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FINANCIAL REMEDIES JOURNAL

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Duncan Brooks KC

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Professor Emma Hitchings, Caroline Bryson and Professor Gillian Douglas

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Chair's Column

HHJ Edward Hess

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

The *Financial Remedies Journal* now enters its third year, and this edition is fizzing with interesting comments and ideas.

Transparency and the FRC Pilot

One of the issues of the moment for family lawyers is the extent to which the press should be able to identify in public the names of parties involved in financial remedies disputes and make public otherwise private information. The analysis in the *Final Report of the Financial Remedies Sub-Group of the Transparency Implementation Group* published in May 2023 showed that a strong 75% of those responding, a good cross section of interested people, thought that parties should be able to retain their anonymity, and the recommendations of that report, including in relation to anonymity, have found their way into the *Transparency Reporting Pilot for Financial Remedy Proceedings* issued by the President in December 2023, which formally commenced in London, Birmingham and Leeds on 29 January 2024. Yet there is an alternative view of this, which is articulated by Sir James Munby in his forceful contribution to this edition of the FRJ, 'Groundhog Day Again: A Response to the Transparency Reporting Pilot for Financial Remedy Proceedings'. Sir James comments favourably on Peel J's words in *Tsvetkov v Khayrova* [2023] EWFC 130 where he said: 'All that said, whether the starting point is as per the long established practice (i.e. non reportability unless the judge orders otherwise) or as per the thesis of Mostyn J (ability to report unless prohibited by the court), if the court is considering whether to permit or prohibit (as the case may be) reporting, it will need to carry out the *Re S* balancing exercise'; but (despite this) Sir James concludes: 'I end by asking, as I must, why the Guidance – so admirable in other ways – seemingly embraces what I worry will in reality prove to be wholesale, routine, near-automatic anonymity.' Those interested in this subject will no doubt continue to watch the debate as it develops through the pilot. All of the above documents are available to read, all free of charge, on the FRJ website.

Legal costs

There are all too many recent judicial pronouncements on the issue of parties incurring scandalously high costs in financial remedies proceedings. As Mostyn J said in *Xanthopoulos*: 'In my opinion the Lord Chancellor should consider whether statutory measures could be introduced which limit the scale and rate of costs run up in these cases. Alternatively, the matter should be considered further by the Family Procedure Rule Committee. Either way, steps must be taken.' In the FRJ interview with Sir Matthew Thorpe, at [2023] 1 FRJ 72, he said on the subject of costs: 'I think they're totally shocking. You know Margaret Booth, a very long time ago … said this is a scandal … And everybody's had a go since. James Munby fulminated about it and didn't make any difference. Nicholas Mostyn has now said the government should do something about it. And actually I rather agree, but I think the problem is that those on the bench who try and make the case they're all poachers turned gamekeeper … It seems to be an ill for which there is no cure.' I therefore commend 'Costs' by Joe Rainer in this edition of the FRJ as a carefully thought through proposal for trying to tackle this problem – for once an answer promoted by a poacher rather than a gamekeeper!

QLRs

For many years we awaited government action on the very difficult area of the cross-examination in court by one litigant-in-person of another litigant-in-person where domestic abuse issues arise in financial remedies proceedings. The invention of the 'Qualified Legal Representative' (QLR) was the government's answer to this problem. The judgment by Recorder Taylor in *AXA v BYB (QLR Financial Remedies)* [2023] EWFC 251 (B) is essential reading for anybody wishing to understand how the QLR process works. The judgment is now followed by the excellent article in this edition by Adrian Barnett-Thoung-Holland and Alice Thornton, 'Qualified Legal Representatives in Financial Remedy Proceedings'. Absent some governmental change of direction on legal aid (which seems unlikely) it may be that QLRs are the least bad option available for dealing with this problem, but that the system comes with some significant problems attached is very apparent from a reading of this article. Not the least of the problems, of course, is finding counsel willing to perform the task for the money on offer.

FRC valete

In this edition the financial remedies world says farewell to Hilary Woodward, the extremely patient and hard-working force behind the Pension Advisory Group – both PAG1 and PAG2. After nearly a decade of both inspiring and coordinating the entirely necessary and successful campaign to persuade divorcing couples to share their pension funds fairly and properly, Hilary has now elected to spend more time with her own pension (not to mention her husband, grandchildren, tennis racquet, Tai Chi activities and garden). I would wish to draw attention to the farewell interview with her in this edition and to thank her hugely and affectionately for the tremendous job she has done and wish her well for the future. As she would entirely acknowledge, there is more work to be done in this area (any doubts about this can be dispelled by studying '*Fair Shares* and the Financial Reality of the "Everyday" Divorce' by Professor Emma Hitchings, Caroline Bryson and Professor Gillian Douglas in this edition). Hilary's retirement, of course, leaves a gap for an aspirant coordinator of PAG3 – but for those who have toiled for more than a few years on PAG1 and 2, maybe not very soon!

Businesses in Financial Remedy Claims

Duncan Brooks KC

QEB

'Business' is a term that covers a multitude of different structures. The most common are limited companies (whether public or private), partnerships and sole traders. There is obviously a big difference between a multinational PLC and a sole-trading plumber. The courts will treat different businesses in different ways.

This article is structured into two parts. The first considers how businesses are approached at a final hearing. The second deals with case management considerations.

Part 1: How businesses are approached at final hearing

The court has to establish the value of the parties' interests in the business ('computation') and then consider how that value should feature within the outcome of the case ('distribution').

Computation

The court will need to make a finding about the value of the business. In many cases, it will be necessary to have expert input – this is considered in further detail under the heading 'Part 2: Case management' below.

The best starting point is Peel J's summary of the law in the recent case of *HO v TL* [2023] EWFC 215:

> '21. First, it is for the court to determine the value, not the expert.

22. Second, valuations of private companies can be fragile and uncertain. In *Versteegh v Versteegh* [2018] EWCA Civ 1050 Lewison LJ said at para 185:

> "The valuation of private companies is a matter of no little difficulty. In *H v H* [2008] EWHC 935 (Fam), [2008] 2 FLR 2092 Moylan J said at [5] that 'valuations of shares in private companies are among the most fragile valuations which can be obtained.' The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap-shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect: see *A v A* [2004] EWHC 2818 (Fam), [2006] 2 FLR 115 at [61] – [62]; *D v D* [2007] EWHC 278 (Fam) (both decisions of Charles J)."

23. Third, I suggest that the reliability of a valuation will depend on a number of factors such as:

> "(i) whether there are applicable comparables, (ii) how 'niche' the business is, (iii) whether the business is to be valued on a net asset basis (for example a property company) or one of the recognised income approaches (such as EBITDA or DCF), (iv) the extent of the parties' interests, and accordingly their level of control, (v) the extent of third party interests, (vi) the relevance of any shareholders' agreements, (vii) whether there is a realistic market for sale, (viii) the volatility or otherwise of the figures, (ix) the reliability of forecasts, and (x) whether the assumptions underpinning the valuation are seriously in dispute."

24. Fourth, in practice the choices for the court will be, per Moylan LJ in *Martin v Martin* [2018] EWCA Civ 2866 at para 93: (i) "fix" a value; (ii) order the asset to be sold; and iii) divide the asset in specie. The latter option (divide the aspect in specie) is commonly referred to as Wells sharing (*Wells v Wells* [2002] EWCA Civ 476).

25. Fifth, whether a business should be retained by one party, or sold, or divided in specie will depend on the facts of each case. Relevant features will include whether the business was founded during the marriage or pre-owned, whether it has its origins in one party's nonmarital wealth, whether the parties were both involved in its strategy and operation, the ownership structure of the business, whether Wells sharing is practical or realistic given that it will usually continue to tie the parties together to some extent, and how to ensure a fair allocation of all the resources in any given case.

26. Sixth, as was pointed out in *Wells* (supra), *Versteegh* (supra) and *Martin* (supra), there is a difference in quality between copper-bottomed assets and illiquid/risk-laden assets. As Moylan said LJ at para 93 of *Martin* (supra):

> "The court has to assess the weight which can be

> placed on the value even when using a fixed value for the purpose of determining the award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties' assets by application of the sharing principle also effect a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge".

27. Seventh, when deciding how to reflect the illiquidity or risk in a private company, the court has three choices:

> "i) The business valuation may incorporate a discount for factors such as lack of control, lack of marketability, and lack of risk. This is particularly common where a party has a minority holding, or otherwise does not have overall control, and there are relevant third-party interests. In such circumstances, the court may simply adopt the business valuation as reflecting these matters. This I term an 'accountancy discount'.
>
> ii) To step back when conducting the s25 exercise and, in the exercise of its discretion, to allocate the resources in such a way as to reflect illiquidity and risk. Conventionally, that would be to allocate to the party retaining the business a greater share of the overall assets to provide a fair balance. As Bodey J said in *Chai v Peng and Others* [2017] EWHC 792 (Fam) at para 140:
>
> > 'It is a familiar approach to depart from equality of outcome where one party (usually the wife) is to receive cash, while the other party (usually the husband) is to retain the illiquid business assets with all the risks (and possible advantages) involved'.
>
> It will be for the court to determine whether, and to what extent, to reflect this aspect in what might be a termed a 'court discount'. Of particular relevance, it seems to me, is whether the illiquid (or less liquid) business represents the principal asset in the case, in which event the distinction between liquid/illiquid assets may be sharper and require particular attention, or whether it is a relatively modest part of the overall assets.
>
> iii) The court might, in the right case, take both the valuation, which includes an accountancy discount, and apply a further court discount i.e. an amalgam of (i) and (ii). Moylan LJ in *Martin* (supra) at para 94 considered that this would not be double counting: '… this is not … to take realisation difficulties into account twice'. It will all depend on the case. If, for example, the accountancy valuation includes a discount for a minority holding, but it is clear that there is no possibility of realisation of interest in the future by sale or otherwise, it seems to me that it would not be unfair to further take that factor into account when allocating assets."'

Issue 1: Does the business have a value at all?

The first question is whether the business has a realisable capital value (and, if so, when), or whether it is simply a vehicle for an income stream. Most (but not all) sole-trader businesses and service companies (which are usually just vehicles for tax-efficient income generation) are worth nothing more than the net assets on the balance sheet.

This observation is not limited to small service companies or self-employed individuals. A recent example is the decision of HHJ Hess (sItting as a Deputy High Court Judge) in *CG v SG* [2023] EWHC 942 (Fam). The business in question was a limited partnership providing professional services in the financial advisory sector. There was a working capital base, but 100% of the profits were distributed to the partners at the end of each financial year. Turnover represented retainers (which represented a break-even figure) and success fees. Importantly, this was a 'singleton' business dependent on the husband's continued involvement. The husband was entitled to 95% of the profits and 90% of the revenue was generated by the husband. Any purchaser would require onerous tie-in obligations contingent on future performance. Both parties were given permission to rely on *Daniels v Walker* experts, and the single joint expert (SJE) was not called to give evidence.

To show the range of opinions with which HHJ Hess was faced, the SJE had valued the husband's shareholding at £8,750,000 (EBITDA of £1,067,000 x 2.5 plus surplus working capital). The wife's expert valued the business at £18,850,000 (EBITDA of £2,700,000 x 5.5 plus surplus cash). The husband's expert's opinion was that the value of the business was £2,633,000 representing the distributable profits held by the partnership. There was no meaningful EBITDA separate from the husband's own earnings, that the multipliers were too high, and that there was no meaningful surplus capital.

HHJ Hess agreed with the husband's expert. The husband's future earnings would not fall to be shared (following *Waggott v Waggott* [2018] EWCA Civ 727). Also of interest is the fact that, despite the husband beating his open offer, there was no order as to costs. HHJ Hess held that the test is not whether a party has beaten their offer, but whether a party has litigated unreasonably. It was not unreasonable on the facts of that case for the wife to have relied on her expert's opinion at the final hearing.

Issue 2: Double counting capital value and income stream

If a business is valued on an earnings basis and the recipient is receiving maintenance from that income, then there is a risk of double counting. See:

- *V v V (Financial Relief)* [2005] 2 FLR 697, where Coleridge J said the following about an optician's business owned by the husband:

> '[28] … There can, of course, be no hard and fast rule in relation to the extent to which the capital value of businesses are or are not brought into account but where (as here) there is no real value except as an income stream, to include it in circumstances where there is no suggestion that there should be a clean break, runs the serious risk, in my judgment, of double counting. I consider that the proper approach in a case of this kind is for the court to treat such business assets as primarily a secure income of the parties, from

> which there has to be a substantive and unlimited order for periodical payments.'

- *Smith v Smith* [2007] EWCA Civ 454, [2007] 2 FLR 1103, where Coleridge J (sitting in the Court of Appeal) allowed an appeal where the District Judge had divided the parties' assets equally, included the value of the business on the husband's side, and ordered the husband to pay maintenance to the wife:

> '[30] … (3) Having included the company at full value and allocated it to the husband, to award the wife the equivalent of half the husband's income generated from the company by way of periodical payments for joint lives was also wrong. It amounted to double counting where, in particular, the business premises was expected to generate a further income for the wife in addition.'

It may be appropriate to view any residual capital value as being something that would be realised by the owner on retirement. If so, a deferred lump sum may be appropriate. I consider this in greater detail below.

Issue 3: Accountancy discounts

At [27] of *HO v TL* (above), Peel J drew a distinction between accountancy discounts and court discounts. A classic example of an accountancy discount is a discount to reflect minority ownership. If a party owns some, but not all, of a business, there may be an issue about whether or not a discount should be applied. The question of whether a minority discount should apply is a matter for the court, not for the expert. Many experts will apply a minority discount, or will give figures that deduct one. That does not mean that the court will do so. In other contexts, such as valuations for HMRC for tax purposes, discounts are commonly applied. However, in the financial remedy context, these discounts are less common. There are a number of cases that essentially say the same thing. The question to ask is whether the shareholding owned by the party to the divorce proceedings will be sold separately from the other shareholdings. If so, a discount may apply. If not, it won't. In *G v G (Financial Provision: Equal Division)* [2002] 1 FLR 1143, Coleridge J did not apply a minority discount because he found that the shareholders would act in concert together. In other words, it was a quasi-partnership. Mostyn J rejected a minority discount argument in *Clarke v Clarke* [2022] EWHC 2698 (Fam) at [17]:

> '… (a minority discount) it is also completely unreal because, in my judgment, on the evidence it was not possible for the judge to find that there were any likely circumstances in which the respondent would sell his shares other than in conjunction with his fellow 50% shareholder. It is my opinion that the judge should have looked into the future, and asked himself whether it was more likely than not that a discount would be suffered. The answer to that question would, on the balance of probability, be no. If the judge was satisfied that the business was run as if it were a partnership, and if the judge was satisfied on the balance of probability that no discount would be suffered on any disposal in the future, then the judge should not have made a middle choice. It seems to me that the question is a binary one. Either the discount applies or it doesn't. There is no room for a third way.'

Mostyn J's views summarise the orthodox reasoning. In most cases where minority discounts are in issue, the other shareholders are business partners or family members. Usually (but not invariably) the aim would be to sell the business as a whole, rather than sell a minority share to a third-party investor. If so, a discount is unlikely to be appropriate. The constitutional documents of the business such as the articles of association may also provide a guide. Discounts are unusual in relation to partnerships. Some companies have provisions about these in the articles of association or shareholders' agreements. However, if a party owns a small investment in a company owned and operated by third parties and where it is realistic to expect that they would sell that minority interest separately, then a discount may be appropriate.

Issue 4: Court discounts

Peel J's second category of discounts is the 'court discount'. The paper value of an interest in a business is (usually) different to cash. It is unlikely that the owner of shares can realise the value quickly. The valuation itself is far less certain than the value of a residential property. How should this be dealt with?

The first case to deal with this issue at appellate level was *Wells v Wells* [2002] EWCA Civ 476, [2002] 2 FLR 97. There are various cases dealing with this topic, but the current state of the law is set out in the Court of Appeal decisions of *Versteegh v Versteegh* [2018] EWCA Civ 1050 and *Martin v Martin* [2018] EWCA Civ 2866. In the above quote from *HO v TL*, Peel J cited part of Moylan LJ's judgment in *Martin*. A fuller quote is below:

> '92. Given the proximity of the decision in *Versteegh v Versteegh*, and also, as it happens, given that my views have not changed from what I said in *H v H*, I can see no reason why we should depart from the conclusions and guidance set out in the former, namely that valuations of private companies can be fragile and need to be treated with caution. Further, it accords with long-established guidance and, I would add, financial reality.
>
> 93. How is this to be applied in practice? As referred to by both King LJ and Lewison LJ, the broad choices are (i) "fix" a value; (ii) order the asset to be sold; and (iii) divide the asset in specie: at [134] and [195]. However, to repeat, even when the court is able to fix a value this does not mean that that value has the same weight as the value of other assets such as, say, the matrimonial home. The court has to assess the weight which can be placed on the value even when using a fixed value for the purposes of determining what award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties' assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge.
>
> 94. I would also add that this is not, as Mostyn J suggested, to take realisation difficulties into account twice. Nor, as submitted by Mr Pointer, will perceived risk always be reflected in the valuation. The need for

> this approach derives from the fact that, as said by Lewison LJ, there is a "difference in quality" between a value attributed to a private company and other assets. This is a relevant factor when the court is determining how to distribute the assets between the parties to achieve a fair outcome.
>
> 95. It might be said, as Mr Marks referred to in his submissions, that it would be unfair to award one party all the "upside" in the event that the valuation proves to have been an under-estimate. That, however, is intrinsic in an asset being volatile. There is potential for the value to increase as well as decrease. If one party is not participating in that risk and is obtaining what Thorpe LJ referred to in *Wells v Wells* as a secure result, one aspect of achieving that result is that, because they don't have the burden of the risk of a decrease in value, they also don't have the benefit of an increase in value. As Bodey J said in *Chai v Peng*, at [140]. "It is a familiar approach to depart from equality of outcome where one party (usually the wife) is to receive cash, while the other party (usually the husband) is to retain the illiquid business assets with all the risks (and possible advantages) involved".'

I will consider orders for sale and transfers of shares later. They are the exception, rather than the rule, because they offend against the clean break principle. If a party is being bought out, then you will need to consider whether or not to discount the shares to reflect illiquidity and risk, including the uncertainty of any valuation. Issues to bear in mind are:

- The amount of liquid assets that the paying party will retain outside of the company valuation. A shareholding worth £1m in a case involving in total £50m of assets is very different to a shareholding worth £45m out of £50m of assets. The consequences for the party retaining the illiquid asset are very different. If it is only a small proportion of their residual portfolio of assets, then there is less reason to discount. This issue was considered by Peel J in *HO v TL* at [27(ii)]. The hotel business was illiquid and valued by reference to its future revenue stream. The court found it to be worth £9.5 million in the context of total assets worth £22.5 million. Peel J held that it would not be appropriate to apply an accountancy discount but might be susceptible to a 'modest' court discount.
- The liquidity of the business. What can be drawn? How long is the paying party likely to have to wait before extracting value from the business?
- The fragility of the valuation. If the valuation is calculated on an earnings basis, then it relates to future profitability and is arguably less certain than a net asset valuation, e.g. that of a property investment business. There are different types of earnings-based valuations, too. Many use an EBITDA x multiplier +/- surplus/deficient assets as an approach. EBITDA will change annually, and there is often a debate about the multiplier, showing that different purchasers would adopt different approaches. Revenue generating businesses (e.g. hotels) may be valued on a discounted cashflow model, which is highly susceptible to large swings with minor variations in the methodology.

There is a raft of cases that deal with the fragile nature of private company valuations. An example in practice is *S v S (Ancillary Relief after Lengthy Separation)* [2006] EWHC 2339 (Fam), [2007] 1 FLR 2120, where Singer J noted the following:

> '[32] In April 2004 the accountants were a mere £14m apart, weighing in for W at £24.75m and for H at £10.61m. They briefly narrowed their differences when they reported jointly in July 2004, each moving about £1.4m towards the other. Mr Nedas, in his first report shortly before the abortive hearing before Baron J in June last year, retreated to a value of £4.66m to which Mr Lobbenberg responded the following month with a revised valuation of £23.5m. But when they met to see what common ground there was they discovered that there was less even than had been apparent, Mr Nedas reducing his valuation to £4.35m while Mr Lobbenberg increased his to something over £30m (revised on the eve of the hearing down to £27.2m). By then however Mr Nedas valued H's shares in T Ltd at no pounds at all. For the purposes of the hearing, however, (and for reasons which do not matter for present purposes) the application proceeded upon the basis that H's advisers took H's shares to be worth either £4.35m or £3.73m (to include the value of his own preference shares).'

Note that the husband sold the business for £137,000,000 approximately one year after the hearing. The wife's application to set the order aside failed (the case is reported as *Stefanou v Gordon* [2010] EWCA Civ 1601, [2011] Fam Law 458).

For example, in *Chai v Peng* [2017] EWHC 792 (Fam), Bodey J discounted the valuation by 30%, of which 10% was to reflect the fragility of the valuation and 20% to reflect illiquidity. Controversially (at least in the mind of Mostyn J in *WM v HM* [2017] EWFC 25, [2018] 1 FLR 313 (the first-instance decision in *Martin*)), Bodey J divided the assets 60/40 in the husband's favour, to reflect the fact that the husband was retaining business assets. Mostyn J considered this to be double-dipping. There is an alternative construction, which is that the valuation was discounted to reflect the inherent risks in the business (Laura Ashley) and lack of liquidity in that business, but that those discounts did not reflect the fact that the husband would retain the majority of his assets in business assets. It is a fine distinction, though.

A court does not have to apply a discount. In *R v R (Financial Relief: Company Valuation)* [2005] 2 FLR 365, Coleridge J rejected an argument by a husband to discount the value of his shareholding in a business because of the risk factor: '[23] I think there is certainly a risk factor but I think there is also a reward factor, given the nature of the business and the husband's track record. The husband does need a breathing space, I find, to rebuild the company to its former strength. The wife should be paid out in full but in an orderly way so as not to destroy the goose, as it is sometimes described, that lays the golden egg'. However, although Coleridge J ordered the husband to pay the wife £900,000 over 7 years, he incentivised the husband by reducing the amount he would have to pay if the sum was paid earlier. In *HO v TL*, one of the reasons why Peel J only applied a modest court discount was that the husband could sell the business and it was his choice to retain it. That business had been built up jointly by the parties during the marriage, though.

If it is possible to buy out the other party's inchoate share by way of lump sum payments or a lump sum by

instalments, that is usually preferable, because it allows for greater certainty and a deferred clean break. However, if it is not possible to do so (because of liquidity constraints), then a court will need to consider other options, such as a sale, transfer of shares, or deferred lump sum. I will consider this in more detail below.

Distribution

The main question is whether the outcome to the case is likely to be driven by the sharing principle or the needs principle. In a 'needs' case, the value and future maintainable profit of the business is part of the background, and will have an impact on the evaluation of needs. But the most important factor is likely to be the ability of the business owner to extract funds to meet the other party's needs. In this scenario, a court can consider:

- transferring funds from non-business assets;
- the extent to which funds can be drawn from the business (net of any applicable taxes). This will usually be by way of drawing against any sums owed by way of loan/capital account, dividends, salary and/or bonuses;
- whether the business could borrow to fund the extraction of capital;
- whether the paying party can personally borrow against the value of the business assets; and
- whether any family or friends are willing to lend money to assist.

Bear in mind that the court will also need to consider the paying party's needs. They are entitled to be housed and to have an income to meet their own needs. The court will also need to consider the fair distribution of business and non-business assets. If one party is receiving all the wheat and the other all the chaff, a court discount is usually appropriate (as considered above).

In a sharing case, the first question will be the extent to which the business should be shared, and the second question will be how that should be achieved.

Post-separation endeavour

If a business has been established during the marriage, then it is a straightforward case for equal division, unless there is a sustainable argument for special contribution (exceedingly unlikely) or post-separation accrual. The principles relating to the latter were recently considered by Moor J in *DR v UG* [2023] EWFC 68 at [50]–[54], where the husband's post-separation accrual argument was unsuccessful and the assets were divided equally. Per Moor J, departures from equality to reflect post-separation accrual only usually occur if:

- it is a 'new venture' case, where a new business has been established post-separation;
- there has been, or will be, a significant delay between separation and ultimate realisation of the proceeds, and there is more to do after the date of trial to harvest the asset. Examples of this are private equity cases, where carried interest will usually fall in many years after the divorce, and *JB v MB* [2015] EWHC 1846 (Fam), where the wife was awarded 20% of the value of the company, reduced from 50% to reflect the significant delay since separation and the husband's 'very significant post-separation endeavour'; or
- there has been a long and unjustified delay in bringing the application (as in *S v S* [2006] EWHC 2339 (Fam), [2007] 1 FLR 2120; and
- earn-out/lock-in arrangements, where the payer has to continue to work in the business after the sale.

Moor J was clear that the above is not an exhaustive list. Further, post-separation accrual arguments should be treated with caution. In *CO v YZ* [2020] EWFC 62, Moor J said:

> 'In general, post-separation endeavour is relied on to argue for a greater share of an increased value of the assets. I have always had real reservations as to the concept for the reason that, if the assets have fallen in value, it is difficult to see why the other party should not then argue that he or she should not have to share in that fall in value. Such difficulties are avoided if the concept is severely restricted in its operation. It is, of course, a very different matter if there has been a significant delay in bringing the application, such as in *Wyatt v Vince*, but that is not the case here. Just as the Husband has continued to run his businesses, so the Wife has continued her contribution in caring for the four children. Moreover, she can say with some force that he has been trading her undivided share. In this particular case, I will also have to consider the very significant losses that the Husband has incurred in other business ventures since separation that the Wife had no involvement in, or even, initially, knew about.'

Pre-marital businesses: evaluating the 'matrimonial' proportion

Courts have taken different approaches to evaluating the non-matrimonial proportion of businesses that were formed before the marriage. The leading case is *Hart v Hart* [2017] EWCA Civ 1306, supplemented by *XW v XH* [2019] EWCA Civ 2262. To summarise the applicable principles:

- Is there a sharp dividing line between matrimonial and non-matrimonial property? If so, there is no need for a detailed enquiry. If not, then there should be a proportionate enquiry.
- The court should make such findings as the evidence allows. The non-matrimonial property may be *de minimis* and thus ignored. There may be a clear dividing line between matrimonial and non-matrimonial property (which would allow a demarcation and more formulaic approach). If so, this should be stated. Or there may be a complex continuum where it is not proportionate or feasible to draw a clear line, in which case it is appropriate to leave the determination of the impact of non-matrimonial property to stage 3.
- The court must exercise its discretion in accordance with s 25 Matrimonial Causes Act 1973, bearing in mind all of the factors. This does not mean that non-matrimonial property will be 'shared'. But the court needs to determine that the outcome is fair having borne all of the relevant s 25 factors in mind. If the court has been unable to draw a sharp line and has deferred consideration of non-matrimonial property to this stage, then the court must consider what lesser award than 50% makes allowance for that non-matrimonial property. In most cases, the court will be able to, and should, make clear at some stage what part of the value of the assets or assets the court has determined is non-matrimonial property. The court does

not need to be formulaic and has a discretion to apply a broad assessment that accords with overall fairness.

The approaches that have been adopted are summarised below.

Jones – accountancy-based methodology

In *Jones v Jones* [2011] EWCA Civ 41, the Court of Appeal failed to give one single agreed rationale for their decision. The husband had established the company 10 years before the marriage and had sold it by the time of the final hearing for £25m. An SJE had valued the business as being worth £2m at the date of the marriage. Wilson LJ began by taking the historic valuation of £2m but then doubled it to reflect an inherent 'springboard' that was latent within the business (which he described as 'highly arbitrary'), and then uprating it by an index to reflect passive growth, to give a total figure of £9m for the present value of the non-matrimonial property. The residue (£16m) was matrimonial and divided equally. The overall percentage was 32%, which was within what Wilson LJ felt was the bracket of overall fairness of 30%–36%. That figure was then deducted from the proceeds of sale of the business to arrive at a figure for the matrimonial property, which was divided equally.

Martin – linear apportionment

In *WM v HM* [2017] EWFC 25, Mostyn J felt that the expert's valuation of the shares at the date of the marriage at £1.5m to £3.3m did not begin to reflect the true present value of what the husband had brought into the marriage. Mostyn J instead apportioned the value based upon a timeline, beginning with the business's foundation in 1978. The parties cohabited from 1988 and separated in 2015. £176m was matrimonial and £45m was non-matrimonial. The wife's appeal was dismissed – see *Martin v Martin* [2018] EWCA Civ 2866.

Impressionistic approach

Examples are:

- *Robertson v Robertson* [2016] EWHC 613 (Fam), where the husband had founded ASOS, the online clothing company. The company had its roots in another company founded by the husband 6 years before the marriage, which lasted for 10–11 years. The husband's ASOS shares were valued at £141m at the date of trial. Holman J felt that the expert's valuation of the husband's shares at the start of the marriage (£4m) failed to reflect the amount of work done by the husband on the business project before the marriage. Fairness required the shares to be treated as half matrimonial and half non-matrimonial.
- *XW v XH*, where the Court of Appeal had to form its own impression because the first instance Judge had not been specific about the extent of pre-marital value. At [163], Moylan LJ stated:

> 'It is clear that, as in *Robertson*, the Company had its roots in a business started some years before the marriage, as reflected in the graph in the judgment, at [200]. I would also note that the graph of the Company's progress in terms of turnover appears to be similar in shape, a J, to that of the company in *WM v HM*, at [18]. Applying the judge's determination that the ultimate success of the Company was attributable to "a not inconsiderable extent" to its pre-marriage "foundations" and that they remained a "significant" factor, I consider that it would be fair to both parties to treat 60% of the wealth derived from the shares, of just under £490 million, as matrimonial property and 40% as non-matrimonial. This gives a figure of £293 million for the former and £195 million for the latter. If the former was shared equally between the parties, the wife's share would be £146.5 million.'

- *IX v IY* [2018] EWHC 3053 (Fam). This case involved assets of £38m which largely derived from a business, Zebra, that was founded before the marriage but which the husband developed and sold during it. The marriage lasted for 8 years. The parties each had children from previous relationships but no children together. There was no SJE valuation evidence. At [107(7)(f)], Williams J found that 60% of the business was matrimonial because the idea had been in place for 5 years and development of the idea into a viable business was well underway before the start of the relationship. However, the cohabiting relationship lasted for 8 years until the business was sold.
- *IR v OR* [2022] EWFC 20. Moor J considered a business that the husband had inherited from his father. This was a long marriage and the parties had five children. The assets were £185m, excluding a further c.£30m that had been settled on trust during the marriage for the parties' children. During the marriage, when the husband was CEO and later Executive Chair, the business had grown dramatically. The company was founded in the 1950s. By 1997 (when the parties married), there were approximately 20 stores in the chain. The business was sold before the parties separated for $1b (gross), by which time there were more than 100 stores in the chain. Moor J said the following of the linear approach: 'I consider [the straight-line approach] is far more likely to be of use in a case where it is one of the spouses who formed the business prior to the date of the marital partnership commencing, as opposed to a previous generation founding the company.'

Although it remains a valid option, the *Jones* approach has fallen out of favour. To the best of the writer's knowledge, there is only one reported case where Wilson LJ's *Jones* formula has been applied (*CO v YZ* [2020] EWFC 62), and in that case Moor J observed that he might have adopted a *Martin* time-line approach had he not already ordered an historic valuation. Judges regularly find that the historic valuation is of little relevance. Retrospective valuations are expensive to obtain, require historic financial records to be available, and are based upon what a purchaser would have paid at the time (i.e. they exclude from the calculation any events that occurred since the valuation date). Historic valuations were effectively ignored in *Robertson* and *XH v XW*. The most recent word is that of Peel J in *GA v EL* [2023] EWFC 187 (dealing with a *Daniels v Walker* application):

> '[32] In my judgment, although there may be cases where the historical valuation exercise can be carried out relatively simply, and will clearly assist the parties and the court, I consider that there must be clear justification for this approach to be adopted before the court gives permission for expert evidence as to past

> values to be undertaken. It should very much be the exception, rather than the norm.'

The linear method has become more popular, even if just by way of cross-check. The reported cases are those of Mostyn J, but this approach was endorsed by Moylan LJ in *Martin* itself and by Moor J in *CO v YZ*. It has been applied to prospective sharing of private equity carried interest (see *A v M* [2021] EWFC 89). It was not applied by Moor J in *IR v OR*, because that was a case where the business had been founded by a prior generation. Moor J considered that the straight-line approach was more helpful in cases where one of the spouses had founded the business before the marriage.

The intuitive approach is probably the most common. Peel J said the following in *GA v EL*:

> '31.iv) Obtaining a historic, black letter accountancy valuation is not the only way of approaching this issue. The straight-line approach adopted by Mostyn J in *WM v HM* [2017] EWFC 25 received approval in *Martin v Martin* [2018] EWCA Civ 2866. Calculations by reference to approved indices might be of some utility. But beyond these tools, the court's approach might involve a more nuanced assessment reached after consideration of increase in turnover, number of employees, the genesis of inspirational business ideas, the actual work undertaken by the party, how such work drove the business and the like. Every case, every set of circumstances, is different, and as was explained in *H v H* [supra] the court is conducting a s25 exercise, within which valuations may assist the court, but are not the be all and end all. Ultimately, the court will need to weigh up a multiplicity of factors with the degree of generality or specificity it thinks fit.'

The difficulty with the intuitive approach is that it is easy for unconscious biases to creep in – a homemaker can never ask for *more* than 50% of the value of a business, and a breadwinner can often find some argument for a departure from equality.

Alternatives where a lump sum or offset is not viable

In *N v N* [2001] 2 FLR 69 (FD), Coleridge J engagingly said:

> 'I think it must now be taken that those old taboos against selling the goose that lays the golden egg have largely been laid to rest; some would say not before time. Nowadays the goose may well have to go to market for sale.'

However, the company was not sold in that case. The husband was given 2 years to raise a lump sum, although Coleridge J did find that a sale of the company was likely. In reality, there are very few cases where it will be necessary to force the sale of a company. Note, though, that Peel J had no qualms in treating the hotel business in *HO v TL* as a resource that the husband could sell to meet a lump sum order ([92i]).

A court can transfer a party's beneficial interest in a business (whether shares, loan account, or partnership interest) to the other party. However, there may be restrictions in the articles of association or partnership deed that make this difficult or impossible, so be cautious before taking this step.

In *AV v DC (No 2)* [2012] EWHC 438 (Fam), Bennett J transferred shares to the wife (finding that this would not result in the business being disrupted), although the transfer could be resisted under the articles. The order provided that if the company or the other shareholders objected, the wife could consider her position and make any necessary applications.

Where there are other shareholders, bear in mind the court cannot adversely affect a third party's rights to property unless they have been given notice of the proceedings and have had the opportunity to intervene (*Tebbutt v Haynes* [1981] 2 All ER 238). A third-party shareholder whose pre-emption rights might be affected by a transfer of shares as part of a financial settlement on divorce may consider intervening in the proceedings to protect their position.

There are also tax consequences to consider.

There are a few reported cases where a court has transferred an interest in the business to the other party, but they tend to be situations where the payee already has a shareholding or where it is the option of last resort. Examples are:

- *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam), where Coleridge J transferred shares in the husband's business to the wife, who had a minority shareholding beforehand. They were held on trust, so that the husband retained the voting rights.
- *C v C (Variation of Post Nuptial Settlement: Company Shares)* [2003] EWHC 1222 (Fam), [2003] 2 FLR 493, where Coleridge J transferred 15% of a company's shares (held in a Cayman Islands settlement) to the wife, in order to achieve equality, holding said that where a wife had played a part in a company and wished to continue being involved, there had to be a compelling reason why she should not be entitled to do so.
- *P v P (Financial Relief: Illiquid Assets)* [2004] EWHC 2277 (Fam), where Baron J divided the shares between the parties to effect 'broad equality of assets, taking account of the fact that the husband has a greater proportion of illiquid assets in the division.'
- *F v F* [2012] EWHC 438 (Fam), where a shareholders' agreement made between a husband and wife about a family company was held to be a post-nuptial settlement, was rescinded, and the wife's shares were transferred to the husband.
- *Versteegh v Versteegh* (above), where Singer J found it was impossible to value the business or estimate its future liquidity. He therefore ordered that the wife should have shares in the husband's business (despite her arguments to the contrary). The Court of Appeal upheld this decision. Although a *Wells* order was an unattractive outcome, there were few other options, and the result was within Singer J's bracket of discretion.

The other *Wells* sharing option is to order a deferred lump sum equal either to a set figure or to a percentage of the net proceeds of sale of the business if/when it is sold. This is often the only option, particularly where there are other shareholders and/or pre-emption rights or vetoes of transfer in the constitutional documents relating to the business.

Wells sharing (whether by transfer of an interest or deferred lump sum) is easy to order in theory, but it does

require very careful drafting, often with corporate law input, to make sure:

- that the net proceeds of sale are properly defined;
- that there is no jiggery pokery (e.g. winding up the business in question and transferring the assets/clients to a new business or parallel trading entity);
- that income payments relating to ownership share are captured (dividends or the equivalent);
- that the business's viability is not jeopardised (e.g. by undue income or bonuses being drawn);
- if appropriate, that there is security, often by way of a charge over shares;
- if transferring an interest, that a suitable shareholders' agreement or partnership deed is drawn;
- if any of the consideration for a future sale is an interest in a new company, purchaser company or merged company, that the order captures that consideration (whether insisting on a cash out or rolling the lump sum over); and
- that there is appropriate disclosure: (a) so that the payee can see how the company is operating (so the types of documents that a shareholder might expect to see); and (b) to corroborate the lump sum when it is paid.

Such orders can also lead to further litigation down the line.

Part 2: Case management

Case management must always be considered in the context of the claim. I suggest that advisers consider the following:

- How central is the business to the case? Is it the main asset in the case, or is it a side-issue? If of tangential relevance, don't spend too much time and money investigating the finer points of detail.
- If you can tell, how is the business likely to be approached at trial?
- Is the outcome likely to be driven by needs or by sharing? If needs, focus on what can be extracted from the business. If sharing, a valuation will be necessary.
- What are the issues about which expert evidence is required? Try to narrow them if at all possible.
- Do the parties own the entirety or majority of the business? If not, how many third parties have rights, and to what extent will those rights feature? An asset ('any property') jointly owned with a third party cannot be sold without giving that third party the chance to make representations pursuant to s 24A(6) MCA 1973, although a party's share in such an asset can be sold without joinder.

Expert reports

The test is at FPR 25.4. A court may give permission for expert evidence if an expert report is 'necessary to assist the court to resolve the proceedings' (FPR 25.4(3)). In *Re H-L (Expert Evidence: Test for Permission)* [2013] EWCA Civ 655, [2015] 2 FLR 1434, Munby P confirmed that '"necessary" means "necessary"'. It has 'a meaning lying somewhere between "indispensable" on the one hand and "useful", "reasonable" or "desirable" on the other hand', having 'the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable'.

FPR 25.5(2) requires the court to have regard in particular to the issues to which the expert evidence would relate; the questions which the court would require the expert to answer; the impact which giving permission would be likely to have on the timetable, duration and conduct of proceedings; any failure to comply with FPR 25.6 or any direction about expert evidence; and the cost of the expert evidence.

FPR 25.6(d) states that the application should be made no later than the First Appointment. Examples of exceptions include where it is necessary to consider replies to questionnaire before deciding whether to apply, and where valuations of properties have been agreed for FDR but no settlement is reached at that point (see FPR PD 25D, para 3.10).

The court will apply the overriding objective at FPR 1.1. Cases must be dealt with expeditiously and fairly; the case must be dealt with in a way that is proportionate to the nature, importance and complexity of the issues; the parties should be on an equal footing; the court should save expense; and the court should allot an appropriate share of the court's resources to the case, bearing in mind the need to allot resources to other cases.

The court must manage cases actively (FPR 1.4). The checklist includes controlling the use of expert evidence (FPR 1.4(2)(e)) and considering whether the likely benefits of taking a particular step justify the cost of taking it (FPR 1.4(2)(i)). There should also be consideration of the President's Memorandum: Experts in the Family Court (4 October 2021) which follows the Supreme Court's decision in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6. This sets out four governing principles: (i) will the proposed expert evidence assist the court, (ii) does the witness have the necessary knowledge and experience, (iii) is the witness impartial, and (iv) is there a reliable body of knowledge to underpin the expert's evidence.

There is a presumption that any expert evidence will be given by a single joint expert (FPR 25.11; *J v J* [2014] EWHC 3654 (Fam) at [46] per Mostyn J).

What a court will expect

The burden is on the applicant for permission to rely on expert evidence to have taken the following steps.

They should have made a formal application, unless the applicant did not have sufficient time to do so, in which case they may make an oral application ('which should be seen as the exception and reserved for genuine cases where circumstances are such that it has only become apparent shortly before the hearing that an expert opinion is necessary' – FPR PD 25D, para 3.8). This should set out the following information (FPR PD 25, para 3.11):

- The field in which the expert evidence is required.
- Where practicable, the name of the proposed expert.
- The issues to which the expert evidence relates.
- Whether the expert evidence could be obtained from an SJE.
- The discipline, qualifications and expertise of the expert (by way of CV where possible).
- The expert's availability to undertake the work.
- The timetable for the report.
- The responsibility for instruction.

- Whether the expert evidence could properly be obtained by only one party.
- Why the expert evidence proposed cannot properly be given by the expert already instructed in the proceedings.
- The likely cost of the report on an hourly or other charging basis.
- The proposed apportionment (at least in the first instance) of any jointly instructed expert's fee, when it is to be paid, and, if applicable, whether public funding has been approved.

The applicant should also have made preliminary enquiries of any experts who might be instructed, including the following (FPR PD 25D, para 3.3):

- The nature of the proceedings and the issues likely to require determination by the court.
- The issues in the proceedings to which the expert evidence relates.
- The questions about which the expert is to be asked to give an opinion and which relate to the issues in the case.
- The date when the court is to be asked to give permission for the instruction (or, if permission has already been given, the date and details of that permission).
- Whether permission is to be asked of the court for the use of another expert in the same or any related field (that is, to give an opinion on the same or related questions).
- The volume of reading that the expert will need to undertake.
- Whether or not it will be necessary for the expert to conduct interviews (and if so, with whom).
- The likely timetable of legal steps.
- When the expert's report is likely to be required.
- Whether and, if so, what date has been fixed by the court for any hearing at which the expert may be required to give evidence (in particular the final hearing) and whether it may be possible for the expert to give evidence by telephone conference or video link.
- The possibility of making, through their instructing solicitors, representations to the court about being named or otherwise identified in any public judgment given by the court.
- Whether the instructing party has public funding and the legal aid rates of payment that are applicable.

Each expert should have provided 'in good time for the court hearing' (FPR PD 25B, para 8.1). The preliminary information should include confirmation:

- That acceptance of the proposed instructions will not involve them in any conflict of interest.
- That the work required is within their expertise.
- That they are available to do the relevant work within the suggested timescale.
- When the expert is available to give evidence, the dates and times to avoid and, where a hearing date has not been fixed, the amount of notice required to make arrangements to come to court (or to give evidence by telephone conference or video link) without undue disruption to their normal professional routines.
- The cost (including hourly or other charging rates and likely hours to be spent) of attending experts' meetings, attending court and writing the report (to include any examinations and interviews).
- Any representations that the expert wishes to make to the court about being named or otherwise identified in any public judgment given by the court.
- There should be a draft order (FPR PD 25D, para 3.12).

Whether to seek expert evidence

Decisions about whether to direct expert evidence will always be fact-specific. I suggest considering the following:

- What proportion of the business do the parties own?
- Who owns the remainder of the shares?
- Are there any documents that specify the valuation that must be adopted? This is most common in partnership deeds, but can appear in shareholders' agreements, etc.
- Are the shares publicly quoted (if so, there is unlikely to be any need for a valuation)?
- Is there any indication or suspicion that the business will be sold within the foreseeable future?
- How close are the parties to retirement age, when it might be expected that the business would be sold or wound up?
- Are there complicated structures involving trusts and holding companies?
- Do the accounts show sizeable profits, or is the business simply an income stream for the family?
- Do the accounts show significant capital assets?
- How liquid does the business appear to be from the balance sheet?
- Is there a suspicion that the business's capital is undervalued (e.g. is land included on the balance sheet at the historic purchase price)?
- Is there a suspicion that the accounts do not show the full picture; in particular, are there concerns about non-disclosure?

There are obvious cases where valuations are probably not required, for example a sole-trader's self-employed business and small minority shareholdings in a FTSE company. There are also cases where it is clear where a valuation *will* be required, such as a company that was built up during the marriage and which shows large turnover and large profits. Many cases fall into the grey area in between.

Some types of company (such as holding companies that hold either properties or investments) will invariably be valued on a net asset basis, and so the main issue will be valuing the underlying assets and re-stating the balance sheet to take them into account. It would be better to obtain evidence about the underlying assets and ask the company accountant to re-state the balance sheet, or an SJE can be instructed on the basis that the task will be more limited and therefore (hopefully) proportionate.

There are examples where valuations have been found to be unhelpful, but that does not mean that it was wrong to obtain the valuation in the first place; rather that the court erred when deciding how to deal with the business within the context of the s 25 discretionary exercise. Classic examples are the 'double counting' cases (discussed above), where the business's value is an income stream and where a maintenance order is a likely outcome. There may, for example, be a residual capital value that would be realised

on retirement (much like a pension would be), which would be difficult to calculate if there is no expert evidence about the value.

Not every income stream should be valued. In *Cooper Hohn v Hohn* [2014] EWCA Civ 896, the wife made an application for permission to adduce expert evidence about the value of management entities through which the husband received an income stream for managing a hedge fund worth $1.15b. The income stream depended on the husband's continued willingness and ability to manage the fund. The proposed evidence was a valuation of capitalised earnings, which was sought late in the proceedings, in breach of the court's timetable and orders. Coleridge J dismissed the application. The wife's appeal was dismissed. Ryder LJ held (at [37]):

> 'Some assets cannot sensibly be ascribed a capital value. It is a fallacy that every asset must be valued in every case or even in every sharing case. Of course, the court will need to draw a balance sheet or asset schedule, but that does not lead to the conclusion that every asset must be valued in order for the court's statutory duty to be complied with. The valuations sought in this case would likely be theoretical. It would not be a valuation of assets available for distribution between the parties.'

Ambit of the report

Remember that the scope of the instruction can be limited. For example, if the case is likely to be resolved by a maintenance order, you may only need a report about maintainable profits rather than capital value. In a needs-based case (where, for example, the company was pre-acquired), the main question may be of liquidity.

As discussed above, historic valuations are the exception rather than the rule. See, in particular, the judgments of Moylan J in *Martin* at [126]–[127] and *XW v XH* at [114].

Costs capping

Be wary of seeking a report without a cost estimate. Once an instruction has begun, there was little that the parties could do to rein the expert's costs in. A court can cap the fees that the expert may recover in the first instance (FPR 25.12(5)).

Letter of instruction

The letter of instruction should be agreed between the parties. Note, though, FPR 25.12 and PD 25D, para 6.1 provide that the parties can email the court (copying the other party) and ask the court to resolve any dispute. Judges will be unenthusiastic about this – see *CM v CM* [2019] EWFC 16, where Moor J held that High Court Judges do not have sufficient resources to determine these disputes and that the parties ought to refer any disputes as a specific issue to an arbitrator.

Questions

Once the report has been obtained, the parties are each entitled to raise one set of questions 'for the purpose only of clarification of the report' (FPR 25.10). This also applies to solely-instructed experts. If an expert does not reply to the questions, then the court may direct that the expert's evidence may not be relied on or that the party who instructed the expert may not recover the expert's fees and expenses from the other party (FPR 25.10). Experts may apply to the court for directions for the purpose of assisting them in carrying out their functions (FPR 25.17). This is seldom used, but is possible where disproportionate questions are put and the expert seeks the court's guidance about whether or not to answer them.

Daniels v Walker applications

For a detailed discussion of this topic, see the article by Nicholas Allen KC, '"For Reasons Which Are Not Fanciful" – *Daniels v Walker* Applications in Financial Remedy Cases' [2022] 3 FRJ 175.

In most cases, the report of an SJE is accepted by the parties and may be submitted in evidence, so that the SJE does not have to attend the final hearing for cross-examination. However, there are cases where one party objects to the expert's findings. The FPR do not make specific provision for instructing a new expert. Where the FPR are silent, the court may have regard to case-law decided under the CPR (although this is only by analogy and the court is not bound by that authority – see *Goldstone v Goldstone* [2011] EWCA Civ 39).

The leading case in this area under the CPR is *Daniels v Walker* [2000] EWCA Civ 508. This case is often misinterpreted as giving the parties freedom to obtain their own expert. In fact, in making the following points, Lord Woolf MR (at [28]–[29]) was more restrictive:

- The instruction of an expert jointly by the parties should be regarded as the first step in obtaining expert evidence on a particular issue.
- If a party wishes to obtain further information before making a decision as to whether or not to challenge the report of a joint expert, then that party should (subject to the discretion of the court) be permitted to obtain that evidence, provided that the reasons for obtaining additional information are not fanciful.
- In the majority of cases, it will not be a sensible approach for the dissatisfied party to ask the court immediately for permission to call a second expert.
- In general terms, where a modest amount is involved it may be disproportionate to obtain a second report in any circumstances.

Under the CPR, the position is different if a party seeks to resile from the evidence of their own expert (as opposed to an SJE). If an expert was named in the order, then that party would need permission to instruct a new expert and the first expert's report must be disclosed before they can rely on the new expert (*Beck v Ministry of Defence* [2003] EWCA Civ 1043). However, if a specific expert had not been named in the order, then permission is not required (*Hajigeorgiou v Vasiliou* [2005] EWCA Civ 236). The courts actively discourage 'expert shopping'.

