a court is considering whether to grant relief to a creditor in respect of a judgment founded on fraud by the debtor. While Parliament evidently thought it right to provide protection for pension rights in bankruptcy, it is equally clear that its intention has been that debts arising from fraud should survive bankruptcy, and it has nowhere said that the creditor should then be unable to have resort to the debtor’s pension rights in the way that he could have done pre-bankruptcy or a post-bankruptcy creditor could. Nor is that surprising. In *Blight v Brewster*, Mr Moss commented that “The idea that the fraudster and forgerer can enjoy an enhanced standard of living at his retirement instead of paying the judgment debt would be a very unattractive conclusion.” While Mr Moss made the remark in the particular case before him, it has wider resonance.’

There then, potentially, exists a route through which fraud could still be pleaded as a basis for circumventing the provisions of s 91(2) Pensions Act 1995. Fraud was an element of *Blight v Brewster* but not in *Manolete* itself. That seems unhelpful to the average financial remedy practitioner – is non-disclosure, for example, an example of fraud for our purposes in enforcement proceedings? What about non-compliance? Neither of those could reasonably come up as high as Newey LJ had suggested a matter of years prior to the *Manolete* decision.

There is another line of argument that s 91 Pensions Act 1995 does not prevent the court from making some orders which do interfere with occupational pensions in any event.

Michael Horton, Rhys Taylor and Paul Cobley argued in 'Protecting the pension sharing order: Part 2', [2021] Fam Law 395 that s 44 Welfare Reform and Pensions Act 1999 disapplies the restrictions on alienation contained within s 91(2) Pensions Act 1995. The most obvious example of this is pension sharing orders themselves under s 24B MCA 1973. If *Manolete* were interpreted narrowly, then the actual power to make pension sharing orders would itself fall foul of s 91(2) Pensions Act 1995. The same would be true for a s 37 MCA 1973 freezing order to protect any pension. The role of s 44 Welfare Reform and Pensions Act 1999 is to prevent that mischief. The authors proposed an approach which allowed for the pension to still be drawn into a nominated account and frozen and would not fall foul of s 91. This could be achieved via s 37 MCA 1973 as a workable alternative. That said, the argument predates *Manolete* and it is not known whether it will still apply thereafter.

Does it mean that *Blight v Brewster* as an enforcement remedy ceases to exist? We have no other options available if the scheme is occupational. The existing statutory framework of the MCA 1973 does not allow us to apply for pension sharing orders in enforcement. If the scheme is private, then the Court of Appeal appears happy that the Pensions Act 1995 will be undisturbed so, for all intents and purposes, *Blight v Brewster* still exists there. How often is that likely to be the case in the average financial remedies case? What of the practicalities? It would still have to be a unique state of affairs where enforcement calls upon a pension ahead of or alongside any other asset (e.g. prop-

erty, bank accounts, etc.) that *Blight v Brewster* would be the leading approach.

It stands to reason, following *Manolete*, that the most successful implementation of *Blight v Brewster* in financial remedies enforcement would be where enforcement relates to a lump sum, the pension is private, the tax free lump sum is impending (debtor is aged 55, the 'minimum pension age' is shortly to increase to 57) and the lump sum has not yet been drawn. To be fair, most of those criteria were still the case in the prior iteration of the remedy. The condition via *Manolete* is that the pension *cannot* be an occupational scheme. Subsequent authorities have also appeared to disregard the requirement for a third party debt order, since the court cannot make such an order for a debt that is yet to exist.

Maybe it makes little difference. In all the time the remedy existed, the method of application was never made abundantly clear. It was and continues to remain absent under the specific enforcement powers the court has and has only been mentioned as being part of its general enforcement powers. Perhaps the very fact that there are no reported decisions of the remedy suggests that it wasn't even needed in the first place?

The only option is to take the Law Commission's original proposals and for these be enshrined into enforcement by way of statute. We can only hope that the comprehensive reassessment of financial remedies law that is coming in the distant future will address it. For now, *Blight v Brewster* is not what it used to be.

Tempering the Wind to the Shorn Lamb – Equity’s Role in Defending Victims of Economic Abuse from Creditor Claims: Part 1 – Undue Influence

Charlotte John

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Spouses and cohabitees face an acutely difficult predicament when persuaded, particularly in coercive relationships, to mortgage the family home as security for borrowing raised for the benefit of their partner.

Perpetrators compel their partners through pressure, emotional manipulation or deceit to jointly borrow or guarantee borrowing, which is raised for the perpetrator’s own ends but secured against the family home. The victim then stands in the position of joint borrower or surety, assuming liability without receiving any corresponding financial advantage. When the business fails or the perpetrator absconds, the victim is left exposed to the claims of banks and other creditors.

Whilst there may be ways of framing claims against the perpetrator, in unjust enrichment or undue influence, such claims may be of little assistance if the creditor is already circling or if, as is commonly the case, the perpetrator is

insolvent or has organised their assets in a manner calculated to thwart enforcement. In such scenarios, the victim suffers the double hit of finding themselves and the family home to be the primary target of creditor claims, as well as loss of recourse against the perpetrator.

This article is the first of a two-part series highlighting equitable doctrines that present options for defending the victim and the family home against the claims of commercial mortgage lenders and trustees in bankruptcy – or at least mitigating the damage.

In Part 1 of this series, I will look at the doctrine of undue influence, with a particular focus on mortgages procured by the exercise of undue influence. Part 2 of this series will look at the ‘equity of exoneration’, which in certain cases permits the burden of borrowing secured against a jointly owned property to be discharged so far as possible out of the equitable interest of the debtor, preserving the non-debtor’s share of the equity.

The Supreme Court has recently examined the obligations of lenders in the context of mortgages procured by undue influence in *Waller-Edwards v One Savings Bank Plc* [2025] UKSC 22, in a victory against the bank for the surety cohabitee which has extended the circumstances in which undue influence can be relied upon against a bank.

In what follows, I will use female pronouns to refer to the vulnerable party in the relationship and male pronouns to refer to the influencing party. Whilst economic abuse is experienced by men and is also prevalent in other categories of relationship (it is also a depressingly common form of elder abuse), the fact pattern in the reported cases concerning mortgage borrowing overwhelmingly involves male partners influencing female partners to assume liability for debts. Any references to husbands and wives should also be read as including unmarried cohabitees and same-sex couples.

Coerced debt as economic abuse

Women’s participation in the labour market and their financial independence have markedly increased since the House of Lords considered undue influence in the context of mortgage transactions in *Barclays Bank Plc v O’Brien* [1994] 1 AC 180. However, as Lady Simler observed in *Waller-Edwards*, any expectation that such developments would reduce the prevalence of domestic financial abuse has proven unfounded.

The Financial Conduct Authority in its 2024 report, *The hidden cost of domestic financial abuse: working together to improve outcomes*, cited in the judgment, suggests that as many as one in six women in the United Kingdom has experienced financial abuse by a current or former intimate partner. According to statistics published by the charity Surviving Economic Abuse, one in seven UK women (equivalent to 4.1m women) experienced economic abuse from a partner or ex-partner in the past year. Furthermore, of those women who reported experiencing any other form of domestic abuse, 71% had also experienced economic abuse; 34% of victim-survivors experienced financial difficulty as a direct result of the perpetrator’s economic abuse, with 17% being left with unmanageable debt; 1 in 25 women had credit taken out in their name without their consent, or because they were scared to refuse the abuser.¹

Before exploring how the doctrine of undue influence

might assist in such scenarios, let's first consider the basic facts of *Waller-Edwards*, which provide a textbook example of the trajectory of this sort of economic abuse.

In late 2011, at what is described in the judgment (without further explanation) as a vulnerable time in her life, Catherine Waller-Edwards entered a relationship with Nicholas Bishop, who worked as a property developer. At the beginning of the relationship, Ms Waller-Edwards was financially comfortable – she owned a mortgage-free property, referred to as 'Pilford', valued at £600,000 and had savings of £150,000.

Sadly, Ms Waller-Edwards was persuaded by Mr Bishop to enter into a series of disastrous transactions. She agreed to exchange Pilford and £150,000 for a partially built property, known as Spectrum, which was encumbered by a charge in favour of a Mr Higgins, which Mr Bishop lacked the means to pay off. Thereafter, she entered into a series of further charges to secure escalating sums against Spectrum, initially in favour of Mr Higgins or his company and culminating in a buy-to-let remortgage loan of £348,000 with One Savings Bank (OSB).

The OSB remortgage was used in part to pay off the existing charge secured against Spectrum. Around £39,500 was used to pay off Mr Bishop's car finance and credit card debts (at the insistence of OSB as a condition of the loan). The sum of £142,000 was used to pay off Mr Bishop's divorce settlement.

By the time the relationship ended, in late 2014, Ms Waller-Edwards was left in a highly precarious position. Her home was heavily burdened by mortgage borrowing, much of which had been raised for Mr Bishop's benefit. Because the loan was on buy-to-let terms, she was occupying the property in breach of the terms of the mortgage. Her savings had been entirely depleted, and, since she lacked the means to maintain the loan repayments, she fell into arrears on the mortgage. Inevitably, OSB initiated possession proceedings. Ms Waller-Edwards defended the possession claim by seeking to set aside the mortgage on the grounds that her consent to the OSB remortgage was vitiated by Mr Bishop's undue influence.

The trial judge accepted that the circumstances gave rise to a presumption of undue influence on the part of Mr Bishop, which OSB could not rebut. However, the trial judge (with whom the High Court and the Court of Appeal agreed), held that OSB was neither fixed with constructive notice, nor put on inquiry in respect of that influence, and granted OSB possession of Spectrum.

I will pick up these threads, and the Supreme Court's decision upholding Ms Waller-Edwards' appeal, after dealing with the essential requirements for establishing undue influence.

Establishing undue influence

The doctrine of undue influence renders a transaction voidable if a person's consent is procured by improper pressure, coercion or an abuse of a relationship of trust and confidence.

The leading case on lifetime undue influence is *Royal Bank of Scotland v Etridge* [2001] UKHL 44, [2002] 2 AC 773. There are two alternative evidential routes to establishing undue influence – via direct evidence of coercion or, more

commonly, where the facts give rise to a presumption of undue influence.

In summary, the presumption of undue influence will arise in the context of lifetime transactions in circumstances where two elements are established:²

- **A relationship of influence:** a relationship of influence will be irrebuttably presumed in certain confined categories of relationship – solicitor/client, trustee/beneficiary, parent/child (but not child upon parent). In all other cases, a relationship of influence will need to be established on the facts. It is well settled that there is no presumption of influence as between spouses and cohabitees, although it is recognised that the high degree of emotional interdependence and trust that typically characterises such relationships provides scope for abuse.³ Outside the defined cases where influence will be presumed, it will need to be shown that the person making the gift or entering into the transaction ('the donor') reposed trust and confidence in the other party ('the donee'). The cosy sounding descriptor of a relationship of 'trust and confidence' may be at odds with the nature of some coercive relationships and is not a definitive 'touchstone'. Other ways of describing the essence of the dynamic include 'reliance, dependence or vulnerability' on the one part coupled with 'ascendency, domination or control' on the other.
- **A transaction that calls for an explanation:** the transaction is not readily explicable by the relationship between the parties, i.e. it must be one which cannot be explained by reference to friendship, the parties' relationship, charity or other ordinary motives on which people act.

Once the evidential presumption of undue influence is triggered, the donee must neutralise the inference that the transaction was procured by abuse of influence. He does so only by proving that the donor entered the transaction after 'full, free and informed thought about it'.⁴

The courts have long regarded the provision of independent and competent advice as the clearest way of displacing the presumption. Such advice must be 'that of some independent and qualified person' but not necessarily a lawyer,⁵ and must be 'relevant and effective to free the donor from the impairment of the influence'.⁶

However, the fact that a solicitor has participated in the transaction and given advice to the donor does not guarantee that the donee will be able to displace the presumption of undue influence.

For an example of a case where the court has found a transaction to be tainted by undue influence despite the involvement of a solicitor, see *Paull v Paull* [2018] EWHC 2520 (Ch). In *Paull*, the solicitor had read out a note prepared on the legal effect of the transfer – despite this document discussing various issues in detail, the Master concluded that it was a 'lawyer's document' and 'not an easy read' and it failed to bring home the central point that the father was irrevocably transferring his property to his son. Second, the Master concluded that it was insufficient to ask the son to step out of the room whilst the advice was given – the father would be aware of that fact and conscious of his son's expectation that the transfer would be concluded at the end of the interview. In these circum-

stances, it was unlikely that the father would have been able to disengage himself from his son's influence.

Influencing factors and the duty of candour in the domestic context

It must be borne in mind that there are sometimes difficult choices to be made in relationships, where the fortunes of the couple are bound together, and that self-interest or affection, rather than undue influence, may often incline a partner to agree to charge the family home in order to obtain finance to support a business upon which the family depends.

As Lord Nicholls put it in *Etridge* at [30]:

'Wives frequently enter into such transactions. There are good and sufficient reasons why they are willing to do so, despite the risks involved for them and their families. They may be enthusiastic. They may not. They may be less optimistic than their husbands about the prospects of the husbands' businesses. They may be anxious, perhaps exceedingly so. But this is a far cry from saying that such transactions as a class are to be regarded as prima facie evidence of the exercise of undue influence by husbands.'

However, when a husband's optimism tips over into misrepresentation, this may amount to an abuse of influence capable of vitiating consent to a transaction – the distinction may sometimes be a fine one. In *Etridge*, Lord Nicholls explained the position as follows at [32]–[34]:

'32. ... Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. Statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence. Similarly, when a husband is forecasting the future of his business, and expressing his hopes or fears, a degree of hyperbole may be only natural. Courts should not too readily treat such exaggerations as misstatements.

33. Inaccurate explanations of a proposed transaction are a different matter. So are cases where a husband, in whom a wife has reposed trust and confidence for the management of their financial affairs, prefers his interests to hers and makes a choice for both of them on that footing. Such a husband abuses the influence he has. He fails to discharge the obligation of candour and fairness he owes a wife who is looking to him to make the major financial decisions.'

The boundary between natural, albeit misplaced, optimism and actionable misrepresentation was explored by the Court of Appeal in *Royal Bank of Scotland Plc v Chandra* [2011] EWCA Civ 192. In *Chandra*, a wife sought to set aside a personal guarantee, secured against the family home, on the basis that her husband had misrepresented that an additional £700,000 loan would be sufficient to complete a highly risky hotel development project which ultimately ran substantially over budget.

The court ultimately rejected her claim of undue influence. Patten LJ highlighted that the husband's statement was an honest forecast based on his genuine belief at the time and, importantly, the wife understood it as an estimate rather than an absolute certainty. Relying on Lord Nicholls'

cautionary note in *Etridge*, above, the Court of Appeal emphasised that an over-optimistic assessment – or even an inadvertent, negligent failure to outline every objective risk – does not equate to a breach of fiduciary duty or an abuse of confidence. For a statement to vitiate consent, it must cross the line from a genuinely held expectation into the realm of an inaccurate explanation or the deliberate suppression of material facts.

This obligation of candour and fairness in relationships of trust and confidence can extend to an obligation to disclose matters external to the borrowing transaction, if they are nonetheless material to the decision to be taken.

This requirement is illustrated by the Court of Appeal's decision in *Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312. At the time that Mr Hewett persuaded his wife to remortgage the family home to consolidate his credit card debts, he was having an extramarital affair. His deliberate concealment of the affair was a fundamental breach of this duty of candour, resulting in the setting aside of the mortgage. The court recognised that the wife's consent was heavily predicated on the assumption that Mr Hewett was as committed as she was to the marriage, the family, and the preservation of their home life. In that context, the affair was a highly material fact that 'cried out for disclosure'.

It is not necessary for the victim to establish 'but for' causation by proving that they would not have entered into the transaction, *but for* the relevant abuse of trust. Instead, the focus is on objectively assessing the materiality of the undisclosed facts. Briggs J in *Hewett* put the test as follows at [35]:

'35. In my judgment the question whether Mr Hewett's affair was a material fact calling for disclosure is to be decided by an objective test, rather than by asking the hypothetical question whether disclosure would have made all the difference to his wife's process of decision making. The issue may be best addressed by asking whether a solicitor, consulted by Mrs Hewett for advice about the wisdom of the transaction, would have thought it relevant to know that her husband was, while asking for her unqualified trust, at the same time conducting a clandestine affair. There can in my view only be an affirmative answer to that question.'

The obligations on lenders post-*Etridge*

In the context of mortgages procured by undue influence, the victim is not just seeking to set aside a contract with the influencer, they are seeking to avoid a contract with a third party. The bank is almost invariably an innocent participant in the transaction, without any involvement in any abuse or undue influence occurring behind closed doors. The courts have had to grapple with the competing policy demands of safeguarding victims and maintaining confidence in commercial lending.

In an effort to resolve this tension, the House of Lords established a framework in *O'Brien* and subsequently refined it in *Etridge*, with the objective of providing a measure of protection for vulnerable individuals and enabling the bank to have confidence in the strength of its security.

A bank is bound by the undue influence of a borrower (and the bank's security charge is consequently liable to be

set aside) only if the bank had actual or *constructive notice* of the risk of wrongdoing and failed to take reasonable steps to mitigate that risk. A bank will have constructive notice if it is 'put on inquiry' that there is a risk of undue influence. In considering when a bank will be put on inquiry, Lord Nicholls in *Etridge* drew a distinction between the following categories of cases – the character of which is to be assessed from the position of the bank:

- **Surety transactions:** a bank is automatically put on inquiry in every case involving a non-commercial relationship (i.e. such as a romantic or familial relationship), where security is being given by one party (the surety) for the debt of the other. In this scenario, the transaction, on its face, offers no financial advantage to the surety. The bare fact that a person is guaranteeing a partner's debt for nothing in return is a red flag that triggers the bank's obligation.
- **Joint borrowing:** conversely, in a joint borrowing scenario where the money is ostensibly being advanced to both parties jointly (e.g. to purchase a second home or for renovations), the bank is generally *not* put on inquiry unless there is some indicator of concern that ought to put the bank on alert.

If a bank is put on inquiry, it must take reasonable steps to ensure the surety's consent is properly obtained and fully informed. The steps that must be taken by a bank in these circumstances have been described as 'the *Etridge* protocol'. In summary, the protocol requires the bank to communicate directly with the wife, explaining it will need written confirmation from a solicitor that the nature and implications of the transaction have been explained to her and that this is required both for her protection and to ensure that she is bound by the transaction.

The bank should provide information to the wife about the husband's financial affairs, and if consent from the husband to do so is not forthcoming, the transaction cannot proceed. In an exceptional case where the bank suspects the wife has been misled (or is not acting of her own free will), the bank must inform the wife's solicitor of the facts giving rise to the suspicion.

The bank must then obtain written certification from the wife's solicitor that the necessary information and advice have been provided.

The effect of the certificate is that it will usually prevent the lender from being fixed with constructive notice of any undue influence. In the normal course of events, any deficiencies in the advice given will not affect the position of the bank – although, as we have seen, the husband himself might be unable to displace the presumption of undue influence if the advice was inadequate.

It is quite common for the same solicitor to act for all parties in the transaction, including the bank. It may be wondered if information acquired by the solicitor in the course of advising the wife can then be imputed to the bank, if the solicitor then acts as the bank's agent in the transaction. However, if the solicitor has been properly constituted as the agent of the wife, then any information that the solicitor receives whilst wearing that hat is not imputed to the bank, because the solicitor's professional duties in giving that advice are owed exclusively to the wife and any information received by the solicitor during those consultations remains confidential to her.

Whilst a lender is usually protected by such a certificate, this protection may be lost if the bank knows facts from which it ought to have realised that the surety has not received the appropriate advice, or where the solicitor has not in fact been retained by the wife and acts only as the bank's agent.

In *Midland Bank Plc v Wallace* (one of the eight cases considered by the House of Lords in *Etridge*), a solicitor instructed by the bank to oversee execution formalities had endorsed a legal charge to confirm that he had explained the document to the wife. The wife's evidence (yet to be tested at trial, as the appeal was against an order for summary judgment) was that this was untrue. If her evidence was correct, then, since the solicitor was acting exclusively on the bank's instructions and had never been retained by the wife, the bank would be unable to rely upon the solicitor's endorsement in order to shed constructive notice of any undue influence by the husband.

Similarly, in *HSBC Bank Plc v Brown* [2015] EWHC 359 (Ch), the bank received a certificate of execution from a solicitor who had entirely failed to meet with – let alone provide advice to – a mother who had entered into a charge to secure her son's debts over a farm owned by the mother but occupied by the son. As the bank had failed to comply with the *Etridge* protocol, the solicitor was not acting as the agent of the mother and the bank proceeded at its own risk.

Waller-Edwards and 'hybrid' transactions

Waller-Edwards concerned, from the perspective of the bank, a transaction of a hybrid character comprising in part what appeared to be joint borrowing and in part borrowing for Mr Bishop's purposes.

By the date of the OSB remortgage, Spectrum was registered in the joint names of Mr Bishop and Ms Waller-Edwards, although subject to a declaration of trust providing that the property was held 99% for Ms Waller-Edwards and 1% for Mr Bishop. OBS believed that the remortgage was to pay off the existing charges secured against Spectrum and that £100,000 was to be used for purchasing another property.

Ms Waller-Edwards did not receive independent legal advice and OSB did not comply with the *Etridge* protocol. The same solicitor acted in the various transactions involving Mr Bishop and Ms Waller-Edwards – initially, he was instructed for Mr Bishop in the exchange of Pilford for Spectrum, then for Mr Bishop and Ms Waller-Edwards jointly in the dealings with the charges in favour of Mr Higgins and his company, and finally for Mr Bishop and Ms Waller-Edwards and OBS in relation to the OSB remortgage.

OSB was not aware that money was being borrowed for the purposes of Mr Bishop's divorce settlement – whilst the solicitor acting in the transaction was aware of this, his knowledge was acquired pursuant to his retainer with Mr Bishop and Ms Waller-Edwards and could not be imputed to the bank. However, the bank was aware that £39,500 was being used to clear Mr Bishop's debts and had insisted on this as a condition of the loan.