Lastly, there is a reported decision about a *Daniels v Walker* application in a financial remedies case. In *GA v EL*, Peel J held that such an application needs to satisfy the 'necessity' test (at [26]). At [28], Peel J summarised the applicable approach:

> 'Whether the further expert evidence is "necessary" will be informed by the approach advanced in *Daniels v Walker* [2000] EWCA Civ 508 and several subsequent cases including *Cosgrove & Anor v Pattison* [2001] CPLR 177, *Peet v Mid-Kent Healthcare NHS Trust* [2001] EWCA Civ 1703 and *Kay v West Midlands Hinson v Hare Realizations Ltd*. From these authorities, I draw the following principles:

i. The party seeking to adduce expert evidence of their own, notwithstanding the fact that a single joint expert has already reported, must advance reasons which are not fanciful for doing so.

ii. It will then be for the court to decide, in the exercise of its discretion, whether to permit the party to adduce such further evidence.

iii. When considering whether to permit the application, the following non-exhaustive list of factors adumbrated in *Cosgrove & Anor v Pattison* (supra) may fall for consideration:

> "… although it would be wrong to pretend that this is an exhaustive list, the factors to be taken into account when considering an application to permit a further expert to be called are these. First, the nature of the issue or issues; secondly, the number of issues between the parties; thirdly, the reason the new expert is wanted; fourthly, the amount at stake and, if it is not purely money, the nature of the issues at stake and their importance; fifthly, the effect of permitting one party to call further expert evidence on the conduct of the trial; sixthly, the delay, if any, in making the application; seventhly, any delay that the instructing and calling of the new expert will cause; eighthly, any special features of the case; and finally, and in a sense all embracing, the overall justice to the parties in the context of the litigation".

iv. For my own part, I would draw particular attention to the words "the overall justice to the parties in the context of the litigation" which seems to me to encapsulate neatly the court's task.'

Parties were allowed to adduce *Daniels v Walker* accountancy experts in the following financial remedies cases, but no reasoning was reported: *R v K* [2017] EWFC 59, *FW v FH* [2019] EWHC 1338 (Fam), *CO v YZ* [2020] EWFC 62, and *E v L* [2021] EWFC 60. In *CG v SG* (where there were millions at stake), HHJ Hess allowed both parties to call their own experts. The wife was granted permission first. She then opposed the husband's later application to call his own expert, but was criticised for taking that stance.

If permission is granted, the court will direct that the experts meet and prepare a schedule of agreement/disagreement.

Cross-examination

FPR 25.9 provides that expert evidence will be in a written report and that the court 'will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.' It is worth remembering that an expert provides opinion evidence to the court, and does not answer the question definitively. If either party wishes to challenge the expert's assumptions, they should usually be given the opportunity to test the expert's evidence under cross-examination (cf. *TUI v Griffiths* [2023] UKSC 48). It may be possible to avoid this by directing written questions on the relevant points in advance of the hearing (note that this would need to be a specific direction). A court can also make a costs order if you find that the costs of the expert's attendance ought to be borne by the party who cross-examined that expert.

If there is more than one expert, those experts disagree, and the disagreement is likely to have an impact on the final outcome, then both experts will need to be cross-examined. A court can 'hot tub' the experts, by asking them to give concurrent evidence. The advantage of this is that the court can deal with issues point-by-point, rather than hearing one expert's evidence and then waiting to hear the other expert's. There can also be a free dialogue. The downside is that it requires the judge to be abreast of the main issues, so that the evidence can run to a set agenda.

If both parties have jettisoned reliance on the SJE in favour of their own experts, then you do not need to call the SJE to give evidence (*CG v SG*), but courts did do so in *CO v YZ* and in *XW v XH* (on a question of Italian law rather than valuation).

After the hearing

Experts are entitled to know how their reports have been used. In my experience, FPR 25.19 (quoted below), is honoured more in the breach:

> '(1) Within 10 business days after the final hearing, the party who instructed the expert or, in the case of a single joint expert, the party who was responsible for instructing the expert, must inform the expert in writing about the court's determination and the use made by the court of the expert's evidence.
>
> (2) Unless the court directs otherwise, the party who instructed the expert or, in the case of the single joint expert, the party who was responsible for instructing the expert, must send to the expert a copy of the court's final order any transcript or written record of the court's decision, and its reasons for reaching its decision, within 10 business days from the date when the party received the order and any such transcript or record.'

Questionnaires

It is common for the non-paying party to ask questions about the business. They may or may not have had input from their own shadow expert. Standard questions will include:

- Financial statements/accounts going back 3 years.
- Evidence of the interest (e.g. shareholdings).
- Ledgers showing drawings/transactions on capital, current or loan accounts, probably for 2 years, but the length of time would be case-dependent.
- Copies of any partnership deeds (including variations) and/or any shareholders' agreements.
- Details of the value at which assets are carried in the accounts, along with any valuations of those assets.
- Updating management accounts prior to the FDR (if the business produces them).

Other questions will be business-specific.

If there is a long list of detailed questions and an SJE is to be instructed, the court may send that list to the SJE and direct that the SJE request that information if the SJE considers that information is necessary for the purposes of preparing the report. The party raising the questions can always repeat any request that the SJE has not made after the SJE's report has been obtained, but would need to show a good reason why those questions should be answered.

Fair Shares and the Financial Reality of the 'Everyday' Divorce

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Introduction

The *Fair Shares* research study provides the first nationally representative picture of the financial arrangements made by divorcing couples in England and Wales.

While approximately 100,000 couples divorce each year, of these only around one-third leave the marriage with a court order in relation to finances, with the vast majority of these being made by consent.[1] Previous research through court file surveys has provided only a partial picture of the court population, but given the methodological difficulties in accessing the non-court population, very little was known about the two-thirds of couples who do not go to court.

The law governing finances on divorce, contained in the Matrimonial Causes Act 1973, has been subject to increasing criticism in some quarters in recent years. However, much of this criticism has been based on high-value reported cases, which make up a tiny minority of the general divorcing population. In light of the Law Commission of England and Wales undertaking a Scoping Review of the law of financial remedies, the findings from the *Fair Shares* study land at a crucial moment.

Our survey data, based on responses from 2,415 participants who had divorced within the past 5 years, together with data from interviews with 53 divorcees, sheds light on the full range of divorces, providing data to fill a major gap in the knowledge and understanding of what divorcees do and how they do it.

In this article, we provide an overview of some of the key findings of the research study, focusing on the financial reality experienced by the 'everyday' couple. We will also briefly consider the implications of these findings in the context of recent substantive law reform proposals. A more detailed outline of the study's methods and aims can be found in the Spring 2023 issue of this Journal[2] as well as in the full report.[3]

Divorcees' financial circumstances at the end of marriage

The context in which couples enter the divorce process is crucial to understanding the financial arrangements that emerge at the end. Their financial circumstances, including the level of income that came into the household during the marriage, the assets and debts they had accumulated, and whether one or both had a pension, are relevant to the level of financial security they will experience after they are divorced.

Most divorcees in the study had relatively modest amounts of wealth to divide at the end of their marriage. The median value of divorcees' total asset pool including home and pension was £135,000. Nearly one in five (17%) had no assets to divide and 63% had total assets worth under £500,000. Although 68% of divorcees had been living in owner-occupied matrimonial homes, once mortgages were taken into account, 34% of these had homes with an equity worth less than £100,000, with only 7% reporting an equity above £500,000; 28% of divorcees were renting, the majority in private tenancies.

Most divorcees had not enjoyed significant wealth during their marriage. Two in five (43%) reported that their net household income was under £2,000 a month when they separated, and only 8% had a disposable monthly income of £5,000 or more. Nearly a third of divorcees (31%) said that they had no savings or assets (other than a pension or matrimonial home) at the point of divorce, and 17% had no assets to divide, while 12% had only debts. Indeed, two-thirds of divorcees (65%) had debts at the point the divorce process began. For some, these were modest (e.g. 16% had debts under £5,000), but 14% owed £20,000 or more.

So, the picture of couples' financial position at the point of divorce was quite contrary to the impression given by the media's reporting of divorces. Most divorcees did not enjoy lives of luxury during their marriage and had relatively modest amounts of wealth to divide at the end.

The study also reflected well-established findings that wives, and particularly mothers, were in more precarious financial positions at the point of divorce than husbands.[4] Wives were more likely to have only part-time employment during the marriage and to earn less than husbands, with 28% having take-home pay of under £1,000 per month compared to only 10% of men. The position was particularly precarious for mothers; among women in paid work, mothers were far more likely (32% of those with dependent children and 39% of those with older children) than working women without children (20%) to have a net monthly take home pay of less than £1,000.

Relatedly, women had accumulated poorer pension provision. Although women were as likely as men to have a pension, men were more likely to have paid into it for longer, and their pensions were worth more than those of women. Figure 1 focuses on pensions not yet being drawn, but the pattern is similar for those already being drawn.

There is a stark picture presented of women being more likely to have a lower value pension than men. Among women with pension pots, four in ten women had a pot worth less than £50,000, compared to three in ten men. And among men with pension pots, 13% had a pot worth at least £300,000 compared to only 2% of women.

Overall, this highlights a particular financial vulnerability for women. Their lower value pension pots are likely to impact on their financial security in retirement, particularly if they have taken the main responsibility for childcare post-divorce and are unable to make decent contributions to a pension scheme over the coming years.

We will address the issue around the fact that so many divorcees did not know the value of their pension pot (final two rows in the Figure 1 bar chart) later in the article.

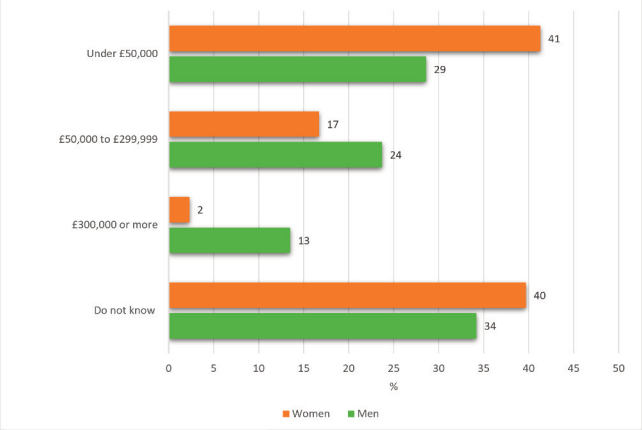

Figure 1: Pensions not yet in payment, by gender

Bases: female divorcees with a pension pot (854); male divorcees with a pension pot (610).

Dividing the assets: equal sharing of assets not the norm

As outlined in Figure 2, only around three in ten (28%)[5] divorcees who had divided their assets at the point of the survey reported receiving roughly half (between 40 and 59%) of the total asset pool. This meant that the majority shared out their assets unequally, with a third (32%) of divorcees reporting receiving a percentage share of less than 40%, including 3% who took on more debts than they received in assets (reported here as 'a negative value') and a further 3% who received nothing. Two in five (40%[6]) divorcees reported receiving more than 60% of the total asset pool, including 7% who received all of the pool and a further 5% who received more than 100%, possibly as a result of their ex-spouse taking on debts.

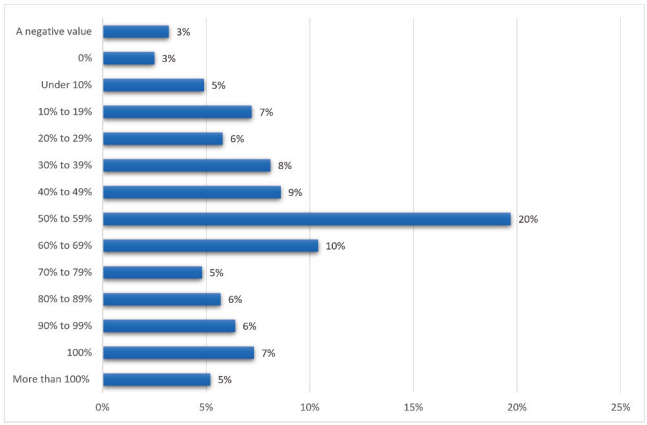

Figure 2: Percentage of the total asset value received by divorcee

Base: all divorcees who had divided assets (excluding those with only debts) for whom a calculation could be made (1,280).

The interview data suggested that the reasons for divorcees sharing out their assets unequally reflected need, individual circumstances and differing motivations amongst divorcees, such as wanting a clean break. One wife who was still waiting for the sale of the marital home to go through and the equity to be split, explained that she had agreed to take less equity than she originally expected, in the hope of having a clean break:

> 'I wanted to end up comfortable, that I could afford to buy a property, which I am in the process of [although] not the one I wanted. I've taken less but I feel now I can have a clean break, by taking less, as long as he keeps his side of the bargain, fingers crossed that he will.' (Wife 7)

Many interviewees also spoke about compromising or conceding when it came to the division of finances in order to spare their children from the emotional upheaval of divorce as far as they could:

> 'I know the impact that a separation can have on children. So, to me, that just trumped any argument over debt and finance and everything else. … [I]f that meant swallowing a bitter pill over finances, that is, I think, where he trumped me in a way because I wasn't, I just wasn't prepared to argue over money.' (Wife 28)

The study found that there was no statistically significant difference between men and women in the value of the shares received, but what did differ between them were the factors tending towards them receiving the larger share in any unequal division. For men, being less entangled in the marriage, such as having no children, or being younger, married for a shorter time, and having fewer assets, pointed towards doing better than their ex-spouse. For women, the reverse pattern was exhibited, though more weakly.[7] However, having a larger pension at the point of divorce was associated with receiving a larger share of the combined asset pool for both women and men, underlining the potential for pensions to make a significant difference to an individual's financial position post-divorce.

Since the median value of divorcees' total asset pool was £135,000, it is unsurprising that half of divorcees who had made arrangements across all of their assets received less than £50,000. Figure 3 breaks down the value of the money

and assets that divorcees received when they had settled all their finances, net of debts. It highlights both the fact that many divorcees came out of their marriages with nothing, and the modest value of the money and assets that other divorcees received. Almost a quarter (23%) ended up with nothing (10%) or only debts (13%).[8] A further one in five (21%) ended up with money or assets worth under £25,000 and only 9% came out of the marriage with £500,000 or more. The picture that is painted is thus of many divorcees ending up with very little, not unexpectedly, given the modest value of their assets.

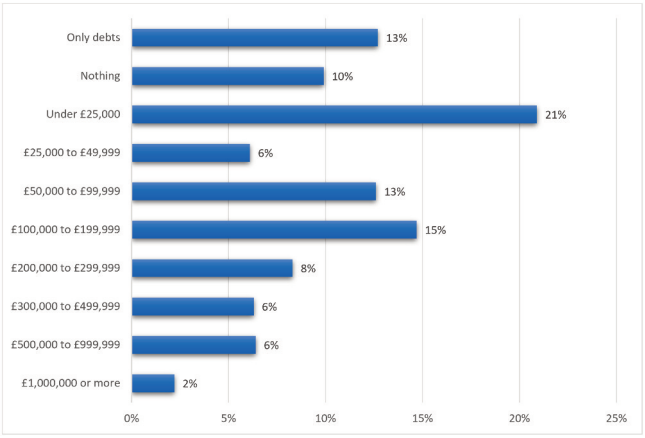

Figure 3: Value of the assets and money received by divorcee

Base: all divorcees who had divided assets (including only debts) for whom a calculation could be made (1,449).

The particular problem of pensions

A worrying issue that came through from the data, was the lack of awareness, understanding or interest in pensions amongst many divorcees. One interviewee knew that her husband had various valuable pensions, but had 'no idea' how much they were actually worth:

> 'He's worth an absolute fortune when he dies. … [but] if there was a way around him not giving me any money, he would find that way. So I didn't look into it. If you don't know what you're missing, you don't mind.' (Wife 27)

This lack of awareness and understanding of pensions fed through, as one would expect, into how, if at all, pensions were taken into account when couples sought to make their financial arrangements.

Over a third (37%) of divorcees with a pension not yet in payment did not know the value of their own (let alone their ex-spouse's) pension pot, with women (40%) more likely than men (34%) to say that they did not know (see Figure 1). In addition, nearly a quarter (23%) of those with an employer pension did not know what kind of pension scheme they were enrolled in, whether defined benefit or defined contribution. Furthermore, only 11% of divorcees with a pension yet to be drawn had made an arrangement for pension sharing, with men (14%) much more likely to report sharing their pensions than women (3%). Pensions were significantly more likely to be shared where they were of higher than lower value or where there were dependent or non-dependent children.

Reflecting earlier research,[9] it is therefore unsurprising that this study found very low levels of pension sharing. Interviewees frequently told us that pensions 'had not come up' in discussions over financial arrangements, including even when lawyers had been involved.

But this was not necessarily only due to ignorance. A spouse might not actually *want* a share of the other's pension. A husband noted that although his wife:

> 'could take 50% of [the pension] She decided not to. I don't know why. … [I]t's been a bonus, like the whole pension thing, that she hasn't … I was prepared to like, lose half my pension, but the fact that she said she didn't want it, that's been a bonus.' (Husband 25)

The prevailing view appeared to be that pensions are entitlements of the individual concerned, and generally to be preserved by that person, rather than 'marital assets' available to be shared. Where pensions were considered, a lack of legal knowledge and advice might well lead some divorcees to make unwarranted assumptions or bad bargains regarding what to do with them. Where a pension not yet in payment was shared, there was an equal split of the participant's pension in only 22% of cases. In nearly half of cases the recipient received less than half and in 18% over half.

Myth vs reality: spousal periodical payments

The issue of spousal maintenance has received particular attention over the last few years in England and Wales. Claims that the current law provides ex-wives with a 'meal-ticket for life' have been used as a rationale to suggest reforms which would limit the spousal maintenance period. However, the findings show that only 22% of divorcees reported having had a spousal maintenance arrangement at the point of divorce (by the time of the survey, this percentage had dropped to 14%).

A number of principal reasons came through from the interview data as to why most couples had no ongoing spousal maintenance arrangement. For many divorcees, the issue was simply not on their radar when going through divorce; others mentioned the practical reality of affordability; the desire for a clean break; the need to demonstrate financial independence from the other spouse, as well as domestic abuse issues with the victim of the abuse wanting to be away from the perpetrator and not wanting to communicate with them going forward.

Where spousal maintenance was paid, women were more likely to receive maintenance than men, but this was nearly always for a fixed term, with 88% of arrangements for a specified period, either defined by a particular event, or an agreed number of years. The payment of spousal maintenance was also associated with a certain amount of vulnerability on behalf of the receiving spouse; for example, where spousal maintenance was paid, it was often connected with having (or having had) children, or with the recipient having an illness or disability.

Therefore, there was nothing within our findings to suggest that maintenance was being used as a 'meal-ticket for life' for the wife. Instead, payments appeared primarily to be used to address the adjustment to post-divorce living arrangements, such as to meet housing and household expenses.

Achieving 'fair shares' – policy thoughts and recommendations

This article has focused on the financial reality experienced by the 'everyday' couple on divorce.[10] As the Law Commission begins its scoping exercise, our findings suggest that it will be vital for policy makers to focus on the circumstances of the majority of divorcees who have limited means, rather than on the concerns of the very wealthy whose stories tend to dominate media accounts. Furthermore, the current broad discretion provided by the law to shape financial arrangements to meet the individual circumstances of each couple appears both appropriate and necessary, given the range and disparities in wealth and earning capacity of the divorcing population, and couples' own priorities and circumstances. It is doubtful that laying down a strong legal presumption of equal sharing of assets or limiting the time period for spousal periodical payments would deliver a substantively fair outcome between divorcees or reflect their own priorities. To the contrary, it would be more likely to cement inequality as between husbands and wives, with mothers and older wives doing particularly badly.

Instead, policy makers need to focus their attention on how to enable and encourage couples to take full account of all of their assets and their future prospects when deciding on what would be the appropriate outcome for them and their family. In particular, greater consideration needs to be given to how pensions may more readily be factored into the arrangements that couples make, if real fairness, as distinct from notional 'equality', is to be achieved.

Notes

1 Family Court Statistics Quarterly (Family Court Tables): July to September 2023, Table 13.

2 E Hitchings, C Bryson, G Douglas, S Purdon and J Birchall, 'Fair Shares? Sorting Out Money and Property on Divorce' [2023] 1 FRJ 47.

3 E Hitchings, C Bryson, G Douglas, S Purdon and J Birchall, *Fair Shares? Sorting out Money and Property on Divorce* (University of Bristol, 2023). Available at: https://www.bristol.ac.uk/law/fair-shares-project/

4 Note, although the survey included same-sex as well as opposite-sex divorcees, same-sex divorces account for a very tiny proportion of divorces.

5 Percentage slightly different to figure due to rounding to nearest whole percentage point.

6 Percentage slightly different to figure due to rounding to nearest whole percentage point.

7 For example, women with dependent children were somewhat more likely than those without to receive more than 50 per cent of the assets, but the differences did not reach statistical significance.

8 Previous research examining court files has highlighted that in some cases where the divorcee ends up with nothing, the other spouse will also have been left in a similar position, i.e. where the parties have no capital or pension assets and there is a clean break 'of nothing'. J Miles and E Hitchings, 'Financial remedy outcomes on divorce in England and Wales: Not a "meal ticket for life"', (2018) 32(1&2) *Australian Journal of Family Law* 43, footnote 36.

9 H Woodward with M Sefton, *Pensions on divorce: an empirical study* (Cardiff University, 2014).

10 See full report for a range of other findings on issues such as the process of sorting out finances, forms of dispute resolution used, the use of legal advice and costs incurred, as well as the financial circumstances for divorcees after their divorce. Note 3 above.

Potanin v Potanina – the Supreme Court Decision

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Background

On 31 January 2024 the Supreme Court handed down the much-awaited judgment in *Potanina v Potanin* [2024] UKSC 3. These proceedings relate to financial claims which can be brought in England for financial provision after an overseas divorce. Although the parties in this case have been described as 'massively rich' with assets estimated at $20 billion, the judgment will have a significant impact on the way all Part III claims are determined – both in terms of procedure and outcome – going forwards in England.

This is only the second time the Supreme Court has had an opportunity to give a substantive judgment on the way in which Part III proceedings should be conducted (the other case being *Agbaje v Agbaje* [2010] UKSC 13). This judgment is likely to be of particular importance given the announcement that despite calls for the Law Commission to review the law on Part III applications, they are not going to be included in their review of financial provision on divorce.[1]

Part III: a brief introduction

Part III Matrimonial and Family Proceedings Act 1984 (Part III) gives the English Family Court the power to make financial orders after a marriage has been dissolved or annulled in an overseas country if there has been inadequate financial provision on the overseas divorce and the parties have a sufficient connection with England.

Part III was introduced at a time when international movement was on the rise and many countries made little, if any, financial provision for women on divorce. The problem became apparent in a series of cases in the 1970s where there had been a foreign divorce which resulted in no financial provision having been made for the wife.

For public policy reasons the English Family Court has a liberal approach to the recognition of overseas divorces. This did however give rise to difficulties when parties with close connections to England divorced abroad and received inadequate financial provision. If England recognised the overseas divorce (which it usually does), the English Family Court had no power to make orders for financial relief.

The Law Commission were asked to review the law in this area and make recommendations. This resulted in a Working Paper in 1980[2] followed by their final Report in 1982.[3] The Law Commission recommended the introduction of legislation to give the English court the power to make financial orders after an overseas divorce where there had been inadequate financial provision abroad and thus Part III was born.

To avoid claims without any merit from proceeding the Law Commission recommended a filter mechanism. Therefore, before an application can be brought for financial relief under Part III the applicant must first apply for and obtain 'leave' under s 13 MFPA 1984. The legislation provides that leave should not be granted unless there is a 'substantial ground' although case law has established that the threshold is not high.

As with any claim it is also necessary to have a sufficient connection, jurisdiction, with England to bring make an application under Part III. The jurisdictional grounds are set out in s 15 MFPA 1984 and require, in summary, either party to be domiciled in England or to have been habitually resident in England for 12 months on the date of the overseas divorce or Part III leave application.[4]

The English court has the power to make a wide range of orders that are very similar to the financial orders which can be made on divorce in England. The range of orders is contained within s 17 MFPA 1984 and includes lump sum orders, property transfer orders, periodical payments orders and pension sharing orders.

When considering whether to make an order the English court is under a duty to consider both a list of factors in s 16 MFPA 1984 when deciding whether England is an appropriate venue and a list of factors in s 18 MFPA 1984 in deciding whether, and if so in what manner, to make an order under Part III.

Part III: the leave process

The procedure to be adopted when applying for leave

under Part III has a complicated history. Although the Law Commission recommended that the leave application should be ex parte, the legislation made no reference to whether the leave hearing should be inter partes or ex parte and the procedural rules (which have changed over time) have not always been clear.

As a result, a practice developed where applicants would often give respondents informal notice of the leave application. This invariably led to the leave application being determined on notice. Alternatively, when the leave application was determined ex parte, respondents would often apply for the grant of leave to be set aside. Both approaches lead to increased time and cost being spent on what was supposed to be a summary process to prevent wholly unmeritorious claims being pursued.

These practices were perceived to have been disapproved in *Traversa v Freddie* [2011] EWCA Civ 81 and *Agbaje v Agbaje* [2010] UKSC 13. In the former the Court of Appeal held that the leave application should be made without notice albeit the court should have the power to direct that the leave application be heard inter partes.[5] The procedural rules were amended to reflect this in August 2017.[6] In *Agbaje* the Supreme Court held that unless the respondent can deliver a 'knock-out blow', any set aside application should be heard with the substantive application.[7]

The more recent practice over the last decade or so has therefore been for applicants to make the leave application without notice although there has been an increasing recognition – particularly following the difficulties which arose in the *Potanin* litigation – that in complex or borderline cases the court may consider that the leave application should be heard on notice.[8]

Although respondents still have the ability to apply for Part III leave to be set aside if made at an ex parte hearing, the threshold the Supreme Court introduced in *Agbaje* (a knock-out blow) is so high that in practice it is very unusual for leave to be set aside once it has been granted. The court will more often direct that any set aside application should be determined at the conclusion of the proceedings once all the evidence has been heard.

This approach has been perceived by some as unfair on respondents. Although there is a high duty of candour on applicants at an ex parte hearing, that is not the same as the respondent being able to make their own submissions on the merits. This perceived unfairness has arguably become more acute following the Court of Appeal's comments in *Potanin* that where leave is obtained based on misleading information it should only be set aside if the misrepresentation was material.[9]

This combination of: (1) leave often being granted ex parte; and (2) the very high threshold to succeed on a set aside application, have led to concerns that respondents are unable to be heard on the issue of whether leave should be granted. They are often not present at the leave hearing and unless they can show a knock-out blow are practically unable to be heard after leave has been granted.

It was against this background that the *Potanin* litigation started in England in late 2018 when the wife applied ex parte for leave to make a financial claim in England following her Russian divorce.

Potanin: brief background

The parties were both born in Russia in 1961. They married in Russia in 1983 and divorced in Russia in February 2014. They had three children who are all now adults. The parties spent all their married life living in Russia.

The parties came from modest backgrounds but during the marriage the husband accumulated wealth estimated to be in the region of approximately $20 billion. The majority of the husband's wealth was not held in the husband's name but through various trusts and corporate vehicles.

There was a dispute between the parties as to the date of separation (2007 per the husband; 2013 per the wife) although the Russian courts found the date of separation to be 2007. In 2007 the husband transferred the sum of $71 million to the wife followed by a further $5.1 million.

After what was described as a 'blizzard of litigation' between 2014 and 2018 the Russian courts awarded the wife at least $41.5 million (there is a dispute as to the exact amount received owing to disagreement as to the appropriate exchange rate to be used when converting roubles into dollars).

In terms of connections with England, in June 2014 (4 months after the Russian divorce was finalised) the wife obtained a UK investor visa. Later that year the wife bought a property in London. The wife's case was that since the beginning of 2017 London had been her permanent home.

Potanin: the Part III leave application

In October 2018 the wife made a without notice application for leave to bring a claim under Part III MFPA 1984. On 25 January 2019 Cohen J granted the wife leave to apply for financial relief pursuant to Part III. Although the judge expressed a strong inclination during the without notice leave hearing to determine the application on notice, the judge determined the leave application ex parte.

Potanin: the set aside application

The husband applied to set aside the grant of leave on the basis the judge had been misled as to the facts of the case, issues of Russian law and the applicable principles of English law. The set aside hearing took place inter partes over 2 days in October 2019 with judgment given on 8 November 2019.[10]

When deciding to set aside the grant of leave Cohen J found three categories of misrepresentation:

(1) factual misrepresentation which the judge said included being given incorrect information about the level of child maintenance and misleading information as to the strength of the connections with England;
(2) misrepresentation as to the Russian litigation which the judge said included not being given copies of the Russian law or judgments and not being told the wife had not made a needs-based claim in the Russian proceedings; and
(3) misrepresentation as to English law which the judge said included not being sufficiently referred to key paragraphs of the Supreme Court's decision in *Agbaje*.

Potanin: the Court of Appeal judgment

The wife applied for permission to appeal the judge's decision to set aside the grant of leave. The appeal hearing took place over 2 days in January 2021 with judgment handed down on 13 May 2021.[11] The Court of Appeal (King LJ delivering the judgment with which David Richards LJ and Moylan LJ agreed) allowed the wife's appeal and allowed the wife's Part III application to proceed.

The Court of Appeal found that the judge had applied the wrong test and adopted the wrong procedure when setting aside the grant of leave. The test the judge adopted was whether – if he had had the full picture at the leave application – he would have granted the wife leave to bring her application. The Court of Appeal said that the judge should have instead listed a short hearing to determine whether there was a knock-out blow.

The Court of Appeal held that the judge's view had been tainted by the procedure adopted at the set aside hearing (which on the one hand was too lengthy, but on the other hand led to the making of findings against the wife without oral or expert evidence) and that the alleged deficits identified by the judge, even if they were to be established, were not sufficiently material to justify setting aside the grant of permission.

The Court of Appeal's order therefore reinstated the grant of leave and the matter was remitted to Francis J for directions to be made to progress the wife's claim under Part III.

Potanin: the Supreme Court judgment

The husband appealed to the Supreme Court. The hearing took place over 1.5 days on 31 October and 1 November 2023. The judgment was handed down on 31 January 2024.[12] By a majority of 3:2 the Supreme Court allowed the husband's appeal.

Practitioners should be aware of the following two areas covered by Lord Leggatt (with whom Lord Lloyd-James and Lady Rose agreed) in his judgment on behalf of the majority: (1) the threshold adopted on the Part III leave application; and (2) the threshold adopted on an application to set aside the grant of Part III leave.

Threshold on the leave application

In an extremely thorough and detailed judgment Lord Leggatt examined the inconsistency in the threshold test adopted by the Supreme Court in *Agbaje* on the leave application which was as follows:

> 'The principal object of the filter mechanism [in section 13] is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than "serious issue to be tried" or "good arguable case" found in other contexts. It is perhaps best expressed by saying that in this context "substantial" means "solid".'[13]

In a passage which should be read by all practitioners Lord Leggatt then gives the following guidance on the threshold to be adopted on leave applications (emphasis added):

> 'I would not wish to cast any doubt on the primary guidance given in *Agbaje* that in the context of section 13 the word "substantial" means "solid". Nor would I suggest that courts which have applied the test as stated by Lord Collins have applied the law incorrectly. But I think that some clarification is called for of what was said in the first two sentences of the passage quoted at para 86 above. *It should be made clear that the threshold is higher than merely satisfying the court that the claim is not totally without merit or abusive*. It does not seem to me necessary, or advantageous, to further explain the test by comparing it with tests applied in other procedural contexts. If any such comparison is to be made, however, as it was by Lord Collins, *the closest analogy seems to me to be with other contexts in which a court has to decide whether a claim should be allowed to proceed to a full hearing or should be dismissed summarily*. In ordinary civil proceedings such a question arises when an application is made for summary judgment against a claimant; or to set aside a judgment entered in default; or (as mentioned above) in deciding whether a claim is of sufficient merit that the court should permit service of the proceedings on a foreign defendant. *In each of these contexts the test applied is whether the claim has a "real prospect of success"*. That is also in substance the test which the court applies in deciding whether to give permission for a claim for judicial review to proceed to a full hearing.'[14]

Lord Leggatt also commented that leave hearings listed for as little as between 20 and 60 minutes are not realistic and that it would not be reasonable to expect such hearings to be measured in minutes rather than hours.[15]

Going forwards practitioners should be aware that the test adopted on Part III leave applications is now likely to be higher. This element was endorsed by Lord Briggs and Lord Stephens in the dissenting judgment.[16] Applicants applying for leave under Part III will need to show more than that their claim is not totally without merit or an abuse of process. The test to be adopted going forwards is whether the claim has a real prospect of success. Practitioners should also be aware when making their application that a longer time estimate may be required (particularly given, as explained in more detail below, it is possible that Part III leave applications will more often be heard on notice going forwards).

Threshold on an application to set-aside leave

In the opening paragraph of his judgment Lord Leggatt held as follows:

> 'Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. Sometimes a decision needs to be made before it is practicable to do this. Then you must do the next best thing, which is – if you make the order sought – to give the other party an opportunity to argue that the order should be set aside or varied. What is always unfair is to make a final order, only capable of correction on appeal, after hearing only from the party who wants you to make the order without allowing the other party to say why the order should not be made.'[17]

Lord Leggatt went on to give three reasons why the approach which has been adopted to the Part III leave process was unfair:

(1) to deny a party adversely affected by an order any opportunity to say why the order should not be made is unfair;[18]
(2) as well as being unfair, such a procedure is also foolish:

judges make better decisions if they hear argument from both sides rather than from one side only;[19] and

(3) a procedure which, while otherwise preventing a party from objecting to an order, allows that party to do so if he can show that the court was materially misled at a hearing held in his absence is likely to raise the temperature, increase court time and waste costs.[20]

Lord Leggatt concluded it would be difficult to devise a worse system than this for dealing with leave applications.[21] Lord Leggatt went on, however, to state that the law as it presently stands (not how it had been misinterpreted) does not lead to those untoward results.[22] The right to apply for the grant of leave to be set aside is unconditional and the rules do not require a knock-out blow.[23] Lord Leggatt went on to explain that the creation of the 'knock-out blow' test was owing to a misunderstanding as to concerns Thorpe LJ and Munby J expressed in *Jordan* and *Agbaje* (in the Court of Appeal) respectively. According to Lord Leggatt, those judges had been criticising as inefficient the requirement to hear the leave application initially ex parte instead of being able to move at once to an inter partes hearing to decide whether to grant leave.[24] Their criticisms had been misinterpreted as being directed at applications to set aside leave once granted.

Lord Leggatt went on to conclude that 'whatever the reason for it, however, it would be quite wrong and unfair if a judge's initial case management decision were to deprive the respondent of the right to present an argument to the court that leave should not be granted'[25] and that 'the end result of this history is that there is a mismatch between, on the one hand, the fundamental principle of procedural fairness reflected in [the rules] which entitles a respondent to apply to set aside an order made without notice and, on the other hand, the practice presently adopted in dealing with section 13 applications.'[26]

Lord Leggatt then considered, and dismissed, three reasons which were advanced for retaining the knock-out blow:

(1) restricting the right to apply to set aside leave granted without notice is justified by the desirability of saving costs and court time. Lord Leggatt's response was that although court time could be saved if courts were to adopt a practice of hearing from applicants alone without allowing respondents to participate in the process unless they can demonstrate by a 'knock-out blow', fairness is not a value which can properly be sacrificed in the interests of efficiency;[27]

(2) denying a respondent a right to object to an application for leave under s 13 is not unfair because granting leave does not decide any issue of substance. In response, Lord Leggatt commented that although a requirement to obtain leave of the court to bring a claim is unusual, that does not mean it is unimportant and the fact a grant of leave does not finally decide any issue of substance between the parties is not an acceptable reason to deny a respondent the right to be heard;[28] and

(3) the approach generally taken by the Supreme Court is that matters of practice and procedure are best left to the Court of Appeal or the Rules Committee to address. In response Lord Leggatt responded that although that is the general approach, there are three reasons why it is not applicable in this case: (a) the practice of denying respondents the right to oppose applications for leave under s 13 originates in observations in a judgment of the Supreme Court (and it is therefore for the Supreme Court to correct the position); (b) no question of procedure is raised which it is suitable to leave for consideration by the Rules Committee (as in their current form the rules of court governing the setting aside of leave granted without notice are clear and unambiguous); and (c) as the practice currently being followed in dealing with applications to set aside leave granted without notice is unlawful the Supreme Court should intervene to end the practice.[29]

This represents a significant change of practice when dealing with Part III leave applications. Since 2010 practitioners have been slow to advise respondents to apply to set aside a grant of leave owing to the very high threshold and costs risks. Sometimes a tactical decision was taken to issue a set aside application for presentation purposes on the basis it would be listed for determination at the final hearing. But, apart from that, set aside applications have been rare over the last decade or so.

Going forwards the test to be adopted on set aside applications is now lower. The obvious concern is that we will see a return to the practice before *Agbaje* and *Traversa v Freddie* of respondents routinely applying to set aside the grant of Part III leave. To counter this I would not be surprised if the courts increasingly utilise their case management powers (see FPR 8.25(3)) to hear Part III leave applications on notice with a time estimate of 2 hours or half a day. Where the application is determined ex parte, applicants will need to be careful to comply with the duty of candour which exists on all ex parte applications.

Potanin: the future

That is not, however, the end of the *Potanin* litigation. There are two other grounds which had been raised by the wife in the Court of Appeal (but were not dealt at the time as the wife had been successful on the primary issue in that appeal) which have been remitted to the Court of Appeal. They are as follows:

(1) even if Cohen J was entitled to set aside the leave granted without notice, he should not have done so because after hearing argument from both sides he should have concluded that the test for granting leave was satisfied; and

(2) the wife's application should not in any event have been dismissed insofar as the court has jurisdiction in relation to it by virtue of the EU Maintenance Regulation.

The first ground brings to a head what is likely to be the main issue in these proceedings. On the one hand, the parties had no connections with England before the marriage was dissolved. Anyone who watched the proceedings in the Supreme Court will know how strongly Lord Leggatt expressed his views about whether it was appropriate for leave to be granted in these circumstances. On the other hand, the wife has been awarded a tiny fraction (estimated at 0.5%) of the husband's wealth as the majority

of his assets held in trusts and corporate vehicles were excluded from consideration under Russian law. How the court balances these competing arguments may to a large extent determine the outcome.

The second ground relates to a provision contained in s 16 MFPA 1984 at the time the wife's application was issued (before the UK's departure from the EU) which stated that the court may not dismiss an application for financial relief under Part III on the ground that England is not an appropriate venue if to do so would be inconsistent with the EU Maintenance Regulation. This provision continues to apply in these proceedings under the transitional arrangements governing the UK's departure from the EU but is unlikely to impact many, if any, other cases in the future.

Lord Leggatt expressed a view (in passing and without hearing argument) that on the face of it that provision did not apply because as the former wife was seeking to bring (rather than enforce) a claim for maintenance she would not be a 'maintenance creditor' within the meaning of the Regulation.[30] With a large degree of trepidation I *very* respectfully suggest that cannot be right. The Regulation governs not only recognition and enforcement of maintenance decisions but also jurisdiction to apply for them. Article 3 of the Regulation provides that jurisdiction shall lie with *inter alia* the court for the place where the maintenance creditor is habitually resident. If the term 'maintenance creditor' was intended only to refer to persons seeking to enforce an existing maintenance decision it would not feature as a ground of jurisdiction to apply for a maintenance decision. A similar view was expressed by Coleridge J in *M v W* [2014] EWHC 925 (Fam) when he held that although the term 'creditor' is generally found where a debt is in existence, on a proper reading of Regulation it includes a potential creditor.[31]

What is of interest is whether the wife's claim will be treated as concerned with maintenance (in which case the EU Maintenance Regulation may apply) or solely concerned with dividing property (in which case the EU Maintenance Regulation would not apply). The following passages is in *van den Boogaard v Laumen* (Case C-220/95) [1997] ECR I-01147 will be relevant (emphasis added):

> '21. Owing precisely to the fact that on divorce an English court may, by the same decision, regulate both the matrimonial relationships of the parties and matters of maintenance, the court from which leave to enforce is sought *must distinguish between those aspects of the decision which relate to rights in property arising out of a matrimonial relationship and those which relate to maintenance*, having regard in each particular case to the specific aim of the decision rendered.
>
> 22. *It should be possible to deduce that aim from the reasoning of the decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship* and will not therefore be enforceable under the Brussels Convention. A decision which does both these things may, in accordance with Article 42 of the Brussels Convention, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond.
>
> 23. It makes no difference in this regard that payment of maintenance is provided for in the form of a lump sum. This form of payment may also be in the nature of maintenance where the capital sum set is designed to ensure a predetermined level of income.'

It will also be interesting to see, if the claim is found to be maintenance in character, whether s 16(3) MFPA 1984 will be interpreted as applying to leave applications or restrained only to substantive application. Section 16(1) MFPA 1984 provides that before making an order for financial relief the court shall consider whether it is appropriate for an order to be made in England and, if not satisfied, shall dismiss the application. Section 16(3) provided that if the court had jurisdiction under the EU Maintenance Regulation (which it did), the court may not dismiss the application on the ground mentioned in s 16(1) if to do so would be inconsistent with the EU Maintenance Regulation. On the surface it therefore appears as though the application, if and to the extent that it is maintenance in character, cannot be dismissed on this basis as it would be inconsistent with the EU Maintenance Regulation.

On the other hand, s 13 MFPA 1984 provides that no 'application' for financial relief under Part III can be made unless leave of the court has been obtained. Might it therefore be argued that the provisions in s 16(3) (which are not repeated in s 13) do not apply to the leave process which takes place before an 'application' has been made? Or will the court interpret that the requirement not to contravene the EU Maintenance Regulation should be applied to the leave process too? Given the wording of s 16(3) 'the court may not dismiss the application *or that part of it* …' (emphasis added), might this lead to only a needs-based element of the wife's claim being permitted to pass beyond the leave stage, with the sharing element being effectively debarred by a partial refusal of leave? What would that look like in practice: leave granted to bring an application restricted to be assessed by reference to the needs principle? Would that not place a fetter on the court's discretion when conducting the exercise required by s 16 and s 18? Even if s 16(3) *did* apply to prevent refusal of the grant of leave, there would be nothing stopping the court from exercising its discretion at the conclusion of the proceedings not to make a financial remedy order after taking all of the s 16 and s 18 factors into account.

Conclusion

It remains to be seen how these complex issues will be resolved. Given the approach taken to the litigation to date it appears, sadly, as though the end to this litigation is not yet in sight. It would not be surprising if the Supreme Court is asked to consider this case again before the proceedings conclude.

Notes

1 Terms of Reference – Financial Remedies on Divorce and Dissolution (para 1.13(4)).

2 *Financial Relief After Foreign Divorce* (180) (Working Paper No 77).
3 *Financial Relief After Foreign Divorce* (1982) (Law Com No 117).
4 Jurisdiction can also be founded on the basis either party has a beneficial interest in a property in England which has been used as a family home, although financial claims are limited.
5 *Traversa v Freddie* [2011] EWCA Civ 81 at [57].
6 FPR 8.25.
7 *Agbaje v Agbaje* [2010] UKSC 13 at [33].
8 See, for example, President's Guidance on the Jurisdiction of the Family Court dated 24 May 2021, para 25(d).
9 *Potanina v Potanin* [2021] EWCA Civ 702 at [87].
10 *Potanin v Potanina* [2019] EWHC 2956 (Fam).
11 *Potanina v Potanin* [2021] EWCA Civ 702.
12 *Potanina v Potanin* [2024] UKSC 3 (*Potanina*).
13 *Potanina* at [33].
14 *Potanina* at [89].
15 *Potanina* at [93].
16 *Potanina* at [110].
17 *Potanina* at [1].
18 *Potanina* at [31].
19 *Potanina* at [32].
20 *Potanina* at [33].
21 *Potanina* at [33].
22 *Potanina* at [34].
23 *Potanina* at [35].
24 *Potanina* at [56].
25 *Potanina* at [67].
26 *Potanina* at [68].
27 *Potanina* at [77]–[78].
28 *Potanina* at [79]–[81].
29 *Potanina* at [82]–[85].
30 *Potanina* at [101].
31 *M v W* [2014] EWHC 925 (Fam) at [39].

Financial Dispute Revolution? The Family Procedure (Amendment No 2) Rules 2023

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There was a time when an unwritten rule seemed to provide that a marriage could only be described as long once the parties had celebrated their china anniversary and entered a third decade together, but times change, and so eventually do some rules. On any view, however, 20 years is a long time.

It has been very nearly that long since Thorpe LJ gave judgment in *Al-Khatib v Masry* [2004] EWCA Civ 1353, [2005] 1 FLR 381, and suggested at [17] that 'there is no case, however conflicted, which is not potentially open to a successful mediation, even if mediation has not been attempted or has failed during the trial process'.

For much, though clearly quite not all of the intervening period, under Family Procedure Rules 2010 (SI 2010/2955) (FPR) Parts 1 and 3, the courts have had not only a power, but also a positive duty, to encourage and facilitate the use of non-court dispute resolution (NCDR), where appropriate, and yet it seems to many that the duty has often not been discharged and the power has generally been underused.

Notwithstanding occasional innovation in certain spheres, the law, lawyers and the judiciary may be considered to be fundamentally quite conservative. We tend to be wary of change and instinctively to favour doing things the way we have always done them. Some baulk at essentially judicial functions being discharged by others who, no matter how eminent and experienced, are not judges, properly-so-called.

It does now appear at last, however, that, as Bob Dylan might say, 'the times they are a-changin'.' One seminal Court of Appeal decision made in civil proceedings late last year suggests that they are. With effect from this April, FPR Part 3 certainly will be.

Churchill

On 29 November 2023, the Court of Appeal, formed of the Lady Chief Justice, the Master of the Rolls and Birss LJ, decided *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416. Sir Geoffrey Vos MR deftly sidestepped the decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, which had been (mis)understood, for nearly 20 years, to be authority for the proposition that the court cannot compel parties to civil proceedings to engage in mediation. Holding that the comments of Dyson LJ (as he then was) that to oblige truly unwilling parties to mediate would be to impose an unacceptable obstruction on their right of access to court were merely *obiter*, the Court of Appeal determined that it is permissible in some circumstances for the court to order that the parties attempt to resolve their dispute via NCDR prior to seeking a judicial determination and/or stay proceedings to allow for NCDR to take place.

Such a power, it was held, must be exercised in a way which does not impinge on the Art 6 right to a fair hearing within a reasonable time by an independent tribunal and must be proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.

Sir Geoffrey Vos MR stated at [59] that:

> 'even with initially unwilling parties, mediation can often be successful. Mediation, early neutral evaluation and other means of non-court based dispute resolution are, in general terms, cheaper and quicker than court-based solutions. Whether the court should order or facilitate any particular method … is a matter for the court's discretion, to which many factors will be relevant.'

The Court of Appeal did not set out any guidance as to how or at what stage in the litigation it should decide whether to make such orders, with Sir Geoffrey Vos MR commenting at [66] that 'it would be undesirable to provide a checklist or a score sheet for judges to operate', although some potentially relevant considerations were highlighted at [61]–[63].

A crystal ball was not required to foresee the outcome of *Churchill*. The Court of Appeal had previously held that, pursuant to Civil Procedure Rules 1998 (SI 1998/3132) (CPR), 3.1(2)(m), the consent of the parties was not necessary for a case to be referred to Early Neutral Evaluation (*Lomax v Lomax* [2019] EWCA Civ 1467) and in *Compulsory ADR* (a report of the Civil Justice Council published in June 2021 and cited in *Churchill*) it was said that any form of compulsory NCDR which is 'not disproportionately onerous and does not foreclose the parties' effective access to the court' is lawful.

Equally, the public policy considerations militating in

favour of a departure from the *status quo ante* were plain for all to see – including the government, which in July 2023 announced that all small claims in the county court (generally disputes up to £10,000) will have a free mediation session integrated into the court process.

Those considerations surely apply with equal and arguably even greater force in relation to family proceedings.

Resolution's call for change to MIAMs

In the same week that *Churchill* was decided, Resolution launched its 'Vision for Family Justice'.[1] One call is for the replacement of statutory Mediation Information and Assessment Meetings (MIAMs) with an Advice and Information Meeting (AIM). The AIM would be delivered by a wider range of family justice professionals than purely accredited family mediators. Whether fairly or not it has been perceived for some time that a MIAM necessarily conducted only by an accredited mediator may have an inbuilt bias towards family mediation, rather than the full smorgasbord of NCDR options which have developed over the years. MIAM providers suggest that all forms of dispute resolution can be discussed at a MIAM, but there remains an anxiety that this may not always be the case.

Resolution also calls for more rounded advice on the NCDR options, beyond just family mediation. The potential issues with family mediation (and indeed all forms of dispute resolution) are helpfully explored in the recent Fair Shares study, a large-scale empirical research project conducted by Professor Emma Hitchings et al.[2] The President of the Family Division also recently set out his stall concerning the need to consider a wider range of dispute resolution options than purely family mediation.[3]

Forthcoming changes to the FPR concerning NCDR

The Family Procedure (Amendment No 2) Rules 2023 (SI 2023/1324)[4] were laid before Parliament on 7 December 2023 and will come into force partly on 8 April 2024 and partly on 29 April 2024.

They are the result of the work and consultation undertaken by the Family Procedure Rule Committee (FPRC) concerning the early resolution of private family law arrangements.[5] The FPRC was essentially charged with consideration of how the rules might encourage early resolution of private family law disputes short of mandating NCDR.

The Ministry of Justice recently conducted a separate consultation concerning the issues associated with mandating NCDR and the results of that are still awaited.[6]

A new definition of NCDR

From 29 April 2024, the definition of 'non-court dispute resolution' at FPR 2.3(1)(b) will be widened to mean:

> 'methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law.'

A change to the conduct of MIAMs

FPR 3.9(2) will be amended to impose a requirement for MIAM providers to 'indicate to those attending the MIAM which form, or forms, of non-court dispute resolution may be most suitable as a means of resolving the dispute and why' and 'provide information to those attending the MIAM about how to proceed with the form, or forms, of non-court dispute resolution in question'.

Resolution have not quite got their AIM, but surely their glass is half full. Henceforth NCDR does not mean just mediation and there will be a requirement on MIAM providers properly to triage into an appropriate form of dispute resolution.

Changing the name might be regarded as cosmetic and in any event beyond the scope of the FPRC since the term MIAM is to be found in primary legislation.

This is surely the moment for MIAM providers and those who train and accredit them to grasp this nettle (some may call it a lifeline). If the current MIAM community cannot step up to this task, then it may be that the Resolution call to widen the scope of MIAM providers will become unanswerable.

References to domestic violence will be widened to include all forms of domestic abuse, in keeping with the Domestic Abuse Act 2021. It will remain the case that domestic abuse provides an exemption from MIAM requirements.

Otherwise, MIAM exceptions will be tightened up, and most notably the FPR 3.8(1)(c)(ii)(ad) 'unreasonable hardship' will be substituted for the tighter 'significant financial hardship'.

Parties and practitioners can also expect a beadier review of MIAM compliance once the matter is before the court. One thinks in this regard of *Re K* [2022] EWCA Civ 468, [2022] 2 FLR 1064 and Sir Geoffrey Vos MR's comments at [6] that it was 'unfortunate' that the parties did not attend a MIAM and had they done so the 'issues between the father and mother that concerned the logistics of the father's contact might have been speedily resolved before the inevitable trauma caused to the family by the fact-finding process' and at [35] that it 'is a matter of concern that a party can avoid the statutory MIAM requirement by simply asserting that a case is urgent and that they need a without notice hearing', 'for the statutory MIAM requirement to be effective, it must be enforced' and '[t]the father ought to have been required to engage with the MIAM process.'

A requirement to state your views about NCDR

A new FPR 3.3(1A) will provide that 'when the court requires, a party must file with the court and serve on all other parties, in the time period specified by the court, a form setting out their views on using non-court dispute resolution as a means of resolving the matters raised in the proceedings'. The court will require this form to be filed digitally in cases which are managed by the family law online portal (currently financial remedies and private law children (albeit this is being piloted solely in Swansea at present)).

The making of an order under FPR 3.3(1A) will be closely akin to the making of an Ungley order (so-called because it

was first devised by Master Ungley to encourage the use of NCDR in clinical negligence cases), by which a court may require a party to file a statement to similar effect and thereafter make an adverse costs order if there have been no reasonable invitations made to engage in NCDR, or if such invitations have either been ignored or unreasonably refused.

The only substantive difference is that whereas the statement filed pursuant to an Ungley order is 'without prejudice save as to costs', one filed pursuant to this rule will be open, meaning that the court will be aware at all stages of the case of the parties' positions regarding NCDR. The form will have to be filed and served. This will require parties to think and talk to each other about NCDR.

Fresh carrot, bigger stick

An Ungley order was made in *Mann v Mann* [2014] EWHC 537 (Fam), [2014] 2 FLR 928, by Mostyn J, who also noted that what was then FPR 3.3(1)(b), but later became FPR 3.4(1)(b), permitted the court to adjourn for NCDR only 'where the parties agree' and called for consideration to be given by the FPRC to the removal of that proviso.

From 29 April 2024, it will be deleted and an amended FPR 3.4(1A) will provide that where 'the timetabling of proceedings allows sufficient time for these steps to be taken', the court may adjourn proceedings to 'encourage parties' to 'undertake non-court dispute resolution.' The agreement of the parties will no longer be required. This is the fresh carrot.

Most importantly, in financial remedies cases, this power to 'encourage' will be backed with an amended FPR 28.3(7), which will expressly make a failure by a party, without good reason, to attend NCDR a reason to consider departing from the general starting point that there should be no order as to costs. This is the bigger stick.

It will be interesting to see whether the forthcoming amendments will herald a change in culture and interest in NCDR, as FPR PD 28A, para 4.4 and recent case-law have incentivised cultural change with regard to the making of open offers.

Taken together, the new provisions go close to, but do not quite amount to, the mandation of NCDR. It remains to be seen whether change is indeed upon us, or whether these provisions will slide into misuse and obscurity. It is hoped that these rule changes will encourage judges, practitioners and parties to keep at the forefront of their minds the possibility of resolving disputes comparatively swiftly, amicably and inexpensively, away from the court.

Notes

1 https://resolution.org.uk/campaigning-for-change/vision/
2 www.bristol.ac.uk/law/fair-shares-project/
3 www.judiciary.uk/speech-by-the-president-of-the-family-division-relaunching-family-mediation/
4 www.legislation.gov.uk/uksi/2023/1324/introduction/made
5 www.gov.uk/government/consultations/early-resolution-of-private-family-law-arrangements
6 www.gov.uk/government/consultations/supporting-earlier-resolution-of-private-family-law-arrangements

Non-matrimonial Assets – The New 'Conduct'?

Laura Moys

1 KBW

In the recent decision of *RN v DA* [2023] EWFC 255 (HHJ Vincent – 30 November 2023) the court was faced with an application by a wife to rescind a decree nisi that had been pronounced in 2012. The husband, conversely, had applied for the decree to be made absolute.

The paragraphs of the judgment dealing with costs reveal that the wife's legal fees incurred in pursuing her application to rescind alone (she had also made an unsuccessful application to strike out the decree for want of prosecution) were a whopping £188,221.80, on which significant interest was also being incurred as her legal representation had been funded by a litigation loan.

Although the judgment does not set out a precise figure for the husband's costs, it is said that the husband accepted they were '… likely to have significantly exceeded those claimed by the wife'.

These costs related *only* to the satellite issue in respect of the 2012 decree. Other than a recent exchange of Forms E, the substantial financial remedy proceedings had not yet got off the ground pending the determination of that preliminary issue.

The driving force behind this expensive skirmish? The judge observed at [26]:

> 'The main reason that the dispute over the divorce has become so charged is that in recent years the husband has become exceptionally wealthy. His estimate of the joint assets in 2012 was £3.2 million. In his Form E exchanged over the weekend preceding this hearing, he put his gross assets at £100 million … He asserts that none of this wealth should fall to be considered within the pot of marital assets that are the subject of the wife's application for financial remedies.'

Although an extreme example – and one in which, given the size of the assets at stake, the wife may well have considered her £188,221.80 to be money well spent – the issues raised in this case highlight the potential for arguments in respect of the source and nature of the assets to dominate a case, consume disproportionate amounts of time and effort, and reduce the chances of early, amicable, settlement.

The reason for this – quite simply – is that in cases in which the sharing principle (as opposed to the needs principle) prevails, assets classed as 'matrimonial' will ordinarily be divided equally, whereas the non-matrimonial assets (the white leopard population continuing to be vulnerable but not – as yet – extinct) are highly likely to be excluded from sharing.

As is often observed, legal constructs that have evolved in the context of so-called Big Money financial remedy cases can have unintended (and potentially adverse) consequences when extracted and applied to cases in which the assets are much more modest.

In a case in which the assets run into the tens of millions (or the hundreds of millions) the impact on the elusive search for a 'fair outcome' of separating out assets acquired prior to the marriage, gifted by way of inheritance, or earned in the no man's land between separation and the final hearing may appear – to the informed observer at least – less acute.

If, for example, the assets are £100m and one party is provided with 60% of them to reflect a very significant premarital contribution, the fact that the other spouse will still be left with a sum vastly in excess of their reasonable needs is likely to satisfy most people's litmus test for fairness, subjective as that test may be.

Likewise, where a case very obviously falls into the 'needs' end of the spectrum the court's focus will rightly be on the struggle to meet those needs and it will be largely untroubled by handwringing over the provenance of the limited assets under consideration.

The difficulty arises, in my experience, when dealing with those cases that land somewhere in the middle: where there is sufficient money for a party's needs to be classed as 'elastic', but where there is no large surplus left over after needs have been met; where an argument about the characterisation of the assets might be arguable, but where the cost of protracted litigation will have a very significant financial consequence.

In these cases, my concern is that the merits (and cost/benefit analysis) of a matrimonial/non-matrimonial argument are not being identified and triaged at an early stage. This is despite the fact that, as Moylan LJ emphasised in *Hart v Hart* [2017] EWCA 1306 Civ at [85]:

> 'First, a case management decision will need to be made as whether, and if so what, proportionate factual investigation is required. As the Supreme Court said in *Wyatt v Vince* [2015] 1 FLR 972 (paragraph 29) the over-

> riding objective requires the court to manage financial remedy proceedings cases actively and to identify those issues which need full investigation and those which do not.'

It is now common in cases in which a party raises 'conduct' pursuant to s 25(2)(g) Matrimonial Causes Act 1973 for the court to require that party to set out their stall early by ordering an exchange of focussed narrative statements.

Again in the context of s 25(2)(g), Peel J in *Tsvetkov v Khayrova* [2023] EWFC 130 stressed that factual assertions should be pleaded '… with particularised specificity …'; that the party should identify clearly *how* the allegation is said to be material to a fair financial outcome; and that the court has the power to strike out conduct arguments at a first appointment hearing where it is clear that further investigation of those issues would be disproportionate.

Despite this being a standard approach in the context of 'conduct', in my experience the same case management rigour is not routinely (ever?) applied where a spouse advances a case based on allegedly non-matrimonial contributions.

Moreover, where attention *is* given to the issue prior to the final hearing, the focus is often on evidence gathering (e.g. a request for a completion statement from 1994 or bank statements evidencing receipt of a gift from an aunt and so forth), and not on establishing the causal link between the existence of the non-matrimonial property and the fairness of the ultimate financial order sought.

In other words, rather than just identifying what the non-matrimonial assets are said to be and their value, in my view parties ought to go further and openly state *how* they say that the existence of the non-matrimonial asset should be factored into the evaluation of the issues in the case (e.g. to confirm whether they will be asking for the entire value of the asset to be excluded from consideration and, if so, what the net effect of that approach is said to be).

In my view, too often the issue of non-matrimonial property is either: (1) left as an issue on which parties choose to reserve their positions until the final hearing; or (2) not properly pleaded leading to generalised assertions such as a request for an award which 'reflects the substantial contributions made by my parents'.

The sharing principle, of course, applies in theory to *all* the parties' property – not just the 'matrimonial' property (*Charman v Charman* [2007] EWCA Civ 503).

In other words (and I appreciate I run the risk of here of oversimplifying c.20 years of nuanced case law) the court will consider *all* the parties' property – irrespective of source – and then decide how it should be divided by reference to the s 25 factors and the need to achieve a fair outcome. The existence of non-matrimonial property is a factor relevant to the question of *how* the sharing principle should be applied (i.e. should the assets be shared equally or unequally).

This is one of the reasons why – as Moylan LJ identified in *Hart* – it is not always necessary to adopt a formulaic approach either when determining whether the parties' wealth comprises both matrimonial and non-matrimonial property or when the court is deciding what award to make.

We should not lose sight of the fact that the ultimate objective is a 'fair outcome' and in some cases the strict ringfencing of a particular 'species' of asset would prevent the court from appropriately balancing all relevant factors (such as the extent to which non-matrimonial resources have been utilised for the economy of the family and mingled with matrimonial assets, or the duration of the marriage).

I have also observed in practice that is not uncommon for a party to describe non-matrimonial property in their Form E as an 'unmatched contribution'. The 'contributions' referred to at s 25(2)(f) are specifically and deliberately defined in the Act as contributions '… to the welfare of the family' and the words '… including any contribution by looking after the home or caring for the family …' are plainly designed to remind the court of the importance of not discriminating between breadwinner and homemaker.

There is, in my view, a real risk of precisely this kind of discriminatory approach being adopted if non-matrimonial property is unquestionably accepted to be a relevant and important 'contribution' by one party *and one that should lead to its exclusion from division* without appropriately balancing that contribution against the (potentially non-financial) contributions made by the other party.

An example of this is in the treatment of assets earned by one party between separation and trial. There is surely a risk of unfairness if the law excludes from equal sharing savings built up over the months between separation and trial held in the sole savings account of the 'breadwinner' spouse without acknowledging the other spouse's non-financial contributions to the welfare of the family over the corresponding period (e.g. continuing to be responsible for the bulk of the practical arrangements when looking after young children). The fact that those domestic contributions cannot be quantified in monetary terms (still less transferred into a separate bank account and 'ringfenced') should not invalidate them.

Before anyone points out that a similar argument has already been dismissed for being 'completely unprincipled' by Mostyn J in *A v M* [2021] EWFC 89, those comments were made in the context of anticipated domestic contributions *post* trial and after the distribution of the assets had taken place, as opposed to evaluating the parties' respective contributions between the date of separation and trial, where divorcing couples are (often) still financially intertwined, and where the court has not yet embarked on the s 25 exercise.

Added to this is the fact that the process of identifying property as matrimonial or non-matrimonial can lead to exactly the kind of accusatory spreadsheet of marital contribution/behaviour that the courts try to avoid in the context of s 25(2)(g) (and notwithstanding the fact that a party's 'conduct', unlike the question of the source of the assets, *is* an express factor included in the s 25(2) checklist).

Absent a nuptial agreement, I venture to suggest that (until they separate, or at least until they receive legal advice) many married couples do not give a moment's further thought to the issue of the characterisation of the assets they enjoy as a family. This may be even more likely after a long marriage where recollections about the original source of the parties' financial resources and the intention with which they have been deployed fade (or, worse, begin to be viewed through the distorting prism of litigation).

Furthermore, the ability to argue about the nature of an asset (in a context in which there is now effectively a 'starting point' that in a sharing case the non-matrimonial

asset will be excluded from sharing) invariably increases tension and risks reducing the prospects of settlement.

In 'medium asset' cases the fact that, as Peel J observed in *WC v HC* [2022] EWFC 22, '… In practice, needs will generally be the only justification for a spouse pursuing a claim against non-marital assets …' may have the unintended effect of disincentivising the parties from agreeing what those reasonable needs are.

Examples

Consider the following three examples:

- Parties approaching retirement age after a 30-year marriage where H seeks a valuation of his pre-marital contributions to a private pension fund. W had always assumed that H's pension would provide for them both in retirement and it never crossed her mind that H might be able to 'ringfence' the contributions he made in the early 1990s. It is arguable that W's needs can be met from an equal share of the matrimonial pension contributions, but this rather depends on what the judge ultimately decides 'needs' means. Costs are front loaded as the pension report is the first large item of expenditure and the argument about non-matrimonial contributions sets the tone for the rest of the litigation.
- H inherited £100,000 during the marriage that he used to pay off debts. W later inherits £100,000 6 months before separation which remains in a sole bank account in her name. Although W's inheritance is, *prima facie*, a non-matrimonial asset which has never been 'mingled', H questions the overall fairness of excluding it from consideration in circumstances where he says he used his own inheritance to benefit the family during the marriage. W counters by asking H to prove that he used his inheritance to pay debts, seeking disclosure of his bank statements from 2006.
- Part way through the marriage W and H buy a holiday home using funds gifted by W's mother during the marriage as part of inheritance tax planning. The holiday home (and the capital contained within it) is not 'needed' by either party in a strict sense, but it was a second home that they both enjoyed during the marriage. The parties argue about whether the property is matrimonial or non-matrimonial: W says that her mother made a gift to her alone; H says it was a gift to them jointly and that, in any event, it was used by them and their children for a number of years such that it has been 'mingled' by virtue of being used by the family as a whole. Due to the ongoing disagreement about whether this property is to be shared, neither party has any incentive to compromise on an estimated market value; as W wishes to keep the property she says H is trying to artificially inflate the price, H says the opposite.

Although hypothetical scenarios, I suspect many of you will recognise aspects of them in your own cases and be familiar with the obstacles they can place in the way of settlement. Other thorny conundrums include:

- 'mixed' assets: for example, where pre-acquired savings are used to discharge the mortgage on a jointly owned property otherwise purchased with matrimonial funds;
- the characterisation of the family home, which is always a matrimonial asset apart from when it isn't (*Vaughan v Vaughan* [2007] EWCA Civ 1085).

So what might be done to improve the situation?

Of course, that question presumes that we agree the situation *should* be improved upon in the first place. After all, Mostyn J suggested in *JL v SL (No 2) (Appeal: Non-Matrimonial Property)* [2015] EWHC 360 (Fam) that:

> 'Given that a claim to share non-matrimonial property (as opposed to having a sum awarded from it to meet needs) *would have no moral or principled foundation* it is hard to envisage a case where such an award would be made.' (emphasis added)

The broad discretion inherent in the application of s 25 acknowledges that every family is unique and that whilst there are overlapping themes the duty on the court is to find a bespoke solution that achieves a fair outcome in the facts of the case in hand. In addition to the scenarios I developed in the 'Examples' section above, I suggest that we would not have to look too hard to identify family situations in which there could very well be a moral or principled foundation for sharing *all* the parties' property equally irrespective of source.

An example might be a long marriage case in which the parties made choices (such as a decision not to invest in a pension) based on an implicit understanding that any inheritance would be used for the family as a whole. Of course, that same scenario could be characterised as a 'mingling' case, but I wonder whether there is a risk that nebulous concepts such as mingling or 'matrimonialising' are used as a fudge in scenarios in which disapplying the sharing principle to the non-matrimonial assets would lead to a subjectively unfair outcome but where the court does not want to be the first one to spot a white leopard.

The word limit for this article (conveniently) does not permit me to advance detailed theories about the development of the law relating to non-matrimonial property and what might be done to improve upon it, but a suggestion might be to introduce an 'inequitable to disregard' threshold akin to that applied to special contribution cases. This would mean that where there has been a very significant and readily identifiable non-marital contribution by one side this would continue to be appropriately reflected in the overall outcome, whilst the majority of medium asset cases and/or those cases in which there are mixed assets with no clear dividing line would fail to pass through the filter.

A (more radical/controversial) alternative (and one which would require legislative change) would be an assumption that the parties intended all of their assets existing at the date of trial to be divided equally (subject to needs) unless they have elected otherwise through a nuptial agreement.

In the meantime, we should remember the extensive case management powers available and, in an appropriate case, consider inviting the court to adopt a robust approach to the question of which issues require further investigation and which do not. Where financial resources allow, the use of early neutral evaluation/PFDR at the earliest opportunity is a very good way of testing the strength of any non-matrimonial property argument before significant costs are incurred.

Financial Remedy Proceedings Transparency Reporting Pilot

Launch date 29 January 2024

Samantha Hillas KC

St John's Buildings

Introduction

Those of you who have appeared in Children Act cases in Leeds, Cardiff or Carlisle in the last 12 months will have encountered the transparency pilot scheme established in those courts in January 2023 and which will be expanded to more courts in January 2024. The essence of the Financial Remedies Court reporting pilot is the same: to permit reporters[1] to publish an account of what takes place in court provided that anonymity and confidentiality are preserved.

The issue of transparency is not without controversy. We know that because:

- There has been a divergence of views amongst judges of the High Court as to the reportability or otherwise of what happens during financial remedy proceedings.
- The respondents to the survey issued by the Farquhar Group as part of its report published in April 2023 expressed a wide divergence of views about the involvement of reporters in financial remedy hearings.
- It was evident from the results of that survey that there is a lack of understanding amongst lawyers about what reporters are currently permitted to do.
- Recent experience has shown us that when judges – and the advocates appearing before them – get it wrong, they can expect to be skewered in the press.

As such, this pilot is to be welcomed. It provides a clear pathway as to what will happen from 29 January 2024 if a reporter attends a financial remedy case in the courts involved in the pilot – Central Family Court,[2] Leeds and Birmingham – and from 4 November 2024 in the Family Division of the High Court. It covers applications for financial remedies upon divorce, applications under Sch 1 Children Act 1989 and applications under Part III Matrimonial and Family Proceedings Act 1984.

The Guidance applies to any level of judge of the Financial Remedies Court. It does not apply to the Court of Appeal (Civil Division), or to appeals to Circuit Judges or High Court Judges which are heard in open court.

Even if you do not routinely appear in the Central Family Court, Leeds or Birmingham, please read the President's Guidance.[3] This pilot represents evolution, not revolution. Reporters are *already* able to attend financial remedy hearings (but not FDRs) as of right. The most likely contentious issue will be what reporters are able to report arising from what they have heard and read at the hearings they attend. The procedural rules and substantive law underpinning the pilot applies to all financial remedy cases in all courts and there is evidence that advocates do not understand it. You are unlikely to be indulged by the court if you are not familiar with FPR 27.11/PD 27B or the *Re S* balancing exercise[4] (see Annexe I to the President's Guidance at paragraph 2(e)).

All family lawyers should have already read the Transparency Project's enormously useful note as to what to do in cases when a reporter attends a hearing in the Family Court. If not, read it. A copy is attached to the President's Guidance as Annexe I and there is a link to it on the Transparency Project's website.[5]

The President's Guidance is not binding. It is open to a judge in any particular case to depart from the guidance to the extent considered appropriate, in accordance with the law and the particular circumstances of the case. However, the Guidance is what the President of the Family Division and Mr Justice Peel as head of the Financial Remedies Court consider should be the general way forward.

The pilot makes clear that all parties must assist the court in furthering the Overriding Objective at FPR 1.3. In any case where a reporter attends, advocates are expected to be prepared to address the court on transparency issues and include transparency as part of the agenda in pre-hearing discussions with clients and the other advocates in the case. Lawyers and lay parties are expected to work constructively with pilot reporters.

The purpose of this article is to set out a series of simple steps and identify the points you will need to consider in pilot cases.

What should I do if I am appearing in a financial remedy case in the CFC, Leeds or Birmingham?

(1) Re-read the President's Guidance. Judges and court staff have been trained on the pilot but late changes of personnel may mean the court requires assistance. Familiarise yourself with, and be prepared to advise your client, the other parties and the court about, what should happen in the event a reporter gives notice that they intend to attend your hearing.
(2) If it is an FDR hearing, there is nothing for you to do. Reporters cannot attend FDRs (FPR 27.11(1)(a)).
(3) For any hearings other than FDRs, download the draft transparency orders in case a reporter attends your hearing and the court intends to make a transparency order or interim transparency order – the advocates will be expected to draft them.

What will happen if a reporter contacts the court to say they want to attend the hearing?

(1) Reporters are expected to give notice to the court if they are proposing to attend a hearing. This does not always happen in practice and late or short notice will not in itself preclude a reporter's attendance.
(2) If it is a remote hearing then the reporter will be entitled to attend remotely. If it is an attended hearing, the reporter may attend in person. If it is an attended hearing and the reporter wants to attend remotely, that is a case management decision for the judge. If there is the equipment and staff available to facilitate a hybrid hearing, efforts will be made to enable the reporter to attend remotely, but a reporter should not assume that they will automatically be entitled to do so.
(3) The court office will ordinarily be responsible for checking the credentials of the reporter. Journalists require a press card. Legal bloggers are expected to produce ID and Form FP301 (or a letter from their appropriate institution) confirming they are qualified lawyers attending for journalistic, educational or research purposes. You should check this has been done.
(4) Advocates are expected to work co-operatively and constructively with reporters in furtherance of the Overriding Objective, but reporters are not to interfere with pre-hearing discussions. Request for interviews with parties must be made through their advocates.
(5) Advocates may approach reporters, whether directly or through their press body, on behalf of their clients if so instructed but cannot question a reporter about their sources or seek to exercise editorial control.
(6) Remember that any applications or discussions before the judge relating to the role of the reporter – for example whether they should be excluded, what they may or may not report, or whether the documents they receive (see below) should be redacted – should take place in the presence of the reporter and the reporter is entitled to make representations.

What should I do if I am attending a financial remedy case in the CFC, Leeds or Birmingham other than an FDR and a reporter attends the hearing?

(1) Be clear with your clients that reporters are entitled (as they have been since 2009) to attend the hearing. Whilst the court can hear argument as to their attendance, the exceptions to their entitlement to attend are limited (see FPR 27.11(3)) and are unlikely to arise. The reporter can be present for as much of the hearing as they want to be. Reporters do not have to stay for the whole of the hearing.
(2) Familiarise yourself with, and be prepared to advise/remind others in the case about, the terms of the standard transparency order (attached to the President's Guidance as Annexe II). In essence, reporters will be permitted to publish any information relating to the proceedings *save for*:
    (a) the names and addresses of the parties (including any intervenors) and their children and any photographs of them;
    (b) the identity of any school attended by a child of the family;
    (c) the identity of the employers, the name of the business or the place of work of any of the parties;
    (d) the address of any real property owned by the parties;
    (e) the identity of any account or investment held by the parties;
    (f) the identity of any private company or partnership in which any party has an interest;
    (g) the name and address of any witness or of any other person referred to in the hearing save for an expert witness.
(3) A transparency order may be made at any stage of proceedings, but it is expected that a transparency order will be considered and, if appropriate, made, at the first hearing attended by a reporter.
(4) Bearing in mind the extent of what a reporter *cannot* publish pursuant to the standard transparency order and that, consequently, the identity of the parties, their children or other identifying facts will remain confidential, consider whether there are any circumstances particular to your case which would support an argument that a transparency order should not be made or that reporting should be further restricted.
(5) The court retains the discretion to direct that there should be no reporting of the case. In some circumstances the judge may decide to adjourn consideration of the transparency order until the conclusion of the hearing and prohibit any reporting of the case in the meantime. In those circumstances an interim transparency order will be made. This appears as Annexe III of the President's Guidance.
(6) The details of the reporter should appear on the face of the transparency order and reporters must be served with a copy – this will usually be done by email by the court staff.
(7) The court may at any time modify or discharge the terms of the transparency order as it considers appro-

priate. Notice should usually be given of any application to do so.

(8) The draft transparency order sets out that the reporter will be given copies of any position statements filed in the case and the ES1 (but not the ES2, which is likely to contain confidential or commercially sensitive financial information) to aid their understanding of the issues in the case. The court retains the power to restrict or widen the scope of the documents to be provided to the reporter.

(9) It is not envisaged that the position statements or ES1 would require redaction, given that the transparency order is unlikely to permit confidential information to be reported in any event. However, consider whether there any circumstances particular to your case which would require an application in the face of the court to redact any information set out in the position statements or ES1.

(10) The reporter may quote from the documents with which they are provided, so long as any such publication is in accordance with the ambit of reporting permitted under the transparency order.

(11) If a document is referred to during a hearing, that does not entitle the reporter to see the document without permission of the court. The normal rule in civil proceedings (CPR 31.22) does not apply to financial remedy cases.

(12) The judge will, at the conclusion of the case, complete a feedback form to inform the President as to the success or otherwise of the pilot. You are not required to provide feedback but if you want to share any feedback, it can be sent to the email address set out below.

Further information

The TIG homepage[6] on the Judiciary website includes links to all of the documents referred to above including the President's Guidance, the draft orders, the Farquhar Group report and a PowerPoint training video.

In the event of queries, legal practitioners are invited to send an email to pilots@thetig.org.uk, managed by Emily Ward and Henrietta Boyle. They will respond as soon as they can but remember they are busy practitioners and patience may be required. Judges are invited to direct their queries about the pilot to their local Financial Remedies Court lead judge in the first instance.

Notes

1 In this article, the term 'reporters' is used to include either duly accredited representatives of news gathering and reporting organisations or duly authorised lawyers attending for journalistic, research or public legal educational purposes ('legal bloggers'), both of whom are permitted to attend hearings pursuant to FPR 27.11(2)(f)–(ff).

2 The pilot will apply to Central Family Court cases heard in the overflow courts at the Royal Courts of Justice. As set out above, it will not apply to cases heard in the Family Division of the High Court until 4 November 2024.

3 https://www.judiciary.uk/wp-content/uploads/2023/12/Reporting.PilotScheme.Final_.President.pdf

4 From *Re S (A Child)* [2004] UKHL 47 at [17].

5 https://transparencyproject.org.uk/wp-content/uploads/WHAT-TO-DO-WHEN-A-REPORTER-ATTENDS-FINAL.pdf

6 https://linktr.ee/TransparencyImplementation

Groundhog Day Again: A Response to The Transparency Reporting Pilot for Financial Remedy Proceedings

Sir James Munby

The Financial Remedies Sub-Group of The Transparency Implementation Group, chaired by HHJ Farquhar, produced its long-awaited Final Report, dated April 2023 but published in May 2023, *Transparency in the Financial Remedies Court*.

On 6 July 2023 I published *Groundhog Day: A Response to the Report of the Financial Remedies Sub-Group of the Transparency Implementation Group*.[1] It will not have made for comfortable reading, but I make no apologies for that: this is an important topic on which candour and precision are vital. Of the *TIG Report*, as I shall refer to it, I said, 'It is a long, detailed and in many ways impressive report though unhappily … demands critical analysis (in both senses). Though there is much to support, there is, I regret to have to say, much to criticise.' I stand by that, and by everything else I said, though I do not repeat it all here.

On 14 December 2023 the President published *The Transparency Reporting Pilot for Financial Remedy Proceedings* dated 11 December 2023. It comes in five parts. First there is *Guidance From the President of the Family Division* (the *Guidance*), which is followed by Annexe I, *What to do when a reporter attends (or wants to attend) your hearing: A guidance note for judges & professionals*, Annexe II, *Draft Final Transparency Order*, Annexe III, *Draft Interim Transparency Order*, and Annexe IV, *Rubric: Draft Judgment Rubric where the judgment is published*.

Annexe I in fact reproduces a document originally published by the Transparency Project which has pointed out, in a blog dated 17 December 2023,[2] that it 'relates to the media or legal bloggers attending, as they are entitled to do, general family court hearings' – in other words, it is not a document focusing on financial remedies proceedings.

I also observe that what are for present purposes the key paragraphs 9 and 10 of the *Draft Final Transparency Order* set out in Annexe II are, save for one inconsequential amendment (the substitution in para 10(g) of 'save for' in place of 'except for'), identical with what had been proposed in the *TIG Report*.

The President is very clear as to his approach. In the *Guidance* (paras 6, 8) he says:

> 'The sub-group has analysed the legal position in some detail, but rightly has not sought to express a view as to whether the contrary approach taken by Mr Justice Mostyn is correct at law. Instead, it has considered where the balance should lie between Articles 8 and 10 (regardless of whether the starting point at law is one of reportability or not) and reached conclusions as to the extent to which reporting should be permitted in financial remedy cases … [The Pilot Scheme] will adopt the recommendations contained within the report of HHJ Farquhar's group.'

No one can challenge this prudent and pragmatic approach. But it has serious implications which need to be borne in mind.

I start with two fundamental points.

The first is the crucial importance of open justice. There are very many statements at the highest level to that effect. I take just two.

In *Scott v Scott* [1913] AC 417 at 447, Earl Loreburn described the rule that English justice 'must be administered openly in the face of all men' as an 'almost priceless inheritance'. One hundred and three years later, in *R (C) v Secretary of State for Justice* [2016] UKSC 2, [2016] 1 WLR 444 at [1], Baroness Hale said:

> 'The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. The court should not hear and take into account evidence and arguments that they have not heard or seen. The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge.'

The second is to dispute the widespread, but wholly false, belief that secrecy is justified when, and because, the rules require proceedings to be heard 'in private'. The law, stretching back to *Scott v Scott* and finding authoritative

expression in more recent times, makes plain that a hearing in private is just a mode of dealing with judicial business, and does not impute secrecy to the proceedings – with the consequence that the proceedings and any judgment given in such a private hearing can be fully reported in the absence of an order made under s 11 Contempt of Court Act 1981.

Hence, it is clear law, established by the House of Lords in *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, that restrictions on publication not otherwise imposed by law can be imposed only following a judicial 'balancing exercise' which has regard to and balances the interests of the parties and the public as protected by Arts 6, 8 and 10 of the Convention, *considered in the particular circumstances of the case*. This last point is vital, reflecting what Lord Steyn said in *In re S* at [17]:

> 'an *intense focus* on the comparative importance of the specific rights being claimed in the *individual* case is *necessary* (emphases added).'

It seems to be common ground (and, rightly, in my view) that, whatever the correctness of Mostyn J's analysis, the key to the present problem is the undoubted applicability of the *Re S* balancing exercise.

The *TIG Report* was clear and unequivocal on the point (para 11.4):

> 'the focus is on a party's right to privacy versus the general right of freedom of expression and to receive information without the interference of public authorities. A shorthand way of putting it is "privacy v. transparency". Decisions involving the exercise of those rights will *invariably* require a judge to balance competing Convention rights, particularly those set out in Articles 8 and 10. This process is referred to within this Chapter as the "*Re S* balancing exercise", with reference to Lord Steyn's speech (emphasis added).'

Very recently the point as been made by Peel J with pellucid clarity in *Tsvetkov v Khayrova* [2023] EWFC 130 at [116]:

> 'All that said, whether the starting point is as per the long established practice (i.e. non reportability unless the judge orders otherwise) or as per the thesis of Mostyn J (ability to report unless prohibited by the court), if the court is considering whether to permit or prohibit (as the case may be) reporting, it will need to carry out the *Re S* balancing exercise.'

My fundamental criticism of the *TIG Report* was (and remains) that, having correctly enunciated the key principle, it failed to carry it through into its recommendations. It proposed (paras 2.14, 2.15) that anonymity should be the 'default position' or 'presumption' and recommended (para 11.53) that the existing practice of anonymising judgments should continue:

> 'However, the Group has taken account of the strong support for the existing practice of anonymising judgments and recommends a continuation of that practice.'

Indeed, the *TIG Report* went on to recommend (para 2.16) that 'there should be a standard form of Reporting Order (RO) setting out what can and cannot be made public by reporters.' The key provisions of the proposed Reporting Order, so far as material for present purposes, were to be found in the following paragraphs 7 and 8:

> '7. A reporter may publish any information relating to the proceedings save to the degree restricted below.
>
> 8. No person may publish any information relating to the proceedings to the public or a section of it, which includes:
>
> a. The names and addresses of the parties (including any intervenors) and their children and any photographs of them;
>
> b. The identity of any school attended by a child of the family;
>
> c. The identity of the employers, the name of the business or place of work of any of the parties;
>
> d. The address of any real property owned by the parties;
>
> e. The identity of any account or investment held by the parties;
>
> f. The identity of any private company or partnership in which any party has an interest;
>
> g. The name and address of any witness or of any other person referred to in the hearing except for an expert witness.'

These recommendations, I said, were not compatible with a proper application of the *Re S* principle as indeed – correctly – enunciated by the *TIG Report* itself (in para 11.4).

But there is a further problem.

An important point which Mostyn J goes on to make is that the fundamental problem about anonymity which he has identified cannot be resolved by the Rules Committees. Primary legislation is required. He has convincingly demonstrated that, absent further primary legislation, there is no power in the Family Procedure Rule Committee to impose such restrictions generally, whether by rule or by practice direction: see *Xanthopoulos v Rakshina* [2022] EWFC 30 at [140], *Gallagher v Gallagher* [2022] EWFC 52, [2022] 1 WLR 4370, [2023] 1 FLR 120 at [82]–[85], and *Augousti v Matharu* [2023] EWHC 1900 (Fam) at [92]–[93]. Nor, it must follow, and as Mostyn J has recognised, can the President do so by issuing guidance. Non-statutory Presidential guidance can no more change the law than can a statutory practice direction.

As he said in *Gallagher*:

> 'to create a scheme providing for standardised anonymisation of financial remedy judgments will require primary legislation.'

So far as I am aware no one has challenged this part of Mostyn J's analysis. Indeed, on this point the *TIG Report* seems to have accepted that Mostyn J was correct, for, under the heading 'Implementation', it makes this important point (para 2.20):

> 'The vast majority of the recommendations would be capable of implementation without any need for a change of the rules or of the substantive law. The issue on which we are not able to state the relevant method of implementation is that of anonymity. *If the law is as set out by Mostyn J then a change in statute law would appear to be required to permit FRC judgments to be anonymised*. If the approach of many other High Court

> Judges is correct, then no change in law would be required.' (emphasis added)

This is a point of critical importance. Whether or not change can be implemented without a change in statute law depends upon whether or not, on the fundamental issue of anonymity, the law is as Mostyn J has set it out. *In other words, one cannot proceed on the basis that there is no need for change in statute law unless first satisfied that Mostyn J is wrong on the law relating to anonymity.*

Against this background I return to the *Guidance*.

It is striking that there is *no* reference at all in the *Guidance* to *Re S* (though it is referred to in Annexe I, paras 2(e), 4(a)) and that there is *no* reference at all in the *Guidance* to what the *TIG Report* had seen as the potential difficulty in proceeding without a change in statute. Given the centrality of these matters, these omissions are surprising. What is particularly regrettable is that nowhere in either the *Guidance* or Annexe I does one find the clear statement, which given general misunderstandings is so necessary, that, as Peel J put it,

> 'whether the starting point is as per the long established practice (i.e. non reportability unless the judge orders otherwise) or as per the thesis of Mostyn J (ability to report unless prohibited by the court), if the court is considering whether to permit or prohibit (as the case may be) reporting, it will need to carry out the *Re S* balancing exercise.'

Carrying out the *Re S* balancing exercise is not just desirable: it is *necessary* and moreover *in every case* if the law is to be complied with.

What for present purposes is the central core of the *Guidance* is this (paras 19–23):

> '19. Where a reporter attends, the court will consider making a standard Transparency Order in accordance with Annexe II. The court retains the discretion to direct that there should be no reporting of the case. The order shall ordinarily be expressed to last "until further order" but the court may consider a specific time limit.
>
> 20. A Transparency Order may be made at any stage of proceedings, but it is expected that a Transparency Order will be considered and, if appropriate, made, at the first hearing attended by a reporter.
>
> 21. The draft Transparency Order at Annexe II provides that the reporter may publish what is said in court, subject to the restrictions contained in the Transparency Order designed to preserve anonymity and confidentiality. The draft order also provides that witnesses shall not ordinarily be identified, save for expert witnesses.
>
> 22. It is anticipated that a judge may decide to make an interim Transparency Order in certain circumstances. Most commonly, this might be at the start of a final hearing, in circumstances where the judge decides to adjourn consideration of the Transparency Order until conclusion of the hearing, and wishes to prohibit any reporting of the case in the meantime. At Annexe III is a draft interim Transparency Order.
>
> 23. The court may at any time modify or discharge the terms of the Transparency Order as it considers appropriate. Notice should usually be given of any application to do so.'

The absence of any reference to *Re S*, never mind the failure to emphasise its vital importance, makes what is said in paragraph 19 especially problematic. For it gives the unwary the impression that the choice is between making a transparency order in 'standard' form or 'direct[ing] that there should be no reporting' – a false dichotomy that does not begin to address the key issue.

In *Groundhog Day* I said of the *TIG Report* that:

> 'it seeks to rely … upon opaque and inadequately explained proposals for the use of a Draft Standard Reporting Order, seemingly as a means of escaping from the problem, which it does not really grapple with, that the implementation of such a policy, unless it is implemented by *Re S* compliant orders, will require primary legislation.'

The disheartening conclusion is that the *Guidance* is no more compatible with a proper application of *Re S* than were the proposals put forward in the *TIG Report*.

The ordinary rule is a presumption in favour of open justice with any derogation permissible only where 'strictly necessary', requiring close consideration and clear justification. And such an exception can only be expressed by means of a formal order made under s 11 Contempt of Court Act 1981.

The *Guidance* turns these principles on their head, for the practical effect of the *Guidance* will be the imposition of anonymity in almost all cases.

I do not of course dispute that the *Guidance* lawfully permits a transparency order to be made in a case heard in private which is not subject to either s 12 Administration of Justice Act 1960 or s 97 Children Act 1989, *provided that it is clearly understood that the Re S balancing exercise is undertaken authentically and not with an inbuilt presumption that the order will be made*.

But, unfortunately, such a presumption, directly at odds with *Re S* and therefore unlawful, is pretty clearly in place. Paragraph 2.15 of the *TIG Report* – not disavowed in the *Guidance* – says so. But the *Guidance* seems to go further. Without putting too fine a point on it, the *Guidance* propounds a policy of anonymisation to be applied save in limited circumstances. It is true that the wording in paragraph 19 of the *Guidance* does not actually say in so many words that the court must make the anonymity order; but when its language is read in the context of the *Guidance* read as a whole and, in particular, the policy articulated in, for example, paragraphs 6–8 and 28–29, there is a strong implication that such an order should be made almost automatically in every case where a reporter attends, unless, of course, the court adopts the alternative more stringent suggestion of prohibiting reporting together.

So far as concerns paragraph 10(g) of the proposed Transparency Order as set out in Annexe II, I repeat the point I made in *Groundhog Day*:

> 'I do have to question the proposed prohibition on naming "any … person referred to in the hearing except for an expert witness." Is it seriously being suggested, for example (and one can think of many others), that one should not be able to identify a judge previously involved in the proceedings or in other, related, proceedings? I would hope that this is merely the consequence of poor drafting following insufficient thought.'

I do not know, and from a purely personal point of view I do

not care, whether anyone has read *Groundhog Day* and considered this point. But the point remains, in my view, sound. Why on earth, to take my example, should that judge not be named?

In relation to the Rubric, the *Guidance* says this (para 29):

> 'In the light of the proposed changes, it is envisaged that a new rubric should be included in judgments which are intended to be released publicly. The rubric contains alternative scenarios:
>
> a. Where no reporter has attended, and no Transparency Order has been made;
>
> b. Where a reporter has attended, and a Transparency Order has been made.
>
> A draft rubric is attached at Annexe IV. It is in the alternative, and appropriate deletions/amendments should be made in each given case.'

The proposed Rubric as set out in Annexe IV provides as follows:

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

I note that this is identical to the form of Rubric proposed in the *TIG Report* except for the addition of the square brackets; the substitution of 'Transparency Order' for 'Reporting Order'; the insertion of the words I have italicised; the substitution of 'may' for 'will' before 'be a contempt of court'; and the addition of the instruction, in bold, '[**Adapt as appropriate**]'. None of these minor changes affects the substance, nor do they begin to meet the two points I made in *Groundhog Day*:

> '1. Why does the proposed rubric recite that the judge has given permission for the judgment to be published? As Mostyn J has laboriously explained, this is needed in the case of a judgment in proceedings to which section 12 of the Administration of Justice Act 1960 applies but otherwise is not needed. The wording is otiose and misleading; its inclusion simply serves to perpetuate misunderstanding and subtly to reinforce the dangerous fallacy that financial remedy cases are so different to all other financial disputes that they should normally be shrouded with a mantle of secrecy.
>
> 2. Why are the words "In no report of, or commentary on, the proceedings or this judgment may the parties or their children or their addresses be identified" included *before* and therefore seemingly independent of the following reference to a Reporting Order. And, if intended to operate independent of the RO, what is the legal basis for such a prohibition? In the light of my own judgments, to which Mostyn J has referred, I have to suggest that the only answer to my question is: none at all. Would it not conduce to clarity (and, indeed, a better understanding of how the rubric operates) if the wording was transposed so as to read:
>
> "In this case a Reporting Order has been made on – which continues in effect. In particular the Reporting Order provides that in no report of, or commentary on, the proceedings or this judgment may the parties or their children or their addresses be identified."'

I do not dispute that, where a transparency order has been made, a confirmatory rubric along these lines could be made, provided that it is clearly understood that the rubric cannot and does not prohibit more than is prohibited by the terms of the transparency order.

The *Guidance* (para 29) contemplates, however, that, even where a transparency order has not been made, a rubric should nevertheless be attached stating that any breach of the anonymity within the judgment may be a contempt of court.

This, to speak plainly, is extraordinarily troubling. If a transparency order has not been made, then how can such a rubric lawfully be imposed and what effect can it possibly have?

Enforceable anonymity of a judgment given in private can only be achieved by an order made under s 11 Contempt of Court Act 1981. Such an order should as a matter of good practice be served on the media before it is sought and, in any event, requires a full *Re S* balancing exercise. A rubric is not an order made under s 11 1981 Act. And whatever it is, it will not have been the subject of an application supported by evidence either served on the media (as a matter of good practice) or on all other parties. One wonders to what extent it will, in reality, have been considered formally by the court at all.

In relation to these points it is necessary also to bear in mind paragraph 10 of the *Guidance*:

> 'The pilot will encompass the following proceedings:
>
> a. Applications for financial remedies upon divorce;
>
> b. Applications under Schedule 1 of the Children Act 1989;
>
> c. Applications under Part III of the Matrimonial and Family Proceedings Act 1984.'

How, I ask, can precisely the same form of Rubric be appropriate both in cases under Sch 1 1989 Act (to which s 12 1960 Act applies) and in cases involving financial remedies upon divorce (to which s 12 does *not* apply)? The short answer is that it cannot.

There is a further point which arises under what is said in paragraph 12 of the *Guidance*:

> 'Cause lists for all FRC courts, including cases heard at the Royal Courts of Justice, will name the parties and state that the proceedings involve financial remedies.'

Consider this example: The case is listed with the names publicly displayed. No journalist attends, so there is, in accordance with the *Guidance*, no transparency order. What if a journalist publishes a report saying:

> 'Today, before HHJ X, the case of Smith v Smith (who live at Acacia Avenue and Privet Drive) was heard. I understand from reliable sources that [and there

> follows an accurate account of the hearing including of the judge's extempore judgment].'

Has the journalist committed a contempt, and, if so, why?

Or consider this example: the case is listed with the names publicly displayed. No journalist attends, so there is, in accordance with the *Guidance*, no transparency order. What if the judge, following the *Guidance* and the form of Rubric set out in Annexe IV, attaches to the judgment a Rubric in this form:

> 'This matter was heard in private. The judge gives permission for this version of the judgment to be published. In no report of, or commentary on, the proceedings or this judgment may the parties or their children or their addresses be identified. All persons, including representatives of the media and legal bloggers must ensure that the terms of this rubric are strictly observed. Failure to do so may be a contempt of court.'

What, I ask, is the legal basis for this asserted prohibition on naming the parties?

And consider another example. Suppose that, in a case where no transparency order has been made, the judgment is published anonymously with the proposed rubric, but a party then discloses on social media their identity and those of the other party and the children, as well as details of any business that had been anonymised. Would it then be possible for contempt proceedings to be taken against that party founded upon the terms of the rubric? The answer surely is that it would not.

In each of these cases, I have to suggest, the rubric would be a *brutum fulmen*.

I end by asking, as I must, why the Guidance – so admirable in other ways – seemingly embraces what I worry will in reality prove to be wholesale, routine, near-automatic anonymity.

I fear that the outsider, viewing matters from a perspective away from the desert island, will respond with the searing observation that it simply reflects an inveterate practice which, however unprincipled and despite Mostyn J's fulminations, shows no sign of abating, and is founded on nothing more substantial than the weary trope: 'we believe we are different and we have always done it this way'.

I hope I am wrong, because I ardently want the Pilot to be a great success.

Notes

1 Available on the Blog of the *Financial Remedies Journal* website at https://financialremediesjournal.com/groundhog-0706.s

2 Available on the Transparency Project website at https://transparencyproject.org.uk/new-reporting-pilot-for-financial-remedies-courts/

'What's In a Name?' Anonymising Financial Remedy Judgments

Alexander Chandler KC

1 KBW

This article addresses four questions posed by Sir Nicholas Mostyn:

(1) How engrained is the practice of anonymisation in financial remedy (FR) judgments?
(2) What rationale was given in those cases for naming the parties or anonymisation?
(3) What is my view of the legal issues in relation to anonymity?
(4) How do I think these issues will pan out?

(1) How engrained is the practice of anonymisation?

In a perfect world, this first question could be answered simply, by counting up the FR judgments that name the parties, and those that anonymise the parties. But this sort of quantitative analysis raises several issues.

What timescale?

In order to analyse the question on a quantitative basis, I have taken a period of 23 months, staring on 1 November 2021 and ending on 29 September 2023. The starting point of 1 November 2021 was the date when Mostyn J handed down judgment in *BT v CU* [2021] EWFC 87, and declared that, from that point onwards:

> '[113] … my default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations.'

The end date of 29 September 2023 is shortly before the ***At A Glance*** conference (11 October 2023), for which the paper on which this article is based was originally prepared.

Which judgments to include and exclude?

There are three main conventions that have applied to the publication of FR judgments.

First, FR judgments at first instance are normally anonymised, subject to the following main categories of exception which for the purpose of this article I describe as follows:

(a) 'Exception no 1': The case is already in the public domain, by virtue of earlier hearings taking place in open court, e.g. *Crowther v Crowther* [2021] EWFC 88;
(b) 'Exception no 2': Judicial findings of iniquity, where the '… judge may release the judgment for publication in the hope that public scrutiny and condemnation may bring shame to the offender and solace to the offended' (*Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315 at [40] per Thorpe LJ; *Hashem v Shayif* [2002] EWHC 108 (Fam));
(c) 'Exception no 3': Where anonymisation is impractical because of the prominence of the parties (e.g. *Spencer v Spencer* [2009] EWHC 1529 (Fam), *McCartney v Mills McCartney* [2008] EWHC 401 (Fam)), or where the parties have courted the press and publication of the judgment would serve to correct false impressions.

Secondly, conversely, judgments on appeal, whether at High Court, Court of Appeal or Supreme Court level, generally identify the parties,[1] although, again, there are exceptions:

(a) in 'very rare' cases, the protection of children may require an appeal judgment to be anonymised: *K v L* [2011] EWCA Civ 550 at [25], *R v R (Divorce: Interim Maintenance: Circumvention of Sanctions)* [2015] EWCA Civ 796;
(b) the vulnerability of a party may warrant anonymisation: see Lieven J's recent decision in *BF v LE* [2023] EWHC 2009 (Fam)); and
(c) Schedule 1 cases normally remain anonymised at first instance and appeal, even where significant adverse findings have been made against a parent: *DN v UD* [2020] EWHC 627.[2]

Thirdly, FR judgments heard below High Court level are almost invariably anonymised, with very rare exceptions,

such as HHJ Wildblood QC's excoriating judgment in a failed intervenor claim.[3] Also, following the FRC Notice of 13 May 2022, judges sitting below High Court level have been requested to refer any issue of transparency to Mr Justice Peel (none have in fact been referred[4]).