The lower courts had held that determining whether the bank was put on inquiry required an assessment of 'fact and degree', looking at the non-commercial hybrid transaction as a whole to ascertain whether the loan was being made for the purposes of one spouse, as distinct from their joint

purposes. The trial judge held that the fact that OBS knew that just over 10% of the total borrowing was to go to Mr Bishop's credit debts did not tip the matter into a surety case – a decision which the High Court and the Court of Appeal upheld.

The Supreme Court rejected this approach, observing that it introduced uncertainty and was impracticable for lenders to operate.

Instead, the Supreme Court endorsed a 'bright line' rule: a creditor will be put on inquiry in any non-commercial hybrid transaction where, viewed from the lender's perspective, there is a greater than *de minimis* element of the borrowing which serves to discharge the debts of one borrower. Where such an element exists, the entire transaction must be treated as a surety transaction rather than a joint loan and the lender must take the protective steps set out in the *Etridge* protocol.

Applying this newly coined bright line test, the Supreme Court held that £39,500 easily surpassed the *de minimis* threshold.

The matter was to be remitted to the county court for consideration of remedy. However, it must follow that because OSB failed to ensure Ms Waller-Edwards received independent legal advice, it was fixed with constructive notice of the undue influence and the mortgage is liable to be set aside.

Implications for practitioners advising victims of economic abuse

The Supreme Court's decision in *Waller-Edwards* brings clarity to the law surrounding hybrid transactions. In discarding the ambiguous 'fact and degree' test, the Supreme Court has lowered the hurdle for identifying transactions that put lenders on inquiry. By establishing the bright line rule that any non-commercial loan with a greater than *de minimis* surety element triggers the *Etridge* protocol, the court has expanded the protective umbrella of the protocol to a wider category of transactions. This at least ensures that more women in Ms Waller-Edwards' position will be required to receive independent legal advice before encumbering their homes. To this extent, the decision in *Waller-Edwards* is a welcome one.

However, there is an argument that the judgment represents a missed opportunity to address the substantive realities of coerced debt. Whilst the Supreme Court has expanded the *application* of the *Etridge* protocol, it has done nothing to improve its *quality*.

I have already set out above some concerning cases, such as *Midland Bank Plc v Wallace* and *HSBC Bank Plc v Brown*, where solicitors have grossly failed in their duties towards sureties. In both of those cases, the surety was able to deploy the solicitor's failings against the bank in question. However, where the bank complies with the *Etridge* protocol, even in a case like *Brown* where the solicitor wholly failed to meet with Mrs Brown, the bank does not have to look behind the certificate unless independently the bank has knowledge of facts suggesting that adequate advice has not been given.

Eleanor Rowan, an academic at Cardiff University, conducted research consisting of interviews with 22 solicitors involved in the delivery of independent legal advice in

mortgage transactions.⁷ Rowan's research reveals that the delivery of independent legal advice is frequently treated by solicitors as a mere 'tick-box' exercise, structured around a checklist provided by the lender. Some of the survey responses make troubling reading, revealing a striking reluctance amongst solicitors to pass evaluative judgment or to advise a client against a ruinous transaction. Despite the expectation in *Etridge* that a solicitor should consider the client's best interests, 15 interviewees rejected any duty to advise against proceeding. Only two interviewees had ever advised a client against entering into a transaction.

The most alarming insight arose when participants were presented with a hypothetical scenario in which a client, having just signed the documents securing her husband's borrowing, was seen leaving the building with her husband, visibly upset and crying. Of the 12 interviewees asked to respond to this scenario, seven stated they would proceed with sending the certificate of independent legal advice to the bank without making any attempt to contact the client. They justified this stance with observations such as 'none of my business I think', 'it could be that their dog has died', 'they could be crying over anything. They could have hay fever!'. Another, revealing a 'wise monkey' aversion to the revelation of any evidence of the emotional reality of the situation, joked: 'I'd possibly give my colleague a smack round the face for telling me'.

Furthermore, the *Etridge* framework itself is arguably flawed in the context of domestic abuse. The courts recognise in cases such as *Paull v Paull*, considered above, that the participation of a solicitor does not always have an emancipating effect, yet it is treated, at least so far as a bank is concerned, as a magical cure in surety transactions. As Ellen Gordon-Bouvier puts it, this approach:⁸

'... demonstrate[s] a distinct absence of understanding of the nature of coercive control and economic abuse, as well as ignoring the wider relational context in which choices are made. While the doctrine of undue influence claims not to be premised on the victim's lack of understanding ... the remedying effect of independent legal advice presumes that once the advice is received, the victim is able to make a rational and self-interested choice. This assumption does not fit with the narratives of sureties who signed under pressure ...'

The sting in the tail and a potential lifeline

It is also to be noted that even where the doctrine of undue influence can be leveraged to have a mortgage set aside, the war is rarely over. The availability of other remedies to the lender will often mean that the family home remains at risk:

- **Equitable charges and Trusts of Land and Appointment of Trustees Act 1996 (TLATA) claims:** a successful undue influence claim avoids the legal mortgage. However, the agreement with the bank typically remains effective as an equitable charge over the influencer's beneficial interest, if the property is jointly owned. It may seem unjust that the bank can achieve by the back door, what it has been denied by the front, however this is a well-established consequence of the application of s 63 Law of Property Act 1925, which provides, in effect, that a conveyance is effectual to pass all the estate or interest which the conveying

parties have in the property. Since the influencer has no basis for setting aside the charge, the bank receives all that the influencer has the power to grant – a charge over their beneficial share. As with other sorts of equitable charges, such as charges created by way of charging order, the lender can seek an order for sale of the property under s 14 TLATA. This will require the court to consider the discretionary considerations under s 15 TLATA, including the interests of any minor children in occupation of the property; however, in most cases this will not fend off the bank forever and a deferred sale will often be the best that can be achieved.

- **The doctrine of subrogation:** if any portion of the voidable loan was used to redeem a prior, valid mortgage or to pay off a vendor's lien, the lender can claim to be subrogated to the rights of the previous creditor. This allows the lender to step into the shoes of the prior chargee – or even be 'sub-subrogated' to an earlier charge – thereby preserving its security over the property to the extent of the prior valid charge.

Where the defence of undue influence fails entirely – perhaps because the lender successfully complied with the *Etridge* protocol or because the borrowing, from the bank's perspective, was ostensibly for joint purposes – the legal mortgage remains valid and binding against the victim. In this scenario, the 'equity of exoneration' may nonetheless come into play in disputes with other creditors of the husband or his trustee in bankruptcy. As will be explored in Part 2 of this series, where jointly owned property is charged to secure the debts of only one owner, equity presumes that the non-debtor co-owner acts as a surety. Whilst this principle does not avoid the mortgage, by invoking this doctrine, practitioners can seek to ensure that the burden of the secured borrowing is discharged, as far as

possible, exclusively out of the other partner's equitable interest. For the victim, the equity of exoneration may represent the final safeguard to maximise their share of the equity.

Notes

- 1 R Wilson-Garwood, *Counting the Cost: The Scale and Impact of Economic Abuse in the UK* (Surviving Economic Abuse and Ipsos UK, 2025).
- 2 *Etridge* at [11]–[14].
- 3 Historically, the courts have treated engaged couples as falling within the established classes of relationship where influence is irrebuttably presumed. In *Re Lloyds Bank* [1931] 1 Ch 289, the justification for this presumption was put in the following terms: a young woman engaged to be married 'reposes the greatest confidence in her future husband; otherwise she would not marry him. In many, if not most, cases she would sign almost anything he put before her'. In *Leeder v Stevens* [2005] EWCA Civ 50, that passage was described as having a 'splendid 1930s redolence about it' but not otherwise demurred from. To date, no English court has expressly departed from this position, despite its inconsistency with the exclusion of married and cohabiting couples from the presumptive categories of relationships of influence. Whilst domestic case law has yet to resolve this contradiction, the High Court of Australia in *Thorne v Kennedy* [2017] HCA 49 has now rejected the continued application of the presumption of a relationship of influence to engaged couples. That is not to say that such relationships cannot be relationships of influence – but the existence of such a dynamic will have to be proven on the facts.
- 4 *Zamet v Hyman* [1961] 1 WLR 1442 at 1446.
- 5 *Inche Noriah v Shaik Allie* [1929] AC 127 at 135.
- 6 *Niersmans v Pesticcio* [2004] EWCA Civ 372 at [23].
- 7 E Rowan, *Commerce Over Care: Exploring Legal Advice Given in Potential Economic Abuse Cases* (Legal Ethics, 2025).
- 8 Ellen Gordon-Bouvier, 'Analysing legal responses to coerced debt', (2024) 44(3) *Legal Studies* 537.

Contract for Family Practitioners – Things You Thought You Could Safely Forget

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Anyone who has taken the unwise decision to get me onto this topic knows that I say that financial remedies is not a specialised subject. It *is* a specialist subject – dabbling in financial remedies law is a recipe for disaster, and everyone reading this will have a story to tell of the lawyer that thought they could run a case without any experience or procedural (or legal) knowledge. But I say that it is not a specialised subject because it is one of the relatively few areas of law in which it is necessary to have at least a working knowledge of numerous other areas of law. Financial remedy practitioners are likely, depending on the case, to need at least a working knowledge of:

- Trusts – both in terms of trusts of land (particularly in intervenor-type cases) and in respect of trusts more generally, which may or may not be nuptial trusts and thus open to variation by the court.
- Company law – whether the company is solely owned by one or both parties, or where they are shareholders with others.
- Partnership law – with similar issues.
- Employment law – particularly where the parties are employees of a company in which they have an interest.

- Housing law – if there are tenanted properties.
- Property law – if there is a boundary dispute, a need to extend a lease to add value, or similar.
- Immigration law – if there are immigration issues arising out of the marriage.
- Inheritance issues – including potential claims that could be made by or against the estate of a parent.

Additionally, there is the need to have a working understanding of various international concepts such as domicile, habitual residence and the different property regimes that apply on a cross-border basis.

It should not be a surprise that there is such a cross-over. The Family Division has existed in its current form only since 1971, previously being the Probate, Admiralty and Divorce Division since the Judicature Act 1873. This miscellaneous jurisdiction of the division over, as AP Herbert once put it, ‘wills, wives and wrecks’ is generally ascribed to the fact that these three parts of the law had all been greatly influenced by the Roman law. The Administration of Justice Act 1970 established the Family Division. Contentious probate went to Chancery, wardship came from Chancery to the Family Division. There has always therefore been a significant overlap between Chancery and Family, and the issues that arise out of family relations will also often invoke the common law.

This article considers issues of contract law and scenarios where they have arisen, often in conflict with the court’s overarching jurisdiction. However, the sorts of issues that will be considered do not concern the contract of marriage itself, albeit the detailed history of the evolution of the law of marriage set out by Mostyn J in *NB v MI* [2021] EWHC 224 (Fam), although *obiter*, is fascinating for those who may wish to consider issues of capacity, declarations of non-recognition of void or voidable marriages and annulment. In that context, Mostyn J said at [10]:

‘In *Durham v Durham* [1885] 10 PD 80, 81 Sir James Hannen P held in a dictum that has since become canonical:

“The contract of marriage is a very simple one which does not require a high degree of intelligence to comprehend. It is an engagement between a man and a woman to live together and love one another as husband and wife to the exclusion of all others.”

This has become the universal standard (although, of course, a marriage now can be formed between a same-sex couple). The simplicity of the contract has been emphasised time and again.’

Some basics

It is time to evoke possibly long-repressed memories of study, by considering the basic principles required for the formation of a contract. However, it is important to remember the essential role in which a developed law of contract plays in society. As Lord Hodge said in his speech, ‘Developing the law of contract: the work of the United Kingdom Supreme Court’ on 27 February 2025:¹

‘Contracts are what enable us to conduct our lives with a degree of certainty. They enable us to buy food and clothes, purchase or rent housing, travel, and enjoy leisure activities with our families. We transact with the

providers of goods and services through the medium of the contract.

Contracts are also at the heart of sophisticated commercial life enabling businesses to undertake complex projects and other ventures by coordinating the participants in the venture and reducing commercial risk by setting out agreed arrangements as to what each party must do in foreseen eventualities.

A developed law of contract enforced by an independent, impartial and incorruptible judiciary is a cornerstone of a sustainable economy and a stable society.'

The essential elements of a contract are offer, acceptance, intention to create legal relations and consideration, together with a certainty of terms, though the court can construe those terms to determine what the parties objectively meant. The court will adopt an objective view to the question of intention of legal relations.

Can spouses (or civil partners) contract?

Yes, of course they can. Though there is a presumption that spouses do not intend to create legal relations. Or is there?

In *Kirishani v Major* [2026] EWHC 835 (Ch) (a case concerning Ms Kirishana and Mr Major), Sir Anthony Mann (sitting as a High Court Judge) considered the application to cohabiting partners of what HHJ Gerald sitting at first instance had treated as being a presumption against an intention to create legal relations between husbands and wives. HHJ Gerald had held that such a presumption exists, and applied it to the cohabiting parties, such that agreements to repay monies spent over the course of the relationship, based upon detailed spreadsheets, were not found to be binding.

The principle derives from *Balfour v Balfour* [1919] 2 KB 571, as elaborated upon by the Court of Appeal in *Jones v Padavatton* [1968] EWCA Civ 4, in which Danckwerts LJ commented:

'Of course, there is no difficulty, if they so intend, in members of families entering into legally binding contracts in regard to family affairs. A competent equity draftsman would, if properly instructed, have no difficulty in drafting such a contract. But there is possibly in family affairs a presumption against such an intention (which, of course, can be rebutted).'

In *Balfour*, Atkin LJ (as he then was), said as follows in respect of certain arrangements between husband and wife:

'Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts. It would mean this, that when the husband makes his wife a promise to give her an allowance of 30s. or 2l. a week, whatever he can afford to give her, for the maintenance of the household and children, and she promises so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were

held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code.'

The analysis of Salmon LJ (as he then was) in *Padavatton* was reached by a different route, but was based upon whether there was a legally binding agreement or a loose family arrangement with no legal effect. The onus is on the party asserting the former, and it depends on whether the parties intended it to be legally binding, and if so whether it was sufficiently certain to be enforceable. The presumption against an intention to create legal relations was a presumption of fact, not law, and:

'It derives from experience of life and human nature which shows that in such circumstances men and woman usually do not intend to create legal rights and obligations, but intend to rely solely on family ties of mutual trust and affection.'

In *Kirishani*, Sir Anthony Mann was of the view that (at [34]):

'So it is the nature of the relationship which is important, not the fact that the parties have gone through a ceremony of marriage or civil partnership. Marriages (and, I would say, in line with the views of the editors of Chitty, civil partnerships) are likely to have common characteristics relevant to an intention to create legal relations in connection with "domestic" arrangements so that the presumption would be likely to apply to many or most of them. That is because of the nature of the relationship itself in everyday life terms, not just because one can describe the couple by virtue of the fact that they have gone through some ceremony. The same sort of considerations may also apply to arrangements between other members of the family, where the basis of the relationship is likely to be based on non-commercial matters. Hence the reference to other family relationships, where common characteristics are present.'

The role of the court is to look at such intention objectively, on the basis of what the words and conduct would have conveyed to a reasonable person in the position of a person asserting a contract: *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 WLR 933 at [25], as cited by HHJ Paul Matthews (sitting as a High Court Judge) when he came to a similar conclusion on an intention to create legal relations between a mother and a daughter for the provision of care, in *Rogers v Wills* [2025] EWHC 1367 (Ch).

Notably, the question of contracts between spouses (in the context of ante- and post-nuptial agreements) was considered in *Radmacher (formerly Granatino) v Granatino (Rev 4)* [2010] UKSC 42. The majority (Baroness Hale being the sole 8-1 dissenting judgment) noted that previously,

marriage involved a duty to live together, and an agreement making provision for the possibility of separation was contrary to public policy, though an agreement to separate or to govern a separation that had already taken place was not, and cited Lord Atkin (as he had by then become) in *Hyman v Hyman* [1929] AC 601 to this effect. It was noted that separation agreements did not override the powers of the court to grant ancillary relief, but carry considerable weight (at [37]), referencing *Edgar v Edgar* [1980] 1 WLR 1410, in which the wife was held to her agreement not to seek lump sum or property transfer orders following on from a separation agreement.

It is notable, given her dissenting judgment, that in order for the Supreme Court to hold as it did, it was necessary to overturn the Privy Council decision in *Macleod v Macleod* [2008] UKPC 64, delivered by Baroness Hale, and in particular the distinction between ante-nuptial and post-nuptial agreements, it finding that the latter, and not the former, did constitute contracts. Whilst the old rule that agreements providing for future separation are contrary to public policy was obsolete and should be swept away, for the reasons given by the Board (at [52]), the Supreme Court majority confirmed that this was not restricted to post-nuptial agreements:

‘If parties who have made such an agreement, whether ante-nuptial or post-nuptial, then decide to live apart, we can see no reason why they should not be entitled to enforce their agreement. This right will, however, prove nugatory if one or other objects to the terms of the agreement, for this is likely to result in the party who objects initiating proceedings for divorce or judicial separation and, arguing in ancillary relief proceedings that he or she should not be held to the terms of the agreement.’

It did not, in fact, matter, whether they were contracts:

‘62. Is it important whether or not post-nuptial or ante-nuptial agreements have contractual status? The value of a contract is that the court will enforce it. But in ancillary relief proceedings the court is not bound to give effect to nuptial agreements, and is bound to have regard to them, whether or not they are contracts. Should they be given greater weight because in some other context they would be enforceable? Or is the question of whether or not they are contracts an irrelevance? This can be tested in this way. Did the identification of the fact that there were no public policy reasons not to treat post-nuptial agreements as contracts alter the weight that the Board attached to them in *MacLeod*? The Board did not say that they had to be given more weight as a result of sweeping away the public policy objections to them. Those objections had long ceased to be relevant and had not inhibited courts from giving some and, in some circumstances, decisive weight to ante-nuptial agreements. The circumstances surrounding the conclusion of a contract will either result in the contract being of full effect, or of no effect at all. The courts have always adopted a more nuanced approach to ante- and post-nuptial agreements. We cannot see why it mattered whether or not the agreement in *MacLeod* was a contract.

63. In summary, we consider that the Board in *MacLeod* was wrong to hold that post-nuptial agreements were contracts but that ante-nuptial agreements were not. That question did not arise for decision in that case any more than in this and does not matter anyway. It is a

red herring. Regardless of whether one or both are contracts, the ancillary relief court should apply the same principles when considering ante-nuptial agreements as it applies to post-nuptial agreements.’

Lord Mance, whilst agreeing with the majority, made an important observation at [128]:

‘Like Lady Hale, para 138 (1) and (2) and para 156, I go no further and express no view on the binding or other nature of an ante-nuptial agreement. It is not difficult to envisage circumstances in which, if such an agreement were to be regarded as having contractual force, its enforcement could be sought before a court, particularly an overseas court, lacking the jurisdiction under Part II of the 1973 Act which applies only when the forum is an English divorce court. I also agree in this respect with what Lady Hale says in para 159.’

Baroness Hale made clear at paragraphs 138(1) and (2), referenced above, that she disagreed with the views ‘merci-fully *obiter*’ that ante-nuptial agreements are legally enforceable contracts or that it was open to the Supreme Court to hold that they are. She expressed the view at [160] that *MacLeod* did not need to decide whether post-nuptial contracts providing for a future separation were legally binding either; both cases were about weight, given the court’s overarching jurisdiction that cannot be ousted should the parties separate or divorce:

‘Some may think that the question whether an agreement is contractually binding has little if any relevance to the weight which it should be given by the court. Others, however, may think differently, especially if the agreement contains provisions to be implemented during cohabitation which have in fact been honoured.’

The troubled question of enforceable contracts, weight and the jurisdiction of the court is not a new one. *Hyman* (above) is authority for the proposition that a spouse cannot contract out of a statutory right to maintenance. A purported contract where the whole or main consideration is a promise purporting to oust the jurisdiction of the court is void: *Bennett v Bennett* [1952] 1 KB 249. But in *Goodinson v Goodinson* [1954] 2 QB 118, the wife covenanted not to bring matrimonial proceedings so long as weekly maintenance was paid as agreed, and was successful in a claim for the arrears, as there was ample other consideration.

In *Amey v Amey* [1992] 1 FCR 289, the husband and the wife had married in 1971, and shortly thereafter purchased and ran a pub in the sole name of the husband. He petitioned for divorce and the marriage was dissolved in 1986. He then paid the wife £120,000 in pursuance of an agreement intended to achieve a clean break, that sum being around 50% of the matrimonial assets. A draft minute of order was settled by counsel and the parties’ intention was that the court would approve the agreement but the wife then died unexpectedly, aged 43. The husband sought to rescind the agreement, so as to get back his £120,000. The claim was dismissed on the basis that the failure to obtain the imprimatur of the court on a clean break agreement as intended did not mean that the agreement was not effective. The court could not decide whether to affirm or vary the agreement, as the claim under the Matrimonial Causes Act 1973 abated. A contract was therefore enforceable, notwithstanding that the court had not approved the order.

These cases show that the widespread impression of the

‘cardinal conclusion’ of Thorpe LJ in *Xydhias v Xydhias* [1999] 1 FLR 68 is incorrect and is of more limited application. There are circumstances in which contract between spouses can be upheld. As Ward LJ showed in *Soulsbury v Soulsbury* [2007] EWCA Civ 969. He held that it could not be correct to state that the only way of rendering a bargain to make payment of money enforceable would be to convert the concluded agreement into an order of the court, and the cardinal conclusions are stated in terms which are too wide. He concluded at [45]:

‘I accept that if there are negotiations to compromise a claim for ancillary relief, then there is a duty to seek the court’s approval as is stated in *Smallman*. But as *Smallman* states, and I do not see how that authority of this court can be ignored by me, even an agreement subject to the approval of the court is binding on the parties to the extent that neither can resile from it.’