Methodology and table of cases

In order to draw *meaningful* conclusions from the data (i.e. FR judgments published between 1 November 2021 and 29 September 2023), I have excluded the following cases: (a) decisions heard below High Court level (i.e. which are invariably anonymised); (b) all appeals (where there is an existing convention that the parties should normally be named); and (c) Schedule 1 decisions (which are invariably anonymised).

This produces a table of cases (see the Appendix) of 38 first instance[5] FR cases,[6] which were heard by a High Court judge (including s 9 judges) and published[7] on the National Archives (or BAILII) between 1 November 2021 and 29 September 2023. The judgments that have identified the parties are shaded in grey.

Quantitative analysis

While acknowledging that this is not a scientific study (statistically, 38 is a small sample), an analysis of the table of cases produces the following results:

Total selection of cases		**38**
Anonymised	25½	67.1%
Naming parties	12½	32.9%

Answer: The short answer to the first question is that roughly two-thirds of first instance FR judgments heard at a High Court level were anonymised. The ratio of (broadly) two-thirds is close to Sir James Munby's earlier review[8] of FR judgments, which indicated that 73.6% of first instance decisions, anonymised from 1990 to 2021.

How can there be 'half a case'?

This relates to the '*Level*' case, which (for reasons which were not explained) has been reported both on an anonymised basis (Roberts J, *LS v PS and Q Company* [2021] EWFC 108 [2021] EWFC 108, 23 December 2021), and, 3 months later, with the parties named (Nicholas Cusworth QC (sitting as a Deputy High Court Judge) in *Simon v Simon and Integro* [2022] EWFC 29). It appears in the table of cases as a half point either way; Schrödinger's set aside, if you like.

(2A) What rationale was given for naming the parties?

The 12½ judgments that name the parties can be broken down into three categories:

– five are judgments of Mostyn J, whose 'thesis' on transparency has been set out in detail in cases such as *Xanthopoulos v Rakshina* [2022] EWFC 30 and *Gallagher v Gallagher (No 1)* [2022] EWFC 52;
– six are cases which fall into one of the three existing categories of exception, because this is made clear in the judgment (e.g. Peel J's decision in *Tsvetkov v Khayrova* [2023] EWFC 130 at [118]) or where this can be inferred from the facts of the case:

Exception 1 (case is already in the public domain due to earlier judgments or proceedings in open court)	*Goddard-Watts v Goddard-Watts* [2022] EWHC 711 (Fam)[9] *Pierburg v Pierburg* [2022] EWHC 2701 (Fam)[10] *Backstrom v Wennberg* [2023] EWFC 79[11]
Exception 2 cases (turpitude)	*Rose v Rose* [2022] EWFC 192 *Tsvetkov v Khayrova* [2023] EWFC 130)
Exception 3 case (prominence)	*Al Maktoum* [2021] EWFC 94

– this leaves two cases, which do not fall into one of the existing exceptions (and which are not decisions of Mostyn J):
  (a) In *Traharne v Limb* [2022] EWFC 27, W sought (and failed to achieve) findings of coercive control as part of her claim to achieve an award in excess of a PNA. According to a postscript to the judgment, both parties were given the opportunity to seek anonymisation but neither did. Since neither party objected to anonymisation, Sir Jonathan Cohen proceeded to name the parties in the judgment;
  (b) As noted above, in the '*Level*' case, an initial judgment was anonymised while subsequent judgments identified the parties (e.g. *Simon v Simon and Integro (Level)* [2022] EWFC 29), without an explanation either way. It remains unclear if the parties were named for reasons of public interest relating to the facts of that case, or because of more mundane reasons, such as the issue by Level of a separate civil claim which presumably would have been heard in open court. In any event, that question is now academic, since the Court of Appeal has handed down judgment on H's case management appeal ([2023] EWCA Civ 1048) whereby the case would in any event come within Exception 1.

(2B) Conversely, what rationale was given for anonymisation?

Around two-thirds of the cases in the table of cases (25½ out of 38) were published on an anonymised basis.

Of those, the following explanations were given in the judgment for anonymisation:

Mostyn J serves notice (i.e. last chance saloon)	2	*BT v CU* [2021] EWFC 87 *A v M* [2021] EWFC 89
Adherence to the status quo	2	*IR v OR* [2022] EWFC 20[12] per Moor J: '[29] … until I am told I have to permit publication, litigants are entitled to their privacy in the absence of special circumstances, such as where they having already courted publicity for the proceedings'

		CG v SG [2023] EWHC 942 (Fam) per HHJ Hess (sitting as a DHCJ): '[S14] … the world awaits the possibly imminent findings of [Farquhar III] … [I] follow the orthodox view described by Thorpe LJ [in *Clibbery v Allan*]. I therefore invite the parties to unite around a version of my judgment which best meets the test of anonymity set out above.'
Unexplained (action takes place off stage)	1	*XO v YO and AA Ltd* [2022] EWFC 114 per HHJ Hess (sitting as a DHCJ): '[91] … I seek any submissions on the issue of whether it should be published in a redacted or anonymised way.'
Balancing exercise undertaken in judgment	1	*HA v WA and BV* [2022] EWFC 110, Sir Jonathan Cohen: '[118] … I have decided that they should not be identified. My reasons in brief are as follows: – I do not think that it would be right to name them when no party or other witness is to be identified. – I accept that it would not be fair to name only Mr C when others in the firm must share the blame. – It would cause disproportionate damage to Mr C's reputation, particularly when his lapses and those of XYZ are being otherwise addressed. – I accept that his contrition is genuine and that at no stage of his evidence has he sought to evade his responsibilities.'
No explanation given in judgment	19½	

This statistic speaks for itself: in the overwhelming number of anonymised judgments, the point of anonymisation is not addressed *at all* in the judgment. It is unclear if the point was argued out and dealt with separately 'off piste' (i.e. outside the published judgment) or was not addressed at all, and the judgment was anonymised by reflex action.

What about below High Court level?

For the reasons explained above, the table of cases does not include judgments below the High Court level. The question arises, have any judges sitting at circuit judge level undertaken the sort of *Re S* [2004] UKHL 47 balancing exercise promoted by Mostyn J? There are notable cases below High Court level where this has happened, e.g. HHJ Farquhar in *X v C* [2022] EWFC 79 (see [103]–[118]) and *AFW v RFH* [2023] EWFC 119 (between [118] and [123]), where, having considered the competing arguments, in both cases the learned judges came down in favour of anonymisation.

Answer: In the 12½ cases that name the parties, five were decisions of Mostyn J ('… the monarch of the autonomous mountainous Principality of Court 50'[13]) and six are explicable by reference to existing exceptions. In the vast majority of cases which anonymised the parties' names, there was no explanation at all in the judgment, about the decision to conceal the parties' identities, either because this took place 'off piste' (i.e. was not recorded in the judgment) or it had not been explored at all.

(3) My view of the legal issues in relation to anonymity

First of all, I concur with the 'Munby/Mostyn thesis', that anonymisation of FR judgments, without explanation, backed up by a rubric which has questionable application to most FR cases in any event, is not compliant with the principles of open justice that have been set out by the House of Lords/Supreme Court in cases such as *Scott v Scott* [1913] AC 417, *Re S (A Child)* [2004] UKHL 47 and *R (C) v Secretary of State for Justice* [2016] UKSC 2.

Where I respectfully depart is in relation to the starting point or presumption favouring naming the parties: per Mostyn J in *Xanthopoulos v Rakshina* [2022] EWFC 30 at [128]:

> '… The correct question is not "Why is it in the public interest that the parties should be named?" but rather "Why is it in the public interest that the parties should be anonymous?" If the correct question is asked then the burden of proof rightly falls on the party seeking to prevent names being published rather than on the party or journalist/blogger seeking to publish them.'

In my view, the starting point should be the other way around: a proportionate and fair balance between the parties' Article 8 rights to private life and the Article 6 and Article 10 principles of open justice and freedom of expression is achieved in most cases by an anonymised judgment, given that:

(a) The scope of disclosure under compulsion in FR proceedings is generally wider than in civil proceedings (*Allan v Clibbery* [2002] EWCA Civ 45 at [100], cf. the more limited basis for disclosure at CPR Part 31);
(b) There are limits to the legitimate public interest in most FR cases, which are fundamentally private and do not generally involve the state (cf. public law children proceedings): *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315 at [30]);
(c) Anonymisation of judgments promotes full and frank disclosure and the implied undertaking of confidentiality (*Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315 at [79]), while satisfying the public interest in understanding how the legal issues (redistribution of assets, etc) are resolved; and
(d) FR proceedings are heard in private (FPR 27.10). This privacy would be undermined if judgments presumptively name the parties.

Against that, I acknowledge the force of Mostyn J's analysis in *Augousti v Matharu* [2023] EWHC 1900 (Fam) at [85]–[88] that the above Court of Appeal decisions in *Clibbery* and *Lykiardopulo* are not binding precedents. However, those judgments nevertheless consider broad principles and contain persuasive *dicta* (as does the House of Lords' decision in *Scott*, which also concerned a different legislative framework[14]). I also acknowledge, secondly, the force of Mostyn J's response to these arguments in *Gallagher v Gallagher (No 1)* [2022] EWFC 52 at [30]–[49] and *Re PP (A*

Child: Anonymisation) [2023] EWHC 330 (Fam) at [49]–[62], namely that:

(a) Civil claims (including under the Inheritance (Provision for Family and Dependants) Act 1975 and TOLATA) may involve significant disclosure, comparable to FR full and frank disclosure;
(b) There are areas of civil practice (e.g. discrimination and employment) that are also fundamentally private, and involve an implied undertaking of confidentiality, which do not lead to anonymisation;
(c) The stipulation in FPR 27.10 that cases are heard in private denotes a mode of trial and does not make the proceedings secret (see *McPherson v McPherson* [1936] AC 177 per Lord Blanesburgh[15]); and
(d) Above all, there is the constitutional principle of the administration of equal justice under the law.

(4) *How do I think these issues will pan out?*

In 'A Year in Review' (27 September 2023), Mr Justice Peel commented:

> 'It seems to me that it is for a higher court to decide the issue once and for all, or (even better) for Parliament to consider what is suitable in the 21st century.'

To my mind, there are a number of ways these issues could pan out:

– Parliament could act, although given its recent record in this area of law and the likelihood of a change of government, the prospect of legislative change impacting on issues of transparency would seem to be a distant prospect.
– We could continue as we have done for the past decade, without a case reaching the higher courts, in circumstances where the leading actors who have championed the cause of transparency (Sir James Munby, Mr Justice Holman and now Mr Justice Mostyn) have now departed the stage. In which case, the wind may go out of the sails on these issues, and the court's conventional approach to anonymisation will be followed, unless another High Court Judge picks up the standard.
– If a case actually did reach the higher courts, where issues of transparency are fully argued out, and the 'Munby/Mostyn thesis' is tested, what might be the outcome? It's a fool's errand to anticipate the outcome of a hypothetical case, but I wonder if the Court of Appeal will be reluctant to depart radically from *Clibbery* and *Lykiardopulo*, and will keep its thumb on the scales in favour of the parties' right to a private life, given the narrow circumstances in which the Court of Appeal can disapprove of its own earlier decisions (see *Young v Bristol Aeroplane* [1944] KB 718, [1946] AC 163 and *Willers v Joyce (No 2)* [2016] UKSC 44). However, that may depend on how the Court of Appeal panel is constituted and whether it includes Warby LJ.[16] Ultimately, it might take the Supreme Court to look at this whole issue anew. Whether the Supreme Court would take a different position is somewhat conjectural!

Appendix – Table of cases

High Court Judge level first instance financial remedy[17] cases, 1 November 2021 to 29 September 2023

Note: shading = parties named

	Case	Date	Judge	Anon	Judgment	Comment	Rubric
1	*BT v CU* [2021] EWFC 87	1.11.21	Mostyn J	Yes	[100]–[113]	Announcement of 'default position' in future. Anonymised names because of reasonable expectation of parties. Revision to rubric	Standard 2
2	*A v M* [2021] EWFC 89	5.11.21	Mostyn J	Yes	[101]–[106]	Pre-WWII no anonymity in Probate Divorce & Admiralty Division. Practice traceable to Registrar hearings taking place in chambers. Impossible to square with *Scott v Scott* [1913] AC 417	Standard 1
3	*al Maktoum* [2021] EWFC 94	19.11.21	Moor J	No		Exception 3	Standard 1
4	*LS v PS and Q Company* [2021] EWFC 108	23.12.21 (Joinder)	Roberts J (Joinder)	Yes	No		Bare
5	*DR v ES* [2022] EWFC 62	20.1.22	Francis J (MPS)	Yes	No		Standard 1
6	*Goddard-Watts v Goddard-Watts* [2022] EWHC 711 (Fam)	3.2.22	Sir Jonathan Cohen	No	No	Exception 1 (Holman J in *Goddard-Watts* [2019] EWHC 3367 (Fam))	Standard 3

	Case	Date	Judge	Anon	Judgment	Comment	Rubric
7	*Baker v Baker* [2022] EWFC 15	4.2.22	Mostyn J (MPS)	No			Bare 1
8	*Collardeau-Fuchs v Fuchs* [2022] EWFC 6; [2022] EWFC 45; [2022] EWFC 135	21.2.22 (MPS) 26.4.22 (Enf) 14.11.22	Mostyn J Mostyn J Mostyn J	No No No	No		General 1[18] Mostyn 1[19]
9	*MG v GM* [2022] EWFC 8	1.3.22	Peel J (MPS)	Yes	No		Standard
4a	*Simon v Simon and Integro/Level* [2022] EWFC 29; [2022] EWFC 35	21.3.22; 1.4.22	Cusworth QC (DHCJ) (s 9) (directions set aside)	No	No	Unclear (public interest relating to litigation funding?)	Bare 2
10	*DX v JX* [2022] EWFC 19	16.3.22	Moor J	Yes	No		Standard 1
11	*WC v HC* [2022] EWFC 22	22.3.22	Peel J	Yes	No		Standard 1
12	*IR v OR* [2022] EWFC 20	29.3.22	Moor J	Yes	[29]	'… until I am told I have to permit publication, litigants are entitled to their privacy in the absence of special circumstances, such as where they having already courted publicity for the proceedings'	Standard 3
13	*Traharne v Limb* [2022] EWFC 27	31.3.22	Cohen J	No	No	'Postscript: The parties have agreed redactions to the judgment and have not sought any further anonymisation including of their respective identities.'	General 2
14	*Xanthopoulos v Rakshina* [2022] EWFC 30	12.4.22 (LSPO)	Mostyn J	No	[74]–[141]	Standard rubric has no relevance to FR cases unless mainly about child maintenance. Need for balancing test has taken place, e.g. *H v News Group Newspapers* ([103]–[104]) Privacy of proceedings relied on in *Clibbery v Allan* extinguished by presence of press (FPR 27.11) ([115]) Standard rubric ineffective ([119])	Mostyn 2
15	*VV v VV* [2022] EWFC 41; [2022] EWFC 46	13.5.22 17.5.22	Peel J	Yes	No		None
16	*ARQ v YAQ* [2022] EWFC 128	19.5.22	Moor J	Yes	No		Standard 3
17	*Gallagher v Gallagher (No 1)* [2022] EWFC 52; [2022] EWFC 53	13.6.22	Mostyn J	No	Whole judgment	Importance of common law rule of open justice Derogation may be allowed only where an intensely focussed balancing exercise has taken place of Arts 6, 8, 10 rights ([4])	Mostyn 2
18	*DE v FE* [2022] EWFC 71	1.7.22	Sir Jonathan Cohen	Yes	No		Standard I

	Case	Date	Judge	Anon	Judgment	Comment	Rubric
19	*AB v CD* [2022] EWFC 116	29.7.22	Roberts J	Yes	No		Standard I
20	*Pierburg v Pierburg* [2022] EWHC 2701 (Fam)	9.9.22	Moor J	No	No	Cat already out of bag Jurisdictional dispute on suit ([2019] EWFC 24])	General 3
21	*XO v YO and AA Ltd* [2022] EWFC 114	22.9.22	HHJ Hess (DHCJ)	Yes	[91]	Provisional view, subject to submissions (not described)	Standard 4
22	*HA v WA and BV* [2022] EWFC 110	27.9.22	Sir Jonathan Cohen	Yes	Yes! [118]		Standard 1
23	*CMX v EJX (French Marriage Contract)* [2022] EWFC 136	2.11.22	Moor J	Yes	No		Standard 1
24	*J v H* [2022] EWFC 133	9.11.22	Peel J	Yes	No		Standard 1
25	*Rose v Rose* [2022] EWFC 192	25.11.22	HHJ Booth (s 9(1))	No	No	Traditional reason of turpitude	Standard 1
26	*HD v WB* [2023] EWFC 2	2.2.23	Peel J	Yes	No		Standard 1
14a	*Xanthopoulos v Rakshina* [2023] EWFC 50	4.3.23 (FH)	Sir Jonathan Cohen		[176]	'Following the decision of Mostyn J reported at [2023] 1 FLR 388 this couple have become widely known in legal circles. In the circumstances, there can be no justification for me keeping their identity confidential in this judgment, however unwelcome such publicity might be'.	General 2
27	*MN v AN* [2023] EWHC 613 (Fam)	10.3.23	Moor J	Yes	No		None
28	*CG v SG* [2023] EWHC 942 (Fam)	13.3.23	HHJ Hess (DCHJ) (s 9(1))	Yes	[56]	Provisional view, subject to submissions (not described)	Standard 1
29	*SS v RS* [2023] EWFC 32 (Fam)	16.3.23	Sir Jonathan Cohen	Yes			Standard 1
30	*DR v UG* [2023] EWFC 68	5.4.23	Moor J	Yes	No		Standard 1
31	*Backstrom v Wennberg* [2023] EWFC 79	28.4.23	L Francis KC (DHCJ)	No	No	Cat already out of bag Committal order by Peel J 8.3.23 – unreported	Standard 1
32	*EK v DK* [2023] EWHC 1829 (Fam)	11.5.23	Francis J (set aside)	Yes	No		Standard 1
	PUBLICATION OF FARQUHAR III	***18.5.23***					
33	*CG v DL* [2023] EWFC 82 (Fam)	25.5.23	Sir Jonathan Cohen	Yes	No		Standard 1
34	*SS v IS* [2023] EWHC 1544 (Fam)	14.6.23	Roberts J (vary nuptial settlement)	Yes	No		None
35	*DH v RH* [2023] EWFC 111	5.7.23	Macdonald J (LSPO)	Yes	No		Bare 3

	Case	Date	Judge	Anon	Judgment	Comment	Rubric
36	*Tsvetkov v Khayrova* [2023] EWFC 130	4.8.23	Peel J	No	[110]–[119]	Traditional reason (turpitude) Acknowledges Mostyn J may be right ([113]) Bound by *Lykiardopulo* and *Clibbery v Allan* ([114])	None
37	*Augousti v Matharu* [2023] EWHC 1900 (Fam)	10.8.23	Mostyn J	No	[69]–[93]	Commends Lord Neuberger Practice Direction 2012 re principles of open justice. Reporting restrictions time limited (1.1.25) Cites Munby – irony that *Clibbery* and *Lykiardopulo* actual ratio was to favour naming, and in any event, *stare decisis* does not apply if legal framework has changed	Mostyn 3
7a	*Baker v Baker* [2023] EWFC 136	11.8.23	Mostyn J	No			Mostyn 4
14b	*Xanthopoulos v Rakshina* [2023] EWFC 158	26.9.23	Peel J	No			Bare 1
38	*HAT v LAT* [2023] EWFC 162	29.9.23	Peel J	Yes			Standard 1

Notes

1 See Farquhar III, paras 12.68–12.75 for an explanation of the divergence of approach of conventions between naming parties in first instance and appeal judgments.
2 Exceptions include *De Renee v Galbraith-Marten* [2022] EWFC 118.
3 *Uddin v Uddin* [2022] EWFC 75: '[1] … these are feral, unprincipled and unnecessarily expensive financial remedy proceedings'.
4 'A Year in Review' (27 September 2023).
5 Including set aside applications but not appeals.
6 Forty-two judgments, since some cases have involved more than one published judgment.
7 I.e. published on The National Archives or BAILII – as opposed to being reported in one of the Law Reports.
8 https://financialremediesjournal.com/content/some-sunlight-seeps-in.cbac724de25044e3ab9c7a5cd5c38521.htm
9 Earlier set aside applications, e.g. Holman J [2019] EWHC 3367 (Fam)).
10 Earlier published jurisdictional dispute on suit which named the parties: [2019] EWFC 24.
11 Parties had been involved in earlier committal proceedings in open court.
12 '… until I am told I have to permit publication, litigants are entitled to their privacy in the absence of special circumstances, such as where they having already courted publicity for the proceedings'.
13 See the interview in the *Financial Remedies Journal*, [2023] 2 FRJ 89.
14 I.e. whether a nullity petition was heard in open court, applying the MCA 1857 and the Judicature Act 1873.
15 A view which was accepted as correct by the speakers at the 5RB seminar on *Transparency in the Family Courts* held on 6 September 2023.
16 See *R (Marandi) v Westminster Magistrates* [2023] EWHC 587 (Admin) where Warby LJ set out at [43] a synopsis of principles of open justice, which at [88] Mostyn J opined applied to all types of proceedings where a reporting restrictions order is sought, including Family Court proceedings heard in private (which would include FR proceedings).
17 Not including Sch 1.
18 'This matter was heard in private. The judge gives leave for this version of the judgment to be published. In no report may the children of the parties be named. Breach of this prohibition will amount to a contempt of court.'
19 'This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that in any report of this judgment or of the proceedings the children shall not be named and the address of the family home in West London shall not be stated. All persons, including representatives of the media, must ensure that these restrictions are complied with. Failure to do so will be a contempt of court. Otherwise, there are no reporting restrictions applying to the judgment or the proceedings.'

Maintenance for a Disabled Adult Child: A Case of Legal Blogging

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Between August 2022 and June 2023 I observed, via Teams, a number of hearings in a single case heard by HHJ Shelton in Leeds and now reported as *AB v CD* [2022] EWFC 197 and 198; and [2023] EWFC 103.

The case concerned cross-applications for variation of a 2012 maintenance order made under the Matrimonial Causes Act 1973. The extant order was that James pay £100 per month to his former wife Beth on a joint lives basis, with a further £1,500 pcm to the parties' severely disabled daughter Isabelle, whose physical and intellectual disabilities mean that she requires round-the-clock care from Beth and, when available, a number of carers funded by the local authority.[1]

Initially, I intended to write about the case because reported cases about maintenance for a disabled adult child under the Matrimonial Causes Act 1973 are few and far between. Given the subsequent announcement of a new Financial Remedies Court reporting pilot, I have now taken the opportunity to discuss the process of legal blogging itself: the rules around accessing the hearing, the practicalities of reporting, the framework for controlling what can be reported, and the drafting of a reporting restriction order.

James sought to end the maintenance to Beth and pay £400 pcm to Isabelle, and Beth sought the same overall quantum, but a reduction to £1 to her and an increase to £1,599 for Isabelle. Courts retain jurisdiction beyond a child's 19th birthday in 'exceptional circumstances' under both s 29(3) Matrimonial Causes Act and Sch 1, para 2(1) Children Act 1989, and a child's disability is an established exceptional circumstance.[2]

The quantum of child maintenance is now determined by reference to *James v Seymour* [2023] EWHC 844 (Fam), but this is a discretionary exercise and a child's disability will give rise to different financial needs. Maintenance for a spouse is based on need and, to the extent it survives and is not double-counting, compensation; and when considering whether to end a joint lives maintenance order, the court must consider whether the recipient is able to transition to independence without undue hardship. However, in circumstances where Beth and Isabelle's needs were so entwined, the overall quantum the household received was what was important – the actual division between Beth and Isabelle seemed significant only to the extent that it affected their respective eligibility for benefits.

I joined part-way through the case, in August 2022, and observed about seven days of hearings spread over almost a year. I was fortunate that the case was being heard online, which was because of the parties' geographic distance from one another. Towards the end, as 'a regular', the court canvassed my availability for future hearings as well as those of the parties (although I would never have permitted my availability to determine any aspect of listing). Given that this was a variation application, there had of course been previous proceedings – in fact there had been several sets of proceedings in the past. On this variation application alone, Rhys Taylor, Beth's barrister, acted pro bono via Advocate for something like eighteen hearings starting in 2020.[3] That these proceedings were marathon was for a variety of reasons tied principally to the parties' and Isabelle's health over time and the effect these had on receipt of benefits by Beth and Isabelle, as well as the impact of illness and Covid-19 furlough on James' earnings. Attempts at mediation had been unsuccessful in part because of serious illness and in part, it appears, because of various objections each had made to certain aspects. These were burdensome proceedings for all involved, in terms of court time and the related stress, uncertainty, and workload. There was some discussion about the need for an end to litigation through making an early judgment so, as the husband put it, he could live his life normally. As the welfare benefits position was unclear, HHJ Shelton decided it was better to postpone a determination by a number of months and try to achieve an order that would last long-term than make an order precipitously and risk future proceedings.

Attending a hearing

Accredited journalists and those who fulfil the criteria to be 'legal bloggers' (collectively 'reporters') have been able since 2018 to access most private Family Court hearings and to report on them subject to the court's permission. The definition of a blogger is tightly defined. They must be:

- a person who is authorised by a practising certificate to conduct litigation or exercise a right of audience in the family court; or
- a lawyer[4] working for the Law School, Faculty or

Department of a Higher Education Institution designated as a recognised body pursuant to s 216 Education Reform Act 1988; or

- a lawyer attending on behalf of a registered educational charity who received written confirmation of their accreditation on a list maintained for this purpose by the President of the Family Division. The only current educational charity listed is the Transparency Project. While there are of course other groups interested in reporting court proceedings, such as Open Justice Court of Protection Project, they are not formed as charities.

All legal bloggers are therefore law-degree educated persons who are either practising law, in legal education, or authorised by the Transparency Project, which is in turn authorised by the President of the Family Division and, of course, regulated by the Charities Commission.

The first reporter to attend a hearing in this case was my fellow Transparency Project trustee, Dr Julie Doughty, who then handed the case over to me. It was therefore she who dealt with the issue of admission to the hearing. Under FPR 27.11(3) a reporter – the collective name for journalists and legal bloggers – can only be excluded from a hearing if: (a) it is 'necessary' in the interests of any child, the safety or protection of a party or witness, or the orderly conduct of proceedings; or (b) where justice would otherwise be impeded or prejudiced. Necessary has the definition given to it in *Re H-L (A Child)* [2013] EWCA Civ 655. Those advocating for the exclusion of the reporter therefore bear the burden of persuading the court that exclusion is necessary or that justice would otherwise be impeded, and submissions should be focused on these criteria. The reporter does not have to justify why they should be admitted beyond establishing their eligibility, although they may wish to respond to any objections.

In this case, Beth did not object to Julie's presence and Mr Taylor was familiar with the Transparency Project and the legal framework. James was not happy, arguing that this was 'forcing him to get a lawyer', although the judge held that Julie could remain. At a second hearing also attended by Julie, he did instruct counsel who again sought to exclude her, arguing that James would suffer anxiety due to her presence and this was a private hearing with no third parties. That of course is not the test, and the purpose of FPR 27.11 is to enable reporters into private hearings. The judge directed himself to the Practice Note by Peel J (to the effect that Peel J can be consulted if a judge needs advice on legal blogging); and said the case is not about a child and he had to consider the safety and protection of the parties including James' ability to give evidence. He concluded that Julie's presence was not disruptive and there were no grounds to exclude her.

My access to the hearing

As Julie was not available for the next hearing I decided to attend. I emailed the court introducing myself, requesting the Teams link, and attaching a scan of my passport as photo identification and Form FP301, the Notice of Attendance of Duly Authorised Lawyer. This is a one-page form that requires the legal blogger to undertake that they are a duly authorised lawyer within the meaning of FPR 27.11(7)(b) and confirm that they are attending 'for journalistic, research or public legal educational purposes', have no personal or agency interest in the case, and will abide by any reporting restrictions on pain of contempt.

I fulfil each of the criteria to be a legal blogger, being a solicitor who runs a free legal advice clinic, an associate professor of law, and a trustee of the Transparency Project, but as the form was not clear whether I needed to identify under which hat I attended, I ticked them all. As the form requires the date of the hearing, it appears necessary to file a new FP301 for each hearing although I understand that some bloggers only file the one – the form does not specify. It would be less work for the court to have a form that applied through all hearings in a given case with a continuing obligation to communicate any changes in my status. It is not as though, having submitted Form FP301 in the past, I would consider myself not bound by the terms at any future hearing, not least because the form merely evidences my knowledge of rules set out elsewhere.

In her discussion of a recent unhappy legal blogging incident reported as *Louise Tickle v A Father & Ors* [2023] EWHC 2446 (Fam), Lucy Reed KC has written that 'a journalist turning up unexpectedly can be discombobulating, anxiety inducing, even irritating. And … it adds just one more thing to the teetering Jenga pile of STUFF that the judge has to balance to keep the show on the road.'[5] That being the case, I would have understood a degree of irritation on the part of HHJ Shelton, however professionally I would expect him to behave. If that is how he felt, he hid it extremely well. I was at all times treated with consideration and exemplary courtesy by HHJ Shelton and his court staff, and while I was aware that the husband did not want me there, the parties themselves were manifestly professional in court despite the pressures of the case, financial and otherwise.

I note that some of the journalists accessing hearings simply send a one-line email attaching a press card and requesting a link. I properly introduced myself, but believe I was assisted by being an academic and a practising solicitor as opposed to a journalist about whom there is perhaps more suspicion. I would nevertheless have declined to say how the case came to be known about by the Transparency Project, if I had known that (which I did not, not being a trustee at the relevant time). In *Louise Tickle v A Father & Ors* Lieven J suggests that this will rarely be appropriate unless the court is concerned that the reporting itself is part of a litigation strategy by one party. Although this judgment post-dates my legal blogging, in the event neither Julie nor I were asked.

The case itself

The case turned on the financial needs of Beth and Isabelle's household. The local authority provided around £45,000 pa for Isabelle's care, including for carers. Unfortunately, their main long-term much-loved carer had recently retired and Beth had not been able to find anyone else who seemed capable of having the same close relationship with Isabelle or expertise. A number of carers left after a couple of days saying they were no longer interested in the role. Isabelle was non-verbal and communicated using Makaton: untrained carers could not, therefore, communicate with her anyway.

This meant that at the end of the financial year Beth had to return a very substantial amount of unspent money, earmarked as wages for Isabelle's carers, to the local council. She was not able to use the money for other needs (except by approval of a council panel to meet a need identified in Isabelle's care plan) or to pay herself. Despite the fact that the lack of carers meant that Beth picked up all the extra care herself, she was entitled only to carers' allowance which is currently £76.75 per week. A recent request for emergency cover had been refused.

As an observer, hearing about the benefits and funding provided to Isabelle, what came through was the sheer exhausting burden of administering the money, finding and retaining carers, ensuring coverage, preparing timesheets for auditing by the council, and arguing with them for the resources Isabelle needed. It seemed to be a full-time job in itself even before one got to the normal running of a household and the care of Isabelle.

One issue in the case was whether Beth had any ability to obtain a paid job on top of this, which was James' position. The authority had agreed to fund Isabelle's attendance from Monday to Friday at an educational facility for disabled adults, which would have, in theory, freed Beth up during the week.

The judge explored this in some depth and concluded that Beth had no current ability to work, although he emphasised the 'current'. She had a serious deteriorating medical condition (about which her GP testified) and even if she was not caring for Isabelle Monday to Friday, caring for her round-the-clock from Friday afternoon through to Monday morning would total some 66 hours of work, an amount which concerned the GP who thought she would need several days of recovery time from each weekend. Planned treatment for Isabelle also meant that Beth would need to take weeks, if not months, off from any paid role to care for Isabelle during her medical recovery, and in the run up to this Beth and Isabelle had 16 medical appointments between them in one month. Moreover, as the GP pointed out, finding a carer who could give Isabelle the same level of care as Beth could was incredibly difficult and Beth was the most knowledgeable advocate for Isabelle at medical appointments. Even if a reliable carer for Isabelle could be found so that Beth could work, the local authority would have to agree to fund the extra hours of care that Isabelle would need during Beth's absence.

James had instructed a barrister via Direct Access to undertake the cross-examination of Beth but could not afford to be represented at later hearings. Beth's testimony did not yield anything other than, in my mind, an impression that she carefully accounted for all expenditure and was not profligate. In contrast, there were a number of elements of expenditure by James which suggested he was living beyond his means. He had rent-free use of a large home with a swimming pool, owned by a family trust which he argued would not allow him to downsize, although he did not present any evidence of this. He said he had the obligation to maintain the house and this was costly, but again had provided no evidence of that. He had a wife who was not employed (but received rent from a flat bought by the trust which he described as an expense overall), two other children to support, and a heron had eaten the koi carp that had been expensive to replace. Thus, although he had a very healthy income from his employment, his expenditure was at a level that was simply unsustainable.

I do have some sympathy for James' position. The court jurisdiction to order a parent to maintain a child into adulthood where there are exceptional circumstances would appear, in theory, to be temporally limitless.[6] There has long been a principle that on divorce people should not be cast onto the public purse if there is an alternative of funding within the marriage, but this denies the reality of the costs of caring for someone 24 hours a day, 365 days a year, for potentially their whole life. He had competing obligations to children and spouses of different marriages and so his ability to plan for the future, including retirement, is extremely difficult with these kinds of open-ended obligations. But this was a case, found the judge, where James had 'recklessly taken on responsibilities he could not afford'. James' reasonable needs were found to be some £5,500 to £6,000 pcm whereas he was spending just under £8,500 and had a large amount of debt. The judge found that his spending was proportionately much greater than that of Beth, as was his standard of living. Although James is in his fifties and wishes to reduce work in order to retire in the next few years, the judge said a number of times that he did not see how this was going to be possible without a change in lifestyle, and urged him to reorder his affairs to enable him to support both households.

Beth's position was also very difficult, albeit not of her own making. Although she was clearly much loved, Beth's whole life since Isabelle's birth had been dedicated to meeting Isabelle's needs. Whether she would have welcomed the opportunity to work outside the home and thus have a corner of life away from her caring responsibilities was to me unclear, as her position was that she was unfit to work. She would have needed an exceptionally understanding employer and I felt that there seemed little sense in her working if the upshot was that the state would need to pay carers – who would need to learn Makaton to communicate with Isabelle – to enable this, and with no guarantee of an equivalent level of care for a young woman with very complex needs.

By this point in the case, it was looking as though the judge would require James to meet Beth's income needs shortfall on the basis that James had the income to do so if he cut the fat elsewhere. The difficulty lay in calculating these needs. Hours and hours of the hearings focused on painstakingly calculating Beth's household income and expenditure; on reworking figures on different premises and adding these into spreadsheets shared on the Teams screen. The judge directed himself to *O'Dwyer v O'Dwyer* [2019] EWHC 1838 (Fam) which refers to the judge's role in managing budgets, but also noted that he could not micromanage the parties' lives. Nevertheless, he was clear that he wanted to get it absolutely right, both to be fair to the parties and to try to minimise the need for any future return to court given the toll of the proceedings on them, but the calculation was complicated by a number of factors. Isabelle was going to a specialist educational facility but would have to take some time out for medical treatment: both of these things affected her entitlement to benefits but precisely what effect they would have and precisely when was not known. The rules – and both Mr Taylor and the local Welfare Rights Group had done a deep dive into them – seemed astonishingly complex and yet left issues of inter-

pretation open. The way in which the DWP would interpret one of its own ambiguous rules was not known. Outstanding assessments in respect of Beth's own benefits entitlement caused hearings to be postponed until more information was available. Benefits allowances changed but so did costs of living. 'None of the figures will sit still', complained Mr Taylor at one point.

It is here that we come to an issue that has caused me much discomfort. While the judge and Mr Taylor applied the latest figures for Beth's income and expenses to a spreadsheet (the judge was assessing what was reasonable as they went), I became aware of an error in their calculation. (The parties themselves appeared rather disengaged, with glazed eyes.) No one had realised that universal credit is paid calendar monthly whereas other benefits are paid 4-weekly, which is not the same at all (52 weeks/12 months = 4.33 not 4). I was on the horns of a dilemma. It was likely that the maintenance order would be set at a level to meet the shortfall so if they proceeded on this basis, the outcome would be wrong and lead to further hearings and more stress. As a solicitor, I was an officer of the court. Did I shed that identity when I became a legal blogger – an observer? Did it matter whether or not the parties were represented, and was the fact that the error was common to all relevant? What would a journalist in the same situation do? Should I email the court later – and how exactly would that be more appropriate than intervening now? In the end, having mentally run through all these points at immense speed and come to no conclusion at all, I nevertheless I put my camera on and the judge interpreted this correctly as my wishing to say something. They accordingly recalculated, and the judge said they would all need to go away and double check everything. I note that the President's new guidance indicates that reporters must 'assist the Court in achieving the Overriding Objective in FPR r1.1, which is to resolve cases justly', but remain ambivalent about whether I did the right thing. Legal blogging remains a brave new world.

In the end, the final order was that James should pay £1,199 per month to Isabelle and £1 per month to Beth. It was, noted the judge, less than Beth wanted but sufficient to meet her outgoings on the latest figures, and if it was any less, there was a risk that Isabelle and Beth would have to leave their specially adapted home and would be homeless. The judge found that Beth would not be able to adjust to independence without undue hardship. It was significantly more than James had wanted to pay, but the judge found that he could pay it if he controlled his expenditure to what he really needed.

Permission to report

It is understandable that some or all parties to a case are going to be worried about the presence of someone intending to report and what they may write. However, admission to a hearing does not mean that it can be reported. A reporter can attend all the hearings in a case and fail at the end to obtain permission to report either at all, or in any meaningful way. (The Reporting Pilot changes this by creating a presumption that reporting will be allowed, hence being called a 'transparency order' rather than, as I had, a reporting restriction order, but there can still be restrictions on what can be reported.) In making this bald statement, I am for the most part ignoring the discussion that has taken place both in judgments and in articles, often published in this journal, about whether or not financial remedy cases are properly and correctly characterised as 'in private', whether there is any implied duty of confidentiality, the efficacy of rubrics (the wording for which seems to change with the wind), or the view expressed by Mostyn J that in the absence of a specific reporting restriction order, a reporter in a financial remedy hearing is fully entitled to publish.[7] The reason for this omission is one of practicality: no one wants to be the case study in which the law of contempt is clarified. That is of course, precisely why it should be clarified: the uncertainty is not helpful to the cause of transparency. Until these issues are resolved, it is sensible to be cautious, which from my point of view meant obtaining an order that explicitly granted permission to report rather than left it to statutory or judicial interpretation.

It is not necessary (unless the court requires it) to make a formal written application for permission to report. Most courts are willing to accept an oral application or an email and this is suggested by the President's Guidance. I was clear early on that I wanted to report for the Transparency Project website. Later, I modified this to say that I wanted to also publish in this journal, because it had become evident that this was one of very few examples of financial remedy cases being blogged in circumstances where a future reporting pilot was anticipated; and that the reporting restriction order in my case was without a template precedent.

Whereas refusal of attendance is based on 'necessity' and the interests of justice, what, if anything, can be reported and the contents of any reporting restriction order depends on the balancing of the relevant Art 6, Art 10 and Art 8 rights set out in *Re S* [2004] UKHL 47. This requires that that a court apply an 'intense focus' to the 'comparative importance of the specific rights being claimed in the individual case'. In this, the child's best interests are 'critical … although they will still have to be balanced against the other rights asserted'.[8] I sensed early on that I would be able to report, but expected there to be various restrictions. At one stage, the judge mooted some kind of editorial control but fortunately never mentioned this again – it would have been inappropriate and indeed placed him in a very difficult position. At a later hearing, in response to a concern raised by the husband, he said 'Ms Morgan will write what Ms Morgan writes'. I had, however, been clear that I was not seeking permission to name the child and that in order to avoid identification of her, this meant anonymity for her parents. I also provided assurances that I had no intention of reporting anything until the court had the opportunity to consider making a reporting restriction order which meant that the court did not have to deal with interim restrictions. That was again very helpful to the court, but was a luxury of not being held to any artificial deadlines. Journalists are often in a position of wanting to report an interim hearing to report a current issue, and it can be a matter of some frustration if they cannot. Academics, frankly, are not exactly known for catching the zeitgeist.

My position that the child should not be named was one I came to after undertaking my own mental *Re S* balancing exercise. I am absolutely positive that HHJ Shelton would

not have permitted it in any case. His intention to protect Isabelle personally from being identified had been clear from the start. If the case had involved the parents only, I may well have sought permission to name them. While Mostyn J has expressed the view that people are entitled to know who is in court, and that in most cases the fact that a couple may have children does not change this, it seemed to me that this was one of those cases which Mostyn J acknowledges as an exception to the principle.[9] The evidence included intimate detail about Isabelle's personal care needs which made it at times similar to the type of evidence heard in Court of Protection cases, and an aspect of Isabelle's Art 8 privacy rights is dignity. To report her health situation and needs accurately to enable better understanding of the context of the case meant not naming her. I was also mindful that she was not directly represented so there was no advocate directly tasked with articulating those rights, although the parties could make submissions about these. This meant, to me, as someone who teaches children's rights, that it was essential that those rights be talked about as part of the process of considering what I could report. It should not be, as Lady Hale had said in a very different context, a case fought on grounds selected by the parents only. Against Isabelle's privacy rights lay her interest in there being more public discussion about the issues in the case, including the moral and legal obligations of parents, the role of carers including her mother, and the role of the state in providing support for disabled people. She had Art 6 rights and Art 10 rights – the right to tell her own story[10] – as well as Art 8 rights, as did her parents, and I had Art 10 rights too: a restriction on reporting is a derogation from those rights. The mother would have favoured reporting on an unanonymised basis, but (perhaps sensing the prevailing wind) did not press this argument. The father sought anonymity. My assessment was that reporting, but with anonymisation, was the appropriate balance in this case. Of course, my assessment was worth nothing at all. It is a decision for the court.

The reporting restriction order

As the Transparency Reporting Pilot only, at this point, covered children cases, there was no template order that could be used for this financial remedy case. I knew that the journalist Louise Tickle draws up two separate lists during the hearings she attends, of respectively those things she wants to seek permission to report and those things she suggests restricting. After unsuccessful attempts to replicate this exercise, I found I had inadvertently written a draft court order – these things happen – and that it gave me carte blanche to report anything other than that which the order excluded, which was identification of the child and the parties and certain other features which would have enabled jigsaw identification. This became the order adopted by the court. (I note the newly released financial remedy template transparency order takes the same 'everything but that which is excepted' approach.[11]) I pilfered some wording from the child transparency pilot template orders, but with alterations to reflect the different legal framework for reporting in a financial case. My draft records that the court has undertaken the exercise set out in *Re S* [2004] UKHL 47 and concluded that the restrictions set out in the order are necessary to secure the proper administration of justice and to protect the parties' daughter, and that there was no sufficient countervailing public interest in disclosure. It states that s 12 Administration of Justice Act 1960 continues to operate save and insofar as the order varies it, and that if permission be needed under the Judicial Proceedings (Regulation of Reports) Act 1926 (an Act which may or may not apply, depending on who you ask), it is given.

In fact, the court itself did not, despite my prompting, explicitly undertake the *Re S* exercise; or at least did not express matters in those terms. This was perhaps because no party was suggesting that they be named, although in *Gallagher v Gallagher (No 1) (Reporting Restrictions)* [2022] EWFC 52 Mostyn J reminds us of Lord Woolf's warning that 'When both sides agreed that information should be kept from the public that was when the court had to be most vigilant.'[12] It did, however, make the order enabling me to write this article. Additionally, the judge agreed to publish his judgments, again suitably anonymised. Any anonymisation therefore needed to fit with the terms of the order so we did not have a situation where I was explicitly prohibited from reporting something that the judgments include.

Conclusions

This was an interesting case and one that I am glad I was able to observe. The judge hoped, I know, that his decision would stand for some time. In reality, I think that James will be anxious to argue that Beth does at some time become capable of work, although for the reasons stated above I am not sure what effect that should have. The case raises interesting issues about moral and legal responsibility within the family and in society as a whole. Of course, such discussions derive from the real lived experience of the parties and while Beth was interested in the issues she faced as a primary carer being talked about, James did not welcome the publicity and perhaps anticipated public opprobrium. What was evident was that both parties were very tired of the litigation, and of a benefits system that was so onerous in its requirements and unpredictable in its assessments, that the parties were never able to plan or see the light at the end of the tunnel.

A shorter adapted version of this article has been published on the Transparency Project website at https://transparencyproject.org.uk

More information

- *AB v CD* [2022] EWFC 197 and 198; and [2023] EWFC 103; the reports from the case I observed.
- The Transparency Implementation Group website www.judiciary.uk/about-the-judiciary/our-justice-system/jurisdictions/family-jurisdiction/transparency-implementation-group/ contains the Farquhar report on transparency in the financial remedies court and useful guidance.
- FPR 27.11.
- *Re S* [2004] UKHL 47
- Form FP301 Notice of Attendance of Duly Authorised Lawyer – the form that a legal blogger must submit to

the court www.gov.uk/government/publications/form-fp301-notice-of-attendance-of-authorised-lawyer

- The President of the Family Division's guidance on the financial remedies pilot is www.judiciary.uk/wp-content/uploads/2023/12/Reporting.PilotScheme.Final_.President.pdf
- Financial Remedies Court Practice Guidance by Peel J and HHJ Hess (13 May 2022) addresses the implications of Mostyn J's decision in *Xanthopoulos v Rakshina* [2022] EWFC 30 and is available at https://financialremediesjournal.com/download/c70e5bcd1c334927bfa0b40dccb9eb82
- *Louise Tickle v A Father & Ors* [2023] EWHC 2446 (Fam) and *Griffiths v Tickle* [2021] EWCA Civ 1882, two appeals by the journalist Louise Tickle about her ability to report, both of which contain useful guidance.
- The guides produced by the charity the Transparency Project, *What to do when a reporter attends (or wants to attend) your hearing: A guidance note for judges & professionals* (pilot and non-pilot version) are on the Transparency Project website https://transparencyproject.org.uk/updated-guidance-what-to-do-if-a-reporter-attends-or-wants-to-attend-your-hearing-pilot-and-non-pilot-court-versions/ together with some examples of blog posts https://transparencyproject.org.uk/legalbloggers/

Notes

1 These are false names, because, as we shall discuss, the reporting restriction order in this case prohibits the naming of the parties or their daughter.

2 See, e.g. *C v F (Disabled Child: Maintenance Orders)* [1998] 2 FLR 1, to which the judge referred himself.

3 Mr Taylor is editor of this journal; this is coincidental as I intended to write for the Transparency Project website and only later considered this journal. He has had no input into the contents of this article apart from pedantically inserting the word 'extant' in one place.

4 Within the rules, the term 'lawyer' is defined as a person with a qualifying law degree (although the concept of a 'qualifying' law degree has since been abolished) or a CPE/GDL/SQE, CILEX level 6 or fast-track diploma, or a post-graduate legal qualification.

5 Lucy Reed KC, 'Transcript reveals what one judge really thinks of transparency' (Transparency Project blog, 30 November 2023) available at https://transparencyproject.org.uk/transcript-reveals-what-one-judge-really-thinks-of-transparency/

6 The history of the jurisdiction is set out in *FS v RS and JS* [2020] EWFC 63.

7 *Xanthopoulos v Rakshina* [2022] EWFC 30.

8 *Louise Tickle v A Father & Ors* [2023] EWHC 2446 (Fam), interpreting *Griffiths v Tickle* [2021] EWCA Civ 1882 at [71].

9 *Gallagher v Gallagher (No 1) (Reporting Restrictions)* [2022] EWFC 52.

10 See comments of Lieven J in *Tickle v Farmer & Ors* [2021] EWHC 3365 (Fam).

11 The financial remedies pilot does include a template order, and it works on the basis that reporting is likely to be permitted on an anonymised basis. Ability to report and the precise restrictions should still be part of a *Re S* evaluation.

12 *R v Legal Aid Board ex parte Kaim Todner* [1999] QB 966 at page 4 (Lord Woolf), citing with approval Sir Christopher Staughton in *Ex parte P*, *The Times*, 31 March 1998.

Xydhias, 25 Years On – What Exactly IS a *Xydhias* Agreement?

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Practitioners will be familiar with the oft quoted phrase that 'the court is not a rubber stamp' (*Kelley v Corston* [1998] 1 FLR 986). The court must continue to exercise its discretion under s 25 MCA 1973 even when presented with an agreement between parties. The court will scrutinise the agreement to ensure fairness in all the circumstances of the case.

Where an issue arises as to: (1) the exact terms of any agreement reached and whether they should be sanctioned; and (2) whether an agreement has been reached, the guidance in *Xydhias v Xydhias* [1999] 1 FLR 683 comes into play. As recently summarised by Moor J in *Pierburg v Pierburg (No 2)* [2022] EWHC 2701 (Fam), [2023] 2 FLR 81:

> '[43] *Xydhias* is authority for the proposition that, in relation to agreements reached in the family law context, ordinary contractual principles do not apply. As the final award was always fixed by the court, the purpose of negotiations was to reduce the length and expense of the legal process. The court has a discretion in determining whether an accord has been reached. Moreover, even where an overall settlement had been agreed, there might well be issues remaining, for example as to the drafting or exact terms of the order, that the court would be able to determine without undermining the overall agreement.'

The facts

The factual background to *Xydhias* is well-known. In the run up to a final hearing, there were lengthy pre-trial negotiations. As the parties' positions grew closer, proposals shifted to consent order form, with five versions passing between the parties. By the latter drafts, the focus was on drafting, correction of errors, and proposals for security of the lump sum payment.

During the back-and-forth of draft consent orders, the wife's solicitors informed the court that the final hearing would not be needed, where 'heads of terms have been agreed', subject to terms of security and the duration of certain continuing obligations. The court was also told that a short appointment should be preserved for approval of a consent order or for negotiation of outstanding points.

At that hearing, the husband withdrew from all negotiations. The wife sought to enforce the agreement that she asserted had been reached.

The district judge found 'the essential building blocks of an agreement were in place' and excised from the final draft order those matters which the husband had not agreed. The husband's first appeal was dismissed.

The judgment

The husband's second appeal was to the Court of Appeal. In dismissing that appeal, Thorpe LJ came to the 'cardinal conclusion … that ordinary contractual principles do not determine the issues in this appeal'. Thorpe LJ set out the applicable principles at 961 onwards, and they bear quoting in detail:

> 'My cardinal conclusion … is because of the fundamental distinction that an agreement for the compromise of an ancillary relief application does not give rise to a contract enforceable in law. The parties seeking to uphold a concluded agreement for the compromise of such an application cannot sue for specific performance. The only way of rendering the bargain enforceable, whether to ensure that the applicant obtains the agreed transfers and payments or whether to protect the respondent from future claims, is to convert the concluded agreement into an order of the court. The decision of the Privy Council in *De Lasala v De Lasala* … demonstrated that thereafter the rights and obligations of the parties are determined by the order and not by any agreement which preceded it. The order is absolute unless there is a statutory power to vary or unless vitiated by a fact that would vitiate an order in any other division. Additionally, as was demonstrated in *Robinson v Robinson* … an order in ancillary relief proceedings may be set aside if the product of a material breach of the duty of full and frank disclosure. An even more singular feature of the transition from compromise to order in ancillary relief proceedings is that the court does not either automatically or invariably grant the application to give the bargain the force of an order. The court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in s.25 of the Matrimonial Causes Act 1973. …
>
> In consequence, it is clear that the award to an applicant for ancillary relief is always fixed by the court. The payer's liability cannot be ultimately fixed by compromise as can be done in the settlement of claims in other divisions. Therefore the purpose of negotiation is not to finally determine the liability (that can only be done by the court) but to reduce the length and expense of the process by which the court carries out its function. If there is a dispute as to whether the negotiations led to an accord that the process should be abbreviated, the court has a discretion in determining whether an

> accord was reached. In exercising that discretion the court should be astute to discern the antics of a litigant who, having consistently pressed for abbreviation, is seeking to resile and to justify his shift by reliance on some point of detail that was open for determination by the court at its abbreviated hearing. If the court concludes that the parties agreed to settle on terms then it may have to consider whether the terms were vitiated by a factor such as material non-disclosure or tainted by a factor within the parameters set in *Edgar v Edgar*. Finally in every case the court must exercise its independent discretionary review applying the s.25 criteria to the circumstances of the case and to the terms of the accord. This approach particularly applies to accords intended to obviate delivery of briefs for trial. Different considerations may apply to agreements not negotiated in the shadow of an impending fixture. …
>
> Litigants in ancillary relief proceedings are subjected to great emotional and psychological stresses, particularly as the date of trial approaches. In my opinion there are sound policy reasons supporting the conclusion that the judge is entitled to exercise a broad discretion to determine whether the parties have agreed to settle. … The court has a clear interest in curbing excessive adversariality and in excluding from trial lists unnecessary litigation. A more legalistic approach, as this case illustrates, only allows the inconsistent or manipulative litigant to repudiate an agreement on the ground that some point of drafting, detail, or implementation had not been clearly resolved. Ordinarily heads of agreement signed by the parties or a clear exchange of solicitors' letters will establish the consensus. Hopefully a case such as this requiring the exercise of the judge's discretion will be a rarity.'

On the evidence, Thorpe LJ held that 'the parties had concluded a compromise during the week before the hearing. Throughout that week it was the husband who was pressing for a settlement and plainly there came a point at which the wife agreed his terms. All that remained unresolved was either mechanics or trivial.'

As to the principles, headline points can be drawn out as follows:

- Contractual principles do not apply within financial remedy proceedings to create an enforceable contract on agreement.
- An agreement is not enforceable until converted into an order of the Family Court.
- The court will not automatically or invariably convert an agreement into an order, and must instead undertake the s 25 exercise.
- When viewed in that context, negotiations between the parties, and the reaching of an agreement, is designed to reduce the time and resources required by the court in exercising its discretion under s 25 MCA 1973.
- The court can also, by way of shortened procedure, determine whether an agreement has in fact been reached, and if so whether there are any vitiating factors, before then coming to the s 25 exercise.
- Where core issues are agreed, residual matters (e.g. drafting, timings/implementation) can be determined by the court and are thus out of the parties' hands at that stage.
- By retaining the ability to determine whether an agreement has been reached, the court aims to reduce further litigation arising from attempts by any party to resile from agreement on peripheral grounds.
- Signed heads of agreement or clear exchange of solicitors' letters are recommended to show a final agreement.

Is *Xydhias* untouched 25 years on?

It is often overlooked that in the later case of *Soulsbury v Soulsbury* [2007] EWCA Civ 969, [2008] 1 FLR 90, Thorpe LJ's conclusions in *Xydhias* came under scrutiny. Ward LJ said at [40] that:

> '[o]ne has to say that there are some who are critical of the "cardinal conclusion" that "ordinary contractual principles" do not apply to determine whether or not the parties had reached a concluded agreement.'

Ward LJ found no controversy in the court having discretion as to whether or not an agreement reached should be sanctioned by the court and made into an order. He reviewed the authorities confirming that the court has a duty to inquire into proposed settlements before making an order, and noted the statement of Ormrod LJ in *Thwaite v Thwaite* [1982] Fam 1 that this does 'represent a significant departure from the general principle frequently stated in cases arising in other divisions of the High Court, that the force and effect of consent orders derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent order'. This difference in treatment was accepted.

The concern raised by Ward LJ was that the court pursuant to *Xydhias* could now exercise its discretion in determining whether or not any such agreement was reached. At [40], Ward LJ highlighted that *Xydhias* had given the Family Division a different and unique test for establishing the *formation* of the underlying agreement itself.

The correctness of that part of the decision did not need to be decided in *Soulsbury*, and Ward LJ expressly stated at [42] that it was not for the Court of Appeal 'to pronounce upon the correctness of the "cardinal conclusion"'. He did, though, consider Thorpe LJ's reason for arriving at that conclusion as material and requiring consideration.

Thorpe LJ's reasoning was, he said, that 'the fundamental distinction that an agreement for the compromise of an ancillary relief application does not give rise to a contract enforceable in law'. It followed, said Ward LJ, that pursuant to *Xydhias*, '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'. He considered that 'stated in those terms, it cannot be correct', and that in expressing this view Thorpe LJ had ignored the *dictum* of Butler-Sloss LJ (as she then was) in *Kelley v Corston* [1998] 1 FLR 986 and the opinion of Lord Diplock in *De Lasala v De Lasala* [1980] AC 546, which Ward LJ had considered at [35] as confirmation that an agreement can be enforced.

Ward LJ also noted that Thorpe LJ was of the view that '[t]he parties seeking to uphold a concluded agreement for the compromise of such an application cannot sue for specific performance' but in *Merritt v Merritt* [1970] 1 WLR 1211 the Court of Appeal allowed specific performance.

Ward LJ therefore concluded at [45] that:

> 'the cardinal conclusions expressed by Thorpe LJ are stated in terms which are too wide. 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 v Smallman* [1972] Fam 25. 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.'

It would seem, therefore, that *Soulsbury* is authority for the proposition that an agreement between parties to settle their respective claims upon divorce can give rise to an enforceable contract and, to that extent, the *dicta* in *Xydhias* that the only way to make an agreement binding is to convert it into a court order was disapproved.

Two further points are of interest when considering the *Soulsbury* 'challenge':

(1) At the outset of *Xydhias*, neither party advanced the argument that ordinary contractual principles did *not* apply when determining whether or not there was an agreement. The husband argued that the absence of agreement as to security, and thus no signed heads of agreement, meant that all material terms were not agreed; accordingly, it was said, contractual principles dictated there would be no enforceable contact. The wife countered, but also by reference to contractual principles. It was therefore common ground between the parties that those principles applied (as it had been in the courts below). This was noted by Thorpe LJ in his judgment, and again by Ward LJ in *Soulsbury* at [37]. It was only *during* the hearing (and at the instigation of the court) that the wife's position changed to include the alternative formulation that formed the basis of Thorpe LJ's judgment.
(2) The husband obtained, on paper, permission to appeal to the House of Lords. However, prior to any hearing taking place before the House of Lords, the parties reconciled and remarried, bringing an abrupt end to the proceedings. The husband's challenge, which again placed reliance on contractual principles, was therefore never considered by the House of Lords – despite the court's clear appetite to consider the same, given the granting of permission.

Despite this, no advance of the *Soulsbury* challenge in opposition to *Xydhias* has come through in judgments thereafter. Indeed, the issue has been somewhat sidestepped. For example:

(1) In *S v S (Ancillary Relief)* [2008] EWHC 2038 (Fam), [2009] 1 FLR 254 Eleanor King J (as she then was) drew together at [23] a number of propositions, including that '[t]he existence of a concluded agreement is a matter of great weight'. She then considered Ward LJ's dictum in *Soulsbury* (cited above) and considered that:

> 'It is not necessary for the purposes of this judgment to consider how Ward's LJ recent observation fits with the body of case-law. Its significance for the purposes of the case management decision I have to make is that it is a further example of the importance of agreements in the eyes of the Court of Appeal.'

(2) In *Independent Trustee Services Ltd v GP Noble Trustees Ltd & Ors* [2012] EWCA Civ 195, [2012] 3 All ER 210 Patten LJ observed as follows at [36]:

> 'The statement by Thorpe LJ (at 394) that the only way of making an agreement to pay money enforceable between husband and wife was to convert it into an order of the court has been criticised in a subsequent decision of the Court of Appeal as too wide: see *Soulsbury v Soulsbury* … But nothing in the later judgment detracts from the proposition that the making of the order has to be a proper and fully informed exercise of the powers contained in the 1973 Act and that, once made, it is the order which therefore governs the rights and obligations of the parties.'

Practical considerations

Leaving to one side the disagreement between Thorpe LJ and Ward LJ as to legal principles, *Xydhias* presents practical problems.

In theory, distinguishing between core/substantive terms (i.e. upon which agreement is necessary for a party to be held to their bargain) and procedural/residual terms (i.e. upon which agreement is not necessary), should not be difficult. That is particularly so for practitioners who can step back and take a more objective assessment. In practice, subjectivity of the parties so often creeps in, where that which is very important to one person may to another be trivial.

Difficulties also arise in defining where the line is to be drawn between quantification and principle on the one hand and mechanics and mode of performance on the other. Using security of payments as an example, the nature of the security might be critical to one party who had to give it, but purely a matter of mechanics to the other. As Moor J observed in *Pierburg v Pierburg (No 2)* at [43] (above), if there *is* an overall settlement the court can determine issues that remain as to (say) drafting or exact terms of the order. The court can do so without undermining the overall agreement, thus preventing the parties being able to resile from the same. Therefore, for the party that still attaches significant importance to the matter of security, that key issue is taken from their control.

Considerable importance therefore lies on whether or not an agreement has been reached at all, and, as a consequence, conflict can arise where one party states a concluded agreement has been reached relying upon *Xydhias*, whilst the other refuses to accept any such agreement exists.

This difficulty may be avoided if the parties follow the guidance of Thorpe LJ. The easy solution to evidencing a concluded agreement is a signed heads of agreement. Time spent setting out core terms in a heads of agreement is invaluable in reducing potential for conflict; that is all the more so late in the day at an FDR where, although so often stretched for time, leaving with a signed heads of agreement (even without the court's approval on a *Rose v Rose* basis) should always be attempted.

Negotiations are, though, often not that formal and take place through a chain of correspondence and conversations, with new matters emerging as negotiations develop. Email rather than formal inter-party correspondence has

only increased this informality, and it is increasingly common for one side to declare in writing that they consider negotiations have reached such a stage that the parties are '*Xydhias*-bound'. To avoid dispute over such declarations, it is advisable to clearly define at an early stage the core/substantive issues (or, if later, as soon as they arise), to make it clear that no final agreement can be reached until those issues are resolved.

Lastly, practitioners should heed the fundamental difference between a *Xydhias* agreement and a *Rose* order (arising from *Rose v Rose* [2002] EWCA Civ 208) – the latter being where an agreement receives the court's approval – and advise clients accordingly. As was relatively recently highlighted by Lieven J in *Kicinski v Pardi* [2021] EWHC 499 (Fam), [2022] 1 FLR 474:

> '[17] … [the judge] referred in a footnote to a useful summary in the FDR Best Practice Guidance of the difference between a *Rose* order and a *Xydhias* agreement. This has some relevance to the approach the Court should take to what was agreed in the *Rose* order, so I shall set it out:
>
> > "Where heads of agreement are signed rather than a consent order submitted, clients should be advised that the heads of agreement are evidence of consensus that may be subject to a 'show cause' application if one party attempts to resile from the agreement but such heads of agreement do not have the same status as an order (whether perfected or unperfected). Practitioners should be careful to explain to clients (and record on the face of the agreement where appropriate) whether any signed agreement is understood and agreed to be *Xydhias*-compliant (ie a binding agreement), *Rose* compliant (ie an approved agreement which amounts to a court order), or otherwise)."'

Costs

Joseph Rainer

QEB

Most readers of this publication will be familiar with the expressions of horror over costs in financial remedy proceedings from the High Court bench in recent years, culminating in a few memorable adjectives ('nihilistic',[1] 'apocalyptic'[2]). In *Xanthopoulos*, Mostyn J described 'exploding with indignation' at the rate and scale of costs incurred in the 2014 case of *J v J* [2014] EWHC 3654 (Fam) and proclaiming that 'something must be done'. It is now 2024 and nothing has been done. Mostyn J concluded at [14] of *Xanthopoulos*:

> 'In my opinion the Lord Chancellor should consider whether statutory measures could be introduced which limit the scale and rate of costs run up in these cases. Alternatively, the matter should be considered further by the Family Procedure Rule Committee. Either way, steps must be taken.'

This article contains my suggestion. I say now and repeat at the end of this piece: *I am not for a moment suggesting this is a perfect solution*. It is a starting point written to get the ball rolling. I strongly recommend pre-reading Henry Hood and Amy Scollan's excellent article 'Living under an LSPO' in the Summer 2023 edition of this publication.[3] Some of the ideas discussed in their piece are referenced below.

What are the problems?

(1) Excessive legal fee expenditure in financial remedy cases: an issue appearing across the board but especially in the big money sphere. Many seem to think this problem has gotten worse over the years,[4] although I haven't seen any independent evidence to corroborate that. If this *is* an increasing problem, it would be difficult to apportion its causation between cultural factors (billing rates and practices at specialist law firms and barristers' chambers) and systemic factors (inefficiencies and externalities in financial remedy law and procedure that contribute towards increased spending).

(2) The inconsistency in the way that legal costs are dealt with *at the end* of proceedings. This is encapsulated by the tension between the general no order as to costs position stipulated at FPR 28.3 and the court's tendency to make awards that have the direct or indirect effect of making one party contribute towards the other's legal fees *without* an explicit costs order being made. Two commonplace examples are the practice of slicing outstanding legal fees 'off the top' of assets before division (which has the effect of the party whose costs were lower paying one half of the difference between the parties' respective costs if it is an equal sharing case), and the practice of making needs-based awards that cover outstanding legal fee indebtedness.

(3) Inconsistency and occasional unfairness in the way that legal costs are dealt with *during* proceedings, primarily the meeting of ongoing legal fee expenditure. This is the realm of the current statutory LSPO regime. Problems with the current LSPO regime are explored in detail by Henry Hood and Amy Scollan in 'Living under an LSPO'.

(4) Closely allied to issue (1), the problem of legal fee expenditure blossoming on contested interim issues in a way that is often quantitatively disproportionate to the amounts in dispute.

The new approach I propose below would aim to tackle problems (1) and (4) and mitigate the impact of problems (2) and (3).

The proposed new approach

My proposed new approach is as follows:

(1) There to be a requirement for both parties to file **costs projections** (CPs) quantifying the sum predicted to take the case to an effective FDR. These to be filed prior to First Appointment at the same time as the other required documents (questionnaires, etc). These CPs are to be in a simplified standard format, like the projections typically prepared for LSPO applications.

(2) After the issue of Form A, the standard gatekeeping order in Form C containing the proforma preparatory directions in advance of the First Appointment should be amended to direct that if either party seeks an LSPO, they must: (a) notify the court within a week of receipt of the other party's Form E; and (b) file and serve the following documents:

(a) With their First Appointment documents (questionnaire, statement of issues, etc), a concise statement dealing with the issues outlined by Mostyn J at [13] (xiv) of *Rubin*, *save for* the costs projection, which will be required from both parties in any event as described above and below. The statement should be limited to four sides by default, with perhaps ten sides permitted for exhibits. There should be no need for extensive corroborating documents given that the

parties will only just have lodged Forms E. Provision of these documents would have the effect of deeming the LSPO application as properly made.

(b) The respondent can then file a page limited statement in response (again, four sides, ten sides of exhibits) within a suitably compact timeframe.

(3) At the First Appointment:

(a) The court is to summarily assess the CPs and determine an appropriate sum for each party to prepare the case for an FDR (or private FDR). The court shall be under an independent quasi-inquisitorial obligation to conduct this assessment even if no objections are raised by the parties, and even where reviewing a directions order submitted by consent. The court may hear concise submissions on CPs if required.

(b) In assessing these CPs, the court is to apply a similar approach to those applied in a summary assessment of costs. The lodestar principles shall be reasonableness and proportionality. The basis for such an assessment is discussed further below, but the court should not automatically apply a discount to the CPs to reflect a notional standard basis of assessment.[5]

(c) The court shall record the outcome of its CP assessment on the face of the First Appointment order (i.e. 'the court has determined that an appropriate figure for the applicant to spend on legal fees up to and including the FDR is £X').

(d) If a party has applied for a LSPO in the manner and timeframe set out at paragraph (2) above, the court shall determine this application at the First Appointment based on submissions unless exceptional circumstances require the hearing of evidence, which may require a separate listing. This determination should be a fast and summary evaluative exercise. The key question will be 'whether' – i.e. the test at s 22ZA(3) and (4). The question of 'how much' will be easier to decide, because: (i) the court will be considering quantum in any event when scrutinising the parties' respective CPs; and (ii) the court will have the other party's CP as a comparative reference point, which it would not have in a LSPO application under the current procedural regime. This approach has already been adopted in a few cases, albeit by reference to the other party's Form H.[6] Parties should expect brief *ex tempore* judgments.

(e) This process will become smoother and more efficient as courts get used to the exercise of assessing CPs. These additional features should not extend the time estimates of standard First Appointments, and First Appointments also considering LSPOs should not take more than 3 hours. As lawyers become more familiar with the process, more LSPOs should be settled by consent. This prediction may be optimistic.

(f) At the conclusion of the First Appointment, the court should warn the parties that if their actual legal spend outstrips the appropriate CP figures assessed by the court, then that overspend will probably be reflected in the final division of assets. This could even be recorded explicitly in the CP recital.

(4) If a case does not settle at an FDR, the exercise shall be repeated at the post-FDR directions hearing, with CPs filed containing estimates to prepare a case for final hearing or such other time period as the court may direct.

(5) At the end of a case, when deciding how to treat: (a) legal fees incurred and paid; and (b) outstanding legal fees:

(a) It is well established that where there is an unjustified and striking disparity in the costs each party has incurred, the court might add back costs already paid in computing the relevant assets.[7] If CPs have been assessed rigorously throughout the proceedings, striking and unjustified costs disparities should not arise at all. If a disparity does arise because one party has overspent beyond their CP, then they will have been warned throughout that this might lead to a costs 'addback'[8] in respect of over-incurred fees already paid from the undivided asset base.

(b) The same goes for outstanding legal fees. In a sharing case, the court will have regard to whether there has been overspend above CPs when taking outstanding costs debts 'off the top' before division of the residual assets. In needs cases, when considering whether a needs award should stretch to discharge outstanding legal fee indebtedness, alongside the guidance of the Court of Appeal in *Azarmi-Movafagh v Bassiri-Dezfouli* [2021] EWCA Civ 1184, the court will also pay heed to whether the applicant has overspent beyond their CP.

(c) None of this will put the court in a straitjacket. The court may think overspend has been justified. It may also find it unfair in all the circumstances to penalise a party for overspend. This new framework does not import post-Jackson era civil law procedural rigidity to the Family Court. The court's evaluative and discretionary process is unfettered. However, an overspend above CPs at least gives the court a concrete evidential foundation to make direct/indirect adjustments at the conclusion of proceedings to reflect costs extravagance and imprudence. It is also procedurally fair, because the parties will have been warned throughout that such an outcome was possible, and even probable.

Why might this approach help?

I direct this section to each of the four problems highlighted at the outset.

Problem 1 – excessive legal fee expenditure

- Theoretically, it will be far more difficult for parties to overspend if CPs are being assessed at each major step in proceedings. It is well established that parties may have to bear their own unpaid costs referable to overspending beyond the bounds of an LSPO.[9] All this new framework does is to extend that principle more

generally to apply to overspend beyond the bounds of assessed CPs.
- It will force parties to confront the actual potential costs of proceedings far earlier and thus (at least theoretically) pay more heed to proportionality. In my anecdotal experience, parties are not particularly concerned by Form H costs estimates – they are too often seen as a box-ticking exercise. I have never been asked by a client 'what happens if we spend more than that?' The foregrounding of costs estimates through the preparation and assessment of CPs may bring this into sharper focus.
- It may encourage lawyers to keep a closer eye on proportionality, in the knowledge that the court (and the other side) will be hawkishly reviewing CPs. That said, I recognise there is a major downside to this – the potential for conflict between lawyers and lay clients as to the level of fees incurred. I discuss this further below.

Problem 2 – inconsistency in the way costs are dealt with at the end of proceedings

- Hopefully, this process will lead to a decrease in costs disparity between parties, which will be more in keeping with the 'spirit of the no order as to costs starting point'.[10]
- The practice of costs coverage in needs cases (i.e. making a needs-based award that discharges outstanding costs indebtedness) should become more tightly confined and thus less intellectually problematic. The scenario explicitly addressed at FPR PD 28A, para 4.4 ('… 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') is less likely to arise where CPs are being assessed at each stage of the proceedings by reference to the principles of reasonableness and proportionality. Some might argue that such awards are still equivalent to inter partes costs orders,[11] but at least quantum will be kept in check.

Problem 3 – inconsistency in the way costs are dealt with during proceedings (LSPO)

- This process seeks to frontload and streamline the LSPO process, with the aim of avoiding multiple hearings. The general proliferation of CPs should simplify the assessment of LSPO quantum, and as already mentioned above, the court will have the other party's CP as a reference point when assessing an LSPO award.
- What this new process does *not* do is to change the principles referable to LSPO. I have always struggled to rationalise LSPOs in sharing cases where the assets happen to be mostly/entirely in one party's name. I have never been able to understand why the happenstance of legal ownership of assets in those cases requires the financially weaker party to jump through the *Rubin* hoops and approach the court as supplicant. My proposed approach does nothing to address this logical lacuna. That would require a change in the law: either to the wording of s 22ZA(4)(b), or a judicial determination on how the word 'reasonably' in that subsection should be construed in this context.[12]

Problem 4 – disproportionate blossoming of legal fees on interim issues

This process should mitigate this problem for the same reasons as those applicable to problem 1 above.

The elephant in the room – creation of three-way tension between the court, lawyers and lay parties

A problem with my suggested approach is its capacity to create tension (and possibly conflict) between a lay client and their representatives. I can foresee this occurring in two scenarios:

(1) The court being critical of a CP prepared by a parties' advisor and pruning it substantially.
(2) The court penalising overspend by a party above their CP notwithstanding protestations by the party's representatives that the overspend was reasonable and justified in the circumstances.

Both scenarios *could* lead to a lay client perceiving that they have been unreasonably overcharged by their legal advisors.[13] An awkward situation analogous to scenario 1 above sometimes arises when the court substantially pares down an N260 costs schedule in a costs application, or criticises a party's Form H at a hearing. This tension is likely to arise more frequently within my suggested approach because the court will be explicitly scrutinising and approving CPs at every hearing.

Ironically, these tensions are an inevitable by-product of curing the overarching problem of costs spiralling. Any framework that inserts the court as a gatekeeper of legal fee spending has the potential to create tension between the lay client and their representatives.

The problem will be mitigated significantly by the court assessing CPs in a fair and realistic manner. This requires the court to have a good understanding of the range of reasonable costings for the legal services provided, which obviously vary from region to region, and will depend on the complexity of the case. In my experience, courts already have a good grip on this. In the context of standard basis assessment of costs, civil law authorities have held that the touchstone for assessing quantum is the lowest amount which a party could reasonably have been expected to spend in order to have its case conducted and presented proficiently – *Kazakhstan Kagazy v PLC v Zhunus* [2015] EWHC 404 (Comm). That case was decided by Leggatt J (as he then was), now Lord Leggatt. In my experience, the Family Court tends to apply this principle in a realistic and flexible manner when assessing standard basis costs orders.[14] I have no reason to believe that the courts will not adopt a similarly realistic approach to assessing CPs.

I suspect that in practice parties and representatives will indirectly self-regulate: the court would probably be more restrained in curtailing CPs if parties are spending at a roughly equivalent level. Significant spending disparities are likely to draw the court's attention.

Conclusion

Obviously implementing this proposal, or something like it, would require significant changes to the FPR. I am not for a

moment suggesting that this is the best or only solution to the problem(s) of costs in financial remedy proceedings. I wrote this article as a jumping off point for discussion. Nothing I suggest is particularly radical, nor is it bringing a CPR-style system of costs budgeting to financial remedy proceedings. In fact, as intimated above, the court already does something similar in LSPO cases: it effectively sets a forward-facing litigation budget for that party (albeit by way of an order that the other party pay over the determined sum). This approach extends that gatekeeping focus to both parties in all cases. If any readers have any feedback, ideas, corrections or abuse arising from this article, I'd love to hear it: https://twitter.com/JoeRainer_

Notes

1 Peel J, *Crowther v Crowther & Ors* [2021] EWFC 88.
2 *Xanthopoulos v Rakshina* [2022] EWFC 30.
3 [2023] 2 FRJ 115, https://financialremediesjournal.com/content/living-under-an-lspo.7e8172a82853479488524d86a50411d8.htm
4 I.e. at a rate meaningfully outstripping inflation.
5 The fairness and logical basis for this approach was explored by Henry Hood and Amy Scollan in 'Living under an LSPO', but in this context a default trimming would not be cogent. The function of the court in this context is to assess the likely quantum of reasonable and proportionate costs.
6 *Chai v Peng* [2014] EWHC 519 (Fam), *LKH v TQA AL Z* [2018] EWHC 1214 (Fam). As Henry Hood and Amy Scollan noted, 'often, a broad approach is taken based on the other party's … costs'.
7 *RH v RH* [2008] EWHC 347 (Fam), [2008] 2 FLR 2142, *LS v LS (Appeal: Costs)* [2012] EWHC 2960 (Fam), *J v J* [2014] EWHC 3654 (Fam), *A v M* [2021] EWFC 89, and see also DDJ Hodson's and HHJ Hess' detailed consideration of this issue in *P v P* [2022] EWFC 158 and *YC v ZC* [2022] EWFC 137, respectively.
8 Of precisely the kind envisaged by HHJ Hess at [42] (vii) of *YC v ZC*.
9 *Re Z (No 2)* [2021] EWFC 72, see also Cohen J in *Xanthopoulos v Rakshina* [2023] EWFC 50. As Henry Hood and Amy Scollan point out in 'Living under an LSPO', those two overspend authorities are not consistent with other earlier High Court cases, but they are a warning to solicitors who 'must now assume we will not recover overspends, irrespective of the circumstances'.
10 HHJ Hess' phrase at [42] of *YC v ZC*.
11 The view taken by Holman J in *Daga v Bangur* [2018] EWFC 91 at [66], and less directly by Francis J in *WG v HG* [2018] EWFC 845.
12 I.e. in a sharing case where the applicant's sharing claim is plainly sufficient to pay for interim legal fees (assessed by reference to their CP) and meet their needs in the final redistribution, it will not be *reasonable* for them to secure a loan to pay for legal services within the definition of s 22ZA(4)(a).
13 Although it won't inevitably be so. There are plenty of cases where a lay client will have knowingly driven legal fee overspending, notwithstanding the warnings of their legal advisors. That said, Henry Hood and Amy Scollan noted of the analogous pruning of LSPO budgets by the court: 'The very fact of the reduction can affect the solicitor-client relationship and the client's confidence in their lawyer and their worth'.
14 See also Simon Colton KC (sitting as a Deputy High Court Judge) in *H v HG* [2023] EWFC 235 on the application of the 'Guide to the Summary Assessment of Costs' in family proceedings.

Historical Business Valuations and the Goldilocks Principle: Not Too Much or Too Little but Just the Right Amount of Hindsight

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This article compares the attitude taken to the use of hindsight in the commercial courts with that in the family courts.

GA v EL

The recent case of *GA v EL* [2023] EWFC 187 and [2023] EWFC 206 provides a useful review of case-law in relation to historical valuations of companies by accountancy expert witnesses and the use of hindsight.

It is instructive to consider and compare the two judgments that have been published in this case: (1) the judgment of Peel J in relation to the wife's *Daniels v Walker* application, heard at the pre-trial review in October 2023,[1] in which the wife applied for permission to adduce her own expert accountancy evidence because she disagreed with the conclusions of the single joint expert (SJE); and (2) the judgment of Stephen Trowell KC (sitting as a Deputy High Court Judge)[2] following the final hearing that took place 6 weeks later in November 2023.

A comparison between the two judgments sheds useful light on the current law regarding historical business valuations and the application of hindsight.

The background

The parties had married in 2007 and co-founded a software company in 2008. Following their separation in November 2019, negotiations over the business's sale began and it was eventually sold in early 2022, realising for the parties approximately £35m gross comprising a mixture of: (1) cash; (2) loan notes; and (3) shares in the purchasing company.

The key issue in contention was whether the increase in the business's value post-separation resulted from the husband's efforts.

DCHJ Trowell reminded himself that the court has to undertake a three-stage inquiry:

(1) to determine if the business value rose post-separation;
(2) to assess the husband's contribution to this increase; and
(3) to decide on a fair asset division.

It is the third of these issues that is critical in understanding the extent to which expert accountancy witnesses can be asked by the court to shed light on historical business valuations for the reasons explored below.

Commercial court's approach to hindsight in business valuation

In *GA v EL*, the court-appointed SJE valued the company at £14.1m as of November 2019. In so doing he adopted the traditional approach by which no account was taken of hindsight.

This accords with a long-held tradition in the commercial courts that the valuation of a company at a particular date should be undertaken without the benefit of hindsight. The approach of taking no account of hindsight was reaffirmed by the Court of Appeal in the context of a claim for an alleged breach of contract, in the case of *Joiner & Anor v George & Ors* [2002] EWCA Civ 160. In that case the allegation that the judge at first instance had erred by failing to take any account of hindsight was rejected.

There are some instances in which the commercial courts have allowed a limited degree of hindsight to be taken into account but only insofar as it can be used to shed light on what forecasts could have been reasonably made at the valuation date.[3] However, the clear basic principle is that only information likely to have been known at the valuation date should be taken into consideration by the valuer.

From an accountancy perspective, there is a very good reason to ignore hindsight. Consider the historical valuation of an asset at, say, 1 January 2014 and suppose that the asset was in fact realised for £1m on 1 January 2024. If one

knew in 2014, with perfect hindsight, that there was absolute certainty that the asset would realise £10m in 10 years' time, then the value of the asset in 2014 is simply £1m discounted only to reflect the time value of money (effectively inflation) for the 10 years between 2014 and 2024.

Different approach in the Family Court

This raises the question as to how a clear line of reported authorities that very greatly restrict the use of hindsight in the commercial courts can be reconciled with a growing line of authorities in the Family Court, most recently endorsed in *GA v EL*, 'that it is not merely legitimate but is realistic and right to use hindsight when making in family proceedings a historic valuation.'[4]

Perhaps the answer to this apparent inconsistency of approach between the commercial and family courts lies in the concept of 'fairness'. Forensic accountants are sometimes asked to opine on Fair Value (although now strictly speaking the term is 'Equitable Value'[5]) but the concept of *overall fairness* or *overarching fairness* is a measure that is outside the area of expertise of any accountancy witness and is not a matter on which such witnesses are qualified to opine. By contrast, fairness or equity lie firmly within the preserve of the court.

Essentially, the accountant business valuer is trying to answer the question as to what value a hypothetical purchaser would pay to acquire an asset at the valuation date knowing only what was known by such a person at the time, i.e. without the benefit of hindsight.

Indeed, for the reasons set out above, if valuers were to use perfect hindsight, they would simply discount the present-day valuation to take account of inflation or the time value of money and the historical valuation would be uncontentious and formulaic.

By contrast, the Family Court poses a different question, namely what value should be ascribed to an asset at the historical valuation date so as to give an equitable outcome to the parties. Essentially, the court applies the benefit of hindsight but only partially. Hindsight is to be applied but only to the extent necessary to achieve fairness. Hence the reference to Goldilocks in the title of this article. The court must not apply too much nor too little but just the right amount. It can use a crystal ball but a cloudy one.

To that end the family courts have developed a series of what the court referred to in *GA v EL* as a 'rough and ready' approach to derive historical valuations. These include a simple linear approach in which the value of the company is time apportioned on a pro-rata basis across the life of the business[6] and the application of a notional 'springboard' to uplift the accountant's valuation at the start of the relationship.[7] Neither of these two approaches are recognised by accountants. They are mechanisms by which the court derives a figure that achieves fairness by adjusting the accountant's valuation or simply directly estimating an appropriate valuation.

The fact that hindsight is not a matter for accountancy experts is clearly demonstrated if one looks closely at the two judgments in *GA v EL*.

Hindsight in *GA v EL*

In the judgement following the pre-trial review in *GA v EL* [2023] EWFC 187, Peel J referred to the SJE having opined, in replies to FPR Part 25 questions, that the value of the parties' combined interests in November 2019 was about £18.9m on the 'hindsight approach' compared with his valuation of £14.1m on the so-called 'present day approach'.

However, in the judgment following the final hearing[8] Stephen Trowell KC (sitting as a Deputy High Court Judge) made it clear that, in reality, the difference between these two figures was not 'one of hindsight'.[9]

The lower valuation reflected calculations and estimates using information available in November 2019, including management accounts for October 2019 but without the benefit of any projections that might have been available at the time.

In his oral evidence the SJE explained that, although he had asked the husband what future growth was anticipated in November 2019, very little information was provided to him in reply. Indeed, he referred to this lack of evidence as being a significant limitation on the scope of his work. The SJE therefore had no alternative but to make his own assessment as to what forecasts might have been prepared in November 2019 by a hypothetical purchaser. He did so by preparing three different projections with incrementally increased levels of optimism as regards sales and profits.

By contrast, the so-called by Peel J (but mis-named) 'hindsight approach' valuation that was given in answer to the questions raised by the wife, used information which was advanced in a marketing presentation sent out in July 2021. This would not have been available at the valuation date. It included actual accounts for the period ending in February 2020 and 2021 and projections of growth for 2022 through to 2024.

In the wife's Part 25 question, she asked the SJE to recalculate the valuation using the actual and forecast growth in the sales brochure. The question did not invite him to consider whether the growth forecast was reasonable. Indeed, in subsequent oral evidence, the SJE stated that he expressly preferred the figure in his report as the value of the company in November 2019, than the figure in his answers to questions. He did so because he considered that, as things were in November 2019, the original figures in his report as to his estimates as to future growth in 2024 were reasonable.

Interestingly, there is no reference in the judgment of the final hearing to the SJE having ever been asked to what extent he considered that the July 2021 marketing presentation shed light on what might reasonably have been prepared for a hypothetical purchaser in November 2019 had the company been marketed at that time. Such a question would have been entirely in line with the commercial case-law authorities such as *Buckingham v Francis Douglas Thomson* [1986] 2 All ER 738, that make it clear that 'regard may be had to later events for the purpose of deciding what forecast for the future could reasonably have been made' at the valuation date.

Nevertheless, it appears that, although not explicitly stated, this is exactly what the SJE had done. He had used the July 2021 marketing presentation as justification for concluding that, in November 2019, a hypothetical purchaser might have been more optimistic about the future prospects of the company than the SJE had originally concluded in his report.

Accordingly, the SJE used the July 2021 marketing material to justify an increase in the multiple. As the judge described it: 'the multiple derives from the projected revenue for 2024, and that is a projection of future growth made with the sales information. The difference is not then one of hindsight: it is a projection but a more optimistic one'.

Conclusion

If one were to read Peel J's judgment in relation to the *Daniels v Walker* application, one might be forgiven for thinking that accountancy expert witnesses can and indeed should have regard to hindsight when undertaking historical business valuations.

However, DHCJ Trowell KC's judgment of the final hearing makes it quite clear that the SJE did not in fact apply hindsight other than to the very limited extent of allowing the existence of subsequent evidence to inform his opinion as to what a hypothetical purchaser might reasonably have forecast at the valuation date. This approach was endorsed by the judge and is entirely consistent with long-established principles of business valuation in the commercial courts.

The SJE's historical valuation is, however, only a starting point. It can then be adjusted to take account of overall fairness. That is a concept that is firmly outside the realm of the expertise of accountants.

Notes

1 [2023] EWFC 187.
2 [2023] EWFC 206.
3 *Buckingham v Francis Douglas Thomson* [1986] 2 All ER 738.
4 Referenced in *GA v EL* which referred to *E v L* [2021] EWFC 60 in which Mostyn J was referring to his earlier decision in *L v HL* [2017] EWHC 147 (Fam) that in turn quoted Moylan J in *SK v WL* [2010] EWHC 3768 (Fam).
5 International Valuation Standards Council definition.
6 *WM v HM* [2017] EWFC 25, upheld on appeal in *Martin v Martin* [2018] EWCA Civ 2866
7 *Jones v Jones* [2011] EWCA Civ 41.
8 *GA v EL* [2023] EWFC 206.
9 *GA v EL* [2023] EWFC 206 at [82].

Securing Property Situated Outside the Jurisdiction of England and Wales for the Benefit of Minor Children

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Readers of the *Financial Remedies Journal* will, of course, be familiar with the operation of s 23(1)(d)–(f) Matrimonial Causes Act 1973 (financial provision for children in connection with divorce/dissolution of civil partnerships), as well as s 24 of that same Act insofar as it makes available property adjustment and settlement orders for the benefit of children of the marriage. Likewise, they will be familiar with the provisions of s 15 and Sch 1 Children Act 1989 when considering how to make financial provision for children outside proceedings for divorce or dissolution of a marriage or civil partnership. In those matters those with parental responsibility, as defined in ss 2 and 3 Children Act 1989, are expected to act on behalf of the relevant children in their best interests and exercise all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property. Likewise, in matters of succession where minor children are beneficiaries of estates, those with parental responsibility are able to manage assets on behalf of their minor children.

Those same readers may not, however, be familiar with an issue that has occasionally troubled both the Business and Property Courts in the Chancery Division and the Family Division of the High Court, that being the exercise of parental responsibility by a parent of a minor child to secure for the child's benefit property, assets or income to which the child is entitled and which is situated outside the court's jurisdiction in a foreign land, or otherwise to exercise what are, in effect, trustee or fiduciary powers to deal with that property, assets or income for the benefit of that child. In those instances, the matter comes before the court by way of an application brought by a parent or guardian seeking to exercise their powers under ss 3(2) and (3) Children Act 1989.

In 2020, 2021 and 2022 the issue came before Peel J in the Family Division in *Re AC (A Child: Parental Responsibility)* [2020] EWFC 90, [2021] 1 FLR 1297; before Master Clark in the Business and Property Courts, Chancery Division in *Re Shanavazi* [2021] EWHC 1983 (Ch); and before Peel J again in the Family Division in *Re B (A Child)* [2022] EWFC 7, [2022] 2 FLR 523.

This article now considers the lessons learned from those cases, what is needed in order to secure or to deal with property held abroad on behalf of minor children, and speculates on what might happen where the current case-law does not apply.

Re AC (A Child: Parental Responsibility) [2020] EWFC 90, [2021] 1 FLR 1297

In the triumvirate of cases, *Re AC* came first. This was a one-sided application by a mother of a child whose father had died intestate in 2017 for a declaration that the mother was authorised by the court to accept on behalf of her child an interest in a property which he had inherited.

The mother and the father had bought a property together in Italy in 2006, they then married in 2007 and had their child in 2009. In May 2018 the mother was granted letters of administration of her late husband's estate. Part of that estate included the father's share of the Italian property, half of which interest would pass, pursuant to the provisions of Italian succession law, to his child, and the other half of which would pass to the mother, being the deceased's spouse.

The case report states, both in its headnote and in the body of the judgment, that 'at the time of his death the Property was held in equal shares by M and F'. The mother and the father were unmarried at the time of the property's purchase, and so they would have been taken, under Italian law, to own their share separately from the other. Upon their marriage, as no specific Italian property regime was declared, they would have been taken to have submitted by default to the community of property regime. That would mean that a right equivalent to that arising by the right of survivorship would apply in respect of the mother's interest in her husband's estate. Under Italian law,[1] however, the

parties' child would retain his entitlement to a 50% share of his father's Italian estate. According to the provisions of private international law, the *lex situs* would apply to the Italian property, such that it should pass in accordance with the provisions of Italian law, even where the father's domicile may have been England (the case report does not deal with this point) and as a result his estate would include the Italian property for inheritance tax purposes.

M brought her claim before Peel J in the Family Division of the High Court seeking a specific issue order under s 8 Children Act 1989 authorising her to accept her child's inherited part of the Italian property for his benefit. M wanted to sell the property and invest the child's share on his behalf. A buyer had been found who was willing to pay €220,000, and the child would receive circa €55,000 on the sale.

M required the court's assistance as Italian law required a formal acceptance of inheritance by the heirs of the relevant estate. It will not recognise Letters of Administration, personal representatives, or fiduciary obligation by a trustee towards a beneficiary. Each heir has to accept their share themselves. The heir would do so by:

(1) instructing a notary or court clerk to draw up an inventory, and then the heir declaring that the inventory is accepted; or
(2) signing a public deed formally accepting their share of the estate.

Peel J noted, at [11] of his judgment, that the mother could do either of those things on her own behalf, being a fully competent adult. Her son, however, as a minor child was not fully competent. Pursuant to Art 2 *Codice Civile* a minor cannot accept the inheritance under Italian law. Article 320 requires that an adult (usually a parent) would provide that formal acceptance on their behalf, with the acceptance being authorised by a 'tutelary judge' who make decisions on behalf of people who lack capacity, including minors.

A minor cannot execute a public act, and so the only method by which a minor can accept their inheritance is by instructing the notary to draw up the inheritance inventory, and the minor accepting that. The tutelary judge has to be satisfied that the authorisation is necessary and in the best interests of the minor. Once all this is done, the child becomes the owner of his inheritance.

The decision of Peel J went onto consider the pre-Brexit provisions of European law which applied in this matter. It was recorded at [13] of the judgment that Italian domestic law defers to the Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility. That Regulation provides at Art 8(1) that 'the Courts of a Member State shall have jurisdiction in all matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.' At the time of the application, England and Wales as part of the United Kingdom was still an EU Member State. As a result of the effect of that Regulation, the Italian court would not make the order the mother sought authorising acceptance on behalf of the child, as it did not have the requisite jurisdiction. England and Wales did as the child was habitually resident in England.

Peel J then went onto consider whether the English law then provided the court with the power to authorise acceptance by the mother of the child's share of the inheritance. In doing so he considered the provisions of s 3(1)–(3) inclusive, which reads:

> '3. Meaning of "parental responsibility".
>
> (1) In this Act "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.
>
> (2) It also includes the rights, powers and duties which a guardian of the child's estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.
>
> (3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover.'

The judge stated that the emphasis in this case was on responsibilities as well as rights. The mother had a *responsibility* to act in the child's interests and she had *duties* to take steps to receive and recover property for that child's benefit, both for their benefit but belonging to another, and also property that was in the child's own name.

Penelope Reed KC representing the mother, had uncovered only one case in which a similar application had been made: *Hays (A Child Proceeding by her Litigation Friend) v Hays* [2015] EWHC 3825 (Ch). In that case Master Matthews (as he then was) was faced with a case in which the mother applied for an order to be appointed as agent for the child in order to enter into a contract for sale of the father's French apartment following his death. The order was granted on the basis of the operation of private international law enabling the Master to apply French law, but the alternative application brought seeking the authorisation as an exercise of parental responsibility under s 3 Children Act 1989 was refused on the basis that the Master could not see any reference to disposal of property on the minor's behalf within s 3. He considered that seeking authorisation to dispose of property went well beyond receipt and recovery and he was not satisfied that s 3 conferred power on those exercising parental authority to enter into a contract to sell real property interests on behalf of a minor. He did note that these sort of cases are usually dealt with in the Family Division and that he may have got it wrong through his own lack of knowledge.

Peel J distinguished Master Matthews' decision, noting that the present case concerned the acceptance of an inheritance, and not at that stage, the disposal of the property contained in that inheritance. His view set out at [21], was that the Master's interpretation of s 3 was too restrictive. If the mother could not enter into a contract of sale on behalf of her son, then he would not be able to receive or recover his property until he achieved majority. He would hold it, but could not convert it. A contract of sale in those circumstances could be argued as falling within the phrase 'entitled to receive or recover'. The provisions of s 3(3) Children Act 1989, further, referred to the rights in s 3(2) as 'including' the right to receive or recover, and the deployment of that word did not limit the powers available

relating to property, which would appear to include disposal.

In his concluding paragraphs, the judge set out the test he applied, namely that he needed to be satisfied that the question which he has to determine is an aspect of parental responsibility and, if so, he must determine the issue having regard to the welfare checklist at s 1(3) Children Act 1989 and to the paramountcy principle, namely that in any exercise of its powers to make an order under s 8 of that Act (child arrangements orders, specific issue orders and prohibited steps orders) the child is the court's paramount consideration. He stated that the exercise under s 8 Children Act 1989 (for a specific issue order in this case) did not entitle the court to make financial provisions orders for the child, such orders falling within the remit of applications brought under the Matrimonial Causes Act 1973 and/or Sch 1 Children Act 1989.

He found:

(1) He had jurisdiction to make the order sought.
(2) The specific issue order sought to recover the property related to an aspect of parental responsibility.
(3) It was in the child's interest to make the order, as it is plainly in the child's interest to have the issue of his inheritance in Italy resolved to his financial benefit.
(4) There were no debts for which the child would become liable.
(5) The application would enable him to receive property to which he was entitled.
(6) The mother had fully and faithfully discharged her parental responsibility in bringing the application.

He made the order sought and reserved the question of any orders specific to the sale of the property, should they have arisen to himself.

Re Shanavazi [2021] EWHC 1983 (Ch)

The matter arose again, this time in the Business and Property Courts of the Chancery Division before Master Clark in an application by Bibi Marium Shanavazi. She was seeking that the High Court authorise her to enter into a contract of sale of a property in Germany and to convey the property to the purchaser on behalf of her minor son, Ilyas Firas Shanavazi ('Ilyas'). That property had belonged to her late husband, Gohlam Shanavazi, who had died on 23 December 2011 when Ilyas, the youngest of five siblings, was just 7 years old. By the time of the application the other siblings were adults and Ilyas was 16 years old.

This was another case in which the deceased died intestate. The Master applied private international law and recorded that succession to the property was governed by German law, that being the law of the country where the property was situated – as mentioned above, the *lex situs*.

Some 8 months after Mr Shanavazi's death, in August 2012, Ilyas and Ms Shanavazi moved to England. The judgment records that they intended to remain here permanently (relevant for issues of domicile and habitual residence, and consequently the court's jurisdiction).

In that case, the application included witness statements from Mrs Shanavazi, from her daughter Asma, and from her solicitor. Included in that evidence was a legal opinion from a Dr Johannes Weber, a notary public and supplementary emails.

Ilyas had, per German law, a 1/10th interest in his father's estate, with his mother being entitled to half and each of his siblings being entitled to the other 4/10ths. The family as a whole wished to sell the property, which had previously been let, but which had become a burden. All the heirs, including Ilyas, entered into a contract to sell at a price far greater than an official valuation obtained. Asma confirmed that Ilyas' share would not bear any debt where the property were sold.

Master Clark went through the legal process to establish jurisdiction carefully and in detail:

(1) Where a deceased leaves several heirs, the estate becomes the joint property of those heirs.[2]
(2) Those heirs own each asset jointly in undivided shares and to sell they all have to act jointly.[3]
(3) Minors cannot consent to the to the sale of property.[4]
(4) A person can be authorised by the family court to consent to the sale of the land on behalf of the minor.
(5) The German land registry would only register a transfer of ownership of land where all the heirs consent.
(6) German law defers to Council Regulation No 2201/2003 to determine where jurisdiction lies in authorising a parent to consent to a sale of jointly held property on behalf of a minor, with that Regulation providing that the courts of a Member State where the child is habitually resident have jurisdiction in matters of parental responsibility. That Regulation does not apply, however, to trusts or succession law.
(7) In this case, Ilyas was habitually resident in England and at the time of the application being brought in late November 2020, the United Kingdom was still a Member State of the EU, although going through the transition period (which ended on 31 December 2020). As the application had been brought before 'IP Completion Day' on 31 December 2020, despite the judgment being handed down in July 2021, EU law, the direct effect of Regulations and the relevant EU case-law still applied. The English court therefore had jurisdiction in matters of parental responsibility.
(8) An authorisation by a court to consent to a sale of property on behalf of a minor is a matter of parental responsibility according to that Regulation's definition (being 'all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect'[5]), per the decision in *Re Matouskova*.[6]
(9) *Re Matouskova* dealt with a case in which an inheritance settlement agreement concluded on behalf of minors by their guardian required the court's approval. The court accepted the argument that the guardian's appointment and the exercise of her activity were so closely connected that it would not be appropriate to apply different jurisdictional rules. Even though the approval had been sought in succession proceedings, it was not to be regarded as a matter of succession law. The court's approval was needed *as a protective measure relating to the administration, conservation of disposal of property*[7] by someone exercising parental responsibility for children who lacked capacity as a result of their age.