If there are no divorce proceedings, it may be that an agreement can be enforced by the courts, if there is the necessary intention to create legal relations and appropriate consideration (which could be resolved by a deed). It appears that a contract can be enforced after death because the power of the court to approve it falls away. Can a pre-nuptial (or post-nuptial) agreement be enforced as a contract after death, so as to avoid the uncertainty of a claim under the Inheritance (Provision for Family and Dependents) Act 1975? If so, could such a contract survive the death of the surviving spouse, so that the estate could claim (but have no claim under the 1975 Act)?

Conclusion

Contract law runs through family law. The above examples are of the big, academic matters. But practitioners will frequently come across contracts of employment, contracts of lease, tenancy agreements, contracts for the sale and supply of goods, and contracts for loan (and then an assessment of whether, between the parties to the marriage – but not determinative on third parties – they are hard or soft loans), on which see *P v Q (Financial Remedies)* [2022] EWFC B9 per HHJ Hess:

‘Once a judge has decided that a contractually binding obligation by a party to the marriage towards a third party exists, the court may properly wish to go on to consider whether the obligation is in the category of a hard obligation or loan, in which case it should appear on the judges’ computation table, or it is in the category of a soft obligation or loan, in which case the judge may decide as an exercise of discretion to leave it out of the computation table.’

Financial remedies courts encounter contracts all the time. Perhaps uniquely however, the question is often not whether they are binding, but rather whether they have any effect, and if so, what?

Notes

- 1 https://supremecourt.uk/uploads/speech_lord_hodge_270225_ed47d6ee23.pdf (retrieved 27 April 2025).

Cohabitation Law Reform – Perspectives North and South of the Anglo-Scottish Border

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Introduction

The man from Berwick-upon-Tweed could be forgiven for being thought Scottish. The town is 2½ miles south of the Anglo-Scottish border, and the northernmost town in England. Its football team, Berwick Rangers, plays in a Scottish football league, despite being based in England.

In 2026, the Berwick man is a metaphor for what may be about to happen to some of our family laws in both countries. The English may find themselves with Scottish-type financial remedies for cohabitants, while the Scots are seeking further guidance for dealing with the more discretionary type of financial remedies to which the English are more accustomed.

In this article, we outline the current relief available for cohabitants in both jurisdictions, the likely direction of travel for legislative reform and what we are likely to be left with. Will the Berwick man have greater clarity or be even more confused than when we started?

Outline of current relief for cohabitants

England and Wales

There are no automatic guaranteed rights to ownership of each other's property on relationship breakdown. The courts have no power to override the strict legal ownership of property and to divide it as they may on divorce. The court can be asked to determine an interest in property under the Trusts of Land and Appointment of Trustees Act 1996 (TLATA). The court determines shares acquired in property where either trust law principles apply or proprietary estoppel applies. One party may be found to have a beneficial interest in a property even where it is in the sole name of the other, or to have a greater share than the other party in a jointly owned property where there is no express declaration of trust. Trying to prove a common intention in relation to ownership of the family home is difficult without written evidence.

In *Stack v Dowden* [2007] UKHL 17, the House of Lords ruled that where a property is registered in joint names in the domestic context, and there is no express declaration setting out the respective beneficial shares of the registered owners, there is a presumption that the beneficial interest will be held in equal shares, unless a contrary intention is shown. To prove entitlement to a different share in the value, it would be necessary to look at all the relevant circumstances to ascertain the parties' shared intentions, actual, inferred or imputed with respect to the property in the light of their whole course of conduct in relation to it.

In *Jones v Kernott* [2011] UKSC 53, the Supreme Court confirmed that where a family home is bought in the joint names of a cohabiting couple without any express declaration of trust, financial contributions are relevant but there are many other factors which enable the court to decide what shares were either intended or fair.

Under Sch 1 Children Act 1989, all parents, including those who are unmarried and not civil partnered, can apply to the court for financial provision for a child rather than in addition to applying to the Child Maintenance Service, including situations when a child is mentally or physically disabled or if the non-resident parent's gross weekly income is above £3,000.

There is no automatic right for couples who live together without getting married or forming a civil partnership to inherit a part of their partner's estate if their deceased partner dies without leaving a will, regardless of how long they have lived together or whether they had children together. Cohabitant claims under family provision legislation are limited to reasonable provision for their own maintenance as opposed to the entitlement for a surviving spouse or civil partner to seek whatever financial provision it would be reasonable for them to receive, whether or not that provision is required for their maintenance.

A cohabitant cannot rely upon their former partner's contributions for the purposes of the State Pension. Occupational pension schemes have a discretion to provide a survivor pension to a financial dependent on the deceased who was unmarried at the time of their partner's death. However, this discretion depends on the rules of each individual scheme.

Scotland

Cohabitants are defined as members of a couple who are or

were living together as if spouses. In determining if this definition is met, the court has regard to the length of time the couple lived together, the nature of the relationship during that period and the nature and extent of financial arrangements which subsisted. A claim may be made under the Family Law (Scotland) Act 2006 (the 2006 Act) regardless of the length of the cohabitation; there is no minimum period.

As in England, Scots Law does not provide automatic or guaranteed rights for cohabitants to share in each other's property following relationship breakdown, save some narrow rebuttable presumptions that cohabitants share in certain household goods and in money or property deriving from a household 'allowance'. However, the 2006 Act provides cohabitants with the right to apply to the court for an order for financial provision within one year of the date of cessation of the relationship otherwise than by death. The court can order a capital sum to be paid for such sum as is specified in the order, and in respect of any economic burden of caring for a child of whom the cohabitants are parents and such interim orders as it thinks fit.

These claims are available to parties who would have jurisdiction to raise a divorce action in Scotland, had they been married. It is not therefore necessary for the cohabitation to have taken place in Scotland in order for a valid claim to be made – either party being domiciled in Scotland would be sufficient.

Cohabitants may make an application to the court for a discretionary award following the death of their cohabiting partner. Such an application must be made within 6 months of the date of death (although there is new legislative provision, not yet in force, extending this to one year). These applications can only be made where the deceased was intestate, was domiciled in Scotland and was living with their cohabitant at the date of death. The court can order a payment of a capital sum from the net intestate estate, an order for transfer of property, or such interim order as it thinks fit. The 2006 Act expressly provides that a surviving cohabitant shall not receive an award exceeding that to which they would have been entitled had the survivor been the spouse or civil partner of the deceased.

Likely direction of travel for legislative reform

England and Wales

Cohabitation is the fastest growing family type in England and Wales, having grown to around 3.6m couples in the United Kingdom compared with 1.5m in 1996.

Despite the inferior protections received by cohabitants as compared with the legal rights and responsibilities upon divorce or death, many people believe in the common law marriage myth; the incorrect belief that after a certain period living together, the law treats cohabitants as if they were married.

The property law remedies are considered complex, while Sch 1 mostly benefits the children of wealthy parents. Cohabitants do not automatically inherit from their partner.

This lack of legal protection results in relationship-generated disadvantage, which is primarily suffered by women on family breakdown, including those from an ethnic minority background and those who had a religious-only wedding (i.e. a non-qualifying ceremony).

Legislation is most likely to involve an opt out scheme as proposed by the Law Commission in 2007. This approach was endorsed by the Women and Equalities Committee in August 2022. The Law Commission in 2007 recommended a scheme to ensure:

'that the pluses and minuses of the relationship were fairly shared between the couple. The applicant would have to show that the respondent retained a benefit, or that the applicant had a continuing economic disadvantage, as a result of contributions made to the relationship. The value of any award would depend on the extent of the retained benefit or continuing economic disadvantage. The court would have discretion to grant such financial relief as might be appropriate to deal with these matters, and in doing so would be required to give first consideration to the welfare of any dependent children.'¹

subject to a review to take into account societal changes since 2007.

As to whether cohabitants should have the same or different rights to married couples, the Law Commission Executive Summary stated:

'Many people think that cohabitants should have access to exactly the same remedies as married couples and civil partners. We do not agree. Although some cohabitants have relationships that many would regard as being similar to those of spouses, there is a broad range of cohabiting relationships, exhibiting different degrees of commitment and interdependence. And cohabitants have not made the distinctive legal and public commitment that marriage entails.'²

There is also likely to be an improvement for claims by cohabiting partners both concerning intestacy and family provision claims.

There may be improved guidelines as to how pension schemes treat surviving cohabitants when claiming a survivor's pension. There may also be a proposal for the inheritance tax regime to be the same for cohabiting couples as it is for married couples and civil partners.

Scotland

The definition of cohabitants is considered vague, outdated and not reflective of modern relationships. The test when making awards for financial provision is unclear and overly complicated, making it difficult to advise on the likely outcome of claims. It is no coincidence that, since 4 May 2006 when the current provisions came into force, relatively few cases have been litigated all the way to a final hearing. The orders available are too limited. The time limit for making a claim is too short and inflexible. There is no specific provision for the court to take into account any agreement between the cohabitants in deciding what order to make or allowing the court to vary or set aside such agreements in certain circumstances.

The Scottish Law Commission published its Report on *Cohabitation* in November 2022 following a lengthy period of consultation. The Report includes a draft Bill aimed at addressing a number of these issues. It recommends that specific reference to 'fairness' should be included in the legislation; this is notably absent at present, although the Supreme Court case of *Gow v Grant* [2012] UKSC 29 put it beyond doubt that the guiding principle should be one of fairness.

The range of orders is likely to be expanded to include property transfer orders, orders for valuation and sale of property and orders for payments for short-term relief from serious financial hardship. The time limits for making claims are likely to be capable of extension on a discretionary basis on 'special cause shown'. There is also a recommendation for specific provision as to what should happen where parties have entered into a written agreement prior to, or during, their cohabitation.

Comparing and contrasting cohabitation law moving forwards on both sides of the Border

Forthcoming reforms in England and Wales – Resolution's position

In England and Wales, practitioners see injustices day in and day out, which particularly impact on children and women experiencing domestic abuse. Without overburdening the Family Court, standardising the types of claims that can be made simplifies cases that would be settled quicker through non-court dispute resolution.

The current application of property law remedies leaves women who take on domestic or care responsibilities the most disadvantaged at present. A regular difficulty is that because of the widespread incorrect belief that cohabitants have 'common law' rights, by the time they find out their true position, it is too late for them to do anything about it.

The law will only work better if it applies equal treatment of children in terms of equal financial protection for the children of married and unmarried partners on relationship breakdown. There needs to be greater protection of women, taking into account the risk of domestic or economic abuse, including controlling and coercive behaviour.

In terms of applying for financial remedies, there needs to be discretion to have available pension sharing, maintenance in some cases, and a carer's allowance, fairly calculated.

It is anticipated that financial remedies on divorce will be reformed at the same time to make outcomes easier to predict, and to more easily facilitate modernised family law remedies being available for both married and unmarried couples.

There is a huge need generally for the law to protect and help all families when relationships break down so that family justice professionals can provide the support they need when relationships break down.

New law needs to support fairer outcomes for victim survivors and reduce the scope for post-separation abuse. Professionals are even more concerned when it comes to unmarried families. In our member research, 85% said it is not sufficiently taken into account in Schedule 1 cases, while 87% said it is not sufficiently taken into account where the parties cohabited but never married.

Current trends

In practice, there are a number of current trends which could be considered to demonstrate that there should be a change in the law.

First, there are cases where the parties separated years, if not decades, ago and where the female partner has

remained living in the former family home as the children's primary carer, paying all of the outgoings, including mortgage payments. The male partner then seeks to realise his interest, often when the children are grown up. In those cases, where there is an express declaration of trust, the female partner is forced to rely upon equitable accounting in respect of her outgoings and will often be met with a claim for occupation rent by her former partner. Equitable accounting claims are notoriously difficult: they require a party to go back over many years to find documents such as bank statements, which they may well no longer have. The law itself is by no means clear either, particularly in respect of occupation rent. The test appears to be whether it would be 'just' to order payment of occupation rent, but there is little guidance on what is 'just'. In *Jones v Kernott* it was stated that, 'It is quite likely, however, that the court would hold that there was no liability to pay an occupation rent, at least while the home was needed for the couple's children'.

Where the property is held in joint names but there is no express declaration of trust, the approach taken by the courts where the parties have only lived together in a property for a short while is inconsistent, ranging from a finding that their common intention was that their shares were held 92%/8% in the female partner's favour, for example *Allen v Webster* [2024] EWHC 988 (Ch), to finding that the male partner is still entitled to a 50% share, subject to any equitable accounting claim.

An added complication in this type of scenario, where the female partner has remained living in the property with the children for many years and is paying all the outgoings, is that there are often issues regarding unpaid or underpaid child maintenance which the female partner will also want the court to take into consideration. In *Barnes v Phillips* [2015] EWCA Civ 1056, it was held that, in principle, it was open to a court to take account of financial contributions to the maintenance of children (or lack of them) as part of the financial history of the parties. There is little, if any, guidance in the reported cases, however, about how the court should approach this task.

What emerges from these trends is that it is in those situations where there are children of the relationship that the law in practice is particularly unclear, leading to uncertainty and, in some cases, unfair outcomes. Where the property is owned in one partner's sole name, then the task faced by the non-owner, often but not always the female partner, is all the more difficult. Not only will they face the difficulties referred to above, but also they have to establish that they have a beneficial interest in the first place.

Forthcoming changes in Scotland

The 2006 Act made great strides in providing Scottish cohabitants with a far greater degree of protection than they had previously enjoyed. However, as is the case in England and Wales (and despite the best efforts of many), a difficulty remains in terms of public knowledge. The 2006 Act abolished 'marriage by cohabitation with habit and repute' (but without retrospective effect); however, many individuals assume that they have rights equivalent to that of a spouse. Alternatively, they assume that they have no rights at all resulting from their status as a cohabitant and may seek legal advice after the point at which their claim has become time-barred. The current time limits can create

very real unfairness (e.g. where parties who would otherwise have had perfectly legitimate claims have been in hospital). The ability of the court to flex these time limits 'on special cause shown', as is suggested, would go some way to addressing this. Practitioners will also welcome the proposal that parties will have the ability to enter into an agreement to negotiate, with an associated extension of the time limit which would otherwise apply.

The discretionary nature of cohabitation claims in Scotland makes them notoriously difficult to advise on. How hard fought they may be is therefore tied largely to a client's appetite for risk. The proposed reforms seek to bring greater clarity. The recommendation is that there be a fresh and more detailed set of guiding principles for the court to consider when making an order following separation. These principles will go beyond the current consideration of economic advantage/disadvantage gained or suffered by either party.

The proposed provision for short-term relief for cohabitants who would otherwise suffer serious financial hardship is key bearing in mind the underlying policy aims of the 2006 Act. This will allow some adjustment period for individuals who have become significantly financially dependent on their cohabitant.

Commentary

At the start of this article, we highlighted the position of the Berwick man and asked whether he is headed for more clarity and certainty or more confused than when we started.

It is worth going back to 1984 and the infamous English case of *Burns v Burns* [1984] 1 All ER 244. In that case, 'Mrs' Burns moved in with Mr Burns in 1961 and they lived together for 19 years. The Court of Appeal decided that she had no equitable or proprietary interest in her family home on separation, which meant she had nowhere to live when the relationship ended.

So far as England and Wales is concerned, until the law is reformed, cases like this will continue. Cohabitants are much more likely than spouses to live in a home owned solely by their partner, while wrongly believing that the length of time they stay in that situation has a bearing on the interests they acquire in their partner's property.

If new legislation addresses this patently wrong (in every moral sense) situation it will be a good starting point, but hopefully modernising and simplifying the law can be achieved at the same time.

So far as providing equal treatment and equal financial provision for all children is concerned, this should frankly be a no brainer.

Of course, the situation in *Burns v Burns* would not arise today in Scotland (even pre- any reforms), as Mrs Burns, whilst not acquiring an interest in the property, would be able to make a financial claim against Mr Burns to reflect the economic disadvantage suffered by her in the interests of the relationship (as seen in *Gow v Grant* [2012] UKSC 29). The reforms which may be introduced in Scotland would improve Mrs Burns' position further in allowing her to seek a transfer of the property (a remedy which is not currently available to cohabitants).

The existing law in Scotland provides for orders to be made in respect of the economic burden of caring for a child of whom the cohabitants are parents. Many reported cases which have included these orders have tied them to childcare costs. The proposed reforms refer to *relevant children* (and so would include a child accepted as a child of the family) and to a *fair* sharing of the economic responsibility of caring for such a child post-cohabitation. What a fair sharing of that responsibility looks like in practice remains to be seen.

In closing, we must all hope that not only will the Berwick man have more clarity and certainty, but also the Berwick woman, and all of their children, irrespective of whether they are in England and Wales or considering their position north of the border. Law reform in England and Wales should look to Scotland's existing and proposed laws to ensure the new law is accessible and protects those most disadvantaged. When we achieve that, we will have better and fairer laws that are fit for purpose for all families.

Notes

- 1 Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown, Executive Summary*, Law Com No 307 (Summary), 31 July 2007, para 1.19.
- 2 Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown, Executive Summary*, Law Com No 307 (Summary), 31 July 2007, para 1.10.

The Great *Marinos/Munro* Debate in Divorce – Beheaded or Survived?

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Prior to March 2001, there were only two grounds of jurisdiction for divorce in England and Wales. First, either party to the marriage was domiciled in England and Wales on the date when the proceedings began. Second, either party was habitually resident here throughout the period of one year ending with that date. So, our bases of jurisdiction were effectively sole domicile and/or one year's *continuous* habitual residence.

When the United Kingdom joined Brussels II in March 2001, the grounds of divorce jurisdiction changed to broadly align with those of other contracting states. We transmuted to six primary grounds of jurisdiction with one residual ground only available if the courts of no other EU member state had jurisdiction, i.e. sole domicile. Two grounds generated a substantial amount of litigation. They were often referred to in shorthand as the fifth and sixth indents. They were as follows:

- (1) where the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made; and
- (2) where the applicant is habitually resident if he or she resided there for at least 6 months immediately before

the application was made and was (in the case of England and Wales) domiciled there.

The debate surrounding these grounds was whether the requirement to have spent 6 months (if domiciled here) or 12 months (if not so domiciled) in England and Wales prior to the date of issue needed to be habitual residence or just ordinary/simple residence.

In *Marinos v Marinos* [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018, Munby J (in arguably *obiter* remarks) favoured the lower threshold, i.e. habitual residence was only required on the date of the application with simple/ordinary residence sufficient for the relevant period prior to issue.

By contrast, in *Munro v Munro* [2007] EWHC 3315 (Fam), [2008] 1 FLR 1613, Bennett J (in his *obiter* and ultimately qualified remarks¹) adopted the higher threshold, i.e. habitual residence was required both on the date of the application and throughout the relevant period beforehand.

In *Tan v Choy* [2014] EWCA Civ 251, [2015] 1 FLR 492, Aitkens LJ tantalisingly considered there may even be three possible interpretations of these provisions (before observing the issue was not relevant to the particular appeal²):

'30 In these circumstances I would accept that there could be legitimate debate as to what is the precise construction of Article 3(1)(a) indent five. It seems to me that there are (at least) three possible constructions. First, it could mean that the person seeking to found jurisdiction has to be "habitually resident" in the territory concerned at the date the proceedings are started and he also has to have "resided" there for at least a year before the relevant proceedings are started. Secondly, it could mean that the person seeking to found jurisdiction has simply to have been "habitually resident" for one year prior to the start of the proceedings. Thirdly, it could mean that the person seeking to found jurisdiction has to establish that he/she is "habitually resident" at the time the proceedings are started and that this fact is proved by establishing that he/she has "resided" in that territory for at least a year immediately before the proceedings were started ("... application was made").'

Although the position remained unsettled, *Marinos* appeared the more favoured approach at first instance³ although at least *Dacey, Morris & Collins* continued to assert the view for *Munro*.

The debate narrowly avoided an airing in the Court of Appeal (and potentially the Court of Justice of the European Union (CJEU)) in *Orenga de Gafforj v Orenga de Gafforj* [2018] EWCA Civ 2070, [2019] 1 FCR 73. The husband's appeal in relation to the interpretation of the fifth indent and against a refusal to make a CJEU reference was to be determined by the Court of Appeal in October 2018. However, only a month prior to this he was '*Hadkinsoned*' for failing to pay the wife's legal costs.

Then came *Pierburg v Pierburg* [2019] EWFC 24, [2019] 1 WLR 4335, where Moor J – placing weight on, among other things, other language versions of an explanatory report of Brussels II prepared by Dr Borrás ('the Borrás Report')⁴ – favoured *Munro* and the higher threshold.

The *Munro* approach was promptly reinforced as, between *Pierburg* and *Nicolaisen v Nicolaisen* [2022] EWFC

70, [2023] 1 FLR 1163, the CJEU decision of Case C-289/20 *IB v FA* [2022] 2 FLR 294 agreed with the Opinion of the Advocate General which confirmed the *Munro* interpretation of the fifth indent. Thus, in *Nicolaisen*, Moor J had little difficulty in confirming the *Munro* approach (and his own approach in *Pierburg*) again. So the issue appeared relatively settled.

Shortly after *Pierburg*, the United Kingdom left the European Union. For us at least, Brussels IIA was no more as of 11 pm on 31 December 2020 (save in relation to divorce petitions issued prior to that date). Section 5 Domicile and Matrimonial Proceedings Act 1973 was duly amended both to remove the direct reference/importation of the Brussels IIA bases of jurisdiction and to add our own. With a couple of notable exceptions, our own were the grounds for jurisdiction formerly contained in Brussels IIA.

One exception was sole domicile was promoted once more to a primary basis of jurisdiction (rather than a residual ground); perhaps thus rendering the joint domicile ground somewhat nugatory.

The main exception, however, appeared to be in respect of our new equivalents for the fifth and sixth indents.