(10) *Re Matouskova* was held by the court to be authority that authorisation to act on behalf of a minor falls within the scope of the EU Regulation.

(11) As far as applicable law is concerned, where an English court takes jurisdiction with respect to children it will apply English law as the law of the forum.[8] In *Hays v Hays*[9] Master Matthews was not referred to the EU Regulation and the argument before the Master inferred that the French court would not make the order – there was no evidence to that effect. Master Matthews characterised the issue as a lack of capacity by a minor, rather than one concerning the child's best interests. Accordingly, he held that the applicable law was the *lex situs*, in that case being France. Master Matthews' analysis was inconsistent with *Matouskova*, which Master Clark preferred.

(12) In cases commenced after 31 December 2020, once the United Kingdom is outside the EU, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children ('the Hague Convention') applies. The child's habitual residence remains the basis of jurisdiction. The objectives of that Convention included measures directed to protection of the person or property of the child,[10] which measures include 'the administration, conservation or disposal of the child's property'.[11]

Having established the jurisdiction of the English Court, both before and after the United Kingdom left the EU, the Master went onto consider s 3 Children Act 1989 and the decisions in *Re AC* and in *Re Hays*. She declared Peel J's reasoning in *Re AC* 'compelling'[12] and agreed with it. She considered she had power to make the order sought.

In making that order she considered what welfare meant within s 1 Children Act 1989, noting that the welfare of the child is the court's paramount consideration. At [50] of her judgment she stated 'Section 1(3) sets out a welfare checklist, which the court is, however, only required to have regard to when a section 8 order is opposed.' This assertion was striking to the author of this article, since the welfare checklist in s 1(3) is applied in the Family Court as a matter of course when the Family Court is making any decision relating to a child's welfare, whether it is opposed or not. A re-reading of s 1(4) of the Children Act 1989, to which s 1(3) refers as being the circumstances in which the court has particular regard to the welfare checklist, does indeed state that the court shall have that particular regard **only** where the court is considering whether to make, vary or discharge a s 8 order, **and** the making, variation or discharge of the order is opposed **by any party to the proceedings**, or the court is concerning whether to make, vary or discharge a special guardianship order or a public law order (care/supervision order).

Accordingly, it does not appear that the Master applied the welfare checklist, but instead considered Munby LJ's guidance in *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677 (at [26]) as follows:

> '"Welfare", which in this context is synonymous with "well-being" and "interests" (see Lord Hailsham LC in *In re B (A Minor) (Wardship: Sterilisation)* [1988] AC 199, 202), extends to and embraces everything that relates to the child's development as a human being and to the child's present and future life as a human being. The judge must consider the child's welfare now, throughout the remainder of the child's minority and into and through adulthood. The judge will bear in mind the observation of Sir Thomas Bingham MR in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 129, that:
>
> > "the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems."'

The Master then weighed up all the factors in the case, including that where Ilyas' mother was authorised to enter into the contract of sale and to convey it on Ilyas' behalf, that would allow the sale to be registered and completed via the German Land Registry; that Ms Shanavazi offered undertakings to apply Ilyas' share for his education, maintenance and benefit; that it was plainly in Ilyas' best interest for the property to be sold at a higher price than its asserted value, and there was no disadvantage to him from the sale. Moreover, it was in his best interests for the proceeds to be liquidated and applied as was proposed. She made the order sought.

In closing, the Master noted that she had considered whether Ilyas should have been joined to the claim. For issues of proportionality, bearing in mind the need to appoint a litigation friend, she decided not to, but directed that the judgment and order be served on him, with permission for him to apply to the court to enforce Ms Shanavazi's undertaking.

Re B (A Child) [2022] EWFC 7, [2022] 2 FLR 523

For the last of the three relevant cases, the issue returned to the Family Division and before Peel J once again.

In that case, the child, B, was 17 years old at the time of the hearing on 16 February 2022. The application had been brought very recently, namely on 4 February 2022, by the issue by B's mother of a Form C100 seeking a specific issue order authorising her to accept a French inheritance and to enter into a valid contract for sale of a French property, both on B's behalf. B, who was 'of an age where his views command profound respect'[13] supported the application, as did B's adult sister, who was a respondent to the application.

B's father had died intestate in France in 2013. He owned a property there and, according to French succession law in that case, the property passed in equal shares to B and to his sister. B was habitually resident in England and, again, under French law B had to formally accept his inheritance. Were he resident in France, his surviving parent could do so by what was effectively an administrative exercise to a tutelary judge. As he was not resident in France, the French judge declined jurisdiction. This case being brought post-Brexit, in his concise judgment Peel J immediately considered the Hague Convention and recorded at [8] that the English court had jurisdiction.

He then moved swiftly to consider the issues of parental responsibility and property, referring to his decision in *Re AC* and applying the same reasoning, he authorised B's mother to accept succession of the French estate on B's behalf.

He dealt lastly with the application for authorisation to sell. While not expressly distinguishing *Re Hays*, Peel J decided that he did have the power to authorise the applicant to enter into that sale contract for the following reasons:

(1) his provisional view in *Re AC* was correct;
(2) Article 3(6) Hague Convention refers to 'disposal' of the child's property, and this reinforced his view that parental responsibility includes the sale of a child's property;
(3) the sale of property is an aspect of its management, which does not alter the beneficial entitlement, but merely converts it to a more liquid form, per Chief Master Marsh at [42] of *South Downs Trustees Ltd (as trustee of the South Downs Employee Benefit Trust) v GH* [2018] EWHC 1064 (Ch), [2018] WTLR 673;
(4) Master Clark agreed with Peel J's view in her judgment in *Re Shanavazi*.

Peel J then made the orders sought, having gone through the consideration of the facts to carry out the balancing welfare exercise.

The conclusion of his judgment set out a helpful checklist of procedural points to ensure that such cases are properly brought before the correct court. He stated:

(1) Applications of this nature are to be made on Form C100, as it is a s 8 Children Act 19898 specific issue order application.
(2) Notwithstanding the provisions of para 5(b) of that Form stating that a full statement should not be provided, in fact, a statement in support is essential. The application is technical in nature, involves applicable law in foreign jurisdictions, and there is usually a need to avoid delay. The witness statement needs to set out the full circumstances of the matter.
(3) This author also respectfully proposes that the witness statement or evidence should include some expert evidence of the law to be applied or the situation in the relevant jurisdiction, particularly if the case concerns a non-Hague Convention country.
(4) Any person with parental responsibility needs to be joined to the case as a party. The child need not be joined unless they fundamentally object to the application and are of an age where they can validly object. If they are considered *Gillick*-competent, the child's views should be sought informally by the applicant and relayed to the court. Those with legal and/or beneficial interests in the property should be notified of the application and be invited to provide confirmation as to whether they do or do not oppose it. They should be reminded that they may make an application to be joined as a party pursuant to FPR 12.3(3).
(5) Peel J considered it would be unlikely that a third party would oppose authorisation to accept an inheritance which is personal to the minor. The court was not making orders for sale, but was authorising the applicant to enable a sale to be effected on behalf of the child. A third party could oppose the sale under the relevant domestic law if they thought fit.
(6) Upon making the application a MIAM exemption should be claimed, although no specific category is required. The author suggests it may be reasonable to cite this decision in *Re B* as being the reason for the exemption. The court should dispense with the need for a MIAM.
(7) Cases of this type should be dealt with in the Family Court by a District or Circuit Judge. It may be allocated to a High Court Judge if it is particularly complex.
(8) Notwithstanding the cost and burden of proceedings, it is appropriate for there to be a hearing in a case of this sort (rather than dealing with it on paper following the application being made) as it involves the child's welfare and the court needs to be vigilant that its welfare is not prejudiced. Peel J noted by analogy the use of infant approval hearings for personal injury settlements.
(9) Although there must be a hearing, it should be the first and final disposal hearing.
(10) Specific issue orders of this sort would usually be heard in private by reason of FPR 27.10, unlike the position in the Chancery Court where the children and parties were named.

What should occur where the property lies outside a Hague Convention country?

Where the property concerned is situated in a country which is not a Hague Convention signatory, then the position must be more complicated. The court will have to determine whether it can seise jurisdiction and is likely to consider, as in *Hays*, the *lex situs* and may, as in that case, apply the law of that country in deciding whether it can authorise the position. The application is likely to be made to the English court precisely because the foreign court or relevant foreign authority has refused to permit the proposed transaction. In that case it is respectfully proposed that the following would need to occur:

(1) The application would still be made to the Family Court as per the procedure set out in *Re B*, but the case should be allocated to High Court Judge level.
(2) The evidence of how the law does and would operate in the relevant country should be comprehensive. A formal legal opinion of an expert would be required, which may come with funding issues.
(3) Application of the relevant country's law should be taken into account in light of the English law and the paramount consideration of the child's welfare should still apply.
(4) The disposal hearing should allow for all interested parties to participate, remotely where necessary, so that there can be no ambiguity about the outcome and no delay in dealing with the issues that arise.

It is likely that, with so many international families and people owning property in different countries, these applications will be made with more frequency. The above collection of short and clear decisions provides us with a practical guide to making the process as clean and painless as possible.

Notes

1 *Codice Civile* (the Italian Civil Code), Art 581.
2 *Bürgerliches Gesetzbuch* (BGB) (the German Civil Code), para 2032.

3 BGB, para 2040(1).
4 Likely to be as a result of their incapacity or limited legal capacity by virtue of their age. These provisions are found in BGB, paras 104–113.
5 Council Regulation (EC) No 2201/2003, Art 2(7).
6 *Re Matouskova* (C-404/14) [2015] ILPr 48.
7 *Re Shanavazi* [2021] EWHC 1983 (Ch) at [30].
8 *Re Shanavazi* [2021] EWHC 1983 (Ch) at [32].
9 *Hays v Hays* [2015] EWHC 3825 (Ch).
10 Hague Convention, Art 1(1)(a).
11 Hague Convention, Art 3(g).
12 *Re Shanavazi* [2021] EWHC 1983 (Ch) at [47].
13 *Re B (A Child)* [2022] EWFC 7, [2022] 2 FLR 523 at [5].

Qualified Legal Representatives in Financial Remedy Proceedings

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Coram Chambers

The recent decision in *AXA v BYB (QLR Financial Remedies)* [2023] EWFC 251 (B) is the first time in which a qualified legal representative (QLR) was appointed and used in a financial remedies final hearing at the Central Family Court. There had been scant other authorities in respect of QLRs to date – the only other decisions are that of *Re A and B (fact-finding hearing – sexual abuse: no QLR available)* [2023] EWFC 232 (which dealt with the very narrow issue in private children proceedings as to whether or not a McKenzie Friend could conduct cross-examination in absence of a QLR) and *T v T* [2023] EWFC 243 (where no QLR was available; therefore neither party was cross-examined and the judge asked such questions of the parties as he felt fit).

Accordingly, this is the first reported decision which directly considers a QLR participating in financial remedy proceedings. It represents a good opportunity for practitioners to review the position on QLRs, both if they are inclined to register for the scheme itself or to consider the best procedures and approach when one may appear opposite them.

Brief background

The case related to a final hearing in a long running financial remedy proceedings between two litigants in person. There was one child of the family, A, and the parties only had the family home as their main asset.

The two salient issues in dispute related to the beneficial ownership of a second property as well as whether there was material non-disclosure on the part of the husband regarding the sale of a property in Iran, which he asserted was entirely the beneficial interest of his mother. One of the key themes of the case was the extreme challenges the court had to face in determining contrary third-party evidence adduced by the parties on the law of a foreign jurisdiction in absence of independent experts.

The final decision was that the wife would effectively have the entirety of the net equity in the family home (for her housing needs and that of the parties' child), as well as a pension sharing order and maintenance by way of a global order – all on the basis of adverse findings against the husband for his non-disclosure.

We do not propose to analyse the final decision in this case in detail – our focus is only on what considerations arise from the implementation and role of QLRs to assist practitioners who have yet to encounter them in financial remedy proceedings (or any other family proceeding, for that matter).

The law on qualified legal representatives

The role of a QLR is summarised in the 'Statutory Guidance: Qualified Legal Representative appointed by the court'[1] as ensuring that 'the fairness of the proceedings is maintained, by carrying out the cross-examination which the prohibited party is prohibited from performing' (p 11). The intention was to prevent alleged abusers from cross-examining alleged victims (and alleged victims from having to cross-examine alleged abusers) in the all-too-common scenario of one or both of the parties being legally unrepresented in proceedings. Uniquely, QLRs are not accountable to the party on whose behalf they are conducting cross examination.

Section 65 Domestic Abuse Act 2021 (DAA 2021) inserted Part 4B into the Matrimonial and Family Proceedings Act 1984 (MFPA 1984). This is supported by FPR PD 3AB and the Statutory Guidance issued by the Lord Chancellor pursuant to s 31Y MFPA 1984. A short summary of the provisions of Part 4B are as set out below.

Under ss 31R–31T, there is an automatic prohibition on cross-examination when:

(1) one party has been convicted of/given a caution for/is charged with an offence against the other party;
(2) there is an on-notice protective injunction in place between the parties; or
(3) One party has evidence of domestic abuse. The list of the specified evidence is found in Sch 3 Prohibition of Cross-Examination in Person (Civil and Family Proceedings) Regulations 2022 (SI 2022/568).

In such circumstances, the court will have to consider the appointment of a QLR if a party is not legally represented.

Even if there is no **automatic** prohibition, the court may nevertheless give a direction prohibiting cross-examination either on application by a party or of its own motion (s 31U(4)). The test laid out in s 31U(1)(b) states that the court will make such a direction where it appears that:

(1) the quality condition or the significant distress condition is met; and

(2) it would not be contrary to the interest of justice to give the direction.

The quality condition is met if the evidence is likely to be diminished and would be improved with the use of a QLR (s 31U(2)). Quality of the evidence is defined in the statute as 'completeness, coherence and accuracy' (s 31U(6)). Coherence is further defined as meaning the ability to give answers which 'address the questions' and 'can be understood, both individually and collectively' (s 31U(7)).

The second condition of significant distress is met if the cross-examination is likely to cause significant distress and it is likely to be more significant than if questioned by a QLR (s 31U(3)).

The court is to have regard to, among other things, the list of factors set out at s 31U(5). Further, the court must also specifically consider whether there is a suitable alternative means for the witness to be cross-examined or of obtaining the evidence that might have been given under cross-examination (s 31W(2)). FPR PD 3AB, para 5.3 explicitly states that the judge conducting the cross-examination is not a satisfactory alternative. Curiously, the Explanatory Notes to the DAA 2021 include a judge putting questions to a witness as a specific example of a 'satisfactory alternative means'. The position has therefore always been somewhat confused.

That said, *A View from the President's Chambers*: *July 2023* at para 16 makes the observation that it is 'both dispiriting and very concerning that the QLR scheme established by the Ministry of Justice (MOJ) to implement Part 4B seems unable to attract anything like sufficient numbers of advocates to act as a QLR in individual cases.' This leaves him suggesting at a para 20, '[the guidance] does not trump the overriding objective and, where there is no alternative, court may have to revert to asking the questions where that is the only way to deal with the case, justly, expeditiously and fairly in the absence of a QLR.'

A decision under s 31U to direct a QLR is binding until the relevant witness is discharged (s 31V). It may be revoked by the court before then, if it is 'in the interests of justice' to do so. If there is an application by a party for revocation, it should only be revoked if there has been a material change of circumstances. No provision exists in Part 4B MFPA 1984 for the termination of a QLR appointment but FPR PD 3AB, para 8.1(b) does permit termination 'when the court so orders', although the specifics of any test for this area not given. As the President of the Family Division puts it: 'Consideration of terminating the appointment of a QLR provides a further opportunity to canvas with the parties any other options, for example, directly instructing an advocate. If a QLR is discharged, short reasons for doing so should be recorded in the court order' (see *A View from the President's Chambers: July 2023*, para 19).

Outside the statutory provisions summarised herein, other supporting documents of interest to practitioners include:

(1) The Statutory Guidance provided by the Lord Chancellor.[2]
(2) *A View from the President's Chambers: July 2023* (in particular paras 16–20 specifically addressing the state of play with QLRs as already referred).[3]
(3) For members of the Family Law Bar Association further materials have been provided on the subject of QLRs. These documents are not binding, but provide a helpful guide for practitioners and judges who are navigating this relatively new scheme.

Practicalities – *AXA v BYB*

As mentioned, this is the first case where the involvement of a QLR has been reported in a financial remedies case. The court in this case appointed a QLR at the pre-trial review on the basis that there had been cross-allegations of domestic abuse made in both prior Family Law Act 1996 proceedings and in the ongoing Children Act 1989 proceedings. In this instance, the court exercised its power under s 31U(4). Despite the cross-allegations, only one QLR was appointed as the respondent was represented by counsel whose attendance was confirmed for the final hearing.

Many practitioners may well have encountered QLRs in cases to date, though, anecdotally, the experience is still rarer than contemplated.

As part of his judgment in this decision, Recorder Taylor summarised the law on QLRs as we have above. He noted that there may be circumstances where a party could be invited to arrange a QLR for the purpose of cross-examining a witness (s 31W(3) and (4)) but opined that this would be altogether distinct from a court-appointed QLR. If a party were to instruct their own 'QLR' by way of a legal representative, '… the extent of the role which the legal representative is instructed to undertake will be a matter for discussion between the party and the lawyer in accordance with the standard provisions of the BSB Handbook or the SRA Code of Conduct. This sits in contrast to the role of a court appointed QLR who is not instructed by or responsible to the prohibited party and whose role is necessarily very limited. The role of any legal representative instructed by a party will necessarily be broader than that of a court appointed QLR by virtue of such instruction, as it must include taking instructions and client confidentiality' at [78].

How might this impact practitioners? The possibility of some sort of services limited entirely to the issue of cross-examination where one has not prepared or been involved in a case at all would engender significant question marks, as the judge correctly points out. There is a lack of clarity as to how privately funded services of this kind, outside court-appointed QLRs, might even work. It is plainly likely, from an ethical and practical standpoint, that few lawyers would be able or willing to offer so specific a service when their wider responsibilities of advising properly on the case might well be hampered. While the provision may exist, it is more likely than not that court-appointed QLRs will need to be relied upon going forwards.

The judge went on to consider that if a litigant in person could not afford a lawyer generally (as was the case for the wife in this instance), it seems unlikely they could afford a curated service purely for the purposes of cross-examination as a 'not-really-QLR'. Contemplating s 31W(3) and (4), Recorder Taylor considered that this aspect could be subject to brief judicial inquiry at a case management or ground rules hearing – the court's concern was that any extended examination on affordability would delay the actual appointment of the QLR where needed (at [79]).

In absence of alternative, 'the court must consider whether it is necessary in the interests of justice for the

witness to be cross-examined by a [QLR] appointed by the court to represent the interests of the party' (s 31W(5)).

The judge went on to summarise at [83] those responsibilities he regarded as being beyond the remit of a QLR based on the guidance:

(1) taking instructions (as opposed to eliciting information from a party);
(2) asserting client confidentiality;
(3) representing the party within proceedings beyond conducting a cross-examination on 'the essence' of the party's case which 'may have significant impact' (Statutory Guidance, para 3.1, quoting Sir James Munby P in *Re S-W (Children) (Care Proceedings: Final Care Order at Case Managements Hearing)* [2015] EWCA Civ 27 at [57]);
(4) negotiating with another lawyer 'on behalf of' the party whose case they will be putting;
(5) making closing submissions; and
(6) drafting court orders.

One interesting point that the court made which thus far has not been subject to any guidance is the question of prospective QLRs' competence for cases. As described within the judgment, it appears that the demographic of potential court-appointed QLRs is comprised of many junior members of the Bar and it was clear that the QLR in this case needed, entirely properly and in accordance with her professional obligations, to be satisfied that the issues lay within her professional competence. The difficulty was that papers, for data protection reasons, could not be provided to the putative QLR to review in advance of the appointment. This left the putative QLR in this case with the judge's assurance that she could be discharged of her appointment should the case be beyond her competence (at [88]). This lacuna probably arises because the QLR scheme initially contemplated a wider range of potential advocates at inception.

QLRs, in general, are permitted to seek such further information as is required from the parties or the court to fulfil the role. The comments by the court in this case appear to suggest that the court might even be limited, pre-appointment, in helping a QLR in that regard, though once appointed this may not be an issue. The guidance is slightly nebulous on this point as the provision of relevant information in some instances may be plainly obvious but should not cross the line into pursuing instructions or negotiation. One wonders what other challenges may exist going forwards.

Pitfalls

It is clear that none of the duties summarised by Recorder Taylor at [83] fall within the ambit of a QLR. That is consistent with the extant guidance. Much can be said of the obvious challenges that exist for QLRs as opposed to acting for a party specifically.

Practical considerations arising from this case, which may be relevant in future include:

(1) What is the position on being released or withdrawing from a case? Plainly, this has come about more as a result of the circumstances of junior practitioners taking up the QLR scheme. It seems unsatisfactory, as the court pointed out in this case, that a QLR has a limited ability to engage with papers prior to appointment. There does not appear to be any filtration scheme in place (save for conflict checks prior to appointment only) for potential QLRs in the same way, for example, that Advocate implements initial reviews and considers what level of call is appropriate. Unsatisfactory as it is, should there be further guidance on this point given the reality of potential QLRs?
(2) While the guidance suggests that a position statement or skeleton argument can be prepared by a QLR, it is difficult to see the utility such documents might have to the court when the QLR does not represent a party (the same query has been raised by the FLBA). It feels somewhat unfair for a QLR to be expected to summarise and present a case which they are effectively not permitted to do anyway. It would appear sensible that the party (who remains a litigant in person, QLR or not) is encouraged by judges to continue to prepare their own position statements to supplement any such document drafted by the QLR to ensure that their case is fully set out.
(3) The statutory guidance on QLRs makes plain that: '… the qualified legal representative is expected, in most cases, to meet with the prohibited party to elicit relevant information that will form the basis of the cross-examination and inform the drafting of the position statement.' The FLBA has made the point that 'conferences' of this kind are not chargeable under the scheme. While taking instructions is beyond a QLR's remit, most advocates appreciate that in the ordinary course of cross-examination, there are often pauses to take instructions where needed. It makes sense that a QLR might 'receive' some type of instruction in the throes of cross-examination to advance or pursue a particular point in cross-examination, where is the practical limit of this in line with the QLR's existing obligations?
(4) What is the impact on the long-stated position that points must be put in evidence for them to be advanced in submissions? A QLR does not conduct closing submissions as the scheme ensures they are released after cross-examination is over. If a point is not put, can it still be pursued in submissions? The court needs to show some flexibility, likely by putting questions it feels appropriate to fill gaps in any cross-examination. The thin red line for a QLR in finding a place where a party can still make a point in submissions and put the case for them without themselves making the submissions needs to be contemplated. This is doubly a concern when a litigant in person will not have the QLR present when making their closing submissions.
(5) Could the possibility of specific services for QLRs on a private non-court-appointed basis be better explored by practitioners? It is likely that some commercial imperative may encourage both practitioners on a public access basis or solicitors' firms to offer this type of service. That is plainly easier said than done, as the court put it in this case. Would such private schemes actually work if the general audience are litigants in person who do not have funds to pay for complete representation in the first place? The FLBA has

observed that there does not appear yet to be any proposals by the BSB to require QLRs to complete either public access training or equivalent, which begs a further question – if one can be court-appointed as a QLR, what are the limitations on them being privately appointed as a QLR, if any? It is likely that the litigant would be instructing counsel directly and therefore it should be necessary for them be Direct Access qualified at the very least, but this has not been clarified anywhere so far.

Thoughts for practitioners facing litigants in person who require QLRs

The provision of a QLR needs to feature fairly early in the proceedings. The guidance clearly had in mind that they would be in attendance at pre-trial review hearings, though this may not always be practical.

It is highly likely that litigants in person will be mostly unaware that QLRs are available to them. At the earliest stage, there lies a responsibility for any practitioner to make a party and the court aware of the potential for a QLR. If this a QLR is raised as an issue, the court will consider directing the relevant forms to be submitted by the parties – namely, the EX740 (for those alleging domestic abuse) and EX741 (for those accused of domestic abuse). These forms help parties to set out the information needed for the court to determine whether to appoint a QLR. The benefit of this is that delays can be avoided, particularly given the apparently limited pool of potential QLRs. It would be sensible at least post an unsuccessful FDR for directions to contemplate a QLR. Certainly, a pre-trial review (if there is one) is the latest point where a QLR needs to be discussed.

The other risk is the adjournment of final hearings as a result of unavailability of QLRs. Given *A View from the President's Chambers: July 2023*, courts will have to carefully consider the overriding objective – dealing with matters expeditiously and fairly, acting proportionately and ensuring that parties are on an equal footing – before deciding whether to adjourn or default to the approach of a judge putting questions to witnesses in cross-examination. Relevant factors are likely to include how long the case has been ongoing, the nature of the allegations, how complex the issues are that the court is being asked to determine, and any particular vulnerabilities of the parties.

A small but obvious observation – even if the case itself involves no cross-examination on alleged domestic abuse, the prohibitions and rules regarding QLRs still apply. None of the tests require consideration about the subject matter of cross-examination. Thus, even if conduct arguments play no part in the financial remedy proceedings, a QLR can still be required (as happened in this particular case).

As ever, practitioners are encouraged to keep an eye out for developments and continuing guidance. The positive to take away from this decision is the fact that QLRs are of practical benefit to the family justice system as a whole and, when available, can ably perform their duties. The onus, for now, lies on those practitioners and the court to streamline the approach and engage with the question of QLRs at the earliest stages so that hearings can be effective.

Notes

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1101848/final-statutory-guidance-role-of-the-qualified-legal-representative.pdf

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1101848/final-statutory-guidance-role-of-the-qualified-legal-representative.pdf

3 Sir Andrew McFarlane, *A View from The President's Chambers: July 2023*, www.judiciary.uk/guidance-and-resources/a-view-from-the-presidents-chambers-july-2023/

Armed Forces Pension Schemes (AFPS)

Mark Hood

Associate Solicitor, Goughs

Armed Forces pensions are among some of the most complex pensions that practitioners can be faced with when dealing with divorce and financial settlements. Their complexity arises not only from the myriad of scheme types, but also the differing aspects of each scheme including accrual rates, the ages that the pension is put into payment, and whether the payments being made can be considered pension or not.

This guide to some of the issues is written for practitioners to consider when faced with such pensions.

Schemes

There are three or four schemes that practitioners may come across regularly. These schemes do not represent the totality of the schemes in existence, and some of the niche schemes include the Royal Gibraltar Regiment schemes and the Ghurka schemes, which have additional legislative complexity overlaid.

Practitioners are likely to deal with a number of legacy schemes. These schemes are all now closed to new entrants and benefits cannot be built up in these schemes. Specifically, these closed schemes are AFPS 1975, AFPS 2005, and the RFPS (Reserve Scheme). Benefits in these schemes are still available to members, and these schemes remain shareable.

Terminology

Part of the mystique with these pensions is the impenetrable language used when dealing with them. These pensions are put into 'payment' they are not 'drawn down', but benefits can be 'drawn'. That seems like semantics, but to 'draw down' infers that a pot of actual money exists whilst in reality for AFPS schemes they are un-funded, and any 'pot' is purely notional. There is nothing therefore to 'draw down'.

Table 1 covers some of the very necessary basics.

Table 1: Definition of terms

Term	Explanation
CARE Scheme	Career Average Re-valued Earnings. Relevant only to the AFPS15 scheme. Every year, 1/47th of annual pensionable earnings are added to a notional 'pension pot'. Carried forward each year it is *indexed* (increased in line with the Average Weekly Earnings index) and the process then repeats until service ends.
EDP	Early Departure Payments. A feature of BOTH the AFPS 15 scheme and the AFPS 05, but NOT a feature of the 75 scheme. EDP are paid on leaving service if the service person served 18 years and left aged 40 or older (AFPS 05) or served 20 years and left service aged 40 or older (AFPS 15). They are NOT pension payments and are not shareable on divorce.
Pension credit member	The person with the benefit of a pension sharing order. They become a member of the pension scheme which is shared.
Pension debit member	The person who shares their pension with the pension credit member.
Lump sums	A sum of 3 x pension automatically payable in both the AFPS 75 and AFPS 05 schemes at normal pension age. The AFPS 15 scheme does NOT have an automatic lump sum, but one can be generated by giving up some of the monthly pension. EDP lump sums are different, and are generated in both the 05 and 15 schemes. (EDP lump sums are a multiple of the deferred pension – 3 x for AFPS 05 and 2.25 x for AFPS 15)
Normal pension ages	The age at which *pension* benefits are paid. They range from *immediate* (AFPS 75), age 55 (05 scheme) or age 60 (15 scheme).
Deferred pension age	A pension credit member gains a deferred pension. AFPS 75 deferred age is 60 years old for service before 6 April 2006 and 65 for service after 6 April 2006. If no immediate pension is payable then the member must wait until deferred pension age. AFPS 05 – normal pension age is 55, deferred pension age is 65. AFPS 15 – normal pension age is 60, deferred pension age is current state pension age.
Reckonable service	From age 21 for an officer under AFPS 75, and from age 18 for other ranks.

Broad principles

All AFPS schemes are non-contributory, meaning no contributions to pensions appear anywhere on the scheme member's pay statements. No reference to pension is even mentioned on military pay statements. All schemes are unfunded, meaning they are paid to members from general monthly taxation receipts. There is no pot of money invested on any stock market that pays for these pensions.

Certain pensions cannot be shared on divorce including War Disablement pensions. An already shared AFPS pension can be shared again in a future divorce, whether that is the pension credit member or pension debit member's benefits.

Resettlement grants may be payable to those who have completed service before the immediate pension point in AFPS 75. Officers ('commissioned') need 9 years' service and other ranks ('non-commissioned') require 12 years' service to be eligible. The other two schemes pay resettlement grants where eligibility to EDP has not been met for all ranks if 12 years of service have been completed.

A resettlement grant is not a pension payment, but of course practitioners can take it into account as a capital payment. If a member goes on to qualify for an immediate pension or EDP, the resettlement grant is not paid.

None of these schemes allow any pension share to be moved out of the scheme and into any other pension arrangement by the pension credit member.

All schemes can pay pension to members from the age of 55, but the pension payments are reduced in amount as they will be in payment for longer. Deferred AFPS 75 pensions cannot be paid any earlier than the age of 60.

Principal scheme characteristics

Table 2 sets out the main differences between the schemes.

Table 2: Comparison of schemes

Benefit	AFPS 1975	AFPS 2005	AFPS 2015
Immediate pension on leaving military service. (IPP – Immediate Pension Point)	Yes. IPP for non-commissioned ranks is on the completion of 22 years' service. IPP for officers is after 16 years' service. (Reckonable service only – from age 18 non-commissioned or 21 commissioned)	Yes, payable if leaving the service aged 55 or older. If younger, then EDP may be payable until deferred pension age (65 years old).	Yes, if leaving at age 60 or older. If younger, EDP may be payable until deferred pension age.
Deferred pension age	Paid to deferred members at age 60 for service before 5 April 2006 and at age 65 for service after 6 April 2006.	Paid at age 65.	Paid at state pension age.
Lump sum	Payable immediately if immediate pension point is reached at 3 x annual pension. Deferred members are paid a lump sum at 3 x pension when taking the pension benefit at 60/65 years old.	If eligible for EDP, it is paid at this point. Sum is 3 x the deferred pension, otherwise 3 x deferred pension when eligible for the pension at deferred pension age.	Not automatic when eligible for pension. See 'Commutation' point below. EDP does attract a lump sum payment of 2.25 x annual deferred pension.
Commutation	Under AFPS 75, members under the age of 55 with an immediate pension can give up some pension in exchange for an increased lump sum. The pension *is restored fully* at age 55.	No.	Can give up pension income to generate a lump sum. £1 given up generates £12 lump sum. Max of 25% of overall pension benefits. Pension is never restored unlike 75 scheme.
Inverse commutation	No.	Yes. Giving up some or all of the automatic lump sum to improve pension income.	Yes. A lump sum is generated on the payment of EDP. This can be given up to increase EDP payments until deferred pension is claimed.

Practical considerations

Here are a few practical considerations that practitioners ought to ensure they have a good understanding of to allow us to deal with these assets fairly.

If the pension debit member is not in receipt of pension income or EDP, then the pension credit member can generate their own lump sum when they claim their pensions at the deferred pension age.

Watch out for younger AFPS 75 members (an AFPS 75/EDP recipient could be aged just 40 years old) and an unusually depressed pension income figure caused by commutation, where the member has sacrificed pension income for a bigger lump sum. This was hugely common to do among scheme members who often had a greater need for capital on leaving, than for income. Don't forget, there are good tax reasons for reducing income too. Remember

that the commutation pension depression in AFPS 75 falls away from the member's 55th birthday, resulting in an uplift of the pension payment as if commutation never took place. Beware of poverty pleading in these situations! Ask for confirmation that commutation was taken.

Fifty-five is a magic age in AFPS. AFPS 75 scheme immediate pension benefits, and 05 and 15 EDPs are all paid at a flat rate from the point at which they start being paid until the magic age of 55. From age 55, AFPS 75 payments and EDP are uplifted by the sum of CPI *backdated* to the date the pension and EDP were first paid, and from here on, increased annually by CPI. Where CPI has been high over time, this can result in significant uprating of these payments.

At age 55, the EDP in the 05 scheme increases to be paid at a rate of 75% of deferred pension value, and increases annually by CPI in the same way as above. For practitioners, this means that the *value* of in payment scheme benefits *increases* annually if the member is aged over 55, and old CETVs should really be updated if they are over 12 months old.

EDP is an income stream, not a pension payment and cannot be shared. It is prudent to be very specific about the value these payments have to the member, especially as the pension credit member can never benefit from these payments themselves (unless they have served and have their own!). The value of EDP can be huge over the time that they could be paid, and may require a significant adjustment on separation to fairly compensate the party not receiving them.

Closing thoughts

As the legacy schemes are phased out, the role that EDP will play and the importance of dealing fairly with EDP will become acute. Practitioners should get familiar with what EDPs are, and are not, how they arise, and when they are paid. All things equal, if there are no further changes to Armed Forces pensions for years to come, EDP could be in payment from the age of 40 until the current state pension age; a period of 28 years. I predict that practitioners will need to be able to understand the value this will present particularly in divorces of younger forces personnel (aged in their 40s) where the potential for future EDP value to outstrip the equity available in property could cause problems when there is insufficient to offset with, or no property available at all. This may preclude a clean break if the solution is to make periodical payments in lieu of a capital lump sum when it isn't available. Options clearly exist to give one party a larger share of the pension to compensate for EDPs in payment, meaning the party with EDP has a larger income up to pension age, whereafter the non-EDP party has a greater share of income in retirement.

These pensions represent a unique challenge to the practitioner and require careful handling so as not to prejudice either party when dealing with them on divorce. They have features unseen in any other pension system (EDPs are unique to Armed Forces pensions), and nuances that require a depth of understanding that is difficult to achieve without regularly interacting with them. Seek specialist actuary advice per the Pension Advisory Group report, *A Guide to the Treatment of Pensions on Divorce* (PAG, 2nd edn, 2024) (see Appendix I), and bear in mind the issues I raise above.

Cohabitation – The Case For and Against Reform

Graeme Fraser
Head of Family and Partner, BBS Law
Making the case for reform

Harry Benson
Research Director, Marriage Foundation
Making the case against reform

Opener

Harry Benson

Divorce law, in principle at least, seems pretty sensible. You keep what you brought into the marriage and share what you gained. At least that's my limited understanding, courtesy of my colleague former High Court Judge Sir Paul Coleridge. So why shouldn't the same or similar rights and responsibilities apply to cohabiting couples who have shared a life together? It doesn't seem fair that one party can sacrifice their career to bring up children, for example, and discover they are left with nothing when the other party runs off with all the cash.

I sympathise greatly with the family lawyers who wrestle with this injustice. Indeed, I even have personal experience of it happening in my own family, in this case to a man who was booted out of the home in which he'd lived for 25 years when his partner died.

Yet I don't believe we should right this apparent wrong. The second order effect is what I'm concerned about, where the secondary consequences end up as far more significant than the primary consequence, and not in a good way.

My own expertise is not law but the psychology of commitment. Yes, a change in the law might resolve the obvious injustices that primarily affect a relatively small number of adults. But it would very likely exacerbate already endemic levels of family breakdown that primarily affect a relatively large number of children.

Graeme Fraser

Resolution's arguments for reform were endorsed by the parliamentary inquiry in 2022 (for the report itself, please go to https://publications.parliament.uk/pa/cm5803/cmselect/cmwomeq/92/report.html) which concluded as follows:

> 'The current law applicable to cohabitants on relationship breakdown can be costly, complicated and unfair. Complex property law and trusts principles often require the financially weaker partner – often women – to demonstrate direct financial contributions to the acquisition of the family home, while childcare and other non-financial contributions go largely unrecognised.'

Last October, Shadow Attorney General Emily Thornberry announced the Labour Party's intention to review the law relating to cohabitation with a view to introducing reform. At Resolution's parliamentary launch of their 'Vision for Family Justice' last November, she emphasised the importance of cross-party initiative when committing and calling for reform.

In light of this, it is important to be clear that any questions about cohabitation law reform are no longer 'whether' but rather 'how' the law should be changed; and the question of 'how' is particularly important as the UK gears up for a general election, after which we should expect significant change to the political landscape.

How many people are affected by the lack of a specific legal regime for cohabiting couples?

Harry Benson

It is often stated that this is a huge and growing problem because over 3 million cohabiting couples lack the protection of the law. It isn't. This is a problem that affects a far smaller minority of couples, involving the combination of significant money and a long-term relationship. Scotland illustrates the point well. After Scotland passed a cohabitation law in 2006, a University of Edinburgh study found some 1,000 couples sought legal advice in the first 4 years. That's 250 couples per year. Half of these had children. So that's 125 cohabiting parents per year seeking justice. Scaling this up, the equivalent in England and Wales would be some 1,250 cases per year.

Now look at the children whose parents split up. Based on my analysis of Millennium Cohort Study data, which aligns with similar figures from the Children's Commissioner, 46% of teenagers in the UK are not living with both natural parents. Of these, 15% had parents who were married and 31% unmarried. Now take that 31% risk and multiply by the 605,000 births in the most recent year. This means that on current trends, 85,000 newborns will experience the break-up of their married parents and 193,000 children will experience the break-up of their unmarried parents. Go back to the 1970s before cohabiting became a thing and divorce rates were very similar to what

we see today, many or most of those additional 193,000 children are the product of our trend away from marriage.

Whatever the strengths and weaknesses of this comparison, the perspective is what's important. For every adult facing a social injustice because they lack legal protection, there are more than 150 children who have experienced family breakdown in a family where there was no marriage.

Graeme Fraser

Legal rights and responsibilities for cohabitants on separation are urgently required due to the demographics that indicate the number of families affected. In 2022, cohabiting couple families accounted for almost 1 in 5 families in the UK, with the 3.6 million opposite-sex cohabiting couples being the fastest growing family type over the last 10 years. Having increased from 16% of all families (2.9 million) in 2012, the increase of c.700,000 families accounted for almost three-quarters of the total growth in the number of families over the 10-year period. We expect the number of cohabiting couple families to rise to 1 in 4 by 2031. Additionally, since 2022, over half of births are to unmarried parents. In this context, this significant proportion of the population can no longer be ignored and reform must be a priority.

Resolution members have considerable experience and awareness of the problems created by the vulnerability of cohabitants under current law. In a survey of over 200 members in 2017 asking about their experience of working with people in cohabiting relationships, 98% of respondents reported having worked with cohabiting couples they were unable to help due to a lack of legal protection. A member survey in 2019 gave similar results. A further survey in late 2022 (to inform Resolution's 'Vision for Family Justice') indicated that 85% agreed that the law in this area needed updating in response to the question: 'If one party has been the stay at home parent whilst the other is the breadwinner, why should it be right that the main carer leaves the relationship with potentially far less than the breadwinner?'

It is also clear that the difficulty arises for women left unprotected by the current law, even after very long relationships during which they raised the children of the relationship. Of those who responded to member surveys in 2017 and 2019, 63% and 67% respectively said in their experience this is an issue where women lose out more often than men.

In terms of translating these numbers into the number of cases, I agree with Harry that the number of cases in Scotland (and indeed Ireland) where reform has been introduced is limited, but this is because the law reforms being proposed are themselves limited, with a view to rooting out the worst injustices under the current law, and ensuring that those left most vulnerable on relationship breakdown are protected under the law.

I note the argument that marriage means that there is less chance of a relationship between a couple breaking down. However, it is becoming increasingly clear that many couples do enter committed and stable relationships without going through the formality of marriage or civil partnership. Additionally, how can it be right or fair that the children of unmarried families fare so much worse than the children of married couples?

Is it paternalistic to impose a cohabitation regime (even if there is an 'opt out')?

Graeme Fraser

Government and parliamentarians have a responsibility to address the discriminatory impact of our outdated law relating to cohabiting partners and to bring the rights and responsibilities of couples living together into the 21st century. Resolution's members encounter many individuals, often female, who are often the financially weaker party, left unprotected by the current law, even after very long relationships during which they raised the children of the relationship. Furthermore, those of an age who are most likely to be affected by the lack of legal protection are also most likely to believe that 'common law marriage' exists. Unlike many other countries, including much of The Commonwealth, we have not changed the law to tackle this situation.

Cohabiting couples currently have little legal protection when they separate. A legal framework of rights and responsibilities when couples who live together split up is needed to provide some legal protection and secure fair outcomes at the time of a couple's separation. Trusting in non-existent 'common law' rights and protections can put couples, and their children, at a significant disadvantage if the relationship breaks down or one party passes away. People face inequality as well as financial hardship and emotional distress because the law has failed to keep in step with the reality of how many families live their lives.

The reality is that despite encouragement and support for the 'opt in' approaches of marriage and civil partnerships, changes to the way that couples choose to live their lives by being in cohabiting relationships means that those most disadvantaged by the relationship, typically women who have given up work to look after the children, will never be able to secure fairer rights and hold their partners to the responsibilities they should be held to account to if we are to have more up to date laws that are fit for purpose. Most people don't write down life changing decisions such as who will run the home and who will be the main wealth generator, because these roles evolve in an unspoken way. It is in fact paternalistic to say otherwise.

Harry Benson

There are some obvious philosophical arguments against applying the same, or similar, or even watered down, rights to cohabiting couples as to married couples.

The first is that it's illiberal and infantilising to impose arbitrary 'opt-out' laws on consenting adults who have agency to access 'opt-in' laws for themselves. The law, and protection it provides, is easily and cheaply accessed via marriage or civil partnership or cohabitation agreement. If two adults lend each other money in a private deal, don't write down the terms of their agreement, and then end up in a dispute, should they have recourse to the law? No, because there's nothing on paper. Why should relationships be any different?

How would the new law for cohabiting couples work?

Harry Benson

It's hard or impossible to establish whether and when a cohabitation begins. In my trade, this is called 'sliding' rather than 'deciding', where there's no obvious entry point. One well-cited US national survey found that half of cohabiting couples reported different months in which they began living together. One-third reported dates 3 or more months apart. There's no reason to think things are any different on this side of the pond. Everyone knows how long a marriage or civil partnership has lasted because there are clear entry points. The ambiguity surrounding cohabiting relationships is guaranteed to create more legal disputes, more financial stress, and more emotional misery.

Graeme Fraser

Position on death

Updating the law would allow the surviving partner on the death of their cohabitant to have an entitlement under intestacy.

Treating cohabitants differently to married couples and civil partners on death for tax purposes means that they do not benefit from the same exemptions in relation to inheritance tax. This can be resolved by equalising the tax treatment for all couples, regardless of the formality of their relationship.

There's nothing controversial about these reforms, which would be easy and straightforward to implement.

Position for children of a cohabiting relationship

Schedule 1 Children Act 1989 needs to be more accessible, flexible and fairer properly to meet the needs of all children, regardless of the relationship from which they were conceived.

The law can be reformed relatively easily by making the child's welfare a consideration for the court in all cases, the court having the power to order that both parents contribute towards the costs of childcare and extending the range of orders available to the court and the criteria to be considered under Sch 1.

Wholesale reform

Wholesale reform would achieve a purely family law-based remedy which would better assist the public. Once a family law remedy is put in place, out-of-court solutions such as mediation or collaborative practice would work better since they would then be based on concepts of fairness invested in family law rather than property law principles.

However, this raises the issue of what type of wholesale reform is most suitable and practical.

The difference model

Under this model, which has been adopted in Scotland and Ireland, cohabitants are treated differently to spouses or civil partners. A separate statutory regime would be needed, containing different and less generous financial remedies. Cohabitants are defined by statute and subject to eligibility criteria. In Scotland, a marriage comparator is used, but the Scottish Law Commission recommended in 2022 replacing this with an enduring family relationship, while Ireland refers to an intimate and committed relationship.

Although Scotland does not require a minimum duration period for cohabitation nor presence of children, Ireland requires 2 years of living together where they have children or 5 years in any other case. The Scottish Law Commission recommendations acknowledge that the outcome could be affected by instances of economic abuse. A difference model in England and Wales would likely also take this into account.

To qualify under the difference model, further requirements need to be satisfied before the claim can be made out such as financial dependency on the other cohabitant in Ireland or demonstrating economic advantage and disadvantage flowing from contributions made to the relationship, including looking after children, in Scotland.

The cohabitation remedies would be more flexible than at present by being based on the orders made on divorce or dissolution of a civil partnership, but limiting their scope would mean that marriage is not devalued by giving unmarried couples the same rights as married couples. Awards under this scheme could include payments for childcare costs to enable a primary carer to work and limited maintenance for cohabitants to reflect economic advantages or disadvantages resulting from the relationship.

The assimilation model

The other option for reform would be 'assimilation', which mirrors the *de facto* regimes in Australia and New Zealand. Once a cohabitant satisfies a statutory definition, they are treated as though they are a spouse. In England and Wales, this would mean Part II Matrimonial Causes Act 1973 becoming operative once a separating couple falls within the statutory definition of cohabitation.

The assimilation model would be simple to implement as it would involve a straightforward amendment to the Matrimonial Causes Act 1973, with qualifying cohabitants accessing the well-established legislation.

Does cohabitation reform risk undermining marriage?

Graeme Fraser

Cohabitation reform does not devalue marriage

People do not marry for legal rights. They marry for other reasons including personal fulfilment, human flourishing and love. Nowadays, men and women have varied working time patterns, and children are born to families of all shapes and sizes. Assuming that marriage is the only workable family form is somewhat patronising, as well as outdated and out of touch with society. The experience of other countries has confirmed that introducing remedies to cohabitants doesn't diminish the marriage rate. Keeping cohabitants deprived of appropriate legal rights and responsibilities will neither help them or society at large, nor improve the marriage rate.

In calling for these reforms, nobody is saying that marriage is a bad idea. Like many other family law practitioners, I spend much of my time at the beginning of an instruction seeing whether a relationship can be saved. But when a relationship has come to an end, it is best to ensure that we have laws that bring the formalities of the relation-

ship as painlessly as possible. This is what we achieved by implementing 'no fault' divorce. Similarly, better and fairer laws that protect unmarried couples at the end of their relationship, many of which are in fact committed and were stable for many years, will ensure that those relationships end with a minimum of acrimony.

While we will continue to do all that we can to ensure that couples enter into formalities that better protect their legal position, we must also be in a position to help those couples who did not do so, very often unconsciously. We know that there are relatively few couples who will enter into cohabitation agreements and declarations of trust and sometimes that is because couples don't believe the worst will happen to them, or it could be because one of the couple refuses to do so voluntarily. But with the large numbers of couples now cohabiting, which has increased hugely over the past 40 or so years, and in particular since the Law Commission Report in 2007, we have to do more to protect the unfairness and vulnerability that already exists for so many persons. Frankly, without legislative reform, the situation becomes a ticking time bomb so the only fair way to resolve this is by introducing new family laws. That is why so many other countries have introduced new laws that have also been relatively uncontroversial while not undermining either weddings or marriages and civil partnerships.

The vulnerable need to be protected

If the law is simply left without introducing any new remedies at all, then there are very real concerns about how those who are left with no rights are at the mercy of those who can apply coercion and control, which could significantly impact on the more vulnerable partner's health, lifestyle, and financial independence generally, including the ability to find a new home on splitting up.

Harry Benson

Let's start by walking into a typical GCSE classroom. If the class is reasonably representative of the UK, we would find that just under half of the teenagers are not living with both natural parents. That's almost certainly the highest level of family breakdown we've ever seen in British history. I obviously agree that some relationships are best ended. But half? Seriously?

It's instructive to look at the sources of this family breakdown. One-third comes from married parents who have divorced. Two-thirds come from unmarried parents splitting up and a small proportion of mothers who never had a meaningful relationship. As part of the PhD I aim to complete this year, I use the latest statistical techniques to compare the risk of break-up among parents who marry and parents who don't. The difference is stark, regardless of what background factors you put into the equation. I use 27 factors in mine. Married parents across age, education, income and other groups are far more likely to stay together. It's hard to avoid the conclusion that there's either something about marriage that helps parents negotiate these challenging years, or something about cohabitation that hinders parents, or both.