As trailed above, the fifth indent is:

‘the applicant is habitually resident *if* he or she resided there for at least a year immediately before the application was made’

Our s 5(2)(d) became:

‘the applicant is habitually resident in England and Wales *and* has resided there for at least one year immediately before the application was made’

The sixth indent was:

‘the applicant is habitually resident *if* he or she resided there for at least six months immediately before the application was made ... has his or her “domicile” there’

Our s 5(2)(e) became:

‘the applicant is domiciled and habitually resident in England and Wales *and* has resided there for at least six months immediately before the application was made’

The replacements of ‘if’ with ‘and’ would suggest the issue had thus been resolved, and resolved conclusively in favour of the *Marinos* approach.

However, there have since been four cases since the United Kingdom’s departure from the European Union which reach different conclusions on the interpretation of these clauses. The two cases which grapple with the issue in the greatest detail (*TI v LI* [2024] EWFC 163 (B) and *AO v EO* [2026] EWFC 30 (B)) are both Circuit Judge/Recorder level, although they have both been certified as suitable for citation.

J v A

J v A [2023] EWFC 132 was a case primarily in relation to whether English divorce proceedings should be stayed to allow the divorce to proceed in Nigeria. Although the issue of jurisdiction did not therefore directly arise, Richard Harrison KC (sitting as a deputy High Court Judge) commented as follows:

‘58 It was well established that for the purposes of Article 3 of Brussels IIA the relevant test for habitual

residence is defined as the place where a person has established their fixed centre of interests: *Marinos v Marinos* [2007] EWHC 2047 (Fam). A significant factor in the assessment is the location of the parties’ matrimonial home: *Marinos*. In *Pierburg v Pierburg* [2019] EWFC 24, Moor J held that references to “residence” in this context should be read as meaning “habitual residence”. His judgment in this respect is supported by the decision of the CJEU in *IB v FA* Case C-289/20 and was reaffirmed by him in *Nicolaisen v Nicolaisen* [2022] EWFC 70.

59 I accept the submission of Mr Perrins that notwithstanding the UK’s departure from the European Union, the terms “habitual residence” and “residence” under the amended version of section 5(2) of the 1973 Act have the same meaning they were held to have for the purposes of Article 3. I have not heard full argument on the point, but I consider that this proposition is supported by the fact that in amending the Act, Parliament clearly intended that there should be a seamless continuation of the jurisdictional position which existed before Brexit.’

Although this paragraph is *obiter* and was made without hearing full argument, it is the first suggestion in a reported case post-Brexit that the courts might adopt a purposive approach and follow the EU interpretation of these provisions despite the new *pro-Marinos* wording.

TI v LI

TI v LI [2024] EWFC 163 (B) primarily concerned the recognition of a divorce obtained in Pakistan. Recorder Nicholas Allen KC held the Pakistani divorce should be recognised in England but also considered whether, in the event he was wrong to recognise the Pakistani divorce, there was divorce jurisdiction in England.

After providing a background to the legislation, the judge considered that when drafting the current legislation, the Ministry of Justice had indicated they intended to follow EU law for continuity and comity. However, the actual wording of the statute departed from the EU wording and literally requires the applicant to be habitually resident only on the day of issue provided he/she has had ordinary or simple residence for the previous 6 or 12 months.

The judge went on to consider another recent judgment of the CJEU namely Case C-462/22 *BM v LO*. This case arose after the German court referred the *Marinos/Munro* debate to the CJEU. The CJEU was clear the relevant provisions required habitual residence throughout the relevant period and not just on the day of issue: *Munro* was correct for Brussels IIA (as it then was).

Recorder Allen KC observed the present position under English law was thus uncertain: the new post-Brexit divorce jurisdiction legislation purports to follow *Marinos* but also purported to follow EU law.

The judge concluded:

‘89 There is to date no reported decision on the interpretation of the amended English provisions. On a literal approach the legislation is clearly the *Marinos* interpretation. However on a purposive approach the UK government intended to replicate EU law which probably was at the time, and certainly is now, the *Munro* interpretation. Post-Brexit, the courts of England and Wales may still take account of CJEU deci-

sions (European Union (Withdrawal) Act 2018 (as amended) s6(2)).

90 In my view, the purposive interpretation is to be preferred because (i) the Ministry of Justice indicated they intended to follow EU law for continuity and comity; and (ii) the position in the EU is now clear and the English courts may still take account of such decisions. In addition, the *Pierburg* analysis – which prefers the *Munro* interpretation – is to my mind wholly persuasive. I therefore take the view the present position under English law is that habitual residence is required throughout the relevant period and not just on the day of issue.’

This judgment is again *obiter* but again expresses a clear view that, despite the wording of the statute, what is required for the period prior to the application is habitual residence rather than just ordinary residence.

KV v KV (No 2)

In the first paragraph of his judgment in *KV v KV (No 2)* [2024] EWFC 359, [2025] 2 FCR 26, Sir Jonathan Cohen summarised the two key issues before him as follows:

- (1) whether there was jurisdiction for the wife to apply in England and Wales for divorce on the basis of her habitual residence in England at the time of her application *and for the preceding 12 months*; and
- (2) if there was jurisdiction, whether the court should stay the English proceedings in favour of the husband’s divorce proceedings issued later in another country.

Thus, Sir Jonathan Cohen implicitly seems to take the *Munro* view – without giving any reasons – that what is required is habitual residence for the entire 6- or 12-month period as appropriate.

Later on, the judge notes he has been referred to several different authorities:

‘but the test is clear in applying Section 5(2) Domicile and Matrimonial Proceedings Act 1973 which provides ...

- d. The applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made.’

The judge immediately then quotes Aitkens LJ in *Tan v Choy* (including the paragraph above referring to the three possible interpretations) but seemingly does so for Aitkens LJ’s definition of habitual residence and observations that the *Munro/Marinos* dispute were irrelevant on the facts of *Tan v Choy*. There is no further analysis as to which of the three possible interpretations Sir Jonathan Cohen was applying nor any specific reference to *Pierburg*, *Munro*, *Marinos* and so on.

The judge concludes the wife was habitually resident in England when her divorce application was filed and in the preceding 12 months but – once again – without giving any reasons as to why that was the appropriate threshold.

It is thus suggested this case, in so far as it touches upon the question, is *obiter* and does not provide any real assistance when considering the correct interpretation of these provisions.

AO v EO

AO v EO [2026] EWFC 30 (B) was a pure jurisdiction and forum dispute before HHJ Hess. The issues were whether England had jurisdiction (upon s 5(2)(d), i.e. the fifth indent replacement) and, if it did, whether proceedings should be stayed in favour of proceedings in Nigeria.

The husband, who sought dismissal of the proceedings for want of jurisdiction, predictably argued for the higher threshold, namely the wife was required to show not only habitual residence at the date of her application, but also for at least a year prior to the divorce application (rather than pure residence).

The most relevant parts of HHJ Hess’s judgment are as follows:

‘10 ... This is a re-raising of the argument which used to raise its head from time to time in relation to the proper construction of the different wording which appeared in EC Council Regulation 2201/2003, article 3, indent 5. It is well known that there were different judicial conclusions about this – on the one side *Marinos v Marinos* [2007] EWHC 2047 and on the other side *Munro v Munro* [2007] EWHC 3315 – and the issue was never conclusively resolved in English law before the United Kingdom left the European Union and the regulation ceased to apply in England. Having considered Mr Ifere’s argument on this, and having read the judgment of Sir Jonathan Cohen in *KV v KV (no.2)* [2024] EWFC 359 which he asserted as support for his proposition, I have not been persuaded that the arguments about indent 5 have any resonance in the post-Brexit era. The wording of indent 5 was markedly more ambiguous than the wording of Domicile and Matrimonial Proceedings Act 1973, section 5(2)(d) and I do not read Sir Jonathan’s judgment as his intending to resurrect the earlier pre-Brexit argument.

11 I agree with Mr Scott that the wording of section 5(2)(d) is tolerably clear. The section requires the applicant to show **habitual residence** as at the date of the application and also **residence** (but not habitual residence) for at least one year immediately before the application was made. ...

12 I agree with Mr Scott that this interpretation is supported by the change in Domicile and Matrimonial Proceedings Act 1973, section 5(2) which was made by the Brexit regulations ... Prior to 1 March 2001 section 5(2) read:-

“(2) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) either of the parties to the marriage:-

- (a) is domiciled in England and Wales on the date when the proceedings are begun; or
- (b) was habitually resident in England and Wales through out the period of one year ending with that date.”

This was replaced by a different formulation in 2001. After 31 December 2020, the wording of section 5(2)(d) was changed to the version set out above. I agree with Mr Scott that the change in wording – written at a time when the *Marinos* versus *Munro* debate was well known – should properly be taken as a deliberate endorsement of the proposition that what was required for the year prior to the application was mere

residence, not habitual residence. If Mr Ifere's interpretation of this were correct, the old wording of section 5(2)(b) could simply have been revived.' (original emphasis)

So, a clear victory for *Marinos*.

Conclusion

HHJ Hess does not, however, appear to have been referred to either *J v A* or *TI v LI* and was not thus forced to deal with the purposive arguments put at their highest and/or the CJEU decision in Case C-462/22 *BM v LO* (in so far as relevant per s 6(2) European Union (Withdrawal) Act 2018).

There is clearly some force in the purposive arguments.

The Explanatory Memorandum to the Jurisdiction and Judgments (Family) (Amendment Etc.) (EU Exit) Regulations 2019 (SI 2019/519) states as follows at paragraph 7.7:

'For divorce etc jurisdiction, this instrument revokes (for England and Wales and Northern Ireland) Brussels Ila and replicates the rules for establishing divorce jurisdiction set out in Article 3 of Brussels Ila, with the appropriate drafting changes necessary to account for the UK no longer being an EU Member State (including omitting the Brussels Ila joint application jurisdiction rule, which is not applicable because joint application for divorce by both parties is not available in England and Wales and Northern Ireland). It extends the additional jurisdiction rule of sole domicile available for non-EU cases to all cases (currently sole domicile is available where no EU court would have jurisdiction under Brussels Ila).'

And as Recorder Allen KC referred to in *TI v LI*, in Case C-462/22 *BM v LO*, the CJEU held as follows:

'The answer to the question referred is that the sixth indent of Article 3(1)(a) of Regulation No 2201/2003 must be interpreted as meaning that that provision makes the jurisdiction of the court of a Member State to hear an application for the dissolution of matrimonial ties subject to the condition that the applicant, who is a national of that Member State, provides evidence that he or she has acquired a habitual residence in that Member State for at least six months immediately prior to the submission of his or her application.'

As raised in the Memorandum above, s 5(2) did not immediately replicate the fourth indent: 'in the event of a joint application, either of the spouses is habitually resident'. At the time, no such joint procedure existed in our jurisdiction. However, on creation of the joint divorce application procedure, s 5(2)(ca) was duly inserted from April 2022 pursuant to the Divorce, Dissolution and Separation Act 2020 (Consequential Amendments) Regulations 2022 (SI 2022/237). The wording is of course markedly similar to the fourth indent: 'in a joint application only, either of the parties to the marriage is habitually resident in England and Wales'. So, this would be suggestive again of an attempt to replicate Art 3 Brussels IIA.

On the other hand, it is arguably questionable whether the outcome in *AO v EO* would have been any different had these arguments been made. HHJ Hess's reasoning in *AO v EO* appears to follow the same line as Munby J's in *Marinos* and Peter Jackson J's in *V v V*, namely the plain reading of the subsections provides the answer: the subsections quite

clearly distinguish between two different concepts, namely habitual residence and pure residence. Moreover, they now do so in a much less ambiguous way than under the fifth and sixth indents. The avenue available to Bennett J in *Munro* regarding the possible interpretation of Art 3, as reiterated in *Tan v Choy*, is clearly no longer available without some strong reinterpretation of the new provisions.

The immortal words of Tindal CJ in the *Sussex Peerage case* (1844) 11 Cl & Fin 85 may well be apposite:

'My Lords, the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute and to have recourse to the preamble which, according to Chief Justice Dyer, is "a key to open the minds of the makers of the act and the mischiefs which they attended to redress".'

It could therefore be argued the departures from the Brussels IIA indents must be seen as being purposeful in themselves. If it had been intended to refer to just one concept, namely, habitual residence throughout, particularly given the prevailing, widely recognised and long-term *Munro* versus *Marinos* debate, the legislation could easily have done so (by the insertion of one word alone: 'habitual'). Indeed, as our legislation prior to 2001 clearly did.

A draft of the Jurisdiction and Judgments (Family) (Amendment Etc.) (EU Exit) Regulations 2019 was prepared by the Ministry of Justice and laid before Parliament under Sch 7, para 1(1) European Union (Withdrawal) Act 2018.

Section 15(2), which sought to amend s 5 Domicile and Matrimonial Proceedings Act 1973, went unchanged after a lengthy consultation process. The Explanatory Memorandum confirms at paragraph 10.2:

'The Government's no deal legislative options have been discussed with key family law stakeholders and leading family law practitioners from October 2016 to December 2018 prior to finalising the policy position set out in this instrument. The Government considered that for this technical area of law it was appropriate to discuss with specialist stakeholders and practitioners.'

It is understood at least Resolution's Brexit Working Party's Report indicated the draft appeared to adopt the *Marinos* approach. This supports the observation of HHJ Hess that the *Marinos* versus *Munro* debate was well known and the drafting 'should properly be taken as a deliberate endorsement of the [*Marinos*] proposition'.

It also cannot be said when the legislation was amended the intention was to replicate the rules in carbon copy, otherwise the sole domicile ground wouldn't have been given the same status as the other jurisdictional bases, although: (1) it would have been strange to retain a residual ground that only applies if no EU member state has jurisdiction post-Brexit; and (2) as above the Explanatory Memorandum does expressly mention this as one of the differences in the new domestic legislation. The overall

effect by the inclusion of the sole domicile ground is a lowering of the jurisdictional threshold. This again appears more compatible with the *Marinos* approach.

The upshot of all of the above is the correct interpretation of these grounds of divorce jurisdiction remains uncertain pending a decision from the higher courts. In the meantime, as we approach the 20th anniversary of *Marinos* and *Munro*, it seems the great debate somehow continues.

Notes

- 1 Bennett J specifically recorded ‘this particular point was not fully argued before me ... I accept that my expiation on this topic may possibly not be justified and, indeed, may even be
- 2 Holman J similarly circumvented the issue in *Olafisoye v Olafisoye (Jurisdiction)* [2010] EWHC 3539 (Fam), [2011] 2 FLR 553.
- 3 For instance in both *V v V* [2011] EWHC 1190 (Fam), [2011] 2 FLR 778 per Peter Jackson J and at first instance in *Orenga de Gafforj v Orenga de Gafforj*: see [2018] EWCA Civ 2070. It was also favoured in Scotland: see *Williamson v Williamson* 2010 SLT (Sh Ct) 41.
- 4 It is understood this same argument was run by Stewart Leech KC (who also appeared in *Pierburg*) to obtain permission(s) to appeal in *Orenga de Gafforj*.

A Light-hearted Reminder of the Core Duties, Professional Obligations and Ethical Concerns that Daily Occur in FR Work

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This article explores the various ethical considerations which any family finance practitioner should bear in mind within their daily practice. The following scenario is envisioned to amplify the potential challenges we face and how they intertwine with the Regulatory Code of Conduct underpinning our profession.

Below, Larry Suitman and Anita Defence navigate an

almost typical family finance case with numerous code-of-conduct challenges thrown their way. Can you spot the challenges? What would you have done?

Where it all began

Mr Larry Suitman, a junior in chambers, is instructed by YourTopLawyers to represent an applicant husband, Mr Graham Horton, at an FDR. The respondent husband is Mr James Horton, who is a litigant in person. Upon receiving details about the case from his clerks, Larry returns the case. Larry tells his clerks he objects to same-sex relationships and will not represent anyone in a same-sex relationship. As a result, Larry's clerks manage to return the matter to another member of Chambers, Ms Anita Defence.

It will be of no surprise to those reading this article that Larry's refusal to represent Graham at the FDR because of his sexuality is a breach of Core Duty (CD) 8, namely that you must not discriminate unlawfully against any person. Under s 4 Equality Act 2010, sexuality remains a protected characteristic. Furthermore, by declining the instruction, Larry has acted in such a way as to breach CD5; he has acted in a manner that would diminish the trust and confidence the public places in him and the profession.

Of key importance is the Cab Rank rule (rC29) with which all practitioners will be familiar. Larry, therefore, ought to have accepted the instruction unless any of the exceptions and scenarios contained at rC21 or gC89 applied. Some examples of the same are as follows: (1) if there is a real risk of conflict; (2) you lack the requisite experience; (3) you are unauthorised to perform the piece of work; and (4) the instruction would involve you undertaking foreign work (if unqualified to do so).

In advance of the FDR, YourTopLawyers contacted the clerks to request that Anita attend court earlier than usual to meet with Graham. YourTopLawyers explained to the clerks and put in the instructions that, owing to the client's cognitive difficulties, he is registered as learning disabled, so extra time was required to ensure his understanding of key concepts. Anita instructed her clerks to increase her (not yet agreed) brief fee to account for the extra time she was required to be at court.

By increasing her brief fee to account for the extra time, Anita is at risk of discriminating against Graham in breach of CD8. Though her fees may have been agreed on an hourly basis as opposed to a flat rate brief fee, it would have been better to specifically agree a brief fee prior to Anita becoming aware of Graham's disability to avoid any accusation that she has breached her ethical obligations.

Anita is in court the day prior to the FDR, and due to issues in that case, the time she had set aside to prepare for the FDR was lost. Anita speeds up her time-limited preparation by getting a specialist legal artificial intelligence (AI) product to 'read' the papers and analyse both the facts and asset schedule in the case. Anita also undertakes legal research with the specialist legal AI product. Anita uses the AI-generated material to prepare her position statement. Anita then uploads a redacted copy of her position statement onto the AI platform and asks the AI to make it

more concise and produce a draft final order. The AI includes a hallucinated case citation and also gets the maths wrong, so it splits the former matrimonial home's (FMH's) net proceeds of sale (NPS) 40:50, short-changing Graham. This error is included in the draft final order, where 10% of the FMH NPS is unaccounted for.

The prevalence and reliance on AI/large language models (LLMs), coupled with the ever-evolving legal and regulatory framework that governs them, can cause pitfalls for practitioners. In our example, Anita should remain alert to her obligations under CD2 and CD6, as well as her broader obligations under the General Data Protection Regulation. It is important for practitioners to take care when selecting an LLM platform with a view to this assisting with preparatory case work. Amongst concerns regarding security, and LLM access to uploaded data for 'learning', as data controllers, practitioners need to bear in mind data retention. Anita should ensure she is aware of how long the LLM will retain the information she has input, and how that fits in with her data retention policy. Anita should also specifically include the use of specialist AI/LLMs in her privacy notice. CD10 requires barristers to take reasonable steps to manage their practice to ensure compliance with their legal and regulatory obligations, and rC87 demands that reasonable steps are taken to ensure proper records of your practice are kept. This rule includes considering how long records are kept for. The Bar Council's Information Technology Panel¹ provides further explanation about the use of LLMs, including concerns about the waiving of privilege by uploading privileged documents to an LLM.

Another obvious misstep by Anita is her failure to check the numbers deduced by the LLM regarding the distribution of the FMH NPS. Again, by not checking the information output, Anita has neglected her duty to her client and, arguably, allowed her discretion to be fettered by outsourcing her work to the LLM. It remains to be confirmed whether deferring to AI would constitute outsourcing for the purposes of rC86, though, if it were, reliance on LLMs would not alter your obligations to your client, and the platform itself should be compliant with: (1) confidentiality rules; (2) your own obligations contained within the Code of Conduct; (3) data processing rules in accordance with your instructions; (4) permitting the Bar Standards Board (BSB) to inspect records; and (5) processing personal data in accordance with agreed arrangements.

A cautionary tale can be deduced from the case of *R (Ayinde) v The London Borough of Haringey* [2025] EWHC 1040 (Admin), whereby counsel submitted pleadings containing five fabricated legal citations. This was considered by the court to be improper, unreasonable and negligent conduct. As such, in relying on the false authority generated by the LLM, Anita has defied most – if not all – of her core duties.

To ensure compliance with CD10 and the associated Bar Council Information Technology Panel guidance² regarding the use of LLMs, barristers are to verify the results derived from the software and maintain procedures for checking its generative outputs. Equally, robust cybersecurity measures must be implemented, particularly as, in the event of any cybersecurity attack, accountability lies with the barrister. It is unclear whether Anita has such safeguards in place, but it

would be sensible for her to review her cybersecurity measures annually to ensure compliance with CD10.

At court

When Anita arrives at court, she introduces herself to James Horton, who informs her that he is not legally represented. Anita reassures James that this will not be an issue and that she is there to help. Anita then tells James that the court is not going to be convinced by his position, as this is plainly a case which justifies a needs-based departure from equality, so he may as well just accept Graham's offer now.

Immediately, CD5 is engaged. The BSB has helpfully given specific guidance that legal jargon should be avoided when speaking with litigants in person. In addition, rather than saying 'the court won't be convinced', Anita should have used language such as 'are you prepared to agree'.³ Anita's interaction with James is not the right approach and undoubtedly diminishes trust and confidence.

James hands Anita his position statement, which reads as if it were written by open-source AI. When Anita queries this, James confirms he used ChatGPT after he had uploaded all the case papers.

There is no guidance from the BSB on what to do when an opposing party uses ChatGPT. In *Norman v Norman* [2025] EWFC 107 (B), District Judge Veal warned that using public forums such as 'Just Answer' to publish or communicate information relating to the proceedings risks breaching FPR 9.46 if jigsaw identification is possible, and a 'healthy dose of caution' should be exercised when 'communicating about issues being considered in family proceedings in any other public forum'. Whilst ChatGPT is not a public forum, its use still raises issues of confidentiality. CD1 would be engaged if James's use of ChatGPT involved disclosing confidential information in a way that risked public identification. All the same concerns addressed above about the use of LLMs would apply to ChatGPT.

Anita then goes to speak with her client, Graham. Graham becomes irritated that Anita 'keeps helping James' when James had asked for clarification in the waiting area. Graham is concerned that Anita is not on his side. Anita responds, telling Graham not to worry as she is helping him too.

CD7 is engaged, which requires Anita to provide a competent standard of work, and CD2, which requires Anita to act in Graham's best interests. Given Graham's expectations that Anita is acting solely in his interests, she should not have suggested she was helping both parties. Instead, Anita should have explained that the help being given to James is limited to procedural assistance only, and that her duty to the court (CD1), coupled with the interests of fairness, requires her to do so.⁴

During their conference, Graham informs Anita that he has not disclosed one of his pensions (the largest) because he doesn't think his ex-husband 'deserves a penny'. He informs Anita that it is an NHS pension of over £100,000, but there is no way he wants his ex-husband to be made aware of this. He gives Anita a copy of the cash equivalent

value (CEV) letter dated the same month as the FDR. Anita advises that this document must be disclosed. She takes the document and goes to give it to James, despite Graham specifically telling Anita she cannot give the CEV letter to James.

Once Graham refuses to authorise disclosure, Anita must not go behind that express instruction. CD2 is engaged and whilst Anita is permitted to robustly advise Graham as to his disclosure obligations, as per rC25.2 where Graham has expressly instructed her not to disclose the CEV, rather than go behind that express instruction and disclose Graham's confidential information in breach of CD6 and CD3, Anita should withdraw as she cannot continue to represent the client knowing they are in breach of their duty to make full and frank disclosure (given this would breach CD1 by misleading the court and CD4 as Anita would be replacing her own independent decision-making with Graham's refusal to comply with his disclosure obligations).⁵ It is important for Anita to recognise that CD2 is constrained by CD1, CD3 and CD4.

When discussing James' limited company, Graham tells Anita that he snooped around James' office prior to their separation. He tells Anita that he logged onto James' computer and obtained a copy of James' company's customer database. Graham says that he thought the database might be helpful evidence that James is operating a thriving business. Graham hands Anita a USB stick, which he says includes all this information, and tells her to give it to the judge.

CD2 is engaged, and Anita must advise Graham of the serious consequences of obtaining information in this way. This is similar to the case of *Imerman v Tchenguiz* [2010] EWCA Civ 908. Importantly, the fact that the documents have been obtained in this way should be disclosed, and the USB should be returned to James. Anita should not view what is on the USB stick herself, and if Graham refuses to return it to James, Anita may need to cease acting.⁶

While taking instructions at court, Graham's instructions are that James' business is worth over £1,000,000 and the family home is worth over £750,000. James's company was started during the marriage. The company arose from an idea Graham had, and Graham did the initial set-up of the business. Graham is a 49% shareholder but not a director. Anita's Bar Mutual Indemnity Fund (BMIF) insurance provides only the lowest coverage, up to £500,000.

The mismatch between the assets in the case and Anita's insurance engages CD10 (proper management of practice) and CD7 (competence). rC76 makes clear that Anita should make sure she has adequate BMIF insurance, which is particularly important in financial remedies. By not considering whether higher cover is necessary, Anita exposes herself and Graham to risks exceeding her insurance limits.

Following the hearing

After the hearing, Anita marked the occasion by posing for a selfie outside Walsall County Court and drafted a LinkedIn post setting out which court she was at and some brief facts of the case, including the parties' first names. Anita plans to ask the clerks to email all the family finance

solicitors in the chambers database, outlining how she won and linking to her LinkedIn post.

With the explosion of the new 'legal influencer', it is of no surprise that Anita is utilising LinkedIn and Instagram as a way of exerting a not-so-humble 'humblebrag' about her win in court. However, barristers using social media must be careful not to breach CD2 (to keep client affairs confidential) and should familiarise themselves with the BSB guidance on social media. Anita, by identifying her client and the court in a situation where the proceedings are private and have not been published through official channels, would inevitably breach her ethical duties.

On her personal (yet public) Instagram account of >5,000 followers, Anita posts that she has today acted in a case featuring two men and expresses her personal dislike of same-sex marriage. Anita's Instagram bio states that she is a barrister but does not specify her chambers. Her profile picture shows her in her wig and gown outside her chambers; the logo is visible along with all the names on the board.

Whilst barristers have a right to freedom of speech, they must also not act in a way which diminishes public trust and confidence in the profession (CD5), or which discriminates against others (CD8). Anita, by posting on her Instagram account, which has >5,000 followers (wow, jealous!), that she acted in a case with a same-sex couple, but does not like same-sex marriage, is clear discrimination in breach of her duties (see paragraph 18 of the Bar Council's social media guidance).

Anita also links her views to her profession by: (1) relating them to a case she has acted in, involving a same-sex couple; and (2) having her profile picture showing her in a wig and gown outside chambers – identifying herself as a barrister and her chambers. Anita may find herself in trouble with the equality and diversity lead in chambers, or she may face disciplinary proceedings before the BSB. There are a number of recent cases in which barristers have been struck off, or suspended, as a result of comments made on social media – so barristers beware!

Anita sent her attendance note after the hearing, which included the fact that Graham had told Anita that he had asked his solicitor to make an offer prior to the FDR, but his solicitor had refused. Anita's instructing solicitor contacted her after reviewing her attendance note. The instructing solicitor asked Anita to amend her attendance note to remove the reference to their refusal to make an offer, as it was not true. The solicitor was concerned that Graham may use it to make a complaint against her; Anita removes this part of her note and re-sends it.

We have all had cases where they have not been prepared as well as they should have, or mistakes have been made. We may be lawyers, but we are still human (sometimes ...)! However, Anita has an ethical duty to maintain her independence (CD4) and act with honesty and integrity (CD4). Maintaining independence includes being free from the influence of her instructing solicitor. Her duty is to her client (CD2) and the court (CD1); therefore, she should not remove the reference made by her client about her solicitor's potential failure to make an offer prior to the FDR. To act otherwise may result in her facing disciplinary action.

Notes

- 1 Bar Council Information Technology Panel, 'Considerations when using ChatGPT and generative artificial intelligence software based on large language models' (Bar Council, January 2024), www.barcouncilethics.co.uk/wp-content/uploads/2024/01/Considerations-when-using-ChatGPT-and-generative-artificial-intelligence-Nov-2025.pdf
- 2 Bar Council Information Technology Panel, 'Considerations when using ChatGPT and generative artificial intelligence software based on large language models' (Bar Council, January 2024), www.barcouncilethics.co.uk/wp-content/uploads/2024/01/Considerations-when-using-ChatGPT-and-generative-artificial-intelligence-Nov-2025.pdf
- 3 Bar Council Ethics Committee, 'Litigants in Person: Guidelines for Lawyers' (Bar Council, June 2015), paras 38–40, www.barcouncilethics.co.uk/documents/litigants-person-guidelines-lawyers/
- 4 Bar Council Ethics Committee, 'Litigants in Person: Guidelines for Lawyers' (Bar Council, 2015), paras 35–36, www.barcouncilethics.co.uk/documents/litigants-person-guidelines-lawyers/
- 5 Bar Council Ethics Committee, 'Disclosure of Unhelpful Material in Family Proceedings (Finance)' (Bar Council, March 2024), paras 18–20, www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Disclosure-of-Unhelpful-Material-in-Family-Proceedings-Finance-March-2024.pdf
- 6 Bar Council, 'Evidence obtained illegally in civil and family proceedings' (Bar Council, January 2014), paras 23–31, www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Evidence-obtained-illegally-in-civil-and-family-proceedings-April-2025.pdf

From Barrister to Neutral – Building a Practice in Non-Court Dispute Resolution

Tristan Harvey

QEB



Introduction

Earlier this year I found myself on a train to Cornwall with Rhys Taylor. We talked about how I had come to develop a practice in non-court dispute resolution (NCDR) and Rhys asked if I'd be prepared to write a piece for the *Financial Remedies Journal* explaining how I'd made the transition and sharing some reflections for anyone thinking about doing the same. Despite doubting that anyone would be remotely interested, I agreed.

Why change?

Before turning to the 'how', it seems sensible to touch briefly on the 'why'. The answer is partly professional and partly personal. As to the professional, there was a great deal that I enjoyed about practice at the family Bar, not least the camaraderie of chambers and the pleasure that sometimes came when I felt that I had made a difference in a case. I came to realise, though, that I enjoyed settling cases much more than I enjoyed fighting them. I wondered if it might be time for a change.

At around the same time, my second daughter had just turned one and my wife returned to work following her parental leave. Like many parents of young children, we wrestled with how to balance demanding careers with bringing up a family and concluded that both of us carrying on as we were wasn't going to work. The upshot was that in January 2014 I started a period of (indefinite) parental leave. It was an inauspicious start, with my plans to throw myself into the local parenting scene thwarted when my eldest contracted chicken pox and then (inevitably) passed it on to my youngest. We spent a month cooped up at home and I wondered if Central Family Court trials weren't really that bad after all.

In the months that followed I thought a lot about what I might do next. I considered continuing my existing practice part-time, but that didn't really address the concerns I had as to whether being an advocate was what I really wanted to do. I thought about trying something completely different, but it wasn't obvious what I might do that would be both flexible and professionally fulfilling. It also felt like a really big decision to leave chambers.

The conclusion I reached was that there might be a way in which I could stay at QEB, focus on the parts of my practice that I enjoyed most and have more flexibility. The seed was sown a few years previously when I attended Resolution's Collaborative training. Although I came away with the impression (at that point in time, at least) that the role for counsel was fairly limited, my eyes were opened to the benefits of NCDR more generally and the skills I learned made me, without question, a better lawyer.

So, in the summer of 2014 I sat opposite my then head of chambers explaining that I would like to develop a practice in NCDR. It would be something of an exaggeration to say that either he, or my then senior clerk, thought it was a brilliant idea. But neither said 'no' and I remain grateful for the support that I was given by chambers in doing something that hadn't been done before.

Starting again from scratch

I knew that developing a new practice was not going to happen overnight. Having been a tenant for more than 10 years it was daunting to find myself, more or less, back at square one.

Having no qualifications in NCDR save for the Collaborative training, the first step along the road was to train to be a mediator and arbitrator. The mediation training was something of a watershed moment. Instinctively, I thought that mediation might be a good fit for me, but the training confirmed it. It also put to bed my lingering worry that as a barrister I might make a poor mediator. Of course there are differences – but knowing what to say, and what not to say, and asking the right questions are crucial in both roles.

Having completed the training I had to decide whether to commit exclusively to non-court work or continue accepting instructions as a barrister alongside it. In the early stages, doing both would undoubtedly have made the financial transition less acute – but my worry was that if I tried to do both, the non-court work would risk being crowded out. Looking back, I'm glad I made the decision that I did. Had I not, it would at best have taken much longer to make the transition, and at worst it may not have happened at all.

Building a practice – from advocate to neutral

Developing a practice in NCDR inevitably took time. When I started out in 2014, the arbitration scheme was in its infancy and PFDRs were still very much the exception rather than the rule. Against that backdrop, it was perhaps unsurprising that most of my time in the early years was spent mediating.

Something that became immediately apparent was that completion of the mediation foundation training was just the beginning of the journey. Although the training was fantastic, I felt that I had an enormous amount still to learn. In particular, the experience of having not one client in the room, but two, felt very alien.

At the same time, it was immediately rewarding. My first mediation session settled, the couple having come into it (somewhat unusually) with completely open minds as to how both the arrangements in respect of their children and the finances might be resolved. Over a number of sessions we explored the different options, considered the pros and cons, and in respect of the finances they reached a resolution which allowed them both – just – to re-house. Any prolonged litigation would likely have made that impossible. A little while after the mediation had finished, they emailed me to thank me and said they couldn't have done it without my help. It was one of the best moments of my professional life.

Over time, I felt more at ease managing the dynamics of two clients, but having spent more than a decade being paid to speak, old habits died hard. By some distance the most difficult thing was learning when to say nothing at all. In the early days it was often too tempting to fill those awkward gaps. I gradually came to understand the power of silence and how important it was not to jump in, not to be the problem solver, but to give clients the time and space to reflect or process before responding.

The changing landscape

Changes within the family justice system over the past decade have undoubtedly helped in making the transition to NCDR possible.

First, a combination of factors including the increased pressure on the court system and the changes to the FPR 2010 in 2024 mean that the 'A' in alternative dispute resolution is now firmly confined to the dustbin. NCDR has increasingly become a fundamental part of family law practice and the courts appear increasingly willing to use the powers available to them to stay cases in favour of non-court options. In *A v M (No 3)* [2024] EWFC 299, Sir Jonathan Cohen remarked that:

'This case cries out for mediation ... I will need to hear from counsel as to whether such mediation takes place ... I have the power to adjourn proceedings for that mediation to take place, and it is a power that I intend to exercise ...'

Although we are still waiting for a High Court decision following the changes to rules in 2024 in which a party is penalised for an unreasonable failure to engage in NCDR, Recorder Nicholas Allen KC in *DF v YB (No 2: Costs)* [2025] EWFC 76 (B) expressed the view that it is only a matter of time:

'I have no doubt that in due course there will be a family case in which a failure by a party without good reason to attend (or engage in) NCDR will be considered to be litigation conduct and justify a costs order ...'

Second, there has been both significant growth in the number of non-court options available to clients and an increased awareness of the importance of better integrating those options. By way of example:

- IFLA's Children scheme was launched in 2016 and later extended to allow arbitrators to hear international relocation cases (to Hague countries);
- mediation is used more flexibly. Resolution now offers training in the hybrid model of mediation, which borrows from the civil and commercial model and allows the mediator to keep confidences, which can be particularly helpful when the outcome is more binary (such as Trusts of Land and Appointment of Trustees Act 1996 cases) or where there are reasons to have clients in separate rooms (e.g. where there are allegations of domestic abuse). It is also much more usual now to involve other professionals, such as the clients' lawyers, in the process;
- one lawyer, two client models have emerged, enabling advice to be given to a separating couple together;
- we have become less siloed in our approach (albeit there is work to do). Rather than seeing the non-court options as wholly independent processes, more thought is given to integration. By way of example, the Collaborative participation agreement has been amended to allow a transition to arbitration and evaluation in mediation is seen as a legitimate route to overcoming impasse.

Thinking about a move into non-court dispute resolution? A few reflections

If you're thinking about focusing more on NCDR, here are a few thoughts.

First, try to see some NCDR in action. If you have a colleague who is trained in mediation or Collaborative practice, see if it would be possible to sit in on a session. Having a better understanding of what each non-court option involves will help you to explain it to clients and explore what might be a good fit for them.

Second, consider some training. The essential skills that are taught as part of the Collaborative and mediation training will stand you in good stead whether or not you decide to develop a practice in NCDR – especially in an ever-changing world where artificial intelligence (AI) is likely to play an increasingly prominent role, if not when it comes to the giving of advice, then at least in the process-side of what we do. The need to be skilled communicators and facilitators, the part that AI will be less able to replicate, is likely to become increasingly important. Speaking from experience, I would however exercise caution before deploying these skills at home or you risk being told by your partner that they 'don't want to be mediated'.

Third, for those at the Bar, consider carving out time in your diary for non-court work. This could be a day or two each week or week-long periods if you're not doing it full-time. Although you run the risk of gaps in the diary, it is

much more difficult to develop a practice if you don't make space for it.

Lastly, if you're seriously considering a move into NCDR, think carefully about the cons as well as the pros. One consequence of doing less court work for those at the Bar is, inevitably, that an application for Silk will be (even) more difficult. This was something that Rhys asked me about on our journey to Cornwall. How did I feel about giving up on that possibility? The answer is that I am completely at peace with it; that the pros of my practice outweigh the cons. But not everyone will feel the same.

Concluding thoughts

I would love to say that when I sat at home 12 years ago surrounded by spotty children and calamine lotion that I had a feel for the direction of travel that family law might take and that I had confidence that a move into non-court work would be successful; but I did not. At best, I sensed that a practice away from the courtroom would be a better fit for me and I gave it a go. If you've made it this far, started this article feeling the same way and haven't been put off by what you've read, I'd simply suggest that you give it a go too.

In Memory of Matthew Brunsdon-Tully

3.6.1984 – 31.3.2026

Lily Mottahedan

1 Hare Court



We shared a room, Matt and I, in the basement of 1 Hare Court. Although it barely fitted two desks and didn't get much sun, it had the key advantage of being right next to the clerk's room. It suited Matt perfectly. Every morning, a procession of barristers would pop in to say hello, catching up on latest chambers news or looking to discuss a particularly thorny legal issue. Whether with pupils just starting out or seasoned KCs, Matt was always supportive, curious about others and generous with his time.

Family law suited him. He was a people person, an incredible listener and a problem solver. Although he boasted an IQ of 154 on his LinkedIn profile, it was his EQ that was the standout. One solicitor recently shared with me that she always breathed a sigh a relief when she walked into a big work do and would see Matt laughing amongst the crowd. She knew she could join his conversation, and he would immediately make her feel included, at ease and, as always with Matt, thoroughly entertained. I know exactly how she felt.

Back in our room, we both tried to make it a little nicer. I hung a few artworks and suggested a sympathetic re-paint. Matt, however, did nothing in half measures. That was always part of his appeal as a friend. His vision was greater. In came a set of weights, quickly followed by a clothing rack with a week's worth of suits on it. Eventually, he ordered a large red vintage chaise longue on eBay.

The chaise longue provided him with a place to rest between long stints drafting his skeleton arguments at his desk, but he also needed fuel. Being the *bon viveur* he was, a sandwich did not appeal. If we had time, we would go

together to Thai Square opposite the Royal Courts of Justice where he would inevitably order the chicken panang. We were both bereft when a red bus crashed into it. No one was harmed but the restaurant had to close down. Matt took his business wholesale to Deliveroo, which he collected from outside chambers several times a day. Within a few months, Matt got a call from Deliveroo's area manager offering him a corporate membership. They thought he was ordering for the whole chambers.

Shortly after the chaise longue arrived, and quite rightly, Matt decided he needed a bigger room. He suggested I join him in the new 1 Hare Court annex across the road from chambers where the recompense for being away from our HQ was an enormous bright room with high ceilings, but I was keen to remain in the main building so we parted ways. Our two most junior tenants drew straws – one ended up sharing with me and the other with Matt. It was the end of an era.

Matt's new roommate left shortly afterwards to head a government department. It was befitting that Matt lost a roommate to the government. He was passionate about politics. He interned with an MP before coming to the Bar, and at one point was thinking of going into politics himself before the law drew him in.

Matt was an exceptionally talented lawyer and advocate, and he loved the intellectual rigour of the law. Following his winning of tenancy at 1 Hare Court, he was instructed by many of the country's best solicitors, some of whom became his close friends. The intelligence, charisma and humour he had in social settings was equally palpable in the courtroom. In a maintenance pending suit application at the Central Family Court one day, he argued that the husband on the other side had a bad case of RAIDS. When the judge enquired what this was, he replied 'recently acquired income deficiency syndrome'. Surprisingly, the term did not make its way into the *Dictionary of Financial Remedies*.

I was only ever on the other side of Matt once, but it ended with a 5-day cross-border non-disclosure trial. During closing submissions, and despite having the difficult task of being for the non-discloser, Matt delivered his submissions with the same courage and conviction that characterised the rest of his advocacy. The non-discloser could certainly not complain of not having his best case superbly presented. After the trial, Matt told me that closing submissions were his favourite type of advocacy. At a recent dinner, I recounted the story to a senior junior at another chambers who told me she had the same experience in a difficult trial against Matt and, like me, could not help but compliment him on his powerful closing speech. I was not surprised.

Matt's struggles with mental health were known by many. He left us and his parents Paula and Paul too soon, aged only 41. But people will remember a truly remarkable human being: a first-class lawyer and a proud Welshman and cricketer, with an infectious sense of humour, a contagious laugh and a brilliant, albeit restless, mind.

A charity fundraiser has been set up in his honour and memory:

www.justgiving.com/page/mbt

His passing is a timely reminder of how important it is to look after each other.

Money Corner: Non-disclosure Agreements – Not Applicable in Financial Remedy Proceedings

Roger Isaacs

Partner, Milstead Langdon



The problem

It is entirely understandable that business owners are protective of commercially sensitive information. Consequently, it is perhaps unsurprising that they often ask for non-disclosure agreements (NDAs) to be signed by accountancy single joint expert (SJE) witnesses who have been appointed to value their companies.

Many of these business owners will have had experience of business valuations in the context of mergers and acquisitions. In those circumstances, NDAs are unquestionably accepted as a standard requirement. Those same business owners may be less likely to have been involved in previous divorces and may well be strangers to litigation generally. That is why their first reaction, when confronted by an intrusive list of questions from SJE's about their businesses, is to reach for a pro-forma NDA.

However, the clauses that are typically found in standard NDAs are generally incompatible with court proceedings. Specifically, they seek to impose obligations upon those

receiving the confidential information to which no SJE could agree to be bound. Importantly, it is the judge and not the SJE who has the discretion to determine what information within the litigation is made public.

By the time a standard NDA has been modified so that it is fit for purpose within financial remedy proceedings, it is likely to have been watered down to such an extent as to make it of little value. For that reason there are better solutions for those with genuine concerns about commercially sensitive data.

Of course, one solution would be for parties to arbitrate as an alternative to litigation. Arbitration is a private tribunal and therefore (subject to appeals, or interlocutory hearings and injunctions in court) privacy can generally be guaranteed in a way that is not possible in the court proceedings on which this article focuses.

Possible solutions

The first and most important step for anyone advising business owners with concerns about confidentiality is to identify precisely what information is considered to be so sensitive that measures are required to protect it.

In the vast majority of cases, it will be sufficient for the business owner's legal team simply to explain the effect of the strict implied duty of confidentiality that is inherent in all civil litigation. That duty is as strong as anything that could be introduced by an NDA and means that any breaches of confidentiality or any use of information obtained in the litigation for other purposes would constitute contempt of court.

If further comfort is required, parties can be asked explicitly to state in writing that they understand their duties of confidentiality and undertake to comply with them. This has no legal force because it is simply a restatement of duties and obligations that already exist, but it can provide useful reassurance to those who are concerned about potential data breaches.