I bow to Graeme as an expert on family law. But I am an expert on the psychology of commitment. The key reason why married couples are more likely to stay together than their equivalent unmarried counterparts is down to the psychology of commitment. Marriage automatically provides the infrastructure of commitment that stacks the odds in favour of two less-than-perfect individuals staying together while bringing up their children. Cohabiting without some kind of formal agreement in front of others raises the risk of things ending in tears.

When couples propose marriage, several things happen. Here is some of the psychology.

First, both parties make a decision about being a couple with a future. Acting on that decision automatically boosts confidence that this is a good decision. This has been shown in sports bets for example. Making the bet makes us feel more confident that our team or horse will win. The team or horse doesn't change but our attitude does. Confidence is important because getting married involves the choice to give up all other choices. That's a risky bet when there are lots of choices and couples don't want to be haunted by the risk that they made a bad choice. We know this as FOMO, fear of missing out.

Secondly, the brain automatically widens the attractiveness gap between the person we've chosen and the alternatives we've rejected. This reduces cognitive dissonance and increases cognitive consistency. This is a powerful principle because it makes couples more likely to see the person they've chosen in the best possible light. It makes couples behave better towards one another and more likely to want to resolve conflict or differences in a more positive way.

Thirdly, a proposal to marry involves sending a signal to one another. Signals are pointless if they don't involve some element of sacrifice. If I say I will spend the day with you, it might be that I have nothing better to do. But if I cancel or forgo a game of golf to spend the day with you, that tells you something about my attitude to you. Saying you want to spend the rest of your life with somebody means forsaking all others and taking on the legal responsibilities of marriage and exit costs of divorce. This is why marriage is often described as the ultimate signal of dedication. Marriage sacrifices other choices.

Fourthly, the decision to marry removes any lingering ambiguity and puts commitment on an equal footing. The early stages of any relationship are defined by ambiguity. 'Where are we going with this?' Failure to resolve ambiguity risks an asymmetry of commitment where one party is more committed than the other. The problem here is that the person who is less committed holds the power. Because they care less about the relationship lasting, they have less incentive to invest time and effort and love. In the few studies that have looked at asymmetry, married couples were much less likely to experience this because commitment is explicitly equal. Among unmarried couples, it's more likely to be the man who is less committed and who therefore holds the power. Here's a counterintuitive idea for you. If you want modern day patriarchy, you're much more likely to find it in cohabiting relationships than marriages.

I could go on. The added level of inertia and constraints involved with living together early on in a relationship can also make ending a fragile relationship that much more difficult. Hence some, possibly many, ambiguous cohabiting relationships that might have been better ended early drift on into unstable parenthood and bring children into the equation. Things like sacrifice and forgiveness that are central to successful relationships also depend on a clear and unambiguous sense of future that come with this kind of long-term decision.

But my point should be clear. Making a decision and acting upon it in all sorts of spheres of life changes our attitude to that decision. Making the decision to marry and acting upon it changes the way couples see one another for the better. Automating marriage-like rights for couples would further remove the need for any kind of clear active commitment and all the psychological benefits that crucial step brings.

While I am in no doubt that some cohabiting couples take this decision-making process very successfully without the need for a formal step such as marriage or civil partnership, most don't. Yet marriage does all these things automatically. It also has one other crucial ingredient that works with the psychology of commitment, weddings.

Weddings have two main psychological benefits. The first is that they provide social affirmation of the choice to give up other choices. On the morning of my wedding, I had the worst attack of nerves I can ever remember. It even beat the experience of flying into battle and coming under heavy artillery fire in my first career as a Royal Navy commando helicopter pilot. But once I arrived at the wedding and saw my friends and family, my nerves evaporated. Their presence affirmed that I had made a good choice. There are several studies, including one of my own, showing that having more than ten guests boosts marital stability.

The second benefit is that weddings add the constraint of accountability. They hold couples to account for the decision made in front of them. Telling friends I was going to run a marathon was the moment I knew I had to complete it. Even though I'd made the decision and acted upon it months earlier, I had to be confident enough that I could finish the run before I told my friends. Telling friends cemented my commitment and gave me further encouragement to complete it, which I then did.

Once again, couples don't have to go through these key psychological steps of mutual decision and telling friends. Clearly some cohabiting couples are extremely successful just as some married couples end up divorced. Couples who get married automatically adopt the key ingredients of commitment whereas couples who don't marry have to add these ingredients one by one. The alternative is ambiguity, asymmetry of commitment, power imbalances, and much-increased risk of family breakdown.

Closing comments

Harry Benson

Whatever you think about cause and effect, there can be no doubt that the trend away from marriage has created unprecedented levels of family breakdown. As family lawyers, you see this day in and day out. I respect that it's an incredibly challenging job. But if you accept that the trend away from marriage has increased the sum of fragile families – and I hope I have explained the psychology behind this – giving automatic opt-out rights to cohabiting couples can only further this trend.

You might disagree that it's illiberal to foist rights onto consenting adults who already have easy access to those rights. You might accept you're going to face a stream of futile cases arguing over when and even whether couples actually cohabited. But giving automatic rights to cohabiting couples risks undermining the whole psychology of commitment. Hard cases make bad law, as you say.

Graeme Fraser

Let's start a call to work together to achieve meaningful change.

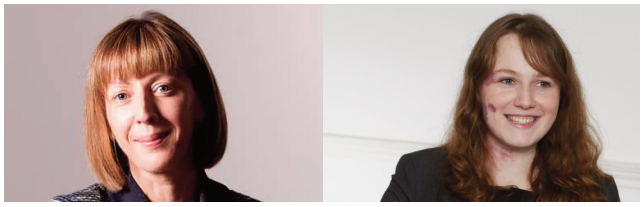
Getting rid of the unfairness that arises from current laws, and achieving meaningful change, are of pressing importance. To opponents of reform, I ask you to help overcome the unfairness in the law by supporting the changes necessary to remove the manifest unfairness that continues until there is legislation. I believe that we are on common ground with our opponents in the sense that nobody advocating reform wishes to devalue marriage (and nor will it), and it is simply not right and highly discriminatory that nearly a quarter of the way through the 21st century, the children of unmarried parents end up being treated less fairly than the children of married parents. Automatic unfairness that exists for unmarried couples on separation and death must be removed, and we need new laws that work for families, not trusts principles that are largely unintelligible, often too expensive and risky to pursue and create weak outcomes. We need laws that can be understood more readily, applied more widely and are fair. If we have fair laws, family disputes can be solved much more easily during the early stages. Family lawyers have a much better chance of providing fair solutions that can add value when the law becomes logical, meaningful, and easier to apply.

Promoting marriage should never come at the cost of ignoring the manifest unfairness that affects millions of couples who are in cohabiting relationships, which are increasingly longer term and more committed, in addition to those with children. The numbers continue to increase inexorably as time goes on. We need new laws that keep up with how people choose and wish to live and provide the remedies that they both want and need.

DR Corner: *Fair Shares* – Mediation Under the Microscope

Joanne Edwards
Partner, Head of Family and Mediator, Forsters LLP

Polly Calver
Associate, Forsters LLP



1 November 2023 saw the launch of the *Fair Shares* report, which presents the results of the first fully representative study of the arrangements families make on separation and divorce.[1] Following a bespoke survey of 2,425 individuals who had divorced in the last 5 years, the report helps us to understand the trends amongst the full (approximately 100,000-strong)[2] population of divorcing couples. Roughly two-thirds of the general divorcing population do not obtain a court order dealing with financial matters and are, therefore, not captured in previous studies of financial arrangements based on the court files.

A key finding of the report was that the median value of divorcing couples' pool of assets was £135,000. The study therefore captures the experiences of those whose lives before, during, and after divorce are markedly different to those featuring in reported cases concerning substantially higher assets. As those of us practising in the area are well aware, the field of divorce and financial remedies is much broader than headline-grabbing cases involving millions of pounds. Policymakers considering the reform of financial remedies law (for whom this report comes at an important juncture given the government's proposed review of financial remedies law and the Law Commission's ongoing work) will be helped by the broader view of the impact of financial remedies law which this report offers.

Non-court methods of dispute resolution were front-and-centre of the findings. This is unsurprising given what was already known about the number of financial remedy cases which are resolved on a non-contested basis. (From July to September 2023, for instance, 70% of financial remedies applications were uncontested and 30% were contested at the time of application, many of which will also have gone on to be settled during the court process.[3]) Therefore, not only can the report inform the way the government approaches the substantive law going forward, but it can feed into policymakers' approach to promoting and supporting non-court dispute resolution.

This article focuses on the findings of the report insofar as mediation is concerned, including the lessons which may be learned. The authors approach this from the perspective of being (in one instance) a mediator, in the other a keen supporter of mediation. However, even the most ardent advocate for mediation would accept that it is not a silver bullet and not suitable in every case. Mediation has been heavily promoted by the Ministry of Justice as a means of reducing the significant burden on the Family Court and supporting families to resolve arrangements through a less adversarial process.[4] Since March 2021, the government has operated a (highly successful) Family Mediation Voucher scheme, offering a one-off contribution of £500 towards the cost of mediation in eligible cases.[5] In March 2023, the government launched a public consultation about measures aimed to increase the use of mediation in family cases, including introducing a mandatory requirement to mediate before a court application is made.[6] The government's response to that consultation is understood to be imminent.

Data from the *Fair Shares* report as to the uptake of, reasons for, experiences of, and results of mediation shed light on the challenges mediation can face. What is clear is that mediation is not a panacea, and that a narrow view of the 'success rate' of mediation should not be allowed to cloud the government's vision when it comes to the need for other resources for divorcing couples.

Uptake of mediation

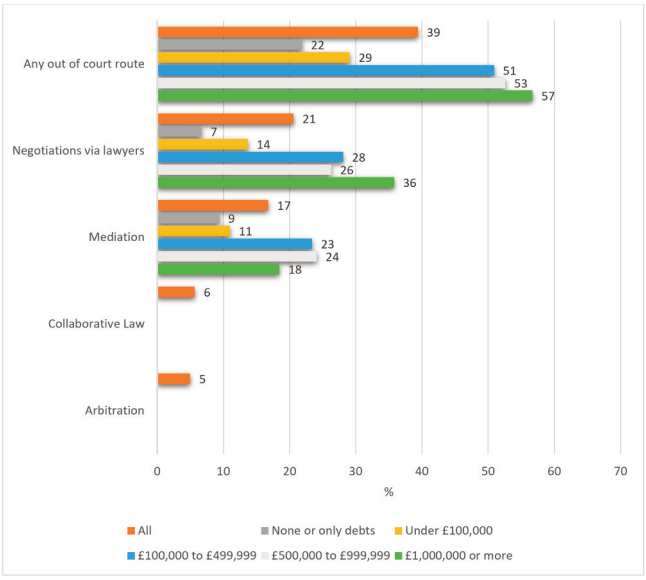


Figure 1: Non-court routes to attempt to make a financial arrangement

Base: all divorcees (2,415); divorcees with no assets or only debts (276); divorcees with assets under £100,000 (570); divorcees with assets between £100,000 and £499,999 (850); divorcees with assets of £500,000 to £999,999 (326); divorcees with assets of £1,000,000 or more (261).

Amongst those surveyed as part of the *Fair Shares* project, mediation was the second most popular form of dispute resolution, coming in closely behind solicitor negotiation. Figure 1 shows that 39% of the divorcees surveyed had used one or more forms of dispute resolution, of which 17% of divorcees reported having tried mediation.[7]

In speculating as to the reason for mediation's popularity compared to other forms of dispute resolution, it is tempting to assume that mediation is simply better-known amongst the general public than, say, collaborative law or arbitration. A third of divorcees said in the *Fair Shares* survey that they had used government websites as a source of information, making the Ministry of Justice's publications an important source of information and signposting, which might be responsible for raising consciousness of mediation compared to other processes.[8]

In the data gathered, the strongest predictor of using mediation was having used a lawyer: 28% of those who had engaged with lawyers reported having tried mediation, compared with 11% of those who had not.[9] Uptake was higher amongst those with greater assets to divide, which mirrors the position regarding the taking of legal advice. It is clear that lawyers have an important role to play in providing information and signposting to help divorcing individuals decide by what process they will resolve matters and the appropriate parameters of settlement. The correlation between use of lawyers and uptake of mediation might be taken to show that mediation is a favoured form of dispute resolution amongst legal practitioners. Potentially counter to this, though, is the fact that use of mediation and use of providers of legal services were both higher in cases where the overall assets were higher. Those who see a lawyer may already be predisposed to consider mediation (for instance because they have assets available to fund the process) compared to those who don't. What is clear, however, is that lawyers play a vital role in signposting people away from court, as shown by the fact that mediation numbers fell off a cliff in the wake of LASPO.

The report shows a continuing lack of understanding about mediation amongst the divorcing population. The researchers highlight that 'some interviewees told us that they had not heard of mediation or had thought it related to disputes over children'.[10]

One interviewee cited in the report described a process where the parties were in separate rooms and a mediator shuttled between them. He falsely referred to this as 'arbitration'.[11] This perhaps goes to show that the public consciousness of 'mediation' is associated with a single mediator and two clients round a single table. The uptake of mediation may be greater – and perhaps even the outcomes of mediation more successful (more of which below) – if the divorcing population was more aware of the range of formats mediation can take, such as mediation with multiple co-mediators, a multi-disciplinary team involving additional professionals (e.g. a financial expert, a therapist), mediation with lawyers attending, and 'shuttle' mediation where the parties need not be in the same room.

Based on this information, although none of the main mediation organisations support government proposals to introduce mandatory mediation, its use may well be increased by improving divorcing couples' understanding of mediation. That may particularly be the case if information provided to divorcing couples broadens awareness of mediation to include a wider range of models (e.g. shuttle mediation). The strong link between use of lawyers and attendance at mediation suggests that funding for early legal advice would be an effective way to increase proper understanding of mediation.

However, getting couples through the door into mediation is not the only challenge if the goal is to bring about satisfactory resolution of financial remedy matters.

Reasons for not using mediation

Notable for the government's proposals for mandatory mediation are the parts of the *Fair Shares* report which shed light on the reasons given by those who chose *not* to pursue mediation (including by those who were clearly aware of it as an option). As the authors of the report summarise: 'The reasons for using lawyers, and using courts, in preference to mediation, were primarily concerned with a lack of ability to negotiate with the other spouse.'[12]

The extracts from interviews provided in the report are illustrative of this, with one individual stating, 'Nobody who was ever going to be able to help us meet in the middle … and we would have paid out money then that we didn't have.' Another said that, '[Mediation] was never discussed because he would have never done it. You'd have got more information talking to a tree …'.

These reactions to mediation suggest that there may well be a 'ceiling' to the number of people who can be encouraged into mediation by 'nudging' from the government. From an ethical perspective, there is also a limit to how far government 'nudging' can go when some divorcees clearly do not feel comfortable negotiating with their spouse, or identify that they do not feel their spouse will enter into mediation in good faith. Self-evidently, it is also important to ensure that where there is/has been domestic abuse, there is very careful screening and consideration as to whether mediation is the right process (and, if so, how that is to be managed).

The government's schemes to promote mediation should not therefore be at the expense of providing solutions for those who, for reasons they have carefully considered, choose not to participate in it (or for whom it is clearly unsafe). For that category of divorcing individuals, the *Fair Shares* research would suggest that solicitor negotiation is the current most opted-for route (for which there is no financial support from the government, post-LASPO).

Experience and outcomes of mediation

When it comes to those who have attended mediation, the report shows that divorcees' experiences of mediation were mixed. While some individuals who had attended mediation reported that it had been helpful, others found that it had been unproductive, unduly expensive, that they had felt 'forced' to attend, or that the sessions themselves had involved 'fight, fight, fight'.[13] This supports previous research, in the context of family matters more broadly, showing that mediation does not always match up to participants' expectations, and can be a difficult experience for those who attend.[14]

In terms of the outcomes of that difficult process,[15] 13% of agreements reached in respect of financial arrangements

were made by those who had attended mediation.[16] Just under half (45%) of agreements reached in mediation were made into consent orders (compared to 72% of arrangements reached via lawyers).[17] This proportion was lower than for agreements reached between the parties themselves (48%).[18] This data might come as a surprise to legal practitioners, who – in the light of *Wyatt v Vince* [2015] UKSC 14 – will approach financial remedy cases on the basis that only an order of the court can bring matters to a final conclusion.

Perhaps even more surprising is the finding in the *Fair Shares* report as to divorcees' perceptions of the effect 'on the ground' of the outcomes of mediation. Survey participants who had made arrangements were asked whether those had worked out as expected. Of those who had a full (rather than partial) agreement, only 44% of participants reported that arrangements made in mediation worked out as expected, compared to 79% in the full sample of divorcees.[19]

These findings call into question the government's claim that mediation has a '69% success rate'.[20] That claim is based on the results of a questionnaire answered by mediators participating in the government's family mediation voucher scheme, and represents the number of families who took up the scheme and reached an agreement on all or some issues in mediation.[21] The results of the *Fair Shares* research suggest that even amongst the 'successes' of mediation, there is a significant proportion of cases where agreements reached are never placed on a formal footing, or to some extent unwind.

The authors of the *Fair Shares* report give the following theory as to why arrangements reached in mediation are failing in such high numbers to live up to expectations: 'Those undertaking mediation may already have tried and failed to negotiate an agreement between themselves (including with the help of lawyers), so that when they did then reach a settlement via mediation, it may have been the result of a rather grudging compromise rather than a real meeting of minds and thus more likely to unravel when it came to be implemented and a party had second thoughts.'[22] In other words, the causality is not between mediation and unsatisfactory outcomes, but between 'difficult cases' and unsatisfactory outcomes. Then, separately, we might wonder whether difficult cases are being funnelled inappropriately into mediation.

Previous research, cited in the *Fair Shares* report, has demonstrated that one of the most important indicators of whether or not people will come to a settlement in financial remedy matters is emotional willingness to settle.[23] That does suggest that there will always be a category of divorcing couples for whom mediation is unlikely to result in anything more than a 'grudging compromise' which may later unravel. In those cases, mediation may not be capable of bringing about long-term resolutions, and the new data suggests that cases falling into that category may have been 'hidden' within the figures for successful mediations. With this in mind, a government 'push' towards mediation cannot replace the proper funding of systems to support individuals within that cohort, including the funding of legal advice, and a fully functioning Financial Remedies Court.

Conclusion

The lesson to be learned is that mediation cannot be assumed to be the end of the story, any more than it can be regarded as a panacea.

There may be some scope for further increasing the uptake of mediation, particularly by improving access to information about mediation and the breadth of forms it can take. Given the strong link between use of lawyers and attendance at mediation, this information may be in the form of early legal advice. In addition, mediation is not 'proper' mediation without the ability on the part of the participants to take at least some legal advice along the way, and to ensure that any agreement reached is properly embodied in a consent order. It is not just about initial advice and signposting.

However, there is likely a 'ceiling' to the number of cases which can – or should – be signposted into mediation. Future measures seeking to bring about resolution of financial remedy matters must take a more holistic view of the 'success' of a financial negotiation, and support divorcing couples to make arrangements which work in the long term and can be properly formalised.

Notes

1 E Hitchings, C Bryson, G Douglas, S Purdon and J Birchall, *Fair Shares? Sorting out Money and Property on Divorce* (University of Bristol, 2023) (*Fair Shares*). Available at: https://www.bristol.ac.uk/law/fair-shares-project/
2 Ministry of Justice, Family Court Quarterly Statistics – October to December 2022 (using data from 2021 due to the change of divorce regime during 2022).
3 Ministry of Justice, Family Court Quarterly Statistics – July to September 2023.
4 Ministry of Justice, 'Supporting earlier resolution of private family law arrangements', Consultation (2023) ('Supporting earlier resolution').
5 https://www.gov.uk/guidance/family-mediation-voucher-scheme (accessed 22 December 2023).
6 See 'Supporting earlier resolution'.
7 See *Fair Shares*, p 120.
8 See *Fair Shares*, p 116.
9 See *Fair Shares*, p 123.
10 See *Fair Shares*, p 124.
11 See *Fair Shares*, p 120.
12 See *Fair Shares*, p 138.
13 See *Fair Shares*, p 123.
14 Symonds, J. et al, *Separating families: Experiences of separation and support*, Nuffield Family Justice Observatory (2022).
15 Please note that the *Fair Shares* report speaks caution in respect of concluding that a particular process 'led' to an outcome. The data can only show *correlation* between those who attended mediation and those who reached particular outcomes.
16 See *Fair Shares*, p 126.
17 See *Fair Shares*, p 126.
18 See *Fair Shares*, p 125.
19 See *Fair Shares*, p 307.
20 See 'Supporting earlier resolution'.
21 Ministry of Justice, 'Family Mediation Voucher Scheme Analysis' (March 2023).
22 See *Fair Shares*, p 322.
23 E Hitchings, J Miles and H Woodward, *Assembling the Jigsaw Puzzle: Understanding financial settlement on divorce* (University of Bristol, 2013).

Tech Corner: Twenty Simple Excel Tips for Financial Remedy Practitioners

Gwynfor Evans

36 Family

Microsoft Excel is a spreadsheet program for presenting formatted numbers and for performing calculations on them. It also offers basic text-editing for labelling and for explaining any figures and calculations.

The spreadsheet consists of thousands of 'cells'. A cell may contain text, numbers, dates, formulas, calculations, or nothing. Each cell has its own format, which can be changed. Every cell is identified by its grid reference: columns ('x-axis') are labelled alphabetically and rows ('y-axis') are labelled numerically. Cells are referred to by their grid reference as A1 or G98, etc.

An Excel file is a workbook. It comprises one or many worksheets. Cells in worksheets can be linked within the workbook. A workbook can also be linked to other workbooks, but it is recommended that you avoid this as it leads to a loss of transparency, broken links if the file location is changed, the possibility of linking to unwanted (or not updated) data, and unintentional revelation to third parties of private data.

Data is entered by clicking on a cell, typing, and pressing 'Enter'. Existing data in cells may also be edited on a PC by pressing 'F2' and on a Mac by typing 'Fn + F2' or 'Ctrl + U'.

The tips below are specifically designed to de-mystify Excel for users who lack confidence, to explain some potentially confusing features and to provide some short-cuts. They are pitched at a basic level (advanced tutoring may follow if there is demand from FRJ readers!). There are useful keyboard shortcuts for PC and Mac users tabulated at the end of the article.

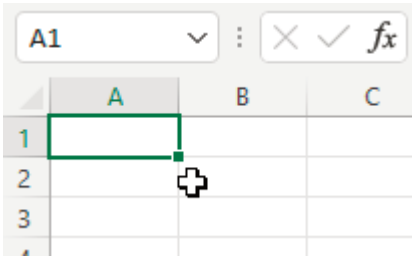
(1) Undo/redo/repeat

Crucial tools for beginners: to undo the last action type Ctrl + Z (PC) or ⌘ + Z (Mac) (⌘ is the Command button, and you don't type the 'plus' sign).

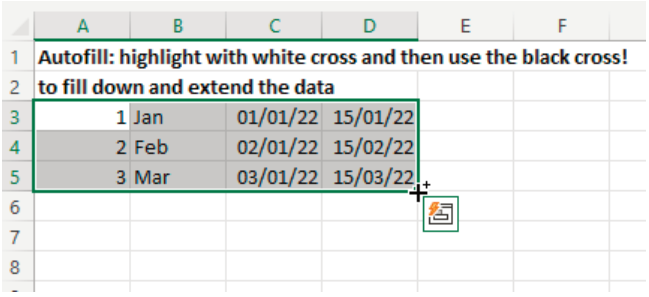
To Redo (or repeat, as the context may dictate) type Ctrl + Y (PC) or ⌘ + Y (Mac).

(2) Understanding the white cross and the black cross

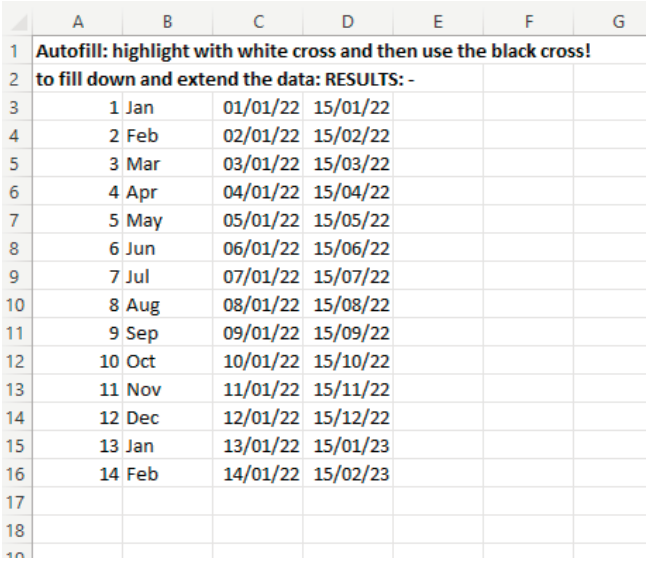
The white cross is for selecting (highlighting) cells either individually or in a group:



The black cross is the AutoFill tool, and it only appears if you hover under the bottom right-hand corner of the cell or the range of cells:



Dragging that black cross down causes this to happen:



The black cross is useful for completing sequences of numbers, dates, weekdays, months, etc – play around and it is quite handy!

TIP: Make sure before you do anything that the correct cross is showing, otherwise you may get unexpected results.

(3) Knowing your left-click from your right

Left-click is generally for selection and editing. Right-click (Ctrl + click on a Mac) brings up a context-sensitive menu, the most frequently-used options being Cut, Copy, Paste, Insert, Delete and Format Cells.

(4) How to enter and check a formula

Enter a formula by typing '=' in a cell. The most useful ones are SUM and simply typing mathematical operations into a cell (use +, -, * (multiply) and / (divide)). For example:

=SUM(C4:C9) will add up the contents of the six cells in the column from C4 to C9.

=0.03*500,000 will display 3% of 500,000, which is 15,000.

=G39/4 will, if G39 contains the number 800, display 200.

All formulas are 'live' (unless you disabled this in Formulas > Calculation Options) and automatically update if the content of any cells to which reference is made are updated.

Double-clicking a cell with a formula in it reveals any cells to which reference is made. This is useful to reveal whether any rows or cells have been omitted from a calculation.

Every cell has its own format: try to keep cells in the same row or column (depending on how you are using your data) formatted the same way.

(5) Check, and don't over-type, your formulas

A 'total' box should contain a formula, summing the numbers above it. If an item's value has changed between hearings, don't just over-type the total, but change the value of the underlying figure (asset value, bank account balance or pension CE).

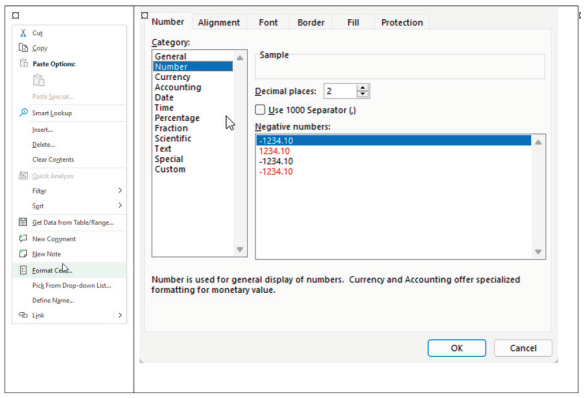
It seems that some proprietary ES2 software produces a 'flattened' ES2 that looks as though it contains a SUM formula, but in which the formula has in fact been removed and over-typed. This increases the likelihood of numbers appearing as though they have been correctly summed where in fact there is no calculation taking place at all! So, always check formulas are still there, and that they refer to all relevant cells above them.

(6) Format cells

The context-sensitive menu is shown on the left below, alongside the 'Format Cells' multi-tabbed pop-up menu.

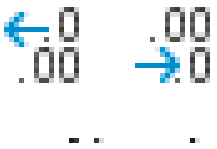
This is where you may adjust number and date formats, decimal places, comma-separators, borders, shading (fill) and so on (although there are short-cut icons to various commonly-used features in the main Excel screen).

NB: If you hover your mouse over an icon it gives a fuller 'tool-tip' as to what it does.



(7) What the ######? Changing the number of decimal places showing

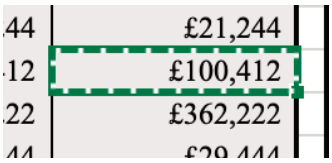
Cells with too many decimal places (or even simply with 'pence') showing can appear as ######. Either resize the column (see below) or reduce the decimal places. To change the number of decimal places, select the relevant cell, range of cells, column or row containing the data and click on these icons:



The icon on the left is 'Increase Decimal' – it shows *more* decimal places and hence a more precise value. The icon on the right is 'Decrease Decimal' – it shows *fewer* decimal places and hence leads to the number taking up less space on the screen: this is useful if there is a lot of contention for screen-space in the spreadsheet in question!

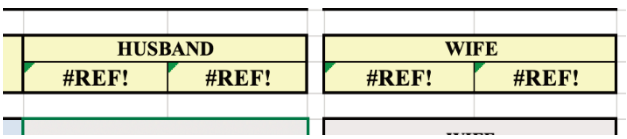
These also work when numbers are displayed as percentages.

(8) Avoiding marching ants



If a cell is surrounded by marching ants (little dashes that move clockwise) then either press 'Enter' to accept the contents/calculation, or 'Escape' (Esc, top left) to get rid of the marching ants. This can be a reason why you are trapped in a certain 'state' in Excel, seemingly unable to work.

(9) Swiftly managing #REF! errors



If a category of assets (e.g. chattels/other/business inter-

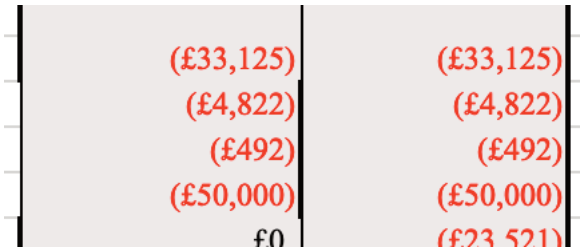
ests) has been deleted, then any formula referring to the deleted sub-total will display as #REF! Don't panic, as the formula itself can be amended.

If the formula in the 'total' cell read '=F36 +F63+F70+F82+#REF!+F102' (the #REF! referring to a deleted cell above) then amend it to say '=F36+F63+F70+F82+F102'. The #REF! will disappear and the correct total will be displayed. NB: Any grand total cell referring to a cell containing a #REF! would itself display #REF! until the error is fixed, and so that will be rectified upon correction, too.

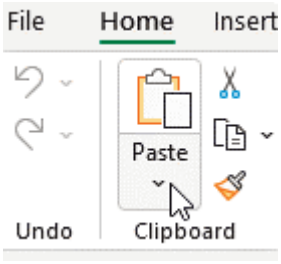
(10) Fixing the formatting using Paste Special → Formats

Common errors on an ES2 are borders that are too thick/thin, or are missing, along with incorrectly shaded or inconsistently formatted cells.

For example, below, the (£4,822) has been copied from right to left along with its formatting, and so the left and centre borders have also been inadvertently changed:

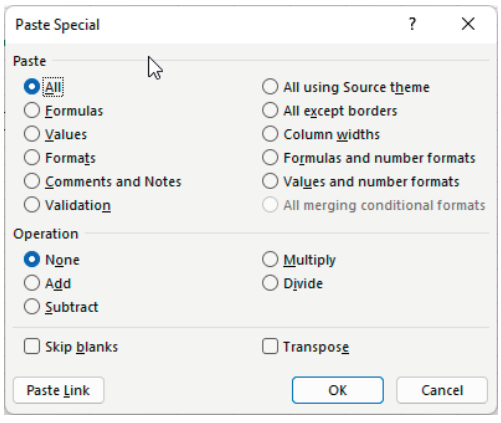


A quick fix is to select another cell, or range of cells, with the desired formatting (the cells with the (£33,125) in them, in the above example), and then Copy, and Paste Special (either via the button below or in the Edit menu):



If you only want the formats of a cell or cells, then copy the cell/cells, and use Paste → Paste Special → Formats (on a Mac the shortcut in the button is 'Keep Source Formatting').

There are various other options. If you select 'Paste Special', you will see the following list of Paste options:



Paste Special → Values is useful for copying either the result of a calculation as if it were just a typed number, or for copying something without its formatting.

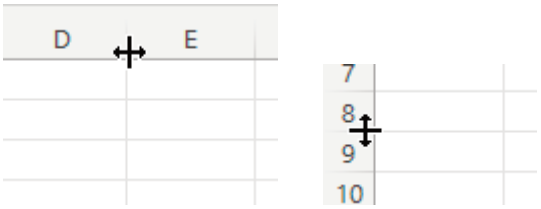
(11) Wrapping comments

'Per H' or 'Per W' in front of a comment indicates helpfully which party has asserted something which is not agreed and this enables each party to agree to the co-existence of two completing explanations in a row. Text does not 'wrap' (around the right-hand end of the cell) by default, but long comments should therefore be wrapped to the column width (to render the ES2 printable).

Select the cell (or the entire column if applicable to many cells), right-click (or Ctrl + Click on a Mac), Format Cells → Alignment → Wrap text (tick box). You may then need to adjust row height, as follows.

(12) Column widths and row heights

To ensure everything looks right you can adjust column widths/row heights (and then the print area too – see below):



Hover over the join between two columns or between two rows and you can drag column widths or row heights.

If you hover over the join and double-click the mouse, then you will find that the column (or row, if wrapping is enabled) will jump to the width or height appropriate to the widest entry in the column. Be careful with this, as sometimes that is not what you in fact want (Excel allows cell contents to cover adjacent empty cells, and so this is not always necessary).

NB: Whilst it is possible to 'Hide' columns or rows: in my experience this creates all sorts of opportunities for leaving old data kicking around in a re-used spreadsheet, or sub-totals that feed in to totals but are invisible. Hiding columns should therefore be avoided pretty much always as it is too dangerous.

(13) Dealing with hidden columns/rows

You will know that there are hidden rows or columns if row/column numbers are not continuous.

Unhide columns by selecting columns either side of the hidden column, right-clicking and then selecting 'Column Width' from the pop-up menu (similarly with 'rows' and 'Row Height').

Setting Column Width to something like 12 will reveal it, and then you can drag the width as above.

(14) Inserting and deleting

To delete the contents of a cell, click on it and press the

backspace or delete keys. It becomes a blank cell, but nothing around it changes.

To delete an entire row or column: first select it by clicking on the row or column header. In the pop-up menu that appears upon right-click (PC) or Ctrl + Click (Mac), select 'Delete'. If you selected a range of cells (this can lead to unintended results …) then you will be asked what you want to happen to the cells around it. You can mercifully swiftly undo any poor-decision making here.

To insert a number of rows then select the entire row (and as many rows below as you intend to insert) before which your new row is to be inserted and from the right-click/Ctrl + click pop-up menu select 'Insert'. New rows appear whose cells inherit the formatting of the cells in the row ***above*** the row you inserted.

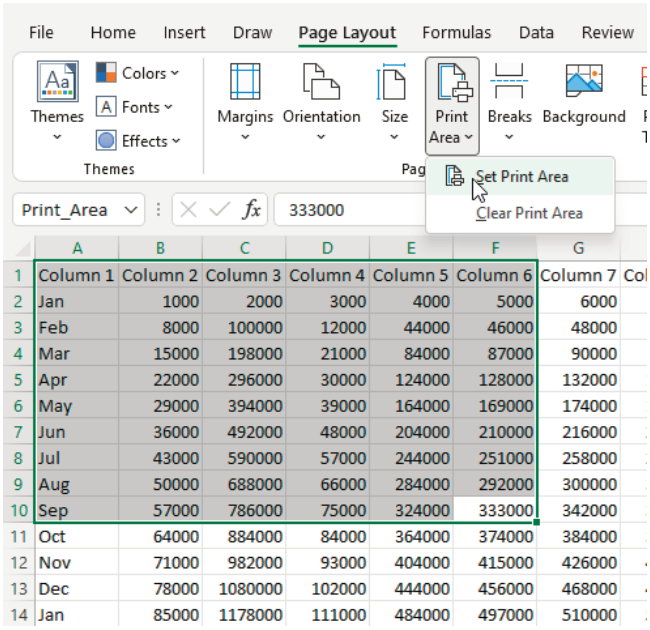
(15) Selecting large parts of a worksheet – do it in reverse

Find the bottom right cell in your worksheet and then select backwards with the white cross, moving top-left, towards cell A1. This prevents you accidentally selecting (if moving towards the bottom right) hundreds of thousands of blank cells.

(16) Setting the print area

To print only a certain part of the page, go to Page Layout → Print Area → Set Print Area

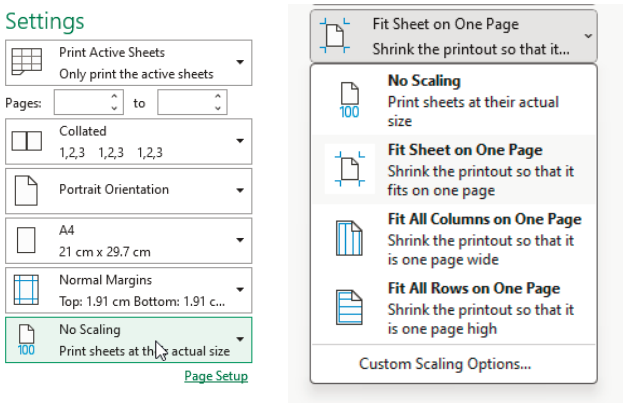
In the example below, only columns A–F and rows 1–10 will print:



	A	B	C	D	E	F	G
1	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
2	Jan	1000	2000	3000	4000	5000	6000
3	Feb	8000	100000	12000	44000	46000	48000
4	Mar	15000	198000	21000	84000	87000	90000
5	Apr	22000	296000	30000	124000	128000	132000
6	May	29000	394000	39000	164000	169000	174000
7	Jun	36000	492000	48000	204000	210000	216000
8	Jul	43000	590000	57000	244000	251000	258000
9	Aug	50000	688000	66000	284000	292000	300000
10	Sep	57000	786000	75000	324000	333000	342000
11	Oct	64000	884000	84000	364000	374000	384000
12	Nov	71000	982000	93000	404000	415000	426000
13	Dec	78000	1080000	102000	444000	456000	468000
14	Jan	85000	1178000	111000	484000	497000	510000

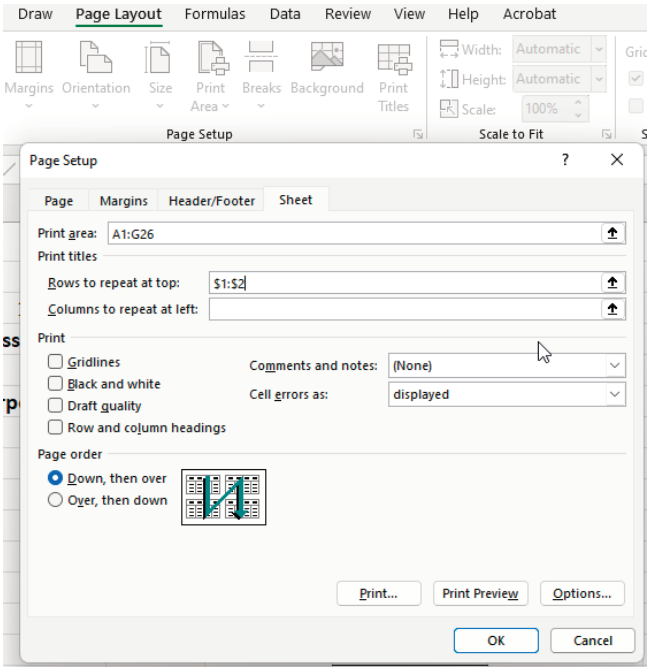
(17) Making your print-outs fit onto one page

It is frustrating to have most of the information on one page, and then the final column on its own on an adjacent page. To solve this, you can instruct Excel to fit the entire sheet (meaning the print area) or all columns/all rows onto one page. The option to do so is found in the Print menu under Settings on the left-hand-side:



(18) Repeating rows at the top of each printed page

It is possible to repeat certain rows (e.g. those containing column headings) at the top of each printed page. To set this up, in 'Normal' view go to Page Layout → Print Titles:



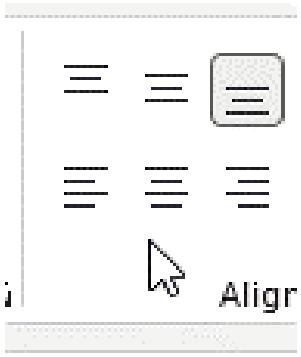
The settings above will repeat the contents of rows 1 and 2 on each printed page.

(19) Single quotation marks to control how Excel treats your data

If text or numbers you enter are not displaying correctly because Excel is auto-detecting a format (e.g. where the last four digits of a bank account number start with a zero, or where you wish to use only the month and year of a date and Excel insists on adding the day), then typing a single quotation mark before the text will make Excel render everything you type in that cell as text.

(20) Aligning text and fixing text that won't align

You can make text or numbers in cells align left, right, centre or top and bottom using the following (self-explanatory) icons on the 'Home' menu:



NB: Ignore the 'Decrease Indent' and 'Increase Indent' icons that are next to these, as they are not particularly useful in Excel.

If, following this, your comments are all supposed to be correctly aligned but the text is still indented in certain entries, then select the entire (text) column (or relevant misbehaving cells only) and change the format using Format Cells → Number → Category to 'Text'.

Some useful keyboard shortcuts

PC	Mac	Operation
Ctrl + W	⌘+ W	Close workbook
Ctrl + O	⌘+ O	Open a workbook
Ctrl + S	⌘+ S	Save workbook
Ctrl + X	⌘+ X	Cut text/cell(s)
Ctrl + C	⌘+ C	Copy text/cell(s)
Ctrl + V	⌘+ V	Paste text/cell(s)
Ctrl + Alt + V	Opt + ⌘+ V or Ctrl + ⌘+ V	Paste Special (menu)
F5	Fn + F5	Go to a specific cell (e.g. F8/A7)
F2	Ctrl + U, Fn + F2	Edit contents of a cell (either in the cell itself or at the top of the worksheet
F4	⌘+ T	Absolute Reference toggle
Ctrl + Home	Ctrl + Fn + Left Arrow	Jumps to top left (cell A1)
Ctrl + End	Ctrl + Fn + Right Arrow	Jumps to bottom right
Ctrl + B	⌘+ B	Bold
Ctrl + I	⌘+ I	Italic
Ctrl + F	⌘+ F	Find something
Ctrl + H	Ctrl + H	Replace something
Ctrl + Z	⌘+ Z	Undo
Ctrl + Y	⌘+ Y	Redo something you just undid OR Repeat something you have just done
Ctrl + [	CTRL + [	Goes to cell or cells referred to in the calculation in the cell you are in!
Ctrl +]	CTRL +]	Goes back to the cell you started in
Alt +	(No direct equivalent)	Adds up the column above the cell you are in using SUM
Ctrl + F6	(No direct equivalent)	Cycles between workbooks
Ctrl+Pg Up/Pg Dn	CTRL + Fn + Up Arrow/Down Arrow	Moves between worksheets in a workbook

Money Corner: Financial Planning for Non-UK Resident Beneficiaries of Pension Shares

Philip Teague

Executive Director,
Cross Border Financial Planning

Introduction

Once a pension sharing order is obtained from the courts in England and Wales, the division of pension assets between UK residents is usually straightforward. The beneficiary will typically have a pension in the UK that can receive their share. Failing this, if they don't already have a pension, one can either be sourced by themselves or financial advice is readily available to provide suitable recommendations.

For non-UK resident beneficiaries who are awarded a pension share of a UK pension, a myriad of challenges emerges, ranging from accessibility and tax considerations to investment decisions and currency risks.

This article will help you to understand the challenges a non-UK resident will face so that when you speak with one, you can help them to understand the depth of planning they will need to undertake.

Accessibility

One of the primary challenges faced by non-UK resident beneficiaries is the limited accessibility to UK pension providers. Most UK pension providers have stringent residency requirements, accepting only UK residents. This poses a significant hurdle for overseas beneficiaries who may not already hold a UK pension capable of receiving the court-ordered pension share. The search for a suitable pension provider abroad becomes a critical concern, and the lack of familiarity with the UK pension landscape further complicates the process.

Alternative options, such as identifying UK pensions that are marketed to overseas clients can be considered. Additionally, establishing communication channels with UK pension providers to navigate residency restrictions and negotiate exceptions becomes crucial in facilitating a smooth transition for the beneficiaries.

Tax implications

Another challenge arises in the form of tax implications. Non-UK residents receiving a court-ordered pension share must carefully consider the tax laws of both the country they reside in and the UK. The interaction between these two tax regimes can result in complexities that can be confusing.

Understanding the tax implications involves not only determining the tax treatment of the pension share itself, but also considering potential tax liabilities upon withdrawal from the pension. The beneficiary should collaborate with tax specialists familiar with both the beneficiary's country of residence and the UK tax system to ensure comprehensive advice tailored to the unique circumstances of the case.

Investment decisions

For non-UK resident beneficiaries unfamiliar with the intricacies of the UK financial market, making informed investment decisions poses a significant challenge. Selecting appropriate investments requires a nuanced understanding of the economic climate, market trends and regulatory frameworks, factors that may be unfamiliar to those residing outside the UK.

To address this challenge, it is important to collaborate with financial advisors who are comfortable discussing the international aspects of investments within a pension for a non-UK resident. Crafting a diversified and risk-appropriate investment strategy that aligns with the beneficiary's financial goals becomes paramount to safeguarding the value of the pension share over time.

Currency risk

The disparity between the currency of the pension and the beneficiary's country of residence introduces currency risk, a consideration often overlooked. The pension, denomi-

nated in British pounds, may face fluctuations in value when converted to the beneficiary's local currency, impacting the overall financial outcome.

To mitigate currency risk, currency management solutions can be discussed, such as moving the denomination of the underlying pension from British pounds to another major currency at an advantageous time. Establishing a framework that considers potential currency fluctuations and outlines risk mitigation measures helps the non-UK resident beneficiary protect the value of their pension share in the face of volatile exchange rates.

Conclusion

Non-UK resident beneficiaries of court-ordered pension shares face a multifaceted set of challenges, from navigating accessibility issues to addressing tax implications, making informed investment decisions, and managing currency risks. Legal professionals play a pivotal role in guiding these individuals through the complexities of pension division, collaborating with financial and tax experts to ensure a comprehensive and tailored approach to safeguarding their financial future. As the landscape of international divorce continues to evolve, a proactive and collaborative approach among legal, financial and tax professionals becomes indispensable in securing the best possible outcome for non-UK resident beneficiaries.

Investments can rise and fall and you may get back less than what you started with. This article is for guidance only and does not constitute individual financial advice. The Financial Conduct Authority does not regulate tax planning. Cross Border Financial Planning are not tax advisers and do not offer tax advice.

Book Review: *Cohabitation and Trusts of Land*

Elizabeth Darlington and Laura Heaton (Sweet & Maxwell, 4th edn, 2024)

Graeme Fraser

Head of Family and Partner, BBS Law

In the absence of a specific family law-based remedy, it is a fair comment to say that practising cohabitation law in England and Wales is more complicated in 2024 than it ever has been before. This significant publication is a comprehensive effort to explain the current law as thoroughly as possible to the busy practitioner who increasingly encounters this work and must tackle the various nuances created because of there being no legislative reform. The key question must therefore be how far does it inform our practices?

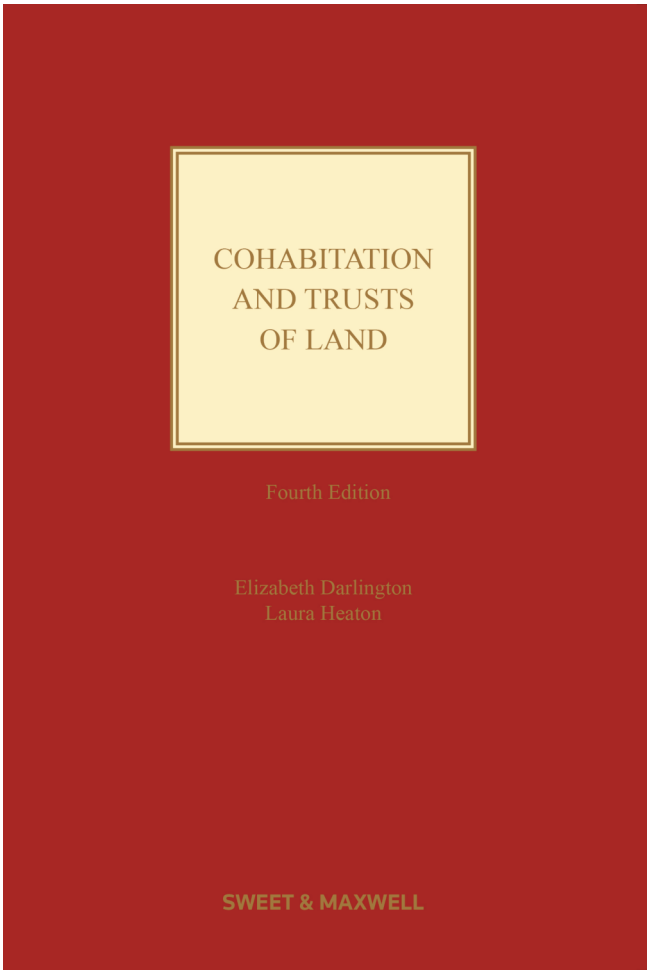
This 4th edition has arrived 7 years after the last iteration in 2016, and it is notable right from the outset the extent to which this book contains revised and updated case-law and explanations. These along with the relevant statutes are copiously covered from start to finish. This book therefore has the benefit of containing detailed case extracts and principles that are helpful as a go-to reference when trying to make sense of a very complicated area of law.

The introduction confirms that cohabitation is an ever-expanding area although the law that governs the breakdown of relationships between cohabiting couples remains broadly unchanged. The book's stated aim is to consolidate all the relevant principles of practice and procedure, whether found in the civil or family jurisdiction, to provide a practical guide to the practitioner advising upon the breakdown of a relationship between unmarried couples.