That said, in a very small minority of cases, there can be a legitimate reason for taking specific action to avoid the inappropriate misuse of information. One example could be a case in which the business owner's spouse has a connection with a competing business. Whilst that may sound like an unlikely scenario, it has arisen.

Another, more common example arises in cases in which the clients of the business include high profile companies or individuals whose custom contributes to its value and therefore whose identity will be a relevant factor in any valuation. The business may well be fiercely keen to maintain client confidentiality and therefore be reluctant to disclose its client list without additional assurances that it would not be made public.

In these exceptional cases, it is first appropriate to agree what information is to be treated as sensitive. Once it has been defined, discussions can take place as to how most appropriately it can be protected.

One option could be for the sensitive information to be disclosed in full to the SJE but on the basis that all references to it in the SJE's report are either redacted or anonymised. This approach can be effective if the primary concern of the business owner is to avoid disclosure of information to the other party in the proceedings. This was the approach adopted successfully in the case of the non-

business-owning spouse who had a connection with a competing business.

However, this approach is less effective if the sensitive information is such that its redaction renders the SJE's report meaningless or difficult to understand or challenge. A good example would be a company whose largest customer was a particular well known and hugely wealthy public figure or a high-profile global company. The identity of that customer would be very likely to inform the SJE's valuation opinion. Without the court or the other party in the litigation knowing the identity of the customer, they would be unable adequately to challenge the SJE's opinions.

The solution here is to address the issue at the earliest opportunity and preferably at the first appointment at which the SJE's instruction is considered by the court. At that stage, representations can and should be made as to how not only the SJE but also the parties and even the court itself are to treat the sensitive information. Specific provisions can then be built into a directions order that ought to be capable of reassuring even the most nervous business owner.

For example, the SJE could be instructed to restrict the sensitive information to a specific section of the report that can then be made subject to specific restrictions.

Summary

In conclusion, when considering the need to preserve commercially sensitive information:

- (1) recognise that an NDA is almost certainly not the answer;
- (2) explain to the client that the implied duty of confidentiality within litigation is sufficient protection in all but exceptional circumstances;
- (3) consider asking the parties to put in writing a statement to the effect that they recognise their obligation to preserve confidentiality;
- (4) if the circumstances are exceptional, define precisely what information is so commercially sensitive that it justifies the need for specific steps to protect it;
- (5) consider whether it would be sufficient to disclose the sensitive information to the SJE for the SJE's eyes only such that it is redacted or anonymised within the SJE's report; and
- (6) lastly, if redaction is not an adequate solution, raise the matter at the first appointment and try to obtain relevant assurances from the parties and the court that allay any legitimate concerns.

DR Corner: The Psychology of Divorce: Integrating Psychological Theory, Family Law and Interdisciplinary Practice

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Introduction

As a consultant clinical psychologist and Law Society approved expert witness, I have been involved in many protracted and high conflict private law proceedings. I have repeatedly documented evidence of long established pathological relationship dynamics that have been augmented by litigation. I have also witnessed the extent of the harm that children and their parents have suffered. As a result of this experience, I was delighted to form a partnership with Stephen Wildblood KC, in an attempt to bring together psychological and legal expertise and experience to address complex relationship issues within the framework of the law.

Historically, family justice systems in England and Wales

have addressed divorce primarily through adversarial legal mechanisms. Concerns have long been raised, however, that the adversarial system may intensify conflict by reinforcing complex dynamics and prolong distress. However, over the past two decades, family law has developed and, increasingly, has incorporated non-court dispute resolution and child focused principles that reflect psychological research on family functioning and wellbeing.

We all know that divorce/separation is one of the most challenging transitions that families experience and so the definition of them in legal terms as disputes concerning children and finances significantly underestimated the very complex difficulties associated with the extended psychosocial process. Divorce and separation involve emotional loss, attachment re-organisation and the restructuring of family relationships. They can also be experienced as a profoundly traumatic life event for both children and parents.

It is well documented that the fact of separation itself may not be associated with negative outcomes. What we now know from psychological literature is that it is the exposure to conflict, and the degree to which emotional and developmental needs are addressed during and after legal processes, that has the most significant and adverse psychological impact. For children, the emotional impact on parents can affect the quality of their relationships, which inevitably adds to the emotional harm they suffer.

This article brings together psychological theory, empirical research and developments in family law concerning children and financial arrangements to examine divorce as an integrated legal and psychological process. It places particular emphasis on the development of mediation, collaborative law and child focused reform initiatives, including the work of the Family Solutions Group. It is argued that integrating psychological formulation and clinical expertise into the legal process is essential to reducing harm, improving outcomes for children and separating couples. The article highlights the significance of interdisciplinary collaboration between lawyers and psychologists especially in protracted and high conflict cases and refers to the significant role of judicial leadership in promoting non adversarial approaches.

Divorce as a psychological process

Divorce as loss and transition

Divorce has been conceptualised within psychology as a form of non-finite loss, often accompanied by grief, anxiety and disruption to identity. Early theoretical models described divorce as involving multiple interrelated transitions across emotional, legal, economic and relational domains. Contemporary research supports this process based understanding, showing that emotional separation frequently precedes legal action and that psychological adjustment/recovery frequently continues for years after legal proceedings conclude.

The course of adjustment doesn't proceed in a linear way and longitudinal studies have indicated that, although divorce increases risk for psychological distress in the short to medium term, most adults are able to develop adaptive coping strategies and resilience. This process can be profoundly affected by the emotional history, including the level of adverse life events and trauma that has been expe-

rienced. It can also be undermined by repeated exposure to conflict (re-trauma), financial difficulties, the quality of post-separation relationships and the welfare and adjustment of children.

Attachment theory and adult adjustment

Attachment theory offers a central foundation and framework for understanding adult responses to divorce. Divorce/separation frequently activates attachment systems, particularly when it is unexpected or there is a high level of conflict. Individuals with an insecure internal working model of attachment may experience heightened anxiety, anger or avoidance, increasing the likelihood of anger, distress and complex defensive functioning within litigation. These attachment related responses can influence negotiation styles, the ability to engage in mediation, and the legal processes themselves. This can then have an impact on emotional functioning and/or mental health of those involved, and affect litigation and outcomes.

Attachment theory is also a framework for understanding a child's responses to separation and conflict. For children, separation can activate attachment systems, producing heightened anxiety, anger or withdrawal depending on attachment style. Children with insecure attachments may experience more prolonged distress, greater reactivity to perceived threats and increased difficulty engaging in education and other activities.

Family systems theory

From a systemic perspective, divorce represents a reorganisation rather than a dissolution of the family. Family systems theory emphasises boundaries, roles and patterns of interaction. High conflict separations are often characterised by rigid boundaries, triangulation of children and escalatory feedback loops. Without intervention, legal processes may inadvertently reinforce these dynamics by positioning parents as adversaries competing for resources or moral legitimacy. This inevitably augments the difficulties experienced with litigation and is likely to affect the outcome.

The impact of divorce on children

Child development

Children's developmental stage critically shapes their understanding of separation. Younger children may experience fears of abandonment and self blame, while adolescents may display anger, withdrawal or risk taking behaviours. Across ages, prolonged exposure to parental conflict, inconsistent caregiving and emotionally charged legal proceedings are associated with increased psychological vulnerability.

Longitudinal research demonstrates that children's adjustment is strongly linked to post-separation parenting quality, predictability of arrangements and protection from adult disputes. These findings underpin modern child focused approaches within UK family justice.

The role of parental conflict

Although for children, divorce represents a threat to the security in their internal working model of attachment, research has consistently demonstrated that outcomes for children are most strongly associated with conflict between

parents, the quality of parenting and their sense of emotional safety, rather than parental separation per se.

Chronic and ongoing exposure to conflict between the parents, difficulties with loyalty and inconsistent parenting are all associated with poorer psychological adjustment; there is then an increased risk of emotional, behavioural and relational difficulties throughout development.

Parental conflict can also affect a child's access to the wider family, and the impact of further losses for children (such as relationships with grandparents and other members family members) are frequently underestimated.

Adversarial legal proceedings can intensify conflict, particularly when disputes become protracted or focus on blame. Complex disputes inevitably also involve difficult emotional issues which risks activating harmful relationship dynamics that further intensify distress. This can then further compromise the ability of a parent to consistently meet the emotional needs of their child/children.

Clinical psychologists and other professionals who work with children and families therefore strongly support approaches that may reduce conflict, promote cooperative parenting and protect children from adult conflict.

The voice of the child

Psychological research and mediation practice have increasingly supported including the voices of children in post-separation decision making. If an interview with a child is carefully managed to be commensurate with their developmental stage and emotional functioning, they frequently benefit from being heard and informed. There is a risk, however, that children may suffer harm if they feel that they have been put into a place of responsibility or feel drawn into conflict. The potential risk to children can frequently be managed appropriately if the perspective of a child is understood as being part of a process rather than conducted in a single interview. It is evidently imperative for any professional to understand the dynamic within the family, and the experience of a child before any interview. A professional will also appreciate that a child will need to feel safe and supported within any process in order for them to be able to talk about what they think and feel.

Finances: fairness and psychological wellbeing

Although the legal framework determines financial outcomes, the manner in which disputes are resolved has a significant impact on psychological adjustment and recovery. Financial proceedings can therefore have a significant impact on psychological functioning and mental health. Psychological issues associated with identity, security and perceived fairness are frequently described, and financial insecurity is a significant predictor of post-separation distress, particularly for parents providing primary care.

Although the discretionary nature of financial remedies in England and Wales allows courts to consider needs, contributions and future welfare, there is evidence that adversarial financial litigation with an imposed outcome can exacerbate conflict and distress. There is increasing evidence that negotiated settlements, where parties feel they have agency, are associated with more positive long-term adjustment.

Mediation, collaborative law and reform initiatives

Mediation

Family mediation has become a central element of family justice reform. Grounded in principles of self determination and neutrality, mediation aims to reduce conflict, promote cooperation and facilitate durable agreements. Meta analytic research indicates that mediated agreements are associated with higher compliance and lower levels of subsequent conflict compared with litigated outcomes.

Child inclusive mediation models reflect developmental research by enabling children's perspectives to inform parental decision making without placing children in conflicted roles. These initiatives are evidently positive, but there are separating couples who are unable to engage because of fear/avoidance and complex and/or pathological dynamics.

Collaborative law

Collaborative law represents a structured interdisciplinary approach in which parties commit to resolving disputes without court proceedings. Mental health professionals may be involved as coaches or child specialists, supporting emotional regulation and communication. This model is particularly relevant in protracted cases when there is a high level of conflict and where unaddressed psychological dynamics may undermine legal resolution.

The Family Solutions Group and child focused reform

The Family Solutions Group (FSG), established in 2020 as a multidisciplinary body, has played a significant role in reframing family breakdown as a psychological issue and an issue for society rather than being only a legal problem. The recent report *What About Me?* argued for early support, diversion from court and the integration of psychological understanding throughout the family justice system.

The FSG's recommendations align closely with psychological research, which has highlighted the psychological impact of litigation on children and adults and the need to avoid adversarial conflict if at all possible. Research has also highlighted the importance of an integrated professional approach.

As the former President of the Family Division, Sir Andrew McFarlane provided sustained leadership in reframing family justice. His public speeches, judgments and support for the FSG highlighted the importance of understanding the emotional experiences of separating families. Sir Andrew McFarlane repeatedly drew attention to the psychological impact of prolonged private law disputes on children, arguing that court should be a last resort. His work fully recognised that the legal processes have a profound impact on psychological outcomes.

Judicial leadership has been instrumental in driving reform within UK family law. Senior members of the judiciary have repeatedly emphasised that court should be a last resort for resolving private family disputes where safeguarding concerns are absent. Recent procedural innovations, including child focused court models, reflect a

growing recognition of the emotional and developmental consequences of litigation.

Such leadership illustrates how legal culture can evolve when informed by psychological evidence and child centred principles.

Interdisciplinary collaboration in high conflict cases

The case for integration

As I have argued, high conflict and protracted cases often involve complex psychological factors, including trauma histories, attachment insecurity and entrenched relational patterns. When legal and psychological processes operate in isolation, disputes may escalate and become self perpetuating. Collaboration between lawyers and psychologists enables early identification of psychological risk, targeted intervention and legal processes that minimise threat and escalation. This interdisciplinary approach is consistent with evidence based models of family intervention.

Professional considerations

Effective integrated practice evidently requires clear understanding of the different roles boundaries, ethical safeguards and shared understanding of professional responsibilities. Training in psychology for legal professionals and in law for psychologists is evidently important to ensure integrated and child focused practice can be provided within an appropriate legal framework.

Discussion

Synthesising psychological research with family law reform highlights the limitations of adversarial approaches to divorce and the benefits of psychologically informed legal processes. The evidence suggests that outcomes for adults and children are shaped not only by legal decisions, but also by how those decisions are reached.

Policy and practice implications include the need for early intervention, expanded access to mediation and collaborative law, and structural support for interdisciplinary working. Future research is evidently required to evaluate the long-term psychological outcomes of reform initiatives and collaborative practice models.

Conclusion

Divorce is both a legal transition and a profound psychological and social process. Understanding divorce, therefore, requires both legal and psychological expertise. If the psychological factors, as well as the emotional, developmental and relational factors that shape family outcomes, are to be appropriately considered, professional cooperation is important.

The significance of psychological theory and empirical evidence, together with recent family law reforms, demonstrate the necessity of integrated approaches that prioritise the well-being of children and the importance of limiting harm to ensure future development.

It is our view that interdisciplinary collaboration between lawyers and psychologists, particularly in high conflict and protracted cases, should be considered as a necessary

requirement for successful separation and effective family justice.

References

- Amato, PR, 'The consequences of divorce: A critical review', (2014) 6(1) *Journal of Family Theory & Review* 37–73.
- Bohannon, P, *Divorce and After* (Doubleday, 1970).
- Bohannon, P, 'The six stations of divorce', in Bohannon, P (ed), *Divorce and After* (Doubleday, 1970), pp 33–62.
- Cafcass, *Private Law Data and Outcomes Report* (Cafcass, 2023).
- Emery, RE, Sbarra, DA and Grover, T, 'Divorce mediation: Research and reflections', (2005) 43(1) *Family Court Review* 22–37.
- Family Mediation Council, *Code of Practice and Standards Framework* (Family Mediation Council, 2024).
- Family Solutions Group, *Progress and Priorities: Updating the Family Solutions Group Recommendations* (Family Solutions Group, 2023).
- Family Solutions Group, *What About Me? Reframing Support for Children and Families Following Parental Separation* (Family Solutions Group, 2020).
- Fraley, RC and Shaver, PR, 'Adult romantic attachment: Theoretical developments and empirical overview', (2000) 4(2) *Review of General Psychology* 132–154.
- Hazan, C and Shaver, P, 'Romantic love conceptualised as an attachment process', (1987) 52(3) *Journal of Personality and Social Psychology* 511–524.
- Jenkins, JM, 'Psychological adjustment to divorce', (2017) 20(3) *Clinical Child and Family Psychology Review* 303–317.
- Kelly, JB and Emery, RE, 'Children's adjustment following divorce: Risk and resilience perspectives', (2003) 52(4) *Family Relations* 352–362.
- McFarlane, A, *Children's Welfare and the Role of the Family Court*, Inner Temple Lecture, 2022.
- McFarlane, A, *Keynote Address*. Family Solutions Group Annual Conference, 2025.
- McFarlane, A, *The Harm of Conflict in Private Law Proceedings*, Judicial College Lecture, 2020.
- Ministry of Justice, *Family Justice Review, Final Report* (Ministry of Justice, 2011).
- Nuffield Family Justice Observatory, *Unrepresented Litigants in Private Law Proceedings* (Nuffield Family Justice Observatory, 2023).
- Wexler, DB and Winick, BJ, *Law in a Therapeutic Key* (Carolina Academic Press, 1996).
- Wildblood KC, S and Gardner, FV, *Family Court: The Last Resort* (Family Law Publishing, forthcoming).

Tech Corner: Artificial Intelligence in Financial Remedy Practice: Opportunity, Risk and Professional Responsibility

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Artificial intelligence (AI) has now arrived in family law in a way that feels both gradual and sudden. Gradual, because technology has been entering practice for years through case management systems, digital bundles, online portals and increasingly capable research platforms. Sudden, because generative systems have altered the texture of daily work almost overnight. A practitioner can type a prompt and receive a coherent narrative, a neatly structured argument or a plausible sounding summary within seconds. That combination is powerful. In the hands of a busy lawyer, it can feel like relief. It can also be a trap.

Financial remedy practice sits directly in the path of this change. It is intensely human in subject matter but relentlessly structured in its mechanics. The work is driven by disclosure and deadlines: questionnaires, schedules, replies, chronologies, narrative statements, budgets, offers and draft orders. The figures must be right and the document trail must be complete. There is constant professional pressure, shaped not only by client expectation, but also by a strict regulatory and ethical framework governing accuracy, disclosure and conduct, alongside client emotion in equal measure. AI appears well suited to this environment because it can process information quickly and present it neatly. Yet the risks matter more here too, because an error is rarely just an error. It becomes part of a case theory, a

negotiation position or a document placed before the court.

The judicial warning

The clearest recent judicial warning about the misuse of generative AI in legal work in England and Wales comes from the Divisional Court in *Ayinde v The London Borough of Haringey; Al-Haroun v Qatar National Bank QPSC* [2025] EWHC 1383 (Admin). The court did not suggest that the use of AI is inherently improper. It recognised that such tools are already being used and will continue to be used. What it did do, in unusually plain language, was explain why generative systems create a particular professional risk.

The risk is not simply that AI can be wrong. Lawyers are accustomed to checking sources. The distinctive problem is that generative systems can be coherently wrong. They can produce content that reads as though it has been researched and verified. They can make confident assertions that are entirely untrue. They can cite sources that do not exist. They can purport to quote passages from real authorities that do not appear in the actual text. This combination of plausibility and falsity is what makes the technology different from earlier forms of legal assistance.

In *Ayinde*, the court dealt with the inclusion of fictitious authorities in submissions. In doing so, it reinforced a fundamental principle: responsibility is personal. The duty to ensure that material placed before the court is accurate rests with the lawyer who drafts, settles and signs the document. That duty cannot be delegated to a tool. Whether the error originates in a generative system, an online summary, hurried copying and pasting or inadequate supervision, the obligation to verify remains exactly where it has always been.

The companion case, *Al Haroun*, demonstrates more directly how AI can contaminate court material if not properly checked. The judgment records admissions about the use of publicly available AI tools alongside conventional research platforms, and a failure to verify the resulting citations and quotations. AI can produce something that looks finished. But if that apparent saving displaces verification, it is not a saving at all. It is a professional hazard.

Why this matters in financial remedy work

At first glance, financial remedy practice might appear less exposed than commercial litigation to fabricated authorities. We do not routinely file extended skeleton arguments in interim applications. Much of our work is fact-heavy rather than law-heavy. That is precisely why the risk is subtler.

Financial remedy work depends on accurate factual matrices. Asset schedules, business valuations, pension sharing calculations and housing needs assessments are built on detailed numerical information. An incorrect date, an omitted liability or a misplaced decimal point can materially affect advice and outcomes. If generative tools are used to summarise disclosure or draft schedules without careful checking, errors can become embedded in negotiation positions.

There is also a second dimension. Generative systems do not merely fabricate authorities. They can import invented propositions into otherwise routine drafting. A draft posi-

tion statement that contains a confident but unsupported assertion about the court's approach to needs, conduct or non-matrimonial property may influence negotiation tone even if it never reaches a judge. Plausible language is not a substitute for legal accuracy.

The fabricated authorities problem

It is worth addressing directly the issue of fabricated authorities because it has now moved from anecdote to reported judicial concern.

Generative systems are capable of inventing cases that do not exist. They can provide a case name, a neutral citation, a summary of facts and a ratio that reads entirely credibly. In some instances, they will cite real cases but attribute to them propositions that cannot be found in the judgment. The result is not a typographical error. It is a fictional legal landscape.

The Divisional Court in *Ayinde and Al Haroun* made clear that the inclusion of non-existent authorities is a serious matter.¹ The court emphasised that counsel and solicitors are under a duty to ensure that authorities relied upon exist and stand for the propositions advanced. The fact that material may have been generated by AI does not diminish that duty.

For family practitioners, the lesson is straightforward, AI must never be treated as an authority. If a proposition matters, it must be checked against the judgment itself or an authoritative source. There is no shortcut around that obligation.

Artificial intelligence as evidence factory

If the research risk is obvious, the evidential risk may prove more disruptive in family practice.

Financial remedy cases frequently involve digital material. Screenshots of messages, social media posts, emails, downloaded transaction histories and audio recordings are routinely relied upon to support allegations about lifestyle, dissipation, cohabitation or hidden assets. Even without deepfakes, authenticity disputes are not uncommon. As generative tools improve, practitioners should assume that some parties will test the limits.

Publicly available tools can now generate convincing audio and visual material. The technology required to manipulate a recording is no longer confined to specialists. That creates practical questions for family lawyers. How confident are we about the provenance of digital material provided to us? Do we routinely request original files? Are we alive to the evidential significance of metadata? At what point should we consider forensic input?

None of this is new in principle. The Family Court has long dealt with contested authenticity. What may change is frequency. What was once exceptional may become routine. Financial remedy practitioners should expect greater scrutiny of digital evidence and be prepared to respond.

Professional responsibility does not shift

Against this background, it would be unrealistic to treat AI as something that can simply be excluded from practice. It

is already part of the professional environment. It influences how clients behave, how work is carried out and what risks arise. The more constructive question is how to use it in a way that strengthens practice rather than undermines it.

The starting point must be that professional responsibility does not shift. The Solicitors Regulation Authority's Standards and Regulations 2019 require solicitors to act with integrity, to uphold public trust and to provide a competent service. Those duties apply regardless of the tools used. AI does not dilute them. If anything, it heightens the need for active supervision and verification.

Firms should consider clear policies on the use of generative systems. Practitioners should be trained in their known failure modes, particularly the risk of hallucination and fabricated citation. Where AI is used to assist with drafting, its outputs should be treated as a first draft requiring careful review, not as a finished product.

Confidentiality and data protection also require active thought. Placing client information into publicly available systems without understanding how that information is stored or used creates obvious risk, not least the inadvertent waiving of legal advice privilege or litigation privilege. In financial remedy cases, where the information involved is often commercially sensitive and deeply personal, casual use is unlikely to be defensible.

A distinction worth drawing

It is helpful to distinguish between general generative tools and technology designed around legal workflows.

General systems are trained to produce fluent language across a vast range of topics. They are not trained to be correct in any specific jurisdiction. They do not understand professional duties. They optimise for plausibility rather than accuracy.

Technology designed specifically for legal workflows can be built differently. It can be constrained to defined processes. It can remain anchored to client supplied information and source documents. It can be transparent about what it has done. It can be designed to avoid the invention of legal authority and to support lawyers in meeting professional obligations rather than tempting them into shortcuts.

That distinction is not simply technical. It is about how technology fits within professional responsibility.

It is in that context that Nova sits.

Nova is a legal services technology platform developed in collaboration with practising family lawyers and academic partners. Nova Engage¹ is an AI-assisted client onboarding system designed for family law professionals. It is not intended to generate legal argument or replace professional judgement. Its focus is on improving the quality of information available at the earliest stage of a matter.

That focus is significant in financial remedy practice. The first meeting often determines the trajectory of the case. If the client arrives with only a partial understanding of their financial position, the meeting becomes an exercise in reconstruction. If key documents are missing, advice is heavily caveated. If important facts emerge later, strategy shifts and risk increases.

Structured onboarding can assist clients to assemble relevant information before the first consultation. Nova Engage guides them through the disclosure landscape in a

systematic way. It can create a clear digital record of what has been provided. For the solicitor, using Nova Engage allows the first meeting to focus on analysis, options and strategy rather than basic information gathering.

There is also a risk management dimension. Early structured information can help identify jurisdictional issues, safeguarding concerns or complex asset structures requiring specialist input. It can assist with supervision and file review. It can support more accurate scoping of work and more realistic fee estimates.

Importantly, systems such as Nova Engage are designed around the information provided by the client. They are not large language models generating free form legal propositions. They do not hallucinate authorities. They operate within defined pathways intended to support, not replace, the professional.

Client expectations in the age of artificial intelligence

There is another practical reality. Many clients now consult generative tools before speaking to a solicitor. Some arrive with a confident narrative about what they are entitled to that has no foundation in law. Others rely on explanations that sound plausible but are inaccurate.

The judicial warning about plausible but incorrect content therefore applies not only to lawyers, but also to the information environment surrounding every case. Practitioners may increasingly find themselves correcting AI-generated misunderstandings at the outset of a retainer.

Structured digital engagement can help to reset expectations. By guiding clients through a process focused on their actual circumstances and documentation, it shifts the emphasis from generic answers to bespoke advice. It reinforces the message that accurate advice depends on accurate information. Used properly, it can improve the quality of the first meeting and reduce misunderstandings later.

Authenticity, supervision and governance

As AI becomes embedded in legal culture, authenticity disputes are likely to increase where digital material is central. Practitioners should consider routine steps to

preserve provenance, including requesting original files and retaining metadata where relevant. Where authenticity is seriously in issue, early consideration of expert forensic input may be appropriate.

At firm level, governance matters. Supervision cannot be passive. If junior lawyers or paralegals are using generative tools, supervisors must understand how and when. Signing off work that contains AI-generated content without verification exposes both individual and firm to risk. The Divisional Court's message was clear: the duty to check is not optional.

Opportunity alongside risk

It would be easy to end this discussion with a list of cautions. That would miss the opportunity. AI, used thoughtfully, can improve preparation, reduce administrative burden and allow lawyers to focus more fully on the human aspects of financial remedy work.

If structured systems can ensure that initial information is more complete, meetings can become more analytical and less interrogative. If routine drafting is assisted but carefully checked, time can be redeployed to negotiation and strategy. If digital engagement improves client understanding at the outset, mismatched expectations may reduce.

The profession should not be complacent. The risks identified by the Divisional Court are real. Fabricated authorities are not an abstract possibility. Synthetic evidence is not science fiction. But neither should practitioners assume that the only safe response is abstention.

Financial remedy practice is built on trust, accuracy and professional judgement. AI does not alter those foundations. It does, however, require us to be deliberate about how we build on them.

Used without verification, it will undermine practice. Used within clear professional boundaries, it can strengthen it. The responsibility for choosing which path we take rests, as it always has, with us.

Notes

- 1 Nova Law Limited, product information relating to Nova Engage is available at <https://novaforlawyers.novalaw.co.uk/>

Important Recent Case Developments

Mid-January 2026 to end April 2026

Professor Polly Morgan

Case Editor, Professor of Family Law,
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These are the noteworthy case law developments since the last issue went to press in March 2026. Not all of them are citable as precedent, but they are all informative and a good demonstration of the cases being heard up and down the country.

Non-compliance

Looking through our case summaries from the first part of this year, the number of reported cases where an issue is non-disclosure, litigation misconduct or some other form of non-compliance is regrettably high. There are a couple that bear reading: the Court of Appeal decision in *De La Sala & Anor v De La Sala & Ors* [2026] EWCA Civ 282, the case in which the wife's mother gave significant money to the husband on the basis that they did not benefit the wife, and his subsequent non-disclosure of the gift; and *MK v SK* [2026] EWFC 28, an unsatisfying case in which Peel J met the wife's needs against a background of non-disclosure by the husband.

We shall turn instead to two different situations: matrimonialisation or otherwise of pensions; and the effect, if any, of errors in the final divorce order.

Standish and pensions

In *BS v HC* [2026] EWFC 20 (B), HHJ Hess considered

whether pensions were subject to matrimonialisation. The parties had agreed that the sharing principle applied to their other assets, but did not agree on the application of the principle to the husband's pensions of over £3m or the wife's modest pensions of £35,000.

The single joint expert had calculated the relevant apportionments for the duration of the marriage, including premarital cohabitation, on three different bases broadly similar to those set out at pages 72 and 73 of the second edition of the *Guide to the Treatment of Pensions on Divorce* (PAG2). Inevitably, the parties disagreed on the correct approach to apportionment, with the husband arguing for an approach based on when the service that led to the pension accrual was performed by the husband, and the wife arguing that the court should consider that the husband, as CEO, had chosen to make very large payments towards the pension fund during the course of the marriage; this led to representations about passive and active growth. In the end, the judge concluded that 'In some cases one of the formulaic approaches might seem fairer, in other cases a different formulaic approach might seem fairer and in other cases a blend of approaches might be fairest' and that, per *Hart v Hart* [2017] EWCA Civ 1306, fairness had a broad horizon and fortuitously did not demand precise mathematical calculations.

On the wife's case, the husband's pensions were wholly matrimonialised notwithstanding that a proportion predated their cohabitation. Matrimonialisation per *Standish v Standish* [2025] UKSC 26 relies upon the parties having treated the asset as shared, over time. The husband argued that undrawn pensions cannot meet the *Standish* test: they have not been used or enjoyed by the parties. HHJ Hess disagreed, holding that while actual use and enjoyment were one example, 'a common intention to put the asset into use and enjoyment in the future could also in my view give rise to matrimonialisation if that intention was relied upon by the other party to his or her detriment'.

That, said the wife, was what had happened. She had taken a large inheritance and used it to buy a property in joint names on the husband's promise that they were to share everything equally during their marriage. Nevertheless, the judge found that the words used were not sufficient on the facts to matrimonialise the husband's pensions. Accordingly, a needs-based approach to pension sharing was taken. As the wife could not reasonably be expected to work, the appropriate pension share was premised on her drawing it immediately.

This judgment has been certified as citeable pursuant to the Practice Note (Citation of Cases: Restrictions and Rules) [2001] 1 WLR 1001 on the issues of pension apportionment and matrimonialisation.

Errors in a final divorce order

Labeja v The Estate of Shatochina Raisa Labeja & Anor [2026] EWFC 53 (B) is a decision of HHJ Farquhar about the courts' powers to set aside a 2014 decree absolute on the basis of fraud or procedural irregularity, and the courts' powers to rectify errors in the decree. It is not certified as citable, but is interesting nonetheless (and, of course, cites authorities on the issue).

The 'husband' claimed, after the death of the 'wife', that he had not known that he was divorced from her in 2014.

There was evidence of service, so his application to set aside the decree was dismissed and the court made findings of dishonesty against him.

However, a second issue was whether the decree absolute actually referred to the parties. The wife's name and the date of the marriage were both wrong. The name that was set out in the documentation clearly related to the wife, and the husband's name was correctly given. The petition had used both of the wife's name forms; only one appeared on the decree. The latter appeared to be a translation error, substituting the wife's date of birth for the date of the marriage. The court found on the balance of probabilities that the parties referred to in the divorce papers were in fact the husband and wife.

The husband argued that neither FPR 4.1(6) nor the inherent jurisdiction gave the court jurisdiction to rectify or amend a decree absolute to change the name of a party or

substitute a new party. The court held, applying *X v Y (Divorce: Rectification of Decrees)* [2020] EWHC 1116 (Fam), that it did have the jurisdiction under FPR 4.1(6) to correct the name and date.

Lastly, on the issue of whether the parties had been separated for 5 years, the ship had well and truly sailed. Perjury does not, by itself, make a divorce petition void, and the time for addressing the issue was back in 2014. Thereafter, the world is entitled to treat the decree as conclusive. While not binding on the court, the King's Proctor had noted, in declining an invitation to intervene, that to set aside an order made so long ago would be both extraordinary and 'almost entirely without precedent in the context of matrimonial proceedings'.

This article draws on the case summaries prepared by the FRJ summariser team. As ever, I am grateful to the team.

The Summary of the Summaries

Liam Kelly

Deans Court Chambers



***Kars v Brown & Ors* [2026] EWHC 31 (Fam) (Ms Naomi Davey, sitting as a deputy High Court Judge)**

A successful claim for reasonable financial provision, brought by a former wife under the Inheritance (Provision for Family and Dependents) Act 1975 following the death of her husband during live financial remedy proceedings. *Keywords: Inheritance Act*

***MM v FF (Maintenance: Scope of EU Withdrawal Agreement)* [2026] EWFC 1 (MacDonald J)**

Appeal against District Judge Devlin's dismissal of an application for child maintenance. MacDonald J examined the scope of the legal framework governing the application of Council Regulation (EC) No 4/2009, as well as the importance of rigorous case management and appropriate judicial conduct. *Keywords: child maintenance; Maintenance Regulation (EU)*

***LP v MP* [2026] EWFC 36 (Cusworth J)**

Having already been found to have committed personal misconduct during the relationship, costs of £275,000 were awarded against W on an indemnity basis after she was found guilty of significant litigation misconduct also. *Keywords: costs; litigation misconduct*

***Sloutsker v Sloutsker & Ors* [2025] EWFC 369 (Garrido J)**

Successful application by the wife for financial orders against the husband following issues of serious litigation misconduct, resulting trusts and pre-nuptial agreements. The husband was ordered to pay a lump sum of £25m, amongst other provision and around £1.02m in arrears relating to earlier maintenance pending suit and legal services payment orders. *Keywords: non-disclosure; pre-nuptial agreements; litigation misconduct*

***Re N (A Child) (Financial Provision: Contact Travel Costs)* [2026] EWFC 18 (B) (Deputy District Judge Vickers)**

Mother's application for financial support pursuant to Sch 1 Children Act 1989. She sought orders for periodical payments including backdated payments. Father sought reimbursement for various child-related expenses he had incurred and to offset that against her claim. *Keywords: Children Act 1989, Schedule 1 applications*

***BS v HC* [2026] EWFC 20 (B) (HHJ Hess)**

Final hearing in financial remedies proceedings. HHJ Hess considering questions of 'matrimonialisation' of H's pensions considering the decision in *Standish* and the extent to which they should be shared. This judgment has been certified as citeable pursuant to the Practice Note (Citation of Cases: Restrictions and Rules) [2001] 1 WLR 1001. *Keywords: pensions; matrimonial and non-matrimonial property*

***TY v XA (No 4)* [2025] EWFC 488 (Cusworth J)**

Protracted litigation in and about financial remedy proceedings. H's non-compliance. Enforcement of previous orders pending permission to appeal application. Numerous enforcement and protective orders made given the husband's obstructive approach. *Keywords: enforcement; legal services payment order*

***DR v ES & Ors (Further LSPO Application)* [2026] EWFC 15 (MacDonald J)**

Hearing of W's fourth legal services payment order application in long running financial remedies proceedings. MacDonald J dealt with questions of historic and future costs in circumstances where W had overspent on the budget set by a previous legal services payment order. *Keywords: legal services payment orders*

***MK v SK* [2026] EWFC 28 (Peel J)**

Final hearing in financial remedy proceedings with findings of non-disclosure (including trust assets) against H, which helpfully summarises the law as to non-disclosure and the court's approach to trusts. Final orders determined with reference to W's needs. *Keywords: trusts; valuations; non-disclosure*

***AO v EO* [2026] EWFC 30 (B) (HHJ Hess)**

Judgment in financial remedy proceedings, addressing habitual residence and forum conveniens where the parties had competing connections to England and Nigeria. *Keywords: jurisdiction; Heman; forum conveniens; habitual residence*

***Collardeau v Fuchs (Contempt of Court: Sentencing)* [2026] EWFC 44 (Poole J)**

Ms Collardeau's application seeking the committal of Mr Fuchs, for contempt of court. No separate penalty for contempt was ordered, but a costs order was made against Mr Fuchs, summarily assessed at £100,000 inclusive of VAT. *Keywords: contempt; enforcement; variation*

***BY v GC (No 3: Costs)* [2026] EWFC 50 (Nicholas Allen KC, sitting as a deputy High Court judge)**

Costs hearing in financial remedy proceedings. W sought recovery from H of legal costs across a range of categories, including those of defending a *Daniels v Walker* application by H, of £621,000. A costs order of £79,000 made. *Keywords: costs; disclosure; Daniels v Walker application*

***XX v GH (Legal Services Act 2007 Exemption)* [2026] EWFC 51 (B) (HHJ Farquhar)**

Following the decision in *Mazur & Anor v Charles Russell Speechlys LLP* [2025] EWHC 2341 (KB), the Family Court refused an application to permit a chartered legal executive to conduct litigation under the Legal Services Act 2007. Exemption from the statutory scheme should be granted only in exceptional circumstances and none arose in this case. *Keywords: Mazur; professional ethics*

***Labeja v The Estate of Shatochina Raisa Labeja & Anor* [2026] EWFC 53 (B) (HHJ Farquhar)**

An application by H to set aside decree absolute made in 2014 on the basis of fraud and/or procedural irregularity, dismissed. The court also considers the power to rectify

errors in a decree absolute. *Keywords: divorce orders (setting aside); divorce orders (out of time)*

***Kay v Martineau Johnson (a Firm)* [2026] EWCA Civ 224 (Newey, Males and Lewis LJ)**

The Court of Appeal held that a professional negligence claim arising from advice given in financial remedy proceedings was statute barred under s 14A Limitation Act 1980. *Keywords: professional negligence; non-disclosure*

***Archer v Archer & Ors* [2026] EWHC 468 (Fam) (Henke J)**

Appeal from finding that an estoppel had arisen in favour of the intervenors to financial remedy proceedings. Henke J held that the trial judge failed to properly consider nature of assurances relied upon and had not adequately explained his findings. Consideration of law relating to appeals out of time. *Keywords: appeals out of time; proprietary estoppel; intervenors*

***MA v WK* [2025] EWFC 499 (Cusworth J)**

Can a non-marriage entered into in England and Wales obtain validity by being registered in a country which permits Nikkah marriage, so that it is recognised in England and Wales as a valid foreign marriage? The answer is 'no'. The *lex loci* of the marriage is determinative. *Keywords: lex loci celebrationis*

***De La Sala & Anor v De La Sala & Ors* [2026] EWCA Civ 282 (Moynlan, Andrews and Nugee LJ)**

The Court of Appeal dismissed two appeals from a set-aside order made by HHJ Hess sitting as a deputy High Court Judge. The court considered issues of material non-disclosure by the husband, and whether gifts made by the wife's mother were conditional. *Keywords: gifts; non-disclosure; set-aside including Barber*

***Re A and Z: Service Out; MPS; LSPO* [2026] EWFC 64 (McKendrick J)**

Interim hearing addressing an application to set aside a previous order permitting alternative service of the divorce petition out of jurisdiction by email in the United States (set aside granted), alongside applications for maintenance pending suit and legal services payment orders. *Keywords: service; maintenance pending suit; legal services payment orders*

Interview with District Judge Lynda Ashworth

Helen Brander

Pump Court Chambers



District judges are unfairly seen by some as the worker bees of the judicial system. They make decisions every day that profoundly affect the lives and rights of people and entities that come before the courts. But their judgments are usually not citable, they do not make precedent, and thus the impact of their decision-making often goes unrecognised, save by those who work in the legal system.

In the Financial Remedies Court so much of the work is carried out by district judges. The effect of their work is life-changing. They deal with people at some of the most stressful points in their lives. The district judge needs to be sensitive to those issues; to listen to, understand, and assess a litigant's needs, motives and desires, and to reach a fair outcome.

As March 2026 drew to a close, the only district judge dealing purely with financial remedies in England and Wales, District Judge Lynda Ashworth, chose to take her well-deserved retirement, from full-time judicial work at least. Among the congratulatory messages sent when news of her retirement spread, were also messages of sorrow that her perspicacious decision-making would not be available to litigants in future.

I had the pleasure of interviewing her in late February about her life, practice and judicial career.

Tell me about you, your childhood, and your background.

I come from a very average background. My parents probably saw themselves as middle class. My dad was certainly middle class; my mum was not, she had quite a hard life. She's very bright, my mum. She came from a not well-off family. She passed her 11+ to go to grammar school, which she loved. In another era, she would have gone on to further education, she might have been me. She probably would have been a history teacher, I think, but there wasn't the money, so she did her O Levels and left school at 16.

My mum's from Rugby, my dad's a Yorkshireman from Hebden Bridge. My dad was doing an apprenticeship at Associated Electrical Industries (AEI) in Rugby. There was a grand lady called Mrs Arthur James – who was the late Queen Mother's godmother – who had a big house, Coton House, at the end of the road where my mum lived and the apprentices from AEI used to stay there. It was a condition they had to go to church on a Sunday where Mrs Arthur James played the organ and that's how my parents met. My mum was pregnant with me when they moved to Chippenham, which is near Bath, for my dad's work.

From 13 I went to the state grammar school for a year. It became a comprehensive and merged with the secondary modern.

Did you always want a career as a lawyer?

I can't tell you why I wanted to be a lawyer, but I knew from the age of 11. I was unshakable about it. We have no lawyers in our family, so I have no idea where that came from. I can't remember seeing anything on the telly that made me think that that was what I want to do, I just knew.

My parents didn't have a clue, bless them, and the careers advice that's available today just wasn't available. I remember we applied for the prospectus of every university in the country to see what they said we needed to do. My school said I needed to show I could think logically so I did maths, English literature and chemistry at A-level.

These weren't my best subjects. The result was that I didn't do very well. My predicted grades weren't very good. I didn't get any offers at university, so I went to Trent Polytechnic. In 1979, it was one of the best institutions in the country to do law. I did my degree and my Law Society finals there and I came back to Chippenham and did my articles with a local firm.

Trent Poly was more of a solicitor's institution than a barrister's institution. I don't think I really thought about it, but I wouldn't have had the confidence for the Bar.

So you did your Law Society finals and then went back to Chippenham and did articles.

I did my articles at a firm called Wood & Awdry. It was a small High Street practice – there were five partners (all men) and that was it – when I started there wasn't anybody else. At the end of my first year at poly, I wrote to all the law firms in Chippenham and asked if I could do some work experience. They were one of only two firms that bothered to reply.

When they took me on, they discovered I could type as I had taken myself off to night school when I was in sixth form and learned how to touch type. They used me as a

quasi-secretary. I also used to help in reception. At the end of the first year, they asked me back and towards the end of the second year, the second senior partner – he was a very austere man – said to me, ‘Well, I suppose you’ll be wanting articles now. We’ve never had an articulated clerk and I didn’t think we’re ever going to have one, especially not a woman’. After that, I kept going back and at the end of the third year they offered me articles.

You proved yourself then!

It was a family firm and of these five partners, the senior partner had been our MP and the second and third junior partners were from well-connected families, so they knew a lot of people. The work that we did was High Street work, but it was also sometimes quite high-powered for quite influential people, which you would never have thought if you saw this little, sleepy place.

I did my articles there and then they offered me a job which, once I’d started my articles, I think had always been the intention, because they wanted somebody to assist the partner doing family law. This was fine because it was family law that had interested me the most anyway.

What did you like so much about family law?

I just liked the maths, really. As I say I wasn’t *that* good at it, but I just liked the analysis. Although, of course, in those days it was different, it was all about reasonable needs – don’t forget this is all way before *White*. I also liked the human element of it, being able to help people.

It was primarily divorce and money. We got very few disputes about arrangements for children – people either worked it out amongst themselves or they didn’t pursue it.

Of course, money was reasonable needs in those days, there was no concept of ‘sharing’. You got the house, you got some maintenance, and that was it. I know *White v White* is what we remember but actually I think it was *Flick v Flick* that really started the ball rolling. The wife was married to a chap who was part of the family that owned Mercedes. Her argument was that she was only getting needs and he got to keep all his money.

White was a very good change in the law. When I do my FDR indications, I always make sure I stress that contributions – financial and non-financial – are absolutely equal. To do otherwise is wholly discriminatory.

Where are we now then? You are a very junior solicitor at Wood & Awdry.

After a year of being a qualified solicitor, I felt I really needed to move.

I then got a job in Bath with a firm called Stuart-Brown & Worboys in 1986. I became a partner there but it didn’t work out so I left.

In 1993 I went to work as an associate solicitor with a firm called Bobbetts Mackan in Bristol, which was a large inner-city firm with a family department. The partner in charge was a very good lawyer and she did a lot of care work as a guardian solicitor. I was there between 1993 and 1997 and then went back to Wood & Awdry.