In covering express declarations of trusts and cohabitation agreements, and the ability to set aside express declarations of trust, the authors stress the difficulties in pleading and making out a case based on fraud, mistake or similar at one's peril. They suggest that the more straightforward cause of action lies in an action for professional negligence against any legal adviser engaged to deal with the conveyancing of the property. The appendices contain some short form declarations of trust together with a model skeleton basic form cohabitation agreement.

The 69-page chapter on constructive trusts is very thorough, including helpful coverage of the key cases such as *Stack v Dowden* [2007] UKHL 17 and *Jones v Kernott* [2011] UKSC 53, and how the concepts of inference and imputation have developed and are to be applied in practice currently.

The diminishing use of resulting trusts as a basis for cohabitation cases is usefully explained, with the emphasis on its current application to investment properties and for commercial partnerships.



The complicated task of quantifying beneficial interests is then examined for both sole and joint name properties. I found the section on specific issues to be particularly helpful as topics such as the treatment of the mortgage advance; mortgage repayments and discounts under the 'right to buy' legislation commonly crop up in day-to-day practice.

A useful explanation of equitable accounting and occupation rent is instructive in assisting the practitioner to formulate the account and inquiry claims. The more

complex calculations may require expert evidence of rental values in contrast to the more straightforward setting off occupation rent against the interest element of the mortgage.

The analysis of the Supreme Court's decision in *Guest v Guest* [2022] UKSC 27 is required reading in terms of paving the way for a clearer understanding and application of the principles and remedies of proprietary estoppel which have continued to evolve since the last edition of this book in 2016.

The relevant statutory provisions of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) are set out in the appendices, accompanied by a chapter with commentary on the right to occupy; applications for orders; and considerations. There is good coverage here of applications made by the trustee in bankruptcy.

Objections to Form A Restrictions are remarkably common in practice, in my experience, so it is excellent to see some basic guidance included as to the use of the Property Chamber, Land Registration, First-tier Tribunal as a point of reference.

The 36-page chapter on practice and procedure summarises the issues that crop up from start to finish of a TOLATA claim. Family lawyers tend to panic when it comes to using the CPR, so the digestible explanations coupled with the relevant forms and precedents should help allay those concerns in the absence of any immediate prospect of cohabitation claims being dealt with under the FPR. Guidance includes whether to start claims under the CPR Part 7 or Part 8; disclosure when it is governed by Part 31 and when PD 57AD applies; and for the drafting of witness statements, updated to include the new rules in respect of trial witness statements in the form of PD 57AC.

The costs and Part 36 offers chapter examines the CPR overriding objective and the court's discretion, as well as case and costs management. Family lawyers often prefer to use their trusted *Calderbank* offers as opposed to Part 36 offers, but Part 36 offers should certainly be deployed more often in TOLATA cases due to the significant costs advantages that can follow, particularly for claimants.

In the foreword, Mr Justice Peel welcomes the attention paid to the different forms of ADR available in this area since it is well understood that lengthy and expensive litigation aggravates the painful consequences for adults and children alike. Practitioners would therefore do well to read the ADR summaries in this book first before launching headlong into costly, risky and uncertain litigation. The potential sanctions include an 'Ungley order', a development we will be seeing shortly in the Family Court with the relevant changes to the FPR coming onstream by the end of April 2024. Additionally, following the decision of *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 (which appears to have been published after the authors' cut-off date for this edition), mediation itself may become rather more common, given that the court held that proceedings may be stayed for ADR even where one party is unwilling to engage provided it is proportionate to do so and the essence of the parties' right to a judicial hearing is not impaired.

There is an interesting short chapter on engaged couples, including how the use of the s 17 Married Women's Property Act 1882 jurisdiction has been deployed by wives based in foreign jurisdictions to bring matters before the court, including seeking injunctions to protect various assets including personal effects and highly valuable jewellery.

A chapter on occupation orders deals with the thorny issue of occupation rights for cohabitants which remains limited and subject to the complexities of ss 33 and 35–39 Family Law Act 1996.

The 47-page chapter on Sch 1 Children Act 1989 is, in my view, just about the right length for this book. The authors focus on property transfer/settlement orders, which are often relevant when considered concurrently with TOLATA claims. The limited statutory criteria are also considered, together with good commentary on quantification. Periodical payments and the carer's allowance are well covered, including the decisions of Mostyn J in *Collardeau-Fuchs v Fuchs* [2022] EWFC 135 and *James v Seymour* [2023] EWHC 844 (Fam). An expanded section on funding for legal costs includes reference to Cobb J's timely warning to lawyers who do not keep in mind the figures prescribed by legal costs funding orders in *Re Z (No 2) (Schedule 1: Further Legal Costs Funding Order: Further Interim Financial Provision) X v Y* [2021] EWFC 72.

Given the increasing number of intervenor's claims in applications for financial relief on divorce, it is both valuable and timely to have a chapter explaining the general principles; procedure; rules and costs consequences. Such cases carry a high risk of adverse costs consequences to everyone involved so a basic working knowledge of these matters is helpful in practice.

For those who extend their practices to inheritance claims under the Inheritance (Provision for Family and Dependants) Act 1975, the final chapter of the book contains a guide to the ACTAPS Code to encourage the resolution of disputes without hostile litigation, and to simplify litigation as far as possible.

In conclusion, the authors have attempted to make this difficult area of law as comprehensible as possible and have achieved these aims by writing a clear and accessible publication. So, to that extent this book very much informs our practices under the current law.

As an ardent campaigner for cohabitation law reform for over 25 years, I sincerely hope that between now and the next edition, we at least see some of the most important and urgent reforms to the laws that affect cohabitants that are desperately needed, including reforming cohabitants' rights under intestacy and Sch 1. At the time of writing this review, the prospect of wholesale cohabitation reform has become an increasingly distinct and welcome possibility, given the indications that this may soon be embraced by all the major political parties as we await changes to the political landscape following the next UK general election due to take place within the next year.

Financial Remedies Case Round-Up

Mid-September 2023 to mid-January 2024

Polly Morgan

Case Editor, Associate Professor and Director of UEA Law Clinic, University of East Anglia

Post-separation accrual

The judgments published within the autumn period fall sharply at each end of the spectrum of wealth. A number of cases involving significant assets have involved arguments around post-separation accrual, perhaps trickling through as a result of Moor J's decision in *DR v UG* [2023] EWFC 68. In that case, Moor J rejected the husband's arguments that his post-separation work in turning around a company justified a departure from equality, as there was no truly new venture that resulted in the sale of the company (per Mostyn J in *JL v SL (No 2)* [2014] EWHC 360 (Fam), [2015] 1 FLR 1202), no further work to 'harvest' the assets, and no undue delay in bringing the case, which were all potential reasons justifying a departure from equality; and the husband was effectively trading the wife's undivided share (per *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790).

The same cases that Moor J had considered were cited in the more recent *GA v EL* [2023] EWFC 206, except that in this case there *was* a departure from equality to reflect post-separation work by the husband. Stephen Trowell KC (sitting as a Deputy High Court judge) summarised the relevant law in a case that is well worth reading.

Determining the date of separation

In contrast to *GA v EL*, in which the parties agreed the date of separation, the date was an issue in *FT v JT* [2023] EWFC 250 (B), another case involving post-separate endeavours. Recorder Nicholas Allen KC noted that there was less authority on what amounted to separation than there was on what amounted to cohabitation, but drew on the comments of Williams J in *IX v IY (Financial Remedies: Unmatched Contributions)* [2018] EWHC 3053 (Fam) to hold that in many ways those factors indicative of separation are the obverse of factors indicating cohabitation. Rather like cohabitation, it is not always easy to find any bright line.

Modest asset cases

At the other end of the financial spectrum, the number of published financial remedies judgments involving modest assets continues to increase. This is very welcome. *VT v LT* [2023] EWFC 256 (B) – the 'B' is now used by the National Archives to denote judgments below High Court level – is a case heard by District Judge Hatvany and dealt with the common but extremely difficult issue of how to house two parties and two teenaged children on £118,000 and limited borrowing capacities. The wife could look to shared ownership with a lump sum deposit. Another modest asset case, this time an appeal, was heard by Peel J. The parties in *Ditchfield v Ditchfield* [2023] EWHC 2303 (Fam) had total net assets of £339,000 but the first instance judge had made serious criticisms of the husband's conduct and disclosure, including in respect of £500,000 that he had taken and used since separation. Peel J upheld the decision that while the parties had similar housing needs, the wife should take the liquid majority with the husband taking a reduced and illiquid share, and thus needing to save up to rehouse himself. He noted that that 'although it is generally desirable in financial remedy cases for each party to be able to own a property, with the attendant benefits of security and potential investment upside, it is not an iron rule. It will all depend on the facts. In this case it is not possible to do so at this stage.'

Appeal from an arbitral award

The decision of HHJ Evans-Gordon in *LT v ZU* [2023] EWFC 179 is notable because it is, we think, the first successful appeal against an arbitrator's decision. The leading case is *Haley v Haley* [2020] EWCA Civ 1369, in which the Court of Appeal held that 'when presented with a refusal on the part of one party to agree to the conversion of an arbitral award into a consent order, the court should, at an initial stage, "triage" the case with the reluctant party having to "show cause" on paper why an order should not be made in the terms of the arbitral award'; and that a court 'will, thereafter, only substitute its own order if the judge decides that the arbitrator's award was wrong; not seriously, or obviously wrong, or so wrong that it leaps off the page, but just wrong'.

In *LT v ZU* the unnamed arbitrator was adjudicating a claim under Sch 1 Children Act 1989 and had made an award that required the father and mother to purchase a three-bedroom home for the mother and children during the latter's minority, and to enter into a joint mortgage with

the mother. The father challenged the award on the basis both that it required him to borrow and that it was unaffordable.

The judge found that the award exceeded the father's income and resources, including his earning capacity. She also held that a parent could not be required to settle property under Sch 1, para (2)(d) unless already entitled to that property either in possession or in reversion. There was no indication in any of the authorities that the court had the power to require a parent to borrow money for this purpose, and it would be a misuse of the court's powers to order a lump sum in order to circumvent this restriction. The father's challenge therefore succeeded.

Applications under s 37

Over in Oxford, HHJ Vincent, who regularly publishes her exceptionally clear judgments, dealt with an application under s 37 Matrimonial Causes Act 1973 to set aside sales of company shares to intervenors. *AP v BP & Ors (financial remedies & s 37 application to set aside disposition)* [2023] EWFC 170 is a useful reminder of the relevant law. The judge held that the dispositions were reviewable as they took place less than 3 years previously and had the consequence of defeating H's claims to ancillary relief. This gave rise to a presumption that W disposed of the shares with the intention of defeating H's claim for financial relief – a presumption that W was not able to overcome. Moreover, while under s 37(4) MCA 1973 the intervenors had a potential defence, the requisite elements – valuable consideration, good faith, and lack of knowledge of the intent to defeat the applicant's claim – were not made out. The disposition was set aside.

The same judge dealt with a similar application in *FA v OA and intervenor (financial remedies – s37 application to set aside)* [2023] EWFC 213. This concerned not s 37 but its equivalent under s 23 Matrimonial and Family Proceedings Act 1984. The judge found that a loan made to the husband by his brother, which had to be repaid pursuant to a Nigerian court order, was not a reviewable disposition.

Things get strange

Meanwhile, our Mostyn Award winner for the must-read case of the issue is a recent and bizarre case heard by District Judge Dinan-Hayward. The husband in *TM v AM* [2023] EWFC 247 (B) applied to set aside a financial remedy order on the basis that the wife had not disclosed ownership and subsequent sale of a diamond ring worth £2m. The ring in question had apparently been found at a car boot sale in Northumberland, amid a blaze of publicity, and the husband had received a 'tip off' that the wife was the finder. The problem for the husband was that the wife denied ever owning the ring and the only connection between her and the diamond ring was that the wife was given to frequenting car boot sales in the north of England and liked to buy costume jewellery.

But things got even stranger from there. Summonsed to court, the auctioneer who had sold the ring confessed, reluctantly and angrily, to having completely fabricated the story that the diamond ring had been found at a car boot sale in order to drum up publicity for his auction house. He had been responsible for planting the story in the media. In fact, the diamond ring was owned by a connection in Antwerp who had asked him to sell it, and who had been so upset by the car boot story that they had asked for it back. There was no connection to the wife at all.

The Summary of the Summaries

Liam Kelly

Deans Court Chambers

Simon v Simon & Integro Funding Limited [2023] EWCA Civ 1048 (King, Moylan, Popplewell LJJ)

The parties agreed an order that had the effect of depriving a litigation funder (Level) of the repayment of a loan advanced to W. Level were joined as a party, and the order was set aside by consent. A full financial remedy trial was directed with Level as a party. H appealed. H's appeal partially succeeded, setting aside the trial direction. However, Level remained a party for the outstanding application for a consent order to be made in the terms agreed between H and W at the FDR. *Keywords: joinder of third parties; appeals; setting aside orders (including Barder applications); trusts, litigation funding*

Ditchfield v Ditchfield (Appeal) [2023] EWHC 2303 (Fam) (Peel J)

H appealed a final order favouring W with a 62/38 asset split. Findings made against H as to his earning potential, disclosure, a contributing partner, and a £500k withdrawal for his sole benefit. The appeal was dismissed; the decision and findings were sound. *Keywords: appeals; disclosure; loans; needs; debts*

Cazalet v Abu-Zalaf [2023] EWCA Civ 1065 (King, Moylan, Peter Jackson LJJ)

An appeal against the decision of Mostyn J concerning the approach the court should take when faced with an application to rescind a decree nisi. Appeal allowed. *Keywords: setting aside a decree nisi*

Xanthpoulos v Rakshina [2023] EWFC 158 (Peel J)

H applied for an LSPO to fund an appeal, having been granted permission by Moylan LJ. Mostyn J's criteria in *Rubin v Rubin* [2014] EWHC 611 (Fam) applied. LSPO granted. Peel J noting, where permission to appeal has not yet been granted, the court should apply greater scrutiny as to the prospects of substantive relief (*Rubin* at [13] (iii)). *Keywords: jurisdiction; conduct; legal services payment orders; appeals*

KG v NB [2023] EWFC 160 (HHJ Willans)

H sought to vary periodical payments per a 2019 consent order. A 2021 consent order concerning the FMH failed to adequately address maintenance terms. A phased reduction lacked justification; a single adjustment sufficed. Variation applications should focus on changes to avoid appeals by the 'back door'. *Keywords: periodical payments; variation application; cohabitation; consent orders*

HAT v LAT [2023] EWFC 162 (Peel J)

W sought MPS and LSPO. Parties entered and implemented a deed of separation 30 years ago although had not converted the deed to an order. W now sought a needs award of £5m, H sought to uphold the deed. *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790 distinguished given H's ongoing financial provision. MPS and LSPO granted. *Keywords: legal services payment orders; maintenance pending suit; agreements; delay*

O v O [2023] EWFC 161 (Recorder Moys)

H challenged SJE valuation evidence. SJE's refusal to answer H's questions justified as questions went beyond 'clarification', H permitted to cross-examine instead. H's financial conduct throughout the marriage disregarded, he did not set out to hide assets from W or put them beyond her reach. H's post-separation conduct placing £40k into spread betting account was material and reflected in final order. *Keywords: conduct; efficient conduct; matrimonial and non-matrimonial property; add-backs*

TRNS v TRNK [2023] EWFC 133 (Sir Jonathan Cohen)

W not held to PNA due to material non-disclosure by H in not updating disclosure which he knew/believed to be out of date, resulting in a differentiation in the value of assets from £935k to £14.5m. *Keywords: disclosure; agreements*

Richard Winter & Anor v Philip Winter & Anor [2023] EWHC 2393 (Ch) (Zacaroli J)

Claimants were two brothers, R and A, whose suit was against the third brother, P, as executor of their father Albert's estate, to challenge Albert's 2015 will, and the solicitors who drafted the will. Detrimental reliance clearly established; R and A had dedicated their working lives to the business, giving up the chance to build an alternative life on the assurances. Equal shares awarded. *Keywords: proprietary estoppel; mutual wills; contractual estoppel*

Seales v Seales [2023] NIMaster 6 (Master Bell) (Northern Ireland)

W pursued a 'conduct case' based, in part, on H's conviction for murder. H attempted to challenge his conviction within the proceedings. Held: H's involvement in the murder had a profound impact on W's physical and mental health, as well as her ability to earn a living. 75% of assets awarded to W along with costs of £50k for litigation misconduct. *Keywords: conduct; add-backs; costs*

Barclay v Barclay [2023] EWFC 164 (Sir Jonathan Cohen)

H faced committal proceedings for non-payment of £245k in longstanding financial remedy proceedings. Application dismissed because court unaware of accessible funds, and impasse not due to H's deliberate defiance of orders. *Keywords: committal applications and judgment summonses; enforcement*

Butler v Butler [2023] EWHC 2453 (Fam) (Moor J)

After a 6-year marriage, W was awarded £58k, deemed the maximum H could borrow against non-matrimonial property. W appealed, arguing insufficient to meet housing needs. Moor J dismissed, stating a higher award would render both homeless. In needs cases, the court need not meet both parties' needs. *Keywords: needs; housing need*

Glaser & Anor v Atay [2023] EWHC 2539 (KB) (Turner J)

A clause requiring the payment of all direct access fees prior to trial falls foul of the Consumer Rights Act 2015 and was not protected by the safe harbour defence pursuant to s 62 of the Act as the term required the payee to pay the full/nearly full price without any services rendered and regardless of any savings or gains made by the payer. *Keywords: direct access; Consumer Rights Act 2015; public access; fees; quantum merit*

AP v BP & Ors (financial remedies – appeal – disclosure – privilege) [2023] EWFC 169 (HHJ Vincent)

H sought disclosure of an earlier agreement between W and intervenors, having found a later agreement. W claimed privilege, citing preparation for legal proceedings related to H's separation of Company A from Company B. Disclosure ordered: no litigation anticipated when the agreement was made, and intended future legal action doesn't privilege a document. *Keywords: setting aside transactions; companies; disclosure; privilege*

AP v BP & Ors (financial remedies & s 37 application to set aside disposition) [2023] EWFC 170 (HHJ Vincent)

H applied under s 37(2)(b) MCA 1973 to set aside W's sale of shares in matrimonial businesses aimed at defeating his claims. W failed to rebut the presumption of intent to defeat H's claims; intervenors could not avail themselves of a defence. Application granted. *Keywords: setting aside transactions; dispositions; companies; intervenors*

LT v ZU [2022] EWFC 206 (HHJ Evans-Gordon)

F's application to adduce further evidence following an arbitrator's award pursuant to Sch 1 granted. Contrary to the arbitrator's expectations, the financial landscape had changed considerably such that to convert the arbitral award without consideration of the further evidence may render it unfair or unjust. *Keywords: Children Act 1989 Schedule 1 applications; needs; appeals; arbitration*

LT v ZU [2023] EWFC 179 (HHJ Evans-Gordon)

F contested an arbitrator's award pursuant to Sch 1, which M sought to convert into a substantive order. The court rejected M's application, holding the court had no power to compel a parent to borrow funds for property transfer/settlement. The award exceeded F's means and wasn't realistic, as it surpassed F's income and resources. *Keywords: arbitration; needs; Children Act 1989 Schedule 1 applications; appeals*

GA v EL [2023] EWFC 187 (Peel J)

Application for *Daniels v Walker* application refused owing to lateness of the application jeopardising the listing for final hearing. In any event, the difference between the SJE and W's proposed expert on a 'hindsight approach' was £1.6m which would likely be immaterial to the outcome. *Keywords: post-separation accrual; Daniels v Walker application; efficient conduct; business assets; experts; matrimonial and non-matrimonial property*

AZ v BZ (Financial Remedies Appeal) [2020] EWFC B86 (HHJ Vincent)

H appealed a final order giving W a 99:1 asset split. The court found the DJ erred in admitting late evidence without allowing H opportunity to challenge. The division was unjust, and the court erred in assessing respective needs, favouring W disproportionately. Decision substituted to 60:40 in W's favour. *Keywords: setting aside orders (including Barder applications); needs; personal injury awards; appeals*

A Wife v A Husband [2023] EWFC 200 (HHJ Willians)

H and W had a nuptial agreement stipulating property, including inheritance, be kept under the acquiring party's name. H inherited an Italian property portfolio and €1.85m, used to buy the FMH. Post-separation, W contested housing needs without challenging the agreement. W received £700k based on 'needs light' approach for fairness. *Keywords: jurisdiction; agreements; debts; needs; Children Act 1989 Schedule 1 applications*

Steels v Steels & Anor [2023] EWHC 2985 (Ch) (Fancourt J)

On appeal, it was found the respondents, the son and wife of the appellant, lacked sufficient evidence of detrimental reliance, on limited assurances provided, to establish a proprietary interest in the property. The appeal was allowed. *Keywords: proprietary estoppel; detrimental reliance*

Mahtani v Mahtani [2023] EWHC 2988 (Fam) (James Ewins KC, sitting as a deputy HCJ)

W found H had divorced her in Indonesia without her knowledge. W applied for non-recognition of the overseas divorce (s 51(3) FLA 1986) and to lift a stay on her divorce and financial remedy applications. H misled the Indonesian court in obtaining the divorce. Court deemed W's steps to bring the proceedings to H's attention reasonable. Application granted. *Keywords: divorce orders; overseas divorce and the 1984 Act; non-recognition of overseas divorce; Family Law Act 1986; jurisdiction*

Y v Z [2023] EWFC 205 (HHJ Hess)

Costs ordered against a litigation friend in Sch 1 proceedings due to failure to secure alternative representation or adjournment, despite prior knowledge of counsel's unavailability. *Barker v Confiance Limited* [2020] EWCA Civ 112 applied. *Keywords: litigation friend; variation applications; costs; capacity*

FA v OA & Ors (financial remedies – s37 application to set aside) [2023] EWFC 213 (HHJ Vincent, sitting as a s 9 deputy HCJ)

W's application to set aside a loan from H's brother, subsequently secured against the FMH via a charging order after Nigerian court proceedings, failed. She couldn't discharge the burden of proof that the loan was a sham. *Bhura v Bhura* [2014] EWHC 727 (Fam) considered. *Keywords: setting aside transactions*

HO v TL [2023] EWFC 215 (Peel J)

Guidance on factors relevant to valuing a private company (in this case a hotel chain, hence *HO v TL*); accessibility of extricating money from trusts per *Charman*; and extent of matrimonialisation of H's extra-marital financial contributions. *Keywords: variation of settlements; matrimonial and non-matrimonial property; valuations; trusts; sharing principle*

HO v TL (Costs) [2023] EWFC 216 (Peel J)

Reaffirming *WC v HC* [2022] EWFC 40, costs can eat into needs, and reasonable settlement attempts or their absence can influence cost decisions. W's unrealistic negotiation stance contrasts with H's, closer to the mark, first offer. Costs awarded against W. *Keywords: costs*

Williams v Williams [2023] EWHC 3098 (Fam) (Moor J)

Hadkinson orders should not precede a final order, Moor J affirming his decision in *Young v Young* [2013] EWHC 3637 (Fam). LSPO made against H despite non-disclosure; evidence showed H held £1m in a UK bank account capable of enforcement. Additional provision provided to assist W to pursue overseas litigation, seeking freezing orders against H's substantial foreign assets. *Keywords: legal services payment orders; Hadkinson orders; conduct*

DH v RH (No 2) (Variation of interim Arrangements) [2023] EWFC 210 (MacDonald J)

At an interim hearing, H sought to discharge LSPO and MPS orders, and discharge a freezing order on a life policy. The court refused H's application in respect of LSPO and MPS, citing no change in circumstances. MPS was decreased by £7k per month due to W's change in living arrangements. Freezing order discharged for H to meet LSPO, MPS and personal expenses. *Keywords: maintenance pending suit; legal services payment orders; disclosure; release from undertakings; interim relief; enforcement; freezing injunctions; variation applications*

GA v EL [2023] EWFC 206 (Stephen Trowell KC, sitting as a deputy HCJ)

Final hearing with the sole issue being how to divide proceeds of sale of a business (see above in respect of a *Daniels v Walker* application in this case). Court reviewed post-separation contribution, awarding W 42.5% and H 57.5% to reflect H's post-separation contribution (15%). *Keywords: debts; needs; Children Act 1989 Schedule 1 applications; agreements; jurisdiction*

H v GH [2023] EWFC 235 (Simon Colton KC, sitting as a deputy HCJ)

H's request for an extension to pay a lump sum order was refused. The court lacked jurisdiction; if wrong, refusal wasn't unfair as H knew of the payment since December 2018 but took financial risks. The *Guide to the Summary Assessment of Costs* provides a good indicator as to the proportionate costs recoverable in family proceeding. *Keywords: costs; guideline hourly rates; striking out applications; Masefield v Alexander; extension of time; lump sum*

Galbraith-Marten v De Renée [2023] EWFC 253 (Cobb J)

Further hearing in the long running saga to determine the appropriate level of maintenance in Sch 1 proceedings. *James v Seymour* calculation adopted but a reminder this is only the starting point. The court retains a statutory discretion to meet needs. *Keywords: child maintenance; Children Act 1989 Schedule 1 applications*

TM v AM [2023] EWFC 247 (B) (DJ Dinan-Hayward)

H's application to set aside a consent order, in which he received 100% of the matrimonial assets, because of an alleged material non-disclosure by W as to a £2m diamond. There was not a shred of evidence to support H's claim and the application was dismissed. *Keywords: disclosure from third parties; setting aside orders (including Barder applications); matrimonial and non-matrimonial property; consent orders*

JN v GN [2023] EWFC 244 (B) (DJ Hatvany)

FMH transferred to W subject to mortgage (approx £225k equity). Departure from equality due to H's reckless spending of inheritance (£468k), marital endowment policy (£28k) and pension (£59k). Costs: H pays £10k in instalments (£350 pcm) due to litigation conduct; W's £19k costs deemed excessive. *Keywords: inheritance; delay; costs; housing needs; conduct; mortgages*

FT v JT [2023] EWFC 250 (B) (Recorder Allen KC)

At the final hearing, date of separation was determined to ascertain post-separation endeavour. W's business interests encompassed both marital and non-marital endeavour due to pre- and post-separation efforts, of which 35% were considered to be matrimonial. H's share would be uncapped at 17.5% until 2038, then 10% thereafter. *Keywords: date of separation; duration of the marriage; matrimonial and non-matrimonial property; post-separation accrual*

VT v LT [2023] EWFC 256 (B) (DJ Hatvany)

Small money case. £118k equity in FMH. H's greater income provided a borrowing capacity of c. £84k. H ordered to pay W £55k in two instalments to enable W to explore shared ownership houses. If H could not pay, FMH to be sold. *Keywords: needs; modest asset cases*

RN v DA (Divorce – Recission of Decree Nisi) [2023] EWFC 255 (B) (HHJ Vincent)

Decree nisi granted in September 2012. W applied to rescind the decree following reconciliation, H sought to apply for decree absolute out of time. The court rescinded decree nisi, citing parties' conduct from 2013 to 2020 as a material change invalidating the decree's basis. *Keywords: setting aside a decree nisi; publicity and confidentiality; rescission of divorce decree; decree nisi/decree final; decree absolute out of time; divorce orders*

AXA v BYB (QLR: Financial Remedies) [2023] EWFC 251 (B) (Recorder Taylor)

First reported case of a Qualified Legal Representative (QLR) in financial remedy proceedings in which Recorder Taylor distils the statutory provisions under which a QLR is appointed, the remit of a court-appointed QLR, and other helpful guidance. *Keywords: disclosure; debts; costs; qualified legal representative; spousal maintenance (quantum)*

Y v Z [2024] EWFC 4 (Peel J)

Determination of M's Sch 1 application against F, a Middle Eastern Royal Family member. Despite a 'millionaire's defence', some disclosure aids the court in assessing statutory factors, enforceability, award structure and claimant budget. Despite H's prior compliance, Peel J ordered security. *Keywords: disclosure; child maintenance; Children Act 1989 Schedule 1 applications; millionaire's defence; security for costs; child support*

A v B (In the matter of the Matrimonial and Family Proceedings Act 1984) [2023] EWFC 241 (B) (HHJ Evans-Gordon)

After an overseas divorce, W faced significant debt to H, prompting his bankruptcy proceedings against W. W sought a capital order, post-sale, of a property solely owned by H before marriage in England. The court found the parties had a 'moderate connection' to the jurisdiction and granted W £550k from the £1.2m sale, reflecting H's pre-marital ownership and short cohabitation period in the property. *Keywords: overseas divorce and the 1984 Act; needs*

Potanina v Potanin [2024] UKSC 3 (Lords Lloyd-Jones, Briggs, Leggatt, Stephens, Lady Rose)

In a majority decision 3:2 (Lords Briggs and Stephens dissenting), H's appeal was allowed. The court emphasised the fundamental rule of procedural fairness that, before making an order requested by one party, a judge must give the other party the chance to object. The relevant rules give a party served with an order made without notice the right to apply to have the order set aside on the ground that the test for granting permission under s 13 MFPA 1984 is not met. This right is unconditional. There is no requirement for one party to show a 'compelling reason' or to show that the court was materially misled or to deliver a 'knock-out blow' to achieve a set aside after hearing from one party alone. *Keywords: overseas divorce and the 1984 Act*

A Crib Sheet for those New to Financial Remedies Practice

Polly Morgan

Case Editor, Associate Professor and Director of UEA Law Clinic, University of East Anglia

By way of an extract from Polly Morgan's *Family Law* (OUP, 2nd edn, 2024), we present an aide memoire of the relevant principles and practicalities for the new financial remedies practitioner.

Summary of the principles and practicalities

(1) Consider 'all the circumstances of the case': s 25(1).
(2) Give 'first consideration' to the welfare of any child of the family aged under 18: s 25(1).
(3) Which factors in s 25(2)(a)–(h), are relevant to your client's case, and what effect will they have? (Note that this is not an exhaustive list.)
   (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire (s 25(2)(a))
   (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future (s 25(2)(b))
   (c) the standard of living enjoyed by the family before the breakdown of the marriage (s 25(2)(c))
   This is relevant to quantum of periodical payments, for example, and the assessment of housing needs. Provides a benchmark but no entitlement to always live at this standard.
   (d) the age of each party to the marriage and the duration of the marriage (s 25(2)(d))
   Older parties are likely to have specific needs, fewer (if any) working years ahead, and may have adopted traditional breadwinner/homemaker roles.
   (e) any physical or mental disability of either of the parties to the marriage (s 25(2)(e))
   (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family
   White v White [2000] UKHL 54: *no discrimination between homemaker and breadwinner in their matrimonial contributions. Rare exception: stellar contribution to matrimonial assets, requires genius.*
   Non-matrimonial assets are a contribution in one party's favour. Will you deal with these through the artistic method – adjusting away from equal division of all the assets to reflect the fact that some are non-matrimonial – or through the scientific method – calculating the amount of non-matrimonial assets and then giving them to the contributor before sharing the rest?
   (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it
   Four kinds of misconduct identified in OG v AG [2020] EWFC 52. Personal misconduct must be 'obvious and gross' per Wachtel [1973] Fam 72. Litigation misconduct such as failure to disclose assets usually dealt with through a costs order or adverse inferences, and 'wanton' dissipation through add backs. In rare cases can be 'obvious and gross' and justify innocent party getting greater share of the assets
   (h) the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit … which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

   Also: Nuptial agreements, not falling explicitly under any part of s 25(2), are still considered 'part of all the circumstances of the case' and part of conduct.
(4) Remember that 'the ultimate objective is to give each party an equal start on the road to independent living': *Miller/McFarlane* at [144] (per Lady Hale).
(5) Now you've identified which factors are relevant, apply the three principles.

There is no hard and fast rule about whether you start with sharing or with needs, and each will give different result. However, starting with sharing has symbolic

merit and was preferred in Charman v Charman (No 4) [2007] EWCA Civ 503

We suggest you start with sharing. What does a 50/50 split of the assets look like?

(6) Are there principled reasons to adjust away (deviate from) equal sharing of capital?

Are each party's needs met by equal sharing? If not, an adjustment away from equal sharing will be necessary, and it may be necessary to dip into any non-matrimonial assets.

To provide a party with compensation for relationship generated disadvantage? Case law trend not to be a separate award under this head but it may result in more generous assessment of need and exceptionally an award in its own right.

To reflect (mis)conduct, if inequitable to disregard?

Because one party has made a stellar contribution to matrimonial assets, within the limits outlined in Charman v Charman (No 4) [2007] EWCA Civ 503? Unlikely to justify more than a slight deviation from equal sharing: Charman at [90]. Very rare to be invoked.

To reflect the presence of non-matrimonial assets (if using artistic method and have not under scientific method already removed these).

Because of the presence of a prenuptial agreement, which is capable to affecting what is fair?

Remember not to treat needs, compensation, and sharing as different heads of award, one added to the other: RP v RP [2006] EWHC 3409 (Fam)

(7) Are there practical reasons to adjust away (deviate from) equal sharing of capital?

One party may give the other extra capital instead of periodical payments, to enable a clean break. This is called 'capitalising'.

Similarly, one may give the other extra capital – and offsetting lump sum – instead of a pension share.

Be careful not to capitalise everything because it is no help at all to have a clean break and intact pension if the client has nowhere to live.

You could have an unequal split for a practical reason such as because one party has taken riskier assets than the other and to compensate for this risk has taken a greater award.

(8) Remember that the client gets the higher amount of sharing, needs, and compensation.

Per the Court in Charman v Charman (No 4) [2007] EWCA Civ 503: 'It is clear that, when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail: per Baroness Hale in Miller at [paragraphs] 142 and 144…. It is also clear that, when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail: per Lord Nicholls in Miller at 28 and 29 and Baroness Hale at 139.'

(9) Remember that there is no principle of equal *sharing* of incomes post-divorce but an award can be made for needs or (rarely) compensation.

(10) Think about the practicalities of the settlement structure as well as the quantum:

Consider capital: has your client got enough money to rehouse themselves and meet their capital needs?

Consider income: has your client got enough money to live on? If not, consider a periodical payments order, or if there is enough money, consider capitalising this for a clean break.

Consider pensions: Do not forget these. Do not treat these as capital available now unless they can be drawn, but just because they are not accessible until pensionable age does not mean they are not important.

Is there a plan for the future? Consider future resources including pensions, and whether your client will have to downsize to free up capital in the event of a future drop in income.

(11) If considering periodical payments:

Consider terminating claims 'as soon after the grant of the decree as the court considers just and reasonable': s25A(1).

Consider terminating any periodical payments once recipient can 'adjust without undue hardship': s25A(2).

SS v NS [2014] EWHC 4183 (Fam): 'The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence'. Amount will depend on claimant's budgetary needs and whether the amount identified 'represents a fair proportion of the respondent's available income'.

Do not forget that child maintenance will be paid according to the statutory formula (see Chapter 6) unless they exceed the income cap.

Does provision need to be secured? Better to address now if problems are anticipated.

(12) Do a cross-check of fairness. In light of the above, does the outcome you are proposing fall within a range of fair settlements?

Interview with Hilary Woodward

Rhys Taylor

Vice Chair of the Editorial Board,
The 36 Group

Hilary Woodward is a former solicitor and mediator, academic and the about to retire CEO of the Pension Advisory Group. At the launch of the Second Edition of the Pension Advisory Group report, Hilary's contribution in the field of pensions on divorce was described as 'incalculable'. She talks to Rhys Taylor about her long career and work relating to pensions on divorce.

Hilary, can you tell me a little bit about your career before you joined academia?

I did my first degree in sociology and social anthropology at the London School of Economics in the mid-sixties. After my degree, I drove a van for about 6 months just to have a complete change! Then I took various research jobs in sociology and psychology such as the Institute of Education, Institute of Psychiatry and the Medical Research Council – that was all good fun.

After a career break, when I had my son, I started working as a casual clerk with a solicitor. He offered me a permanent job, so I decided I'd do the solicitor training. I was admitted in January 1982, having done my training at Hackney Law Centre and Clinton Davis & Co in the East End of London. It was quite tough, especially when you've got a young child to look after. It was also pretty frontline stuff. Legal aid then was in good shape, a lot of my work was legal aid and I seemed to have a lot of domestic abuse injunctions and emergency cases to do. Our local county court was Shoreditch and I also spent time in the drafty corridors of Somerset House, then home to the Principal Registry, doing the family work.

I then moved to Bristol in 1987 and took a temporary post with Bristol Social Services' legal department. I got thrown in the deep end there and sent off to court without any proper briefing. The first person I met there was David Burrows, who was acting for the mother, and he was very chivalrous when I was looking completely clueless in front of the judge! He helped me through it, so I'm forever grateful to him.

I then worked for 3 years in Weston-Super-Mare at a company called Gordon & Penny running, or effectively starting, their family department. And then 3 years later I joined Henriques Griffiths in Bristol and became a partner and ran the family law team. I became an active member of Resolution and the Bristol (what was then) Solicitor's Family Law Association Committee.

Are there any particular memories you have of characters or cases you did before you moved to academia?

I had a few hairy ones, I have to say! One where I was personally threatened by the respondent in the case. He was alleged to have assaulted my client and set fire to the apartment where she lived with their two young children. He said he knew where I lived and was following me around, that was quite scary. I think he was committed in the end. I had a few wardship cases and I do remember that in my first one the judge told me off by for filing too many reports. It was quite a learning curve, I have to say.

You mentioned you used to work in Somerset House – do you have any recollections of that?

I do have a lot of recollections of standing around in crowded drafty corridors usually with the barristers and the clients. I used to instruct Elizabeth Lawson a lot. I also instructed Chris Sharp who was then a junior, a few times, and several others whose names you might recognise.

Is there anything you'd like to say about how practice differs then to how it changed subsequently?

It's quite a long time since I've been in practice now, but certainly legal aid made a massive difference then. I instructed barristers a lot of the time, when I had less experience. I'm sure that now solicitors would be expected to do much more of the donkey work themselves in court. I trained as a mediator and worked for about 20 years alongside my solicitor practice. Roger Bird was a senior registrar at Bristol County Court and was also a trustee of the Bristol Family Mediation Service that I worked with. Mediation was beginning to gather pace when I started doing it and becoming more mainstream and eventually getting the support of the Legal Services Commission, that made quite a big difference. That's all changed now, of course.

Why did you make the switch from legal practice to academia?

Initially, I took part in a study that Gwynn Davis was doing

at Bristol University and he invited me to assist him with another study he was doing on ancillary relief outcomes, which was also with Roger Bird. He basically encouraged me to think about going into research. I suppose it was something I enjoyed doing. It was a bit like going full circle from my earlier career after my degree and my research jobs.

For the younger readers, could you please remind us who Gwynn Davis is?

He was a professor at Bristol University Law School, not with lawyer background, but he ended up doing a lot of Family Law research and was very highly regarded. He had quite a personal take on the way things worked. He predicted that mediation was going to run into trouble unless it had commercial backing from solicitor firms. He's retired now. I think he ruffled a few feathers in his time, but he was a very interesting person to work with.

How did you first get into pensions on divorce?

When I was working as a solicitor partner my specialisms were pensions and cohabitation and I got accreditations in those areas. I enjoyed the fact that they were both intellectually challenging as areas of law, something to get to grips with. The trigger was probably when I worked with Gillian Douglas at Cardiff University, after I got fully into the research work. She, Julia Pearce and I went to a weekend multidisciplinary conference at Trinity College that Jo Miles and Rebecca Probert had set up on 'Sharing Lives, Dividing Assets'. The conference was absolutely fascinating with very high-quality speakers, including Deborah Price who did an eye-opening paper on 'Pension Accumulation and Gendered Household Structures'. In the course of the discussion about that, Jo questioned why there were so few pension orders – this was probably 10 years after pension sharing had come into force. Gillian Douglas had been encouraging me to find another project to do and I just thought, 'that's the question I want to try and answer – why are there so few pension orders?'

You published a paper in 2014 following a significant amount of research – can you tell me how that came about and what the work involved?

Well, it came about out of that conference. At some point I applied for funding from Nuffield Foundation. The project took a year or two longer than planned, as these things have a tendency to do. It was a quantitative and a qualitative study, so we did a survey of about 370 divorce files with financial orders on them at three different courts. We read through the whole file to get every single bit of data we could about the financial background and the orders that were made, and then analysed it. We also interviewed 32 family solicitors and seven District Judges to get the qualitative side of practice. We engaged George Mathieson as a pension expert to assess some of the data that we had. He looked at 100 or so cases and his verdict about a lot of it was pretty damning.

We could see ourselves that the quality of financial disclosure, especially in regard to pensions, was very poor in the majority of files; that the fairness of the orders was unclear or in question; that the rationality of the orders was questionable in about half the cases; that solicitors lacked a lot of confidence in dealing with pension issues on divorce and were desperate for more guidance, either from case-law or from some other source.

There was very little evidence on the files of the use of pension experts but talking to the solicitors and judges, they all agreed that where pension experts had been involved, it had been helpful – cases usually settled more quickly as a result of the engagement of experts.

One of the things that shocked me about it was the lack of training of the District Judges. At that time, of course, we didn't have the Financial Remedies Court and a huge proportion of most DJs' work was around children issues, so they tended to choose training to match that. There was very little training on ancillary relief at all, never mind pensions – that came as a bit of a shock to me.

What came across from the solicitors was the resistance of clients to deal with pensions or to agree to instruct an expert mainly because of the time, costs and worry about it being contentious. The common thing which we all know about is wives not wanting to upset the husbands; the husbands being fairly possessive about what they saw as their pensions and not seeing it as a family asset. And there was a strong drive towards clean break settlements which also had an impact on the (low) number of pension orders.

You were later involved with one Rhys Taylor in a paper delivered at the 2015 FLBA conference called *Apples or Pears: Pension Offsetting on Divorce* – could you tell me a little bit about that?

I went to a seminar in Newbury where, you, Rhys were one of several speakers and I distributed the key findings from my report. We got talking and you suggested getting together to have an experiment about offsetting, because this was probably the weakest area from my research and also from your experience – the differences in offsetting outcomes and valuations were substantial.

We devised three mock scenarios and we approached a number of pension experts. We had 14 who wrote reports as if they were a single joint expert and explaining how they would value an offset in those particular cases. The results were massively divergent, we couldn't believe the differences. For example, in the middle money case which involved a defined benefit pension, the range of opinion from the experts was between £290,000 and £798,000! We discovered, when we arranged a meeting with the experts to try and work out why these differences were coming out, that part of the reason for the differences was that we hadn't given sufficient information to the experts when we asked them to do their reports; we hadn't asked quite the right questions. It became very obvious from our discussions how important the letter of instruction is and how little understanding there was between the pension experts and the lawyers.

And how, on the back of that paper, did the Pension Advisory Group come about?

It was pretty much as a direct result of my research and the *Apples and Pears* project. We wrote an article in *Family Law* and gave the paper to the FLBA conference which aroused a lot of interest. The experts that we were talking to were also very enthusiastic about carrying on the discussion, and we could see that there was a lot of mileage and potential in getting together a group of people to try and thrash out some of the more difficult issues around pensions and to

produce a guide for practitioners and judges, to help them through the minefield of the area. It's a very complex area and quite daunting for anybody who doesn't specialise in it and it became obvious that there was a desperate need for something to guide people through it.

So you and I got together, had several meetings at each other's houses (this was long before lawyers had adopted use of Zoom) and drew up a plan of the sort of issues we wanted to discuss, and who might be involved in the group. We talked to His Honour Judge Edward Hess and Mr Justice Francis and they got on board. The idea was born, in principle at least, of setting up a group which we called the Pension Advisory Group. At some point, I can't remember exactly when, I applied for funding from the Nuffield Foundation to pay for the time of our academics and for general expenses.

Can you tell me, what was the mix of people on PAG and how did PAG go about doing its work?

We had a mix of judges, barristers, solicitors, pension experts (which included actuaries and financial advisors) and academics.

Our academics included Jo Miles from Cambridge who was a very well-established researcher in ancillary relief, and Debora Price from Manchester who's a social gerontologist (and a former member of Coram Chambers). Debora gave us the context within which we were working to understand what was going on in the wider world with pensions and families, especially on divorce.

We also had a mediator and representatives from associations such as the Association of District Judges, FLBA, Resolution, the Family Justice Council, and so on.

Can you describe a little bit about how the work of the original PAG was undertaken before the popularisation of Zoom?

Well, we had face-to-face meetings! We had quite a lot of meetings with the whole group of about 30 people. We also had three overlapping working groups – legal, expert and valuation – and they had numerous meetings. Most members were members of more than one working group so there was feedback between the groups about what was being discussed. There was a vast amount of email traffic. We would then thrash it all out in the whole group meetings if agreement hadn't been reached in the working groups.

Several members took responsibility for writing up the different sections. We'd all expected the guide to be much shorter than it eventually was, it turned out to be about 170 pages. Jo and Debbie took a lot of responsibility for the final editing. In the course of the project we conducted consultations with professionals working in the field, individuals and organisations. We also published draft reports, which we got quite a lot of feedback on and had focus groups where we talked in depth about what was happening on the ground with pension experts, solicitors and barristers. Debbie also did a survey of practitioners. So we had a lot of input which was all fed into the whole process. We eventually ended up with *The Guide to the Treatment of Pensions on Divorce* which was published in 2019 and after a lot of slog, hard work, and I have to say huge commitment from most of the members, none of whom were getting paid for their time.

Have you got any observations to make about the benefits of working in an interdisciplinary or multidisciplinary method in the way that PAG did?

Oh, it's very refreshing in lots of ways – you get different perspectives. If you're specialising in something and it's a niche area, you get very involved in the nitty gritty of things. If you engage with other professionals in the field, you get a different perspective on things; you can see that there are slightly different languages for each profession which are not always well understood between them. It was, I think, very helpful to understand in a non-judgmental kind of way what we were each meaning when we were talking about different things, for example, 'true' or 'fair' value; what the pension experts needed to know if we were instructing them, and what they didn't want to know; what the lawyers needed to know about how to instruct them, and what the judges needed to know about what was being done and on the ground. Challenging at times but felt very worthwhile.

Can you tell me a little bit about the impact that the PAG has had?

I think it's been wonderful, actually. We had, within a very short space of time, thousands of downloads of the report from the Nuffield Foundation website (which is where we published it, freely accessible, which is a key requirement of Nuffield). We had formal endorsement by the President of the Family Division and the Family Justice Council, including the President saying that for any dealings with pensions on divorce, people should refer to our Guide as the first step. We had a lot of interest, a lot of engagement, a lot of seminars, articles, blogs. On the whole, very positive feedback. It also led to publication of the *Survival Guide* published by Law for Life, also known as the Advicenow website – they specialise in drafting guides for lay people, so they have a lot of very helpful guides for couples who are divorcing. Debora Price also obtained funding for a video which was another guide for lay users, people engaging with divorce and pensions on divorce. There have also been quite a few case reports which have quoted the Guide, usually favourably, which is very gratifying.

The Guide was first published in July 2019, and there's a new Guide now available from the end of the 2023, colloquially known as PAG2. Why did you want to update the report?

I think it was suggested at the launch of PAG1 by Edward Hess that if it was going to remain relevant, we would have to update it from time to time. I had kept a record of all feedback following the PAG1 Guide. So 2 or 3 years later, I suggested to him that we might think about gathering the same or a fresh team to look at changes that had occurred in the interim and also to look at the feedback from users of the Guide as to how useful it is; how much they use it; if they need more guidance on other areas and what are the key areas that they need guidance on?

We carried out a full consultation to get all the feedback and that informed the new Guide. It doesn't mean to say that we have agreed with everything that people have said, but we have tried to take it all into account and talk about it. Some of the changes, of course, have involved Brexit and new divorce law – surprisingly only modest effects, as far as our Guide is concerned, I would say. Perhaps one of the

biggest changes is the Galbraith Tables which is a new way of trying to assess the value for offsetting purposes where full expert reports are not being sought.

And can you briefly describe how the Galbraith Tables came about?

It came up in PAG1 when we speculated if we could have anything such as you have with personal injury claims that practitioners could refer to in order to get some idea of potential value of claims, of offsetting claims.

Is that a piece of work that PAG did itself or did someone come forward?

Jonathan Galbraith came forward as the main author of the Galbraith Tables, as you might guess. There was a lot of discussion in PAG2 about how they might be used and caution about that, but they're a clear step forward as far as pensions on divorce are concerned.

What are the logistics in organising the meetings for PAG2? Was it easier doing it all via Zoom?

Yes, obviously far less time consuming for people travelling. Most of our meetings for PAG1 were in London and I know there was an incident where you, Rhys, Val Le Grice and various other PAG members got stuck in the lift at the Royal Court of Justice! It's never easy to get very busy professionals together, all at the same time but it was a lot easier on Zoom than it was getting them up to London.

You've now been involved in working with pensions on divorce for between 10 to 15 years with your initial research, *Apples and Pears*, PAG1 and now PAG2 and the *Survival Guide*. What are you intending to do once PAG2 has been published?

Retire! Wave everyone gratefully goodbye and wish them well! Oh, but after carrying on disseminating the PAG2 Guide, helping to publish the new *Survival Guide* and reporting to Nuffield.

And what plans do you have for your retirement?

Well, between PAG1 and PAG2, I have taken up quite a lot of activities and I was a bit stubborn about not dropping them when PAG2 got going, so my life is pretty full. I do Pilates classes, Tai chi, tennis, French and Spanish tuition, volunteering at the village shop, grandchildren, book club and a few other things. I'll probably do more of those. Richard's always nagging me to help in the garden! Music maybe, even people are trying to persuade me to sing! I'll try and keep busy.

Well, Hilary, thank you for your time, and thank you so much for the immense contribution you've made to family law.

Thank you very much and I should say I couldn't have done any of it without the massive support of our chairs, of you, of all the PAG members and the people who fed back into our work, and the Nuffield Foundation, Brewin Dolphin … the list is endless.

Thank you.

Thank you.

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