I was at Wood & Awdry for another 10 years until I got appointed in 2008. I came in as an associate solicitor, not a partner – my one foray into partnership was not entirely successful and it didn’t really interest me, it wasn’t something that I wanted to do.

What made you want to become a judge?

I was appointed a part-time district judge in 2002. At 42, I had been working as a lawyer since 1983, when I started my articles, so for nearly 20 years. I wanted two things: to expand my horizons and do something different; and to give something back to my profession – that’s important to me.

I also did quite a lot of extracurricular work: I set up a young solicitors group in Bath; I was on the National Committee for Young Solicitors with the Law Society for several years; I was a committee member of the Legal Aid Practitioners Group; I was a council member for Bristol Law Society; I also did a year lecturing on the ILEX course for South Bristol College.

I got it the second time. If you got through the paper sift you were invited for interview. They gave you a scenario and you had to deliver a judgment based on it. There was no role-play, I just had about 20 minutes to write a judgment on a road traffic accident, then you deliver it and then the interviewers asked questions. And you squirm in your seat, it was very uncomfortable, because they really grill you! I remember it even now.

I had an informal mentor, a district judge called Gillian Stuart-Brown – the Stuart-Brown of Stuart-Brown & Worboys. She was so supportive, not only of me but of other local solicitors who wanted to become judges. There were four or five of us at the time, and I can’t tell you what an inspiration she was. I always thought she was a very good judge, she was so kind and supportive and really took an interest in me.

I was in the west country, I was born there and had no intention of moving. Gillian told me that as there were so few vacancies on the Western Circuit, I needed to widen my remit, so I applied for the London group and I got it. Actually, for me, that was the best thing that could have happened because I suffer terribly from nerves and imposter syndrome, like many of us. What helped me was it was so refreshing to be able to come up to London and make my mistakes in front of people who didn’t know me. I think that helped me in terms of developing a style and then I thought about becoming full-time.

Where did you sit when sitting in London as a DDJ?

I went all over. Willesden was my favourite court – they were so welcoming and supportive there of deputies. There was a circuit judge there called Peter Copley. He had his chambers set up like a dining room and all the deputies were always invited to have lunch up there, it was a three-line whip, you had to go. At that time the district judges were Morris, Steel, Dabezies and Cohen. It was a very welcoming place.

In 2007, after 6 years sitting part-time, I applied to become full-time. I was 48 when I was appointed. The application process took about 18 months.

I did that in the January and then in the July I got notified I had been successful. They wouldn’t then tell you where you were going for ages, even in October they hadn’t told us. I then went to do the course for my Section 8 ticket. There were about six of us that had been appointed on this course and none of us knew where we were going. Of those six, four were prepared to go anywhere and two were adamant that they were only going to the courts they wanted to go to and if they didn’t get them, they weren’t

going to take up the appointment. The thing was that in those days, there were four applicants for every one position. The accepted practice was that if you turned something down, you were really at risk of not being offered anything else and everybody knew of people that that had happened to. It took an enormous amount of chutzpah to say, 'if you don't give me what I want, I'm not doing it'. I wasn't in that position, I wanted to be a full-time judge, I'd had enough of private practice, so I was prepared to take anywhere.

I remember talking to my mentor about it. She asked me where I had applied to go and I said that I've ticked on the box anywhere in the south east and she said, 'Oh, for God's sake, Lynda, they'll give you Southend!'. I think she just used it as an example, like it was the end of the universe. I had no connection with Southend at all, I had never been to Essex!

And it was Southend! It then never crossed my mind to say 'no'. I relocated and signed up for 5 years (we all had to sign up for 5 years). I felt quite strongly, something to do with my sense of duty probably, that it was very unfair on the people in the court office if, the minute I got there, I was desperately trying to go somewhere else. I felt that having taken it, I owed it to them to make a success of it. That's why I stayed there until I came to London.

I had to be persuaded to come to London. It came about because Lynn Roberts, who was an amazing judge, was my DFJ. She saw me one day and said there was an expression of interest for judges who were experienced in financial remedy work to sit at the Central Family Court and she suggested I do it.

My circuit arranged for me to do 2 weeks every 3 months, they didn't want me to do a long stint.

The first case I ever did there was nearly the last – it was a long financial remedies case. Of course, when you're new there, everybody tries to test you, to see what they can get past you. I'm fully aware that there's something like the chambers totem, or the jungle drums, the text messages that go around, 'Do you know this judge?', 'What are they like?'

I found the first case I did very intimidating, but I kept going back and obviously I was doing alright. Martin O'Dwyer was extremely supportive of me, he was very, very helpful. After I had been going a couple of years, he kept saying to me, 'you need to come and sit here full time'. I just told him that I couldn't afford to live in London, that I didn't want to have to sell the flat in Southend.

I also thought it was too far to commute on a daily basis. To do it once a week, you could probably do it but not every single day. When I come in on a Monday from Southend, I get up at 5.45 and I catch a train at 6.45 and I'm here at my desk by 8.15 – so it's about an hour and a half each way, that's 3 hours a day.

That was why I said 'no' and then it all changed with COVID-19 because you couldn't go anywhere and you couldn't spend any money, so I managed to amass some savings. I was not entirely happy by then at Southend because I felt it was becoming very marginalised as a court. I came up to London to do some sitting and they asked me if I would consider moving here full-time. Lynn Roberts said that if I did, I could only do money. I thought about it and I thought, 'Well, why not – I'm getting near the end of my career, I've been in Southend a long time, I no longer owe them anything'.

What do you mean by marginalised?

When I started in Southend, the DCJ was based there, there were two other full-time judges and a judge who sat there 3 days a week and we regularly had circuit judges, it was a thriving court. Then all the admin, all the listing and everything was moved to Chelmsford. The DCJ retired, the new DCJ became peripatetic and so would visit but wasn't based with us and as the district judges retired, they weren't replaced. Ultimately, by the time I left, there were two of us and the visiting CJs. You just felt it was becoming subsumed by Chelmsford and we were just a satellite court.

When did you go full-time in London?

Three years ago, January 2023 – I've done just over 3 years.

So you stay up when you're in London?

Yes, I rent a flat. I jokingly say I pay to work, because I don't have much money left by the time I've paid for the rent. I'm not complaining, it was my choice. I knew when I took the job that I would have to fund my living arrangements here. For me, it was more the idea that I would be able to do just money, because that is my passion.

What were you doing before you were doing just money? The full range of DJ work?

Yes, the only thing that I've never done in sitting, although I did it in practice, is care. When I was appointed, you didn't automatically get a care ticket. I was offered one and I said 'no'. It never appealed to me.

I was doing personal injury; I was doing contract; I was doing insolvency, which I quite enjoyed and then they took away a lot of that jurisdiction. I did everything that the District Bench did. Obviously, financial remedy, children and the dreaded small claims.

Why dreaded?

Have you ever tried to decide who's fault a road traffic accident is while one person's telling you one thing and somebody else is telling you another?!

I really enjoyed doing housing law. I liked insolvency. I was quite good at both of those, which were areas of law I'd not had any practice in before.

What saddens me today is that the District Bench is becoming a reflection of the legal profession in that it is becoming very specialised. You hear of courts where people only want to do the area of law they did in practice or where the District Bench concentrates on civil and the Circuit Bench might do family law. Now, to me, that's not what the job is about. I can see that's where we're going, but one of the good things for me was that I felt that a lot of what I learned about housing and insolvency stood me in really good stead in terms of financial remedy work.

It would have been easy to try to do lists that were only family, but I used to make myself do lists I knew wouldn't be. It was the only way I'd get the experience, to get out of my comfort zone.

I've just done a case where it transpired that the husband was a discharged bankrupt. I asked him if he had disclosed his interest in the family house (which wasn't in his name, but it was accepted he was the beneficial owner) to the trustee in bankruptcy. He replied that he didn't know, so we had to adjourn to see if the trustee in bankruptcy

wanted to become involved. Even though he was discharged, it didn't mean the trustee didn't have an interest in it.

Things like that, just the mechanics of how things work. I think now there's tendency for judges to be more niche. Having said that, I'm niche now, but I did my dues!

So memorable cases. Have you got a few that stand out?

As a practitioner, I took a case to the Court of Appeal. It was all to do with whether care proceedings should be adjourned pending the outcome of criminal proceedings. There had been a Court of Appeal decision where it had been decided there were certain circumstances where you might be able to do that.

We were dealing with a case where both the mother and the father were being prosecuted in relation to sexual abuse of their children. Our criminal department were adamant the parents could not give evidence in the care proceedings before they gave evidence in the criminal proceedings. I used to do my own advocacy in those days, so I appeared before the circuit judge, argued it and lost. I asked for permission to appeal and was granted it.

We took it to appeal and Caroline Wright was instructed. The Court of Appeal tore her to shreds. It was one of the most awful days of my life as a practitioner. I can remember it now. They said we shouldn't have brought the case at all and it was outrageous. It was a legal aid case and so to be paid there needed to be 'legal aid taxation' as it was called in those days. It was Lady Justice Butler-Sloss and her parting words, when it came to costs, were something like 'I don't consider that the solicitors should get any money for this'. I walked around London for the rest of the day. I was so shocked, I really was.

We ended up having to have the bill taxed, so we sent it off and it came back with a note saying, 'in view of the court's comments, why should I assess your bill at all?'. I then had to come up for an appointment with the taxing master. He got very cross with me because I handed him a bundle and he said I should have sent it in advance. He then asked me why I took the case to the Court of Appeal and I told him that counsel had advised we should. He told me that I shouldn't have blindly followed counsel's advice. I told him that we hadn't, that we had a detailed consideration of it and an analysis. He then said, 'Well, I can't read all these papers now and I'm going on holiday. I'll call you and let you know the outcome'. I hate to say this, I was actually in tears.

Anyway, we didn't hear anything for about 3 months when our bill was taxed and paid in full. I felt absolutely vindicated, but it taught me a powerful lesson. I would hope that I have never treated anybody like that in court. I would hope that people in my courtroom get treated with respect and courtesy. I'd like to think that's one of my legacies.

Then another memorable case, also with Caroline. I used Caroline and Sue Jacklin KC a lot as counsel.

We acted for a man who had had his divorce done in the High Court. He hadn't attended the final hearing and, at the time, he had one of the highest lump sum orders made against him that had ever been made and he hadn't paid it. He had an order for costs made against him and the solicitor acting for the wife sent him the bill and invited him to come over from France, where he lived, to go through the bill with her at his offices. He accepted and when he arrived she had him arrested by the tipstaff.

Nobody batted an eyelid about that at the time. When I told this story a couple of years ago at the lunch table, there was at least one person who was appalled and thought that that was very bad conduct on behalf of the solicitor. So it just showed you how times change.

I got called out to the police station on a Saturday night by my criminal team saying this man was in the cells and could I do anything about it. The tipstaff took him up to the High Court on Monday and then they tried to find a judge who would deal with it. On the Wednesday it went back in front of Mr Justice Connell, the same judge who had dealt with the original divorce. Caroline Wright was amazing because our backs were really against the wall because this chap hadn't paid the money, he was bang to rights, he hadn't paid it. Caroline spotted the other side hadn't applied for a decree absolute so the order was unenforceable and they had to let him go.

Why it's memorable is because Mr Justice Connell said in his judgment, 'I recall at the time of my judgment, in the husband's absence, I made some fairly robust comments about him. I would like to say that now, having had the opportunity of seeing him and hearing the evidence, I don't change my view.'

That was a good one to win, but that was Caroline though, not me.

Have you published many judgments?

A few. *B v M* is the big one because that's the one that was reported and picked up by the newsletter. Then in the days when we were still doing the acronyms, there was *R v NG* which is about the Married Women's Property Act. I published that one because it was said to me there weren't many cases about it.

I published one about LASPO and Schedule 1 payments, it was for costs funding under Schedule 1. Interestingly, Mr Justice Peel didn't agree with me because he gave a decision last year which was contrary to mine. My decision was that you could hear an application for a LASPO after the proceedings have concluded if it was made before they had concluded. Mr Justice Peel said that once the financial proceedings are ended, that's it.

I also published one on a combined preliminary issue and final hearing and one on a PNA last week.

How much hassle is it to do written judgments? Do you do those?

I find it helps to marshal my thoughts if I have it down in writing, it helps me to have a structure. Anybody who looks at my judgments will know that they're all the same structure. It helps me to focus on the issues.

I do give *extempore* judgments, but if I'm dealing with a final hearing, it's usual that I've written it. Sometimes I'll read them out and sometimes I'll send them out. For me it's just the way I am. I think that comes from being a solicitor.

If I've got litigants in person I tend to read them out, because I think if they just get it sent to them, then it's difficult for them to follow.

I did one several years ago in a very difficult case. I had three litigants in person and I actually took a leaf from the book of the care judges and I did a summary of what the written judgment said.

Aside from that, as a judge, you've also been a judge trainer. How long have you done that for?

About 11 years. I started off as a tutor and I tutored at the Judicial College on financial remedies and private children. And then, when I became course director, I was largely responsible for the financial remedies courses.

How much hard work is it organising those courses?

It goes again to giving something back and also it's a change from the day job. That was one of the reasons I wanted to do tutoring, it was just something a bit different. I liked teaching and I still do, I like to impart knowledge. I am passionate about my subject and if I can explain something or give advice about how to do things, I really like doing that.

I really enjoyed the tutoring. Of course, the thing I'm really proud of is the financial remedies course, I am exceptionally proud of that.

Are you still involved in that?

No, times change and people move on and it would not be right to be involved.

I felt for a long time that financial remedies work was underrepresented at the Judicial College. When they decided that they wanted to have some kind of induction course, I was delighted and very pleased to be able to design it.

I should say that Judith Crisp helped a lot, she prepared all the syndicate questions. I couldn't have done it without her. She's also a really good sounding board, so I don't want to take all the credit for it because she definitely was a big part of it. Mark Haigh and Robert Prigg were also a great support. If you needed a speaker or you needed somebody to do something, people would deliver for you. It was a real team effort.

I knew what I wanted to deliver. I wanted to do a course that took people through an FDR because that was where non-money practitioners were struggling, they couldn't quite understand the concept of it so that's why that course has a whole afternoon just dealing with the FDR.

I was really taken aback by the response it got the first time we ran it, I was quite amazed actually. It has stood the test of time.

FDRs have to be good. People need to hear it from a judge who needs to be robust about it but in a kind way. It's no good telling somebody they haven't got a hope in hell. You've got to persuade them that it's the right thing to do in just one hearing. Sometimes the cases that you think are the ones that won't settle, do. I had two a couple of weeks ago – one of them was very difficult, I didn't think it would settle and it did; the other one, a long marriage, plenty of money, should have been straightforward 50/50 and that didn't settle.

How can the justice system be improved? Where do you start? More money?

That's never going to happen is it? But that's what's really needed – investment in judges and judicial time.

Has the cut in sitting days for the FRC affected you?

Yes. FRC work at Central London is always over-listed on the basis that cases come out. Occasionally you'd be fortunate

and you'd get a bit of breathing space if enough cases come out that they couldn't fill the gaps, which would leave you time to do the admin and the referrals, which are incessant, they don't stop throughout the day.

I'd say two things really: first of all, the ability to carve some time in the day has gone because your lists are less likely go short; and, secondly, because of the fewer number of judges, the full-timers are getting far more referrals because they're having to be dealt with by a smaller number of people.

Also having to manage people's expectations in terms of them having had their cases stood down. Sometimes it is lack of judicial availability. But sometimes it is for other reasons. I got a transcript this afternoon where the parties turned up and it was quite clear that the time estimate was woeful so it had to be relisted. I can't imagine how frustrating it must be for parties who've geared themselves up to have this day and then suddenly it's taken away.

If they then can't afford to set up an arbitration immediately, or they don't want to arbitrate as they want a judge, they feel like the justice system has let them down.

I think that in one respect, having private FDRs and arbitration is a good thing, it does take the pressure off the system. But on the other hand, there's a danger that you're creating a two-tier justice system where those who can afford to opt-out and those that can't afford to have to remain within the system.

Part of the problem now, of course, is that the reduction of sitting days means that the system is under incredible pressure, so people are having to wait long periods of time for hearings. Of course that plays into the hands of those litigants who don't want to cooperate or to provide disclosure or documents.

And trying to get urgent dates ...

Well you can't. The number of applications you see now for enforcement in terms of where there's an order to sell a property and somebody's not cooperating and they've got an offer, or there's a mortgage offer and they desperately want a hearing and we just can't accommodate it. You sympathise with these people but there's nothing that you can do about it.

However, there's no point complaining about it because we're not going to get any more funding, so we've got to find a way to deal with it. For me, that probably means more effective, proactive case management. I would say for practitioners, it means more realistic time estimates for cases.

Which means what?

Well, a realistic time estimate should always allow for judicial reading or judicial consideration at the end of the day.

I'm afraid there are still some practitioners who think it's alright if you have 2½ days of evidence and submissions and you finish the submissions at 13.00 on the third day and at 14.00 the judge delivers their judgment.

We are now starting to try and get trial templates put into orders so that everybody can be very clear about what's required.

The point is if there are more realistic time estimates, fewer trials will be vacated. It is things like that, making sure that there's efficient use of judicial time.

Another area of concern is questionnaires. The amount

of time we have to spend going through them. Personally, I think questionnaires are becoming wholly disproportionate to the issues in a large number of cases. You're being asked for questionnaires and then schedules of deficiencies and then schedules of deficiencies to replies to deficiencies and further questionnaires ... you just get to a point and say, 'Stop, where is this all going?'

I think there's a tendency to forget that it's for a party to prove their case. If somebody says that they're ill and they can't work, it's up to them to prove it and if they don't provide the evidence, that's their problem.

When I'm going through a questionnaire with a red pen I say to litigants 'I'm looking at what questions are going to help me deal with this as the judge at final hearing'. Do I really want to know what somebody's engagement ring is worth? No. If you want to know what the value of a car is, get them to give you the number plate and put it into We Buy Any Car. I'm not interested in why you spend £50 or £500 a month on going to the beauticians because, at the end of the day, it will be my decision as to what's a reasonable level of expenditure for you. I'm also not interested in 'Do you have any other bank accounts anywhere in the world that you haven't disclosed?' because the question is asked and answered by the Form E.

There comes a time when I think you just have to say, 'I'm going to ask the court to draw adverse inferences as to what you've got and you might find that the court thinks you've got more than you actually have'.

The other thing I say is don't complain if the answer to the question is not what you expect it to be. You get that a lot of the time. They've answered the question and you don't like it, that's not a deficiency.

When do you last sit?

Friday, 13 March. I'd already booked 2 weeks leave off for the last 2 weeks. My final day is therefore 31 March, but I'm not listed that day. On 30 March I'll probably hand down judgment on the case I heard this morning.

And then?

I'm relocating back from Southend to the west country to be near my family. My dad is 90 and my mum is 89.

I don't have any immediate plans. I decided I wasn't going to book a big holiday but I'm going on a trip to Malta in May. I do like to travel, but I thought I'll just see how things go and just get used to not working. Just some me time, really.

Are you going to do some part-time sitting?

I have applied to sit in retirement. This is the funny thing, because we didn't hear anything for months. Eventually Edward Hess contacted them. They replied saying, 'oh, really sorry, we found her email in our junk mail'. I haven't heard back yet.

What are you going to do for fun?

I live in a flat so, as and when I move, I want a garden. I used to have a garden years ago when I lived in Chippenham, it was lovely garden, but I was too busy to look after it. My parents are very keen gardeners.

I want to start doing more cooking again. I like baking bread so I'm quite looking forward to doing more of that.

Reading for pleasure. My favourite books are *Bleak House* and *To Kill a Mockingbird*. I do like to read, I like classics.

Walking, enjoying life, going to cinema. I'm a big film fan. My favourite movie is *Gone with the Wind*. I very much like 1940s and 1950s black and white films. I'm very into the golden age of cinema – Bette Davis, Humphrey Bogart, Cary Grant – films like that.

You've chosen to retire now, haven't you? It's not that you are obliged to.

No but I think the time is right. I'm a big believer that nobody's indispensable. Time moves on, you know.

I was going to retire last March but Edward Hess asked me if I would consider staying, and I said that I would because we'd lost Jane Evans-Gordon and it was going to leave a big hole.

It's interesting that I didn't have much trouble making that decision, so I knew that I wasn't ready to go, actually, but now I am. The thing is, when you have good days, it's the best job. When it goes right, when somebody sends you a lovely email saying thank you so much for something that you did.

Years ago, I did a telephone hearing in Southend. The husband hadn't paid the lump sum he'd been ordered to. There had been an appeal – I had the judgment of the judge who dealt with the first hearing and the appeal decision. It was an application to enforce. He attended on the line with counsel who hadn't been involved in the appeal who tried to run an argument that was totally contrary to what was said in the appeal. I was able to say 'you can't say that as you've argued something else in your appeal'. They went off to think about it for 5 minutes and when they came back the husband agreed to pay the money owing to the wife. Her counsel sent me a really lovely email saying that her client was just so grateful and that she felt that other judges wouldn't have taken the time to have read into it to that extent. To me, that's part of the job but I accept there is lot of time pressure.

I like to think that I have a reputation for having read things. I can only speak for myself but I don't like not being sure of what I'm doing. It's all to do with wanting to do the best you can for people. However, everybody prepares for and deals with cases in their own way.

At the end of the day, I have to go home and look in the mirror and know that I did the best I could. That's what's important to me, to know that I made the best decision I could in that case based on the information I had. I think if you know that you've done the best you can, you can't be criticised. Nobody gets it right all the time, do they?

Martin O'Dwyer once said to me that only a judge who plays it safe will never get appealed. It was a good point. Sometimes you've just got to make a decision. Appeals do not concern me. I was told many years ago, and it's good advice, that if you're right, you'll be upheld and if you're wrong, you'll know not to do it again.

Lynda, thank you. On behalf of everyone I wish you a long and happy retirement.

